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ALERT

FCA Liability For Davis-Bacon Act Violations

Government Contracts Law360
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On October 1, in *United States ex rel. Brian Wall v. Circle C Construction, L.L.C.*, the Sixth Circuit reaffirmed that False Claims Act (FCA) allegations can be premised on violations of the Davis-Bacon Act in cases that do not require interpretation of the Department of Labor's (DOL) complex regulations concerning classification of employees. This decision highlights yet another path for plaintiffs to bring *qui tam* suits in an ever-expanding universe of ways to demonstrate FCA liability.

In *Circle C*, an employee of a subcontractor on an Army construction project brought a *qui tam* action, alleging that the subcontractor and prime contractor violated the FCA by submitting improper wage and payroll certifications. The whistleblower alleged that the contract governing the project incorporated the Davis-Bacon requirement that the contractor pay wages set by the Secretary of Labor, and that the contract included provisions that set specific wages for electrical workers. The contractors' payroll certifications did not disclose electrical work performed by employees of the subcontractor, and falsely certified that the prime contractor paid the required Davis-Bacon wages to the subcontractor's electrical workers, which the whistleblower alleged constituted false certifications under the FCA.

After the subcontractor settled and was dismissed from the case, the district court awarded summary judgment and trebled damages to the whistleblower, concluding that the prime contractor violated the FCA by submitting false payroll certifications regarding wages for the subcontractor's employees. The prime contractor appealed, arguing that (1) DOL, and not the district court, had primary jurisdiction over allegations of Davis-Bacon violations, and (2) the whistleblower had failed to prove the requisite elements of a FCA claim: falsity,

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knowledge and materiality.

The Sixth Circuit affirmed the district court's finding of liability. The court first reasoned that the whistleblower's decision to allege Davis-Bacon Act violations in his complaint did not preclude his ability to bring a FCA claim in district court because the case involved "misrepresentation" and not "misclassification" of employees under Davis-Bacon rules. Specifically, the court found it clear that the contractor misrepresented the subcontractor's work in failing to account for its employees and falsely certifying that they received Davis-Bacon wages. There was no argument that the contractor had simply misinterpreted or misapplied the requirements of the Davis-Bacon Act. For this reason, determining whether the contractor violated the FCA did not require interpretation of complex Davis-Bacon Act regulations concerning classification of employees—a role jurisdictionally reserved for DOL. In these circumstances, deference to the DOL's administrative procedures was not warranted and the case was properly heard by the district court.

After finding that it had primary jurisdiction to decide the plaintiffs' FCA claim, the court concluded that the contractor acted with reckless disregard concerning the falsity of the payroll certifications, and thus violated the FCA. The prime contractor conceded that it understood the Davis-Bacon requirements, and yet did not supervise the subcontractor's payment of its employees, and did not verify the payroll certifications for accuracy and completeness. This lack of supervision and verification resulted in payroll certifications that did not account for the subcontractor's electrical workers and falsely certified that they received Davis-Bacon wages. Though it affirmed summary judgment with regard to liability, the Sixth Circuit overturned the district court's damages assessment, concluding that the district court's calculation was speculative and was based in part on purchase orders that were not addressed in the whistleblower's complaint.

The Sixth Circuit's decision continues the trend of broad interpretation and aggressive enforcement of the FCA, allowing matters previously thought to be contractual or administrative in nature to be molded into claims of fraud against the Government. In doing so, the ruling will likely encourage whistleblowers to level more FCA allegations relating to contractors' standard wage certifications under federal labor standards statutes. Indeed, under the theory articulated by the Sixth Circuit, a whistleblower may be able to strategically package Davis-Bacon Act violations as a FCA case, thus bypassing DOL jurisdiction and opening up a much broader scope of potential remedies (i.e., trebled damages and penalties). Contractors should thus take time to review and update their current wage and payroll policies and subcontractor oversight practices, keeping in mind that prime contractors are generally liable for subcontractors' Davis-Bacon Act violations. *See* 29 C.F.R. 5.5(a)(6). Depending on the circumstances, contractors may also want to consider reviewing past payroll certifications and voluntarily disclosing any discrepancies or other problems to the appropriate Government officials, to preclude a potential whistleblower from fashioning historical payroll issues into a *qui tam* action.