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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Q&A With Kirkland & Ellis' Rob Ryland

Law360, New York (September 23, 2010) -- Robert S. Ryland is a partner in Kirkland & Ellis LLP's Washington, D.C., office concentrating in government contracts, health care, investigations, compliance and white collar matters. He has experience in counseling, litigation, investigation and white collar defense for clients in the services, manufacturing, construction and health care industries.

Q: What is the most challenging case you've worked on, and why?

A: The most challenging and interesting cases require complete immersion into the technical details of the client's operations. For example, I've had cases involving satellite engineering, administration of the Medicare program and the ballistic properties of protective armor.

One of the most challenging cases was a $200 million contract dispute in the massive Big Dig project for the construction of interstate highway tunnels under Boston. I devoted months to reviewing the contract, interviewing engineers about the drawings and specs, learning the job site, walking the tunnels and becoming familiar with state-of-the-art safety technologies, as well as working with the experts and writing numerous briefs.

While we prepared for mediation, I also helped the client respond to the enormous pressure of accelerating work as the parties were actively disputing most of the key aspects of performance — assigning fault for delays, defective drawings, interference with installation of new equipment and hundreds of unresolved change orders.

The parties even disagreed on the documents that actually constituted the contract, which occupied 53 volumes — originally about six linear feet. At the mediation kickoff session, the government filled a room with documents and invited us to confirm and stipulate to the authenticity of the "agreed-upon" contract. I walked into the room, opened the first volume and immediately recognized the government's "conformed" contract, which included all of the changes that the parties were disputing.

In the end, our mediation was a success, and one of the government's representatives admitted that I understood the contract better than anyone on his side of the table.

Q: What accomplishment as an attorney are you most proud of?

A: I've had a number of "home runs" in the white collar field — cases dropped by the government or by qui tam attorneys after we get to the bottom of the facts and make our presentation to the Department of Justice or the Inspector General.

We often need to educate the investigators on the applicable regulations and terms of the contract because they are typically complex and easily misunderstood by outsiders or even by the contracting parties themselves. Sometimes I'll prepare a white paper or work with the customer agency to stipulate the applicable legal standards.

Other cases are hard fought. I've had cases involving the U.S. Army, Air Force and Navy; the U.S. Departments of the Treasury, Transportation, Health and Human Services and Veterans' Affairs; the U.S. Postal Service and others — even the Department of Justice as a buying agency.

We have several pending False Claims Act matters, including a case that appears to be headed to trial later this year.

Q: What aspects of law in your practice area are in need of reform, and why?

A: It is well known that the government has dramatically increased the outsourcing of work to private businesses, even the day-to-day monitoring and auditing of other contactors, and this has resulted in pressure for private industry to become more like the government.

For example, the government has ended the era of "voluntary disclosures" by contractors seeking to cooperate in anti-fraud efforts, and instead mandated a contractual duty to "fully cooperate" with government investigators and self-report "credible evidence" of any fraud or overcharges.

It will take years for the courts to work out what these terms really mean, but the fact remains that it is virtually impossible for most private businesses, no matter how ethical, to comply 100 percent with all of the requirements of a government contract.

I emphasize with my clients that the government not only writes adhesion contracts but also relies on fraud enforcement tools — mainly the False Claims Act — to monitor compliance with the extraordinarily complex requirements and regulations that apply to the contractor's performance.

While the outsourcing of compliance monitoring to qui tam whistleblowers may lead to more spectacular settlements and press releases, the public will eventually realize that "fraud" recoveries may be outweighed by the overall burden on the federal procurement system. This method of compliance monitoring has real and substantial costs to industry, which become internalized as a risk factor in doing business with the government.

Q: Where do you see the next wave of cases in your practice area coming from?

A: Defending contractors accused of contract or health care fraud under the False Claims Act has been a busy practice area since the late 1980s. These investigations and qui tam cases have continued unabated, and we expect an increase in workload given recent amendments to the law, as well as the new contractor self-disclosure requirements.

Q: Outside your own firm, name one lawyer who's impressed you and tell us why.

A: I'm on the board of a nonprofit for an affordable-housing project in Arlington County, Va., which is transitioning from old suburban to new urban. We've been working for several years with a local attorney, Jon Kinney, on land use and related regulatory and financing issues. I've been impressed with the complexity of Jon's practice area and by his command of the law, the market and the politics.

You need an expert in each of these areas when you are developing land in an urban environment where so many parties participate in determining the look and feel of the community. Clients appreciate that Jon provides expert guidance to achieve a successful outcome, and that he works with community groups to ensure a fair process.

Q: What advice would you give to a young lawyer interested in getting into your practice area?

A: The rules that apply to government contracts are, in many respects, the opposite of what you learn in your first-year law school contracts class. For example, the “Four Corners” doctrine, as well as the doctrines of estoppel and apparent authority, may not apply to the government.

The government also benefits from other advantages in contracting, litigating and investigating procurement-related matters. Success in this field requires skill in litigation, of course, but also a flair for negotiation and a careful eye for reading lengthy regulations. To excel, you need to appreciate and understand how your client serves the government and meets the public’s need for products, services and technologies.

The practice of law in this field is diverse. During any given day, you may be negotiating a teaming agreement on a major new defense program, litigating a protest or contract dispute with a civilian agency, suing a subcontractor in state court or defending a criminal investigation of your client — but the critical element of mastering the case will be understanding why the government relies on your client in meeting the goals of a public program.