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DOECAA October 2011 Employment and Labor Law Update

By

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A. The Service Contract Act ("SCA")

1. Increase in Health and Welfare ("H&W") Rates

For SCA-covered contracts awarded on or after June 17, 2011 -- note that this is a change from the usual June 1 effective date -- the new per employee (so-called "low-level") H&W benefit rate is $3.59 per hour, $143.60 per week or $622.27 per month. All Agency Memorandum ("AAM") No. 210, June 17, 2011. *See* http://www.wdol.gov/aam/AAM210.pdf. The average cost fringe benefit rate (so-called "high level") also has been increased to $3.59 per hour. While the dollar amounts of the low- and high-level benefits are the same, the method of compliance remains different. Specifically, the low-level benefit applies on an employee-by-employee basis for hours paid for up to 40 hours per week, whereas compliance with the high-level benefit is determined based on the contractor's average fringe benefit cost for hours actually worked by all employees on the contract, including overtime, but not leave time. (Contractors should take note that the new benefit levels are *not self-executing*. Rather, they apply to a particular contract only if and when the contracting officer modifies the contract to require the new levels. Typically, this occurs when an option is issued.)

2. New "Price Adjustment Calculation Tool" ("PACT") on Wage Determinations Online Website

During 2010, the Wage Determinations Online website (www.wdol.gov -- a collaborative effort of the Office of Management and Budget, Department of Labor ("DOL"), Department of Defense, General Services Administration, Department of Energy ("DOE"), and Department of Commerce), unveiled PACT, an automated method of accurately calculating SCA price adjustments that is "specifically designed to streamline the price adjustment process and timeline." It consists of a

format for contractors to submit their price adjustment proposals and a Government component that calculates and helps contract specialist to analyze the proposals for accuracy, allowability and consistency. According to the website, the essence of PACT is "an excel spreadsheet with specifically embedded formulas used to calculate the correct amount of Service Contract Act price adjustment under the principals of [Federal Acquisition Regulation ("FAR")] 52.222-43/44, 32 Fair Labor Standards Act and Service Contract Act Price Adjustment" (the "FLSA/SCA Price Adjustment clause"). More information may be found at http://www.wdol.gov/pact/intro.aspx.

3. Energy Secretary Announces Contractor Pay Freeze

In a "Dear Colleagues" email on December 17, 2010, Secretary of Energy Chu wrote: "President Obama proposed a two-year pay freeze for all civilian federal workers, which is predicted to save $2 billion for the remainder of FY 2011 and $28 billion over the next five years. It's in the same spirit of shared sacrifice that I am implementing a similar freeze on salary and bonus pool increases for site and facility management contractor employees, who run day-to-day operations at certain Department of Energy sites and facilities, including national laboratories, and do a great service for the country." Secretary Chu's announcement does not appear to address SCA requirements for periodic adjustments to wages and benefits, and absent binding contractual limitations on costs and changes to the SCA regulations and statute, it provides no basis for DOE contracting officers to deny price adjustments to which contractors are entitled under the FAR FLSA/SCA Price Adjustment Clause.

In addition, the Government is examining executive compensation allowability. It is increasingly likely that the thresholds for reimbursement of executive compensation will be lowered in the coming year.

4. Federal Court and Board of Contract Appeals Decisions

a. *K-MAR Indus., Inc. v. U.S.*, 91 Fed.Cl. 20 (2010)

Held: In a procurement for a fixed-price contract, the agency was not required to evaluate the offeror's proposal that six of eight personnel would be exempt from the SCA because that was not one of the evaluation criteria and there is no duty to perform a cost realism analysis when procuring a fixed-price contract.

b. *Champion Business Services v. GSA*, CBCA No. 1735, 10-2 BCA ¶ 34,539

Held: Under a contract for temporary staffing, the Government's refusal to pay for holiday and vacation time did not require the contractor to violate the SCA since the contractor could have built holiday and vacation costs into its labor rates.

c. *Shawview Cleaners LLC*, ASBCA, No. 56938, 10-2 BCA ¶ 34,550

Held: Government employees -- even if they are contracting officers -- lack the authority to waive a statutory requirement such as compliance with the SCA. Therefore, a contractor had no legal basis to rely on Army and Air Force Exchange Service personnel who, it claims, fraudulently induced the contractor to enter into a contract by misrepresenting the wage determination as merely guideline and not mandatory.

d. *Bonner v. Metropolitan Security Services*, 2011 U.S. Dist. LEXIS 26251 (W.D. Tex. March 15, 2011)

Held: Payment of cash fringe benefits acted to boost up the regular rate of pay for overtime purposes and warranted granting conditional class action status. The court found that DOL's regulations to the contrary are not supported by the plain language of the FLSA and SCA.

e. *United States of America ex rel Anthony Head v. The Kane Company*, Civ. Act. No. 05-317 D.D.C. July 25, 2011)

Held: Qui tam action alleging fraud arising from alleged implied or actual certification by contractor of payment of SCA wages and/or fringe benefits is allowed to proceed and the motion to dismiss that cause of action is denied.

f. *Appeal of Office Automation & Training Consultants*, ASBCA Nos. 56779, 56838 (ASBCA 2011)

Held: Summary judgment granted to Government because an SCA wage determination was allegedly referenced in solicitation and because contractor had duty to seek clarification of any ambiguities. Accordingly, contractor claim for monies is denied even through no SCA wage determination was physically included in RFP or contract. The contractor has sought reconsideration which request is pending at the Board.

5. Administrative Review Board ("ARB") and Office of Administrative Law Judge ("OALJ") Decisions

There were no substantive ARB decisions relating to the SCA in 2010 or 2011. The following are some OALJ cases of interest:

a. *Fredy Bowers aka F & B Enters.*, Case No. 2008-SCA-16 (OALJ, July 12, 2010)

Held: Although some factors weighed in favor of relief from debarment, the respondent's long history as a Government contractor belied his claims that he was

unaware of his obligations. In addition, his initial outright refusal to correct non-compliances rendered hollow his subsequent promises to cooperate and comply.

b. *HHMT, Inc.*, Case No. 2006-SCA-27 (OALJ, August 4, 2010)

Held: Mail haul contractor violated SCA by paying team drivers only for the hours they actually spent driving rather than for all hours in the truck. Also held: The person with *de facto* control of the company is the "party responsible," even though he is not an officer, and therefore is personally subject to debarment.

6. New Field Operations Handbook

DOL issued revised chapters 14 and 15 to its Field Operations Handbook ("FOH") on the SCA and the Davis-Bacon Act. The new handbook is dated October 25, 2010 and contains the Wage and Hour Division's guidance to the investigators in the field as to how to interpret the laws and regulations. The FOH is not binding law or regulation, but some tribunals have given it due deference as an expression of policy by the agency charged with interpreting the wage and hour laws. What ever its weight, the FOH is a valuable tool to predicting what path DOL may take on legal issues involving the SCA or the Davis-Bacon Act.

B. The Davis-Bacon Act ("DBA") and Related Acts

1. Applicability of the DBA to Work Funded by the American Recovery and Reinvestment Act ("ARRA" or "Recovery Act")

a. All Agency Memorandum No. 208

On May 5, 2010, DOL issued AAM No. 208 to provide general guidance to governmental and other entities concerning the applicability of Davis-Bacon labor standards to projects financed with the proceeds of the five specific tax-favored bonds listed in section 1601 of Division B of ARRA. AAM No, 208 also highlights the responsibilities of state and local government entities, contractors, and others for implementation of, and compliance with, the Davis-Bacon labor standards in connection with projects financed with the proceeds of the tax-favored bonds.

b. DOL Letter to Department of Energy dated January 5, 2010

Individual homeowners who receive rebates for material and/or labor costs he or she incurred in connection with qualifying energy efficiency and weatherization improvements to his or her home under a DOE State Energy Program rebate program or similar programs are not responsible for Davis-Bacon compliance.

2. Federal Court Decisions

a. U.S. ex rel. Wall v. Circle C Construction, LLC, 700 F.Supp 2d 926 (M.D. Tenn. 2010)

Held: DOL's exclusive jurisdiction over DBA enforcement does not preclude an action brought under the False Claims Act ("FCA") where the prime contractor failed to flowdown DBA requirements to a subcontractor. The prime contractor's payment requests were false because the prime was not complying with the contract; thus, the court granted summary judgment to the Government under the FCA.

In addition, the Government was entitled to summary judgment on its claim of "unjust enrichment" since the contractor was paid money it would not have been paid had the Government known the contractor was not complying with the DBA.

Notably, the $1.66 million judgment, which included treble damages, was almost as much as the value of the contract from which it arose, i.e., a $1.9 million contract to perform construction work on buildings at Fort Campbell in Kentucky and Tennessee.

3. Administrative Review Board Decisions

a. Independent Electrical Contractors, Georgia Chapter, Inc., ARB No. 10-009 (ARB Mar. 10, 2010)

The Petitioner had sought review of a DBA wage determination, but together with the Wage-Hour Administrator filed a joint motion to dismiss because Wage-Hour would be conducting a new survey of electrician wage rates in Georgia in the early summer of 2010. The contractor did not forfeit its rights because Wage-Hour agreed to dismissal without prejudice and pledged not to object to the timeliness of a new petition if Wage-Hour failed to timely begin the survey and the Petitioner filed a new petition. The ARB granted the motion.

4. Wage & Hour Division ("WHD") Administrator Ruling on Application of DBA

a. DOE Y-12 Facility

On July 30, 2010, the WHD Administrator issued a ruling that the DBA should have been applied to the construction of two buildings at DOE's Y-12 Facility. While the ruling is not retroactive, the Administrator states that the ruling will educate agencies regarding DOL's interpretation of the DBA. In this case, DOE transferred real estate to a non-profit entity created by the City of Oak Ridge, Tennessee, which also sold bonds to finance the construction of buildings which are leased long-term back to DOE.

b. Washington, D.C. CityCenter Project

Nancy Leppink, Deputy Wage & Hour Administrator, on June 17, 2011 ruled that the lease of DC land to a private developer (known as the CityCenter Project) constituted construction under the Davis-Bacon Act, despite fact that none of the building would be used by the government. DOL found they were still public works. The Washington Post in an editorial on September 6th called the decision "astonishing." The City and the private developers have appealed the WHD decision to the Administrative Review Board in *Mid-Atlantic Regional Council of Carpenters vs. The District of Columbia*, and the carpenters union has cross-appealed the decision not to make the wage adjustment retroactive.

C. Executive Orders ("E.O.")

1. DOL Issues Rules to Implement E.O. 13495, Nondisplacement of Qualified Workers under Service Contracts

Ten days after taking office, President Obama signed E.O. 13495 establishing a general policy of the Federal Government that service contracts and solicitations for such contracts shall include a clause that requires the contractor, and its subcontractors, under a contract that succeeds a contract for performance of the same or similar services at the same location, to offer those employees employed under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified. The E.O. directed the Secretary of Labor and the Federal Acquisition Regulatory Council to issue rules within 180 days to implement the E.O.

On March 19, 2010 -- almost 14 months after the E.O. was signed -- DOL issued proposed rules to implement the order. In the preamble, DOL stated that the proposed rules were largely based on similar rules issued in the Clinton administration. Some notable aspects of the proposed rule included: Exclusion of "managerial and supervisory personnel; coverage if a covered contractor terminates a subcontract and brings the work in-house; new record-keeping requirements; new notices to post; obligations even if the successor contractor is not given a list of the incumbent employees by the predecessor contractor; provisions on timing and method of making "bona fide" offers; and clarification that the successor was not required to offer jobs to more employees than it planned to use to perform the work.

DOL received 38 comments submissions before the closing date of May 18, 2010. After the review of the comments, proposed regulations were sent to the Office of Management and the Budget ("OMB") which sat on the proposal for

many months. In the absence of final rules, the Executive Order was not in effect and was not meant to be added to solicitations or contract modifications.

On August 29, 2011, DOL issued final rules http://www.federalregister.gov/articles/2011/08/29/2011-21261/nondisplacement-of-qualified-workers-under-service-contracts. However, even those rules do not go into effect until the FAR Council issues implementing regulations. So neither contracting agencies nor contractors need to comply with the Executive Order until the FAR provisions are promulgated.

2. DOL and FAR Council Issue Rules to Implement E.O. 13496, Notification of Employee Rights Under Federal Labor Laws

On December 13, 2010, the FAR Council issued an interim rule amending the FAR to implement Executive Order 13496. Earlier in the year, DOL also issued a final rule implementing that executive order.

DOL's rule dictates the contents of the notice, a copy of which is available to be downloaded from DOL's website (http://www.dol.gov/olms/regs/compliance/EO13496.htm). DOL's poster lists employees' rights under the National Labor Relations Act to form, join, and assist a union and to bargain collectively with their employer. The notice also provides examples of unlawful conduct by employers and unions that interfere with those rights and informs employees how to contact the National Labor Relations Board. 75 Fed.Reg. 28,368 (May 20, 2010).

The FAR Council's interim rule creates a new FAR subpart 22.16 and contract clause (FAR § 52.222-40) entitled "Notification of Employee Rights Under the National Labor Relations Act." The interim rule also revises the FAR clauses relating to commercial item acquisitions (FAR § 52.212-5, "Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items," and FAR § 52.244-6, "Subcontracts for Commercial Items) to require that the new FAR clause be included in commercial item contracts.