Current Issues Affecting Government Contractors

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Contractor's Liability Arising Out of Prevailing Wage Violations Continues to Expand

In *United States ex rel. Wall v. Circle C Const., LLC*, 697 F. 3d 345 (6th Cir. 2012), the Sixth Circuit Court of Appeals recently reinforced a concern felt by many federal contractors: a subcontractor's failure to completely comply with the Davis-Bacon Act can subject a general contractor to harsh liability, not just with the Department of Labor, but also under the False Claims Act. The Sixth Circuit's decision in *Wall* is a strong warning to federal contractors. However, as discussed below, contractors can take certain measures to help ensure they avoid a similar outcome.

In *Wall*, the Sixth Circuit held that a construction contractor violated the civil False Claims Act (FCA) when it failed to ensure that its weekly certified payroll records—required under the Davis-Bacon Act as a condition of its public works construction contract—were complete and accurate in all material respects. Specifically, the army hired a contractor to construct buildings on a military installation and required the contractor to comply with the Davis-Bacon Act, including paying prevailing wages, and submitting certified payroll records on a weekly basis. As is common, the contractor also was required to ensure that its subcontractors complied with the Davis-Bacon Act in the same manner.

The project began in 2004, and the contractor submitted its own certified payroll records, but did not list the employees of one of its subcontractors in those records. The subcontractor did not submit any certified payroll of its own. Further, although the contractor passed down the wage determination excerpts from its own contract, it did not discuss the Davis-Bacon Act's requirements with the subcontractor, verify whether the subcontractor submitted its own payroll records, provide the subcontractor with blank payroll forms or ensure that the subcontractor was paying the appropriate prevailing wages. According to the subcontractor, the contractor did not inform it of the need to provide certified payroll until 2006.

In January 2007, an employee of the subcontractor filed suit under the FCA against his employer and the contractor, alleging they violated the FCA by knowingly submitting false payroll certifications. The United States intervened and filed an amended complaint specifically alleging that all of the contractor's payroll certifications were false, because the subcontractor and contractor (1) failed to disclose that the subcontractor's employees performed work called for in the contractor's contract; and (2) the payroll records falsely asserted that the contractor paid the proper prevailing wages to all employees, when this was not the case.

After the action was filed, the contractor asked the subcontractor to provide new certified payroll records for the years when the subcontractor's employees had not been included. The subcontractor provided this information to the contractor, who in turn submitted it to the government, but never verified the records for completeness and accuracy.

Ultimately, the district court granted the plaintiff's motion for summary judgment and entered judgment against the contractor in the amount of $1,661,423.13, representing treble the amount of actual damages believed to have been suffered by the government as a result of the contractor's failure to ensure the subcontractor's compliance with the Davis-Bacon Act.

On appeal, the Sixth Circuit concluded that the contractor's payroll certifications were expressly false because (1) certain certifications stated on their face that they were complete, when in fact they did not include information about one of its subcontractors; and (2) other certifications wrongly represented that the prevailing wages were paid to the subcontractor's employees, when the subcontractor's records proved they were not.

Further, the court found that the contractor acted "knowingly," a requirement for liability under the FCA, because the contractor admitted its familiarity with Davis-Bacon requirements and conceded that it should have submitted

payroll certifications for all employees on the project. Moreover, the contractor acknowledged that it had no first-hand knowledge regarding the subcontractor's payments to its employees, did not timely inform the subcontractor of the need to submit payroll certifications and did not verify the accuracy of those payroll certifications it received from the subcontractor.

Finally, the court held that the false statements were "material" to the government's decision to make payments to the contractor, thereby triggering liability under the FCA.

On the issue of damages, however, the court reversed. The plaintiffs argued, and the district court held, that the government's "actual damages" were the full amounts paid to the contractor for the work performed by the tradesmen who were not paid proper wages, ostensibly because the government would not have made any payments at all had it known the payroll certifications were false. On appeal, the court found that the amount of the award should have been the difference between what the government actually paid to the contractor and the payments to which the contractor would have been entitled in the absence of fraud, and remanded the case to the district court for recalculation of damages.

This case serves as another example of recent instances where a contractor's administrative missteps have been used as the predicate basis for liability under the False Claim Act. In the specific context of prevailing wages, this case serves as an important reminder to contractors of not only their own obligations under the Davis-Bacon Act, but as significantly, their obligation to ensure and monitor that their subcontractors comply.

Generally speaking, and as highlighted by *Wall*, under the Davis-Bacon Act, contractors are responsible not only for themselves, but also their subcontractors, when their contract contains an express requirement to comply with Davis-Bacon. In order to comply with the Act, contractors must follow this checklist:

(1) pay their workers the proper prevailing wages and fringe benefits;

(2) maintain and submit, on a weekly basis, payroll records for each laborer and mechanic working on the project;

(3) certify that such payroll records are correct and complete;

(4) flow down, in every subcontract, specific statutory language setting forth the Davis-Bacon requirements;

(5) ensure that all subcontractors also submit certified payroll records; and

(6) ensure that all subcontractors pay their workers prevailing wages and fringe benefits.

These requirements are, without question, onerous on a contractor and require a significant amount of time and cost to ensure compliance. In light of decisions like *Wall*, contractors must start by making sure their own personnel understand the unique rules and regulations inherent in government contracting, and to establish protocols for ensuring compliance with such rules and regulations.

But that is not enough — contractors must understand they are responsible for down stream compliance with regulations equally applicable to subcontractors. As demonstrated by *Wall*, merely flowing down the requisite Davis-Bacon Act contract clauses to contractors is not compliance, and can instead result in FCA liability. The contractor must take affirmative steps to ensure that the subcontractor's employees are being paid appropriately, that certified payroll records are being submitted and that such records are complete and correct.

These requirements may demand additional personnel and perhaps implementation of protocols that were never previously considered necessary. However, with the FCA's treble damages, as well as the Davis-Bacon Act's own liability provisions, which include possible debarment, it is well worth the time and costs for contractors to ensure their compliance and their subcontractors' compliance with all prevailing wage requirements.

Decisions Affecting the Marketplace

Protest Decisions

Agency Must Reasonably Notify Bidders of Price-Realism Analysis

In light of the federal government's current financial situation and the general instability of global markets, contractors — perhaps now more than ever — may determine that it is in their best business interest to submit low-priced proposals. In a recent decision, the Government Accountability Office (GAO) helped protect contractors who decide to submit low-priced proposals by holding that an agency must notify offerors in advance if low-priced proposals can be considered a signal that the offeror has a poor understanding of the solicitation.

In the matter before the GAO, the Centers for Disease Control and Prevention issued a request for proposals for a time-and-materials task order for information services support. The solicitation provided that the award would be made to the proposal most advantageous to the government, with technical factors being more important than price. With respect to price evaluation, the solicitation merely provided that a "price analysis of the proposal may be conducted to determine the reasonableness of the offeror's price proposal."

The protestor submitted a proposal containing the lowest price, an amount that was also below the government's estimated price. In its evaluation of the protestor's price, the agency noted concerns that the protestor's low price posed performance risk and reflected a lack of understanding of the agency's requirements. The GAO held that the agency's evaluation of the protestor's price constituted an improper realism analysis.

The GAO explained that while it is within an agency's discretion to provide for a price-realism analysis, offerors competing for a fixed-price contract "must be given reasonable notice that a business decision to submit low pricing will be considered as reflecting on their understanding or the risk associated with their proposals." Further, the GAO explained that an analysis of "reasonableness" of an offeror's pricing seems to concern whether an offeror's price is too high, and when a solicitation merely states that price will be evaluated for reasonableness, offerors are not on notice that "a decision to submit low pricing might be considered as reflecting on their understanding or ability to perform."

The GAO held that the solicitation at issue did not provide reasonable notice of price-realism analysis and sustained the protest because the agency "improperly relied on an unstated evaluation factor in determining that the protestor's proposed pricing was so low as to call into question its understanding of the solicitation requirements and its ability to perform".

Emergint Technologies, Inc., B-407006 (Comp. Gen. Oct. 18, 2012).

Changes to the Marketplace

Possible Changes to FAR Concerning SBA 8(a) Sole-Source Contracting

A recent Government Accountability Office (GAO) report issued on December 12, 2012, asserts that government agencies are having a slow start to the implementation of a requirement to properly provide justifications for 8(a) sole-source contracts over a $20 million threshold. The justification requirement was put in place through a revision to the FAR in an effort to bring more attention to large 8(a) sole-source contracts. The Small Business Administration's (SBA) 8(a) program is one of the federal government's primary means for developing small businesses owned by socially and economically disadvantaged individuals.

The report notes that of the 14 sole-source 8(a) contracts awarded since the FAR was revised, only three included an 8(a) justification. The agencies awarding the remaining 11 contracts did not comply, either because contracting officials were not aware of the justification requirement or because they were confused about what the FAR required. Moreover, the report explains that the SBA does not have a process in place to confirm that 8(a) justifications are being completed or that agencies are complying with the general requirements. As a result, the GAO report recommended that the administrator of the Office of Federal Procurement, in consultation with the FAR council, provide clarification concerning actions that contracting officers should take to comply with the justification requirement and clarify the requirements for contracts that are modified to above or below the $20 million threshold. The report also recommended that the administrator of the SBA provide instructions concerning the process for ensuring compliance with the justification requirement.

These changes will likely assist contracting officers in understanding the requirements for 8(a) justifications with the GAO's desired effect of increasing the 8(a) sole-source justifications. Additionally, since these changes will likely be incorporated in consultation with the FAR council, there may be significant changes made to the FAR regulations concerning 8(a) sole-source contracts, and those contracting actions that modify the contract value above or below the $20 million threshold. As the saying goes, time will tell, but it will remain important to follow any changes to this type of government contracting as companies and government agencies work collectively to ensure compliance with the FAR.

New RFP Platform May Reduce Confusion and Lead to Better Contracting

There is new tool coming to the contracting officer's tool box that could change the way small businesses submit bids. The new "RFP-EZ" effort will aim to provide a better platform for contracting officers to create RFPs by enabling them to review previous RFPs and write RFPs more easily and clearly. The new program, being managed by the Small Business Administration, is open to all agencies and will run for six months.

Currently, contracting officers often combine and reuse language from previous RFPs, sometimes creating unforeseen issues for RFPs written for entirely different goods or services. In contrast, the new online program will offer contracting officers a consolidated list of previously used RFPs for various goods and services and will provide notes concerning important elements for particular types of RFPs.

From the contractor's perspective, the program will also simplify the process to search and find bidding opportunities and generally provide a more user-friendly online experience. Additionally, the vendor's submission is simplified to four primary questions for each RFP, including: 1) What would your approach be to solve this problem? 2) What have you done in the past that indicates that you would be good at solving this problem? 3) Who is going to work on this project? 4) How much will it cost?

The plan is for the program to operate for six months, after which time it will be taken down and evaluated for areas of improvement and ways to expand its use. This program will be worth watching, as it may become a useful tool for a wider range of government contracting, potentially becoming larger as the system takes hold.

Government Contractor Litigation

Court of Federal Claims Overturns GAO Precedent by Holding that VA Set-Aside Regulation Is a "Goal" Rather than a "Requirement" Prohibiting FSS Procurement

In a decision affecting an estimated $3 billion in annual Department of Veterans Affairs (VA) contracts, the Court of Federal Claims recently ruled in favor of the VA with respect to whether the 2006 Veterans Benefits, Health Care and Information Technology Act (the "Act") requires the VA to determine at the outset whether it can set aside each of its procurements for restricted competition among service-disabled veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSBs) before making purchases under the Federal Supply Schedule (FSS). In contrast to a litany of Government Accountability Office decisions, the court in *Kingdomware Technologies, Inc. v. the United States* held that the Act does not require the VA to determine if it can conduct its acquisitions using restricted competition among SDVOSBs or VOSBs before deciding to procure goods and services under the FSS.

Kingdomware Technologies, Inc. concerned an SDVOSB's bid protest claim seeking injunctive relief compelling the VA to comply with the Act in light of the VA's failure to set aside a procurement for an emergency notification service for limited competition among SDVOSBs before ordering against the FSS. The GAO had previously sustained the plaintiff's protest based on GAO's determination that the Act mandates that the VA first determine whether SDVOSB or VOSB set-asides should be used before ordering goods or services under the FSS. The plaintiff argued that GAO correctly interpreted the Act and asked the court to adopt GAO's finding. In response, the VA argued that the Act does not restrict the VA's discretion to order against the FSS, a procurement method under which an agency is generally exempted from small-business set-aside requirements provided under the Federal Acquisition Regulations (FAR).

In deciding this case of first impression, the court first considered whether Congress has directly addressed this issue. In light of the Act's goal-setting provisions, the court determined that the Act is "at best ambiguous as to whether it mandates a preference for SDVOSBs and VOSBs for all VA procurements." The court further noted that the Act is silent as to the relationship of the set-aside provision and the FSS. Accordingly, the court held that the Act "is not plain on its face…and is ambiguous with regard to the discretion left to VA…."

Because the court determined that the Act is silent or ambiguous as to the issue in dispute, the court next addressed whether the VA's interpretation of the Act was reasonable. The court held that VA's interpretation of the Act was reasonable based on the fact that VA's interpretation remained consistent over time, did not directly conflict with the Act or the VA regulations implementing the Act, and was consistent with the traditional relationship between set-asides and the FSS found in the FAR.

Shortly following this decision, GAO issued a decision stating that it "will no longer consider protests based solely on arguments that the VA must consider setting aside procurements for SDVOSBs (or VOSBs) before conducting an unrestricted procurement under the FSS."

Kingdomware Technologies—Reconsideration, B-407232.2 (Dec. 13, 2012).

Kingdomware Technologies, Inc. v. the United States,---Fed.Cl.---, 2012 WL 5984589 (Fed. Cl. Nov. 27, 2012).

Pros in the Press

- This month, Andy Howard authored an article in *Law360* discussing the reconciliation between a new Federal Acquisition Rule and the Freedom of Information Act, the former requiring federal contractors to disclose all "credible evidence" that a federal contractor had committed a criminal violation. Among the criticisms of this new rule is that such disclosures could be obtained under the Freedom of Information Act. The article may be found at http://www.law360.com/articles/411857/trying-to-reconcile-far-disclosure-rules-with-foia.

- In November 2012, Alston & Bird hosted a program in our Los Angeles office on California's new mechanic's lien laws. Kevin Collins and Mark Johnson were the featured presenters. Significant changes to California's laws governing mechanic's liens and related remedies became effective on July 1, 2012—this program discussed how these important changes will affect businesses and the construction industry.

- On November 12, 2012, Jeff Belkin's article "ORCA Is a Killer Whale, but 'Uncle' SAM Is Bigger and Meaner," appeared in Volume 26, Issue 14, of *Government Contracts Litigation Report*.

- In October 2012, Jeff Belkin and two colleagues, including regulatory counsel for UPS and an assistant U.S. attorney, spoke at the Society for Corporate Compliance and Ethics' (SCCE) 11th Annual Compliance & Ethics Institute in Las Vegas on the anatomy of a government investigation, from inside counsel, outside counsel and government attorneys.

- Andy Howard was quoted in an October 2012 *Industry Market Trends* article discussing how to land a government contract. The article may be found at http://news.thomasnet.com/IMT/2012/10/16/how-to-land-a-government-contract.

Note: All *Law360* articles can only be viewed by those who have subscriptions to *Law360*.

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