

## Government Contracts MVP: Morgan Lewis' Brad Fagg

By **Max Stendahl**

*Law360, New York (December 14, 2012, 1:55 PM ET)* -- Morgan Lewis & Bockius LLP's Brad Fagg tallied big victories in 2012 for nuclear utilities on claims the federal government failed to accept and dispose of spent fuel, winning \$70 million in damages for one client and a favorable Federal Circuit ruling for another — and earning a spot on Law360's list of Government Contracts MVPs.

Over more than two decades, Fagg has built a formidable practice focusing on spent nuclear fuel cases. He acts as lead counsel for most of the nation's nuclear utilities as they seek to recover damages from the U.S. Department of Energy. To date, he has recovered well upwards of \$1 billion in judgments and settlements for his clients.

That record of success continued in 2012. In a Nov. 30 ruling, after a two-week trial, the U.S. Court of Federal Claims entered a judgment in favor of Fagg's client Portland General Electric Co. The company, which operates a nuclear power plant near Rainier, Oregon, alleged the DOE violated a contract by improperly refusing to pick up spent fuel, and sought \$113 million in damages.

In a 41-page ruling, U.S. Court of Federal Claims Judge Eric G. Bruggink awarded Portland General Electric more than \$70 million. The case was more complicated than others Fagg has worked on, he said, because the company's nuclear reactor was shut down, creating issues regarding expert testimony and proof of causation.

Fagg said he and other Morgan Lewis partners enjoyed taking on complex cases like that one.

"I personally find it more interesting and energizing," he said. "By the time we get involved, it's become something that has typically attracted a lot of attention at high levels among our clients."

In another attention-grabbing case in 2012, Fagg represented Entergy Corp. unit Entergy Nuclear Vermont Yankee LLC in a case stemming from the DOE's failure to dispose of spent fuel at the Vermont Yankee Nuclear Power Station.

The DOE agreed to pay \$35 million to ENVY for the construction of a spent-fuel storage facility, and the Court of Federal Claims awarded ENVY an additional \$9.6 million.

In a 34-page opinion that featured two partial dissents, the Federal Circuit reversed some of those extra damages claims but upheld a \$3.4 million award for ENVY's legal and lobbying costs related to the facility.

The complex case involved multiple parties and moving pieces, according to Fagg.

“The court of appeals did not completely buy the government’s argument on damages,” he noted.

While 2012 was a banner year for Fagg, it was not the only MVP season of his career. He has taken more than a dozen spent fuel cases to trial and was the architect of the first spent fuel settlement on behalf of Exelon Corp., the nation’s largest nuclear utility.

That accord was groundbreaking, according to Morgan Lewis: it marked the first time the government had settled a breach of contract claim by agreeing to make annual payments for damages.

Fagg said his spent fuel practice gained steam in the late 1990s, when such disputes moved from being a regulatory issue to a litigation issue. Fagg, who joined Morgan Lewis in 1995 after working as a trial attorney in the U.S. Department of Justice’s civil division, said his public sector experience also bolstered his practice.

“It was kind of the perfect confluence of my professional development going back to my early years as a DOJ lawyer and the preeminent nuclear practice that Morgan Lewis has,” he said. “I was in the right place at the right time.”

During trials, Fagg says he often has employees of his utility clients to testify about the practical effect of the government’s alleged breach.

“We really focus on telling the story from the client’s perspective,” he said. “They’ve paid a lot of money to the government and gotten nothing in return. Communicating that has really set the stage for the large damages [awards] we’ve been able secure.”

To be sure, Fagg’s work is not limited to spent fuel cases. He also counsels government contractors on compliance, construction and procurement issues, among other matters.

For example, in 2012, Fagg served as lead counsel to the prime management and operating contractor for the Los Alamos National Laboratory, which filed an action in the Civilian Board of Contract Appeals on contract claims over the construction of a \$126 million research facility. Fagg secured settlements for the laboratory on two different occasions, in March and again in August, after conducting negotiations among several parties with “shifting alliances,” he said.

In that case and others, Fagg’s practice largely avoids routine government contracts disputes, he said.

“There’s a lot of government contracts practitioners in town, and there’s a need for that representation,” Fagg said. “The nature of my practice, as it’s evolved over the years, focuses more on the extraordinary.”

--Editing by Eydie Cubarrubia.