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E-ALERT | Government Contracts

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THE GOVERNMENT CONTRACTS UPDATE

DOL TO ASSUME AUTHORITY FOR EMPLOYEE WAGE CLAIMS

On November 5, 2013, the United States Senate passed the Streamlining Claims Processing for Federal Contractor Employees Act. This legislation, already passed by the House of Representatives, transfers administrative authority for processing construction contractor wage claims from the Government Accountability Office's Comptroller General to the Secretary of the Department of Labor ("DOL") by amending the Davis-Bacon Act of 1931. The Davis-Bacon Act requires contractors to pay workers the "locally prevailing wage" for federally-funded construction projects.

DOL currently has responsibility for establishing prevailing wages required by the Davis-Bacon Act. Under the new legislation, DOL would also assume responsibility for claims that an employer failed to pay Davis-Bacon Act wages. As a result, DOL would have plenary authority over both implementation and enforcement of the Davis-Bacon Act. Sponsors of the new legislation believe that moving the claims process to DOL will help contractor employees obtain unpaid wages in a more timely manner. The bill is now before President Obama, who is expected to sign it shortly.

SENATE COMMITTEE PASSES DATA ACT TO TRACK GOVERNMENT SPENDING

On November 6, 2013, the United States Senate Committee on Homeland Security and Governmental Affairs passed the Digital Accountability and Transparency Act ("DATA Act"). This proposed bill provides for standardized reporting of federal spending to a single website, USASpending.gov, to facilitate public monitoring of spending and identification of improper payments, fraud, and wasteful expenditures. USASpending.gov, a website established in 2007 and operated by the U.S. Office of Management and Budget, is a publicly-accessible, searchable website with data on federal funding. The DATA Act's approach ends agency-specific financial reporting systems, and instead, uses USASpending.gov's single public database.

The DATA Act bill assigns responsibility to government agencies to report streamlined financial data under various categories, including appropriation, agency, and program activity. The bill is designed to make it easier to analyze spending across federal agencies. Legislators believe that the DATA Act, if passed and signed into law, will reduce compliance costs for contractors and grantees by automating financial reports and requiring agencies to improve tracking of their own fiscal data. The full Senate will now consider the bill.

CYBERSECURITY CERTIFICATIONS BRING CONTRACTING ADVANTAGES

New federal cybersecurity certifications offer contracting advantages for companies that act promptly to certify their information technology platforms. For example, the U.S. General Services Administration's Federal Risk and Authorization Management Program ("FedRAMP") creates a standardized approach to security assessment, authorization, and continuous monitoring for cloud computing platforms. Similarly, the Defense Information Systems Agency ("DISA"), an entity within

the Department of Defense ("DOD"), created a new security certification program to review contractor technology platforms for additional DOD security control requirements. Federal agencies may include FedRAMP security standards in contract solicitations for cloud computing services. Indeed, FedRAMP even offers template contract clauses for federal agencies to use. Obtaining both FedRAMP and DISA cybersecurity program certifications could provide contractors with a broader pool of potential government contracts, for which there might be a smaller pool of offerors to compete against.

CASE DIGEST

Covington Helps Defeat Challenge to Stay Override, Allowing for Continued Performance on $1 Billion Contract During Pendency of Bid Protest (*Dyncorp Int'l LLC v. United States*, No. 13-689C (Nov. 5, 2013))

On November 5, 2013, the United States Court of Federal Claims ruled that the U.S. State Department's ("State") decision to override the Competition in Contracting Act's ("CICA"), 31 U.S.C. § 3553, automatic stay to allow for continued performance on a $1 billion contract for "life support services" in Baghdad, Iraq, was neither arbitrary nor capricious. State awarded the contract in question to PAE Government Services, Inc. ("PAE"), represented by Covington & Burling LLP. Dyncorp International LLC ("Dyncorp") and other unsuccessful bidders have protested the award at the Government Accountability Office ("GAO").

The protests prompted CICA's automatic stay of PAE's performance on the contract. In response, State's Head of Contracting Activity issued a written determination to override the stay, explaining that PAE's continued performance was in the government's best interests to prevent a possible lapse in vital services for State employees working in a hostile environment. Dyncorp filed a complaint in the Court of Federal Claims, arguing that the override was unnecessary because there were other incumbent contracting vehicles that could be extended to provide the required services during the pendency of the protests. Dyncorp's complaint sought both a declaratory judgment that State's override decision was improper, and injunctive relief prohibiting PAE's continued performance.

The court denied Dyncorp's requests for relief. In so doing, it observed that State's concerns about a lapse in essential life support services provided in a "dangerous place" were not illusory. The court noted that while other incumbent contracts might be available, it was possible that extending such contracts "would not unfold with the efficiency of a Swiss watch." Accordingly, the court concluded that State's override decision was neither arbitrary nor capricious. Courts are often skeptical of agency decisions to override CICA-based stays, but the ruling here confirms that a court will still uphold a sufficiently-justified override decision. More importantly, the outcome allows PAE to continue to provide critical life support services for State Department personnel serving the United States in Baghdad.

Second Circuit Rules That Attorney May Not Disclose Client Confidences in False Claims Act Action (*United States v. Quest Diagnostics, Inc.*, No. 11-1565-cv (2d Cir. Oct. 25, 2013))

On October 25, 2013, the United States Court of Appeals for the Second Circuit affirmed a district court's ruling that Unilab Corporation's former general counsel, Mark Bibi, violated New York state ethics rules by disclosing confidential information after joining other former company executives to file a *qui tam* action against Unilab under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729–3733. The *qui tam* relators alleged that Unilab, a clinical laboratory company, violated the Anti-Kickback

Statute, 42 U.S.C. § 1320a-7b, over an almost ten-year period by providing clients with unreasonably discounted prices to induce "kickback" referrals of Medicare and Medicaid business.

Bibi believed that he could disclose confidential information he obtained in his former role as Unilab's attorney under an ethics provision permitting such disclosure when it is "necessary . . . to prevent the client from committing a crime." N.Y. Rules of Prof'l Conduct R. 1.6(b)(2). The United States District Court for the Southern District of New York, however, disagreed. In granting Unilab's motion to dismiss the complaint, the district court found that the FCA did not preempt attorney ethics rules, and that Bibi's participation in the action violated New York's Rules of Professional Conduct. The Second Circuit affirmed, concluding that Bibi violated New York Rule 1.9(c), which prohibits a lawyer from using a former client's confidential information to the client's disadvantage.

The Second Circuit acknowledged that while Bibi may have believed that Unilab intended to commit a crime, he disclosed more confidential information than was reasonably necessary to prevent Unilab's kickback scheme, especially given that he had held other positions that granted him access to confidential information, including Vice President, Executive Vice President, Secretary, and consultant. The Second Circuit also affirmed the district court's ruling that Bibi's improper disclosure required dismissal of the case as to all of the *qui tam* relators to ensure that Unilab was not prejudiced by the disclosure in any subsequent litigation based on the same facts. The Second Circuit's decision confirms that the FCA does not provide license for an attorney to disclose a former client's confidences.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our government contracts practice group:

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