

PUBLICATION

Failing to Pay Proper Wages on Government Contracts Can Lead to Liability Under the False Claims Act [Ober|Kaler]

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For FY 2016, there are more than 36,000 federal government construction contracts where Davis-Bacon Act, 40 U.S.C. § 3142, prevailing wages applied. According to www.spending.gov, these types of contracts accounted for \$9 billion in spending. Public contracts with state and local governments with similar prevailing-wage requirements account for even more construction projects. What many prime contractors do not realize is that failing to comply with the prevailing-wage requirements of the Davis-Bacon Act (DBA), or other wage protection laws, can result in much more than complaints from employees and administrative inquiries. It also can constitute a violation of the False Claims Act (FCA), 31 U.S.C. §§ 3729 - 3733, or similar state statute.

The FCA is a comprehensive federal statute that imposes liability for individuals or organizations that knowingly file or cause to be filed false claims for payment against the government. The act originated during the Civil War to provide a remedy against unscrupulous government contractors. Lawsuits under the FCA, referred to as *qui tams*, are typically initiated when a whistleblower (referred to as the Relator) discloses the basis for the claim to the Department of Justice and files a suit, under seal, in a United States District Court. The Justice Department, typically through a U.S. Attorney's office, then investigates the allegations and decides whether to proceed or drop out of the case.

Once the DOJ makes that decision, the case comes out from under seal, and the Relator may voluntarily dismiss the case or proceed without the government in a civil suit against a defendant. In either instance, if there is a settlement or judgment of liability against the defendant, most of the money will go to the government and the Relator will get a share of the proceeds. Relators may also seek compensation for retaliation if they claim they were terminated or otherwise suffered adversely because they engaged in protected whistleblower activity.

The FCA focuses on claims for federal money, but in 2015 the state of Maryland passed the Maryland False Claims Act, Md. Code, General Provisions § 8-102(b)(1)-(9), that operates very similarly to the federal statute but focuses on state funds.

While the DBA has its own set of remedies for individual workers or the Department of Labor to seek redress, the FCA operates in tandem with the DBA to also provide the government with civil remedies when contractors fail to comply with the DBA. In most cases, contractors are required to submit certified payrolls attesting that the company and its subcontractors have complied with the DBA for both wages and benefits. Contracts often make clear that invoices will not be paid absent this certification. However, liability does not depend on there being a specific certification. Considering the recent United States Supreme Court opinion in *Universal Health Services Inc. v. United States ex. rel. Escobar*, liability can also be based on the implied certification of the invoices if compliance with the DBA was condition of payment on the contract.

The invoices constitute claims under the FCA, and if the invoices are submitted knowing that the certification of compliance is fake, the contractor can be exposed to significant damages under the FCA. These damages can typically include up to three times the amount of each invoice that is falsely certified, as well as penalties ranging from \$10,781 to \$21,563 per claim or invoice. A contractor can be found to be "knowing" if he has

actual knowledge, is intentionally ignorant, or shows a reckless disregard toward the information presented to the government.

Contractors should consider several good practices to try to avoid exposure under the FCA for failing to comply with the DBA.

First, contractors should fully understand the requirements of the DBA and what prevailing wages apply to the work performed. The wages differ for each location, and if the contract is a multi-year project, wages may or may not adjust each year under the contract.

Second, when in doubt about contractual requirements, a company should communicate with the government contracting officer. Asking the contract officer to confirm the prevailing wages and fringe benefits for each specialty will help ensure compliance. If the job requires a specialty that is not specifically mentioned in the prevailing wage chart, the contracting officer can help confirm the proper way to categorize the employee and determine the wages. Keeping a record of all communications and disclosures to the government will help deter someone claiming later that a company hid material information.

Third, careful companies create internal compliance and quality-control checks to verify compliance for both pay and fringe benefits. This often includes special attention to high-wage earners like electricians and plumbers, as the value of their pay and benefits tends to be much higher than for other workers.

Fourth, many companies work through an attorney to hire an outside consulting firm to conduct a sampling of company records and independently review the billing to make sure the right amounts are paid.

Fifth, disciplined, organized recordkeeping, including regular data system backup, is essential to demonstrate company actions and thought processes if conduct is challenged or reviewed years in the future. This will also be useful in demonstrating that the company followed its own compliance programs and the law.

Lastly, a government contractor should be prepared to respond to a government subpoena. Establishing standard operating procedures for how to respond, including how records will be preserved once a subpoena is received, who is responsible for the various tasks, and developing relationships with an outside counsel, are all good steps to have taken before they are actually needed.

Federal and state construction contracts are important to our infrastructure and a major part of the construction economy. The potential value can be appealing for business, but contractors need to make sure they understand the requirements of statutes like the DBA and the FCA, and the potential consequences for failing to comply, before agreeing to perform government contracts.