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Articles contained in this issue of the CLE:



FALSE CLAIMS IN CONSTRUCTION – QUI TAM ISSUES IN THE INDUSTRY TODAY

In 1862, Major Quartermaster Justus McKinstry, a military purchasing officer, was court-martialed for, among other things, buying horses for the Army from favored sources at grossly inflated prices, ultimately benefitting himself and his sources, at the expense of the government. President Lincoln dismissed him from the Army and soon thereafter, responding to McKinstry's fraud and others like it, including reports of bullets sold to the government with sawdust instead of gunpowder, Congress enacted the False Claims Act (FCA). Known as Abe Lincoln's Law, the FCA punished persons who sought to obtain financial benefit by, in essence, "ripping off" the government. The original enactment contained a *qui tam*, or whistleblower, provision, short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur* (loosely translated from Latin, meaning "he who brings an action for the king as well as for himself.").

Today, the FCA is widely regarded as the most effective tool in combating fraud against the federal government, and the penalties are harsh. Since 1986, when the FCA was

beefed up to address defense industry fraud, more than $22 billion has been recovered by the federal government under the aegis of the FCA. Violators must repay the government three times the amount of the fraud, and are also liable for civil penalties of $5,500 to $11,000 per false claim. Further, offenders can be disqualified from future federal and state government contracts. Whistleblowers, also known as Relators, are permitted to file an FCA claim on behalf of the government, and may be entitled to between 15% and 30% of the government's recovery in the action.

The pharmaceutical industry often gets most of the media attention because of the high dollar amount of recent false claims settlements. The **construction industry** is also a target for fraud, particularly after the passage of the American Recovery and Reinvestment Act of 2009 (ARRA). Signed into law by President Barack Obama on February 17, 2009, ARRA provided $787 billion to stimulate the economy through various avenues, including construction and infrastructure improvement projects. As you read this, that money is being spent across the country on projects as diverse as interstate highways and water treatment facilities. An interesting component of the American Recovery and Reinvestment Act was the creation of a website (recovery.gov), which is designed to provide transparency and clarity regarding where and how the money is being spent. The Recovery Board encourages citizens to report suspected fraud, waste, or abuse. All reports are closely reviewed and if any warrant investigation, they are referred to the appropriate Inspector General. This fraud-spotting reporting mechanism is another weapon in the arsenal against fraud and waste in the construction industry, and serves to assist Relators in bringing false claims to light.

Additionally, in order to strengthen several provisions of the False Claims Act that had been undermined by recent court decisions, on May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 (FERA). FERA serves to ensure that fraud perpetrated on the government by the submission of false claims will be brought to light and punished under the FCA.

Key Provisions of the False Claims Act

Specifically, the False Claims Act prevents certain types of fraudulent conduct. Types of fraud range from the simple to complex, and can be perpetrated by anyone who submits or causes the submission of a claim to the government knowing that claim is false or with reckless disregard as to whether that claim is false. The types of fraud most commonly prosecuted in the construction industry are described in §§3729(a)(1) and (a)(2) of the FCA. Section (a)(1) prohibits knowingly presenting, or causing to be presented, false claims to the government. Section (a)(2) prohibits using a false record or statement to get a false claim paid.

"Knowingly" means that, with respect to information, a person (1) has actual knowledge of the information, (2) acts in deliberate ignorance of the truth or falsity of the information, or (3) acts in reckless disregard of the truth or falsity of the information. Further, the intent to defraud is not necessary – only the knowledge that the information is false when presented.

A "claim" can include requests for progress payments, final payment, equitable adjustments, or any other type of request for payment. Therefore, while the language of the law is clear, the actual conduct prohibited is not so clear.

Types of forbidden conduct run the gamut from obtaining a contract under false pretenses, padding hours, costs, and performing substandard work, to making misrepresentations concerning site conditions or materials and submitting inflated requests for equitable adjustment. Not only the prime contractor presenting the claim to the government may be held liable, but also a subcontractor on a large project who submits an inflated bid or false claim to the prime or general contractor may be held liable without regard to whether that subcontractor (or architect or any other party submitting a claim) deals directly with the federal government. Indeed, liability attaches under the False Claims Act whenever a person knowingly makes a false claim to obtain money or property, in circumstances where the funding is provided by the government.

False Claims in the Construction Industry

False claims may often be found in collusive bidding schemes, kickbacks, and filing of false certifications of compliance. Collusive bidding is the practice whereby several contractors work in concert to ensure a higher bid price for the winning bidder. Such practices might include a bonus or loser's fee as part of an arrangement wherein the winning bidder will hire the loser to perform a part of the contract. The loser's fee is then rolled into the bid price and serves to inflate the amount of government money spent on the project.

Often it is difficult to track where government dollars are spent when funds used to sponsor projects come from mixed sources. The courts have tackled this tracking problem, particularly in circumstances where local money and federal dollars are intertwined in a particular project, and impose liability on the theory that the fraudulent claim was part of the inducement to enter into the contract. The U.S. Supreme Court stated in a 1943 case that the collusive bidding scheme did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the government.

Kickback schemes have also been found to impose liability under the False Claims Act. A prime example is an Amtrak project manager who suggested an asbestos-remediator subcontractor inflate its bid to incorporate a kickback to the project manager referred to as a "consultant fee". The subcontractor submitted the inflated final invoice, with the "consultant fee" included, to Amtrak. Upon discovery of the kickback scheme, the project manager was criminally convicted, and the subcontractor was found liable under the FCA for submitting a false claim.

Another forbidden practice punishable under the FCA is false certification. False certifications made during the course of the bidding process, such as certification that the contractor has met contractually mandated disadvantaged business enterprise utilization,

when it has not, are also sufficient to impose FCA liability. Other false certifications of compliance that may implicate FCA liability include representations concerning timely payment to subcontractors for the purpose of obtaining progress payments, certifications regarding minority-owned businesses, wage compliance certifications, and certifications of quality of materials used.

Perhaps the most famous example of false claims liability in the construction industry is Boston's Central Artery/Tunnel Project, also known as "The Big Dig". This huge construction project was many years over schedule and over budget. Defects in slurry walls caused flooding of the tunnel roadways on several occasions, and a defective ceiling collapsed, causing the death of a young woman. Both Massachusetts, under that state's version of the False Claims Act, and the federal government, under the federal FCA, brought a false claims case against Bechtel/Parsons Brinckerhoff, the joint management firm and main contractor on the Project. Bechtel/Parsons Brinckerhoff, which designed and oversaw construction of the multi-billion dollar project for more than 20 years, allegedly failed to properly oversee subcontractors that were overcharging based on employee classifications and using inadequate materials for the construction. The case against Bechtel/Parsons Brinckerhoff eventually settled for $407 million, including settlement of the alleged false claims related to ceiling compliance certification, failure to properly oversee slurry wall construction, and claims related to subcontractor overbilling. Claims against other contractors on the Project have allowed the State and the U.S. Government to recover over $500 million to date.

Examples of simple or straight forward false claims relating to Boston's Central Artery/Tunnel Project are the certification of payment of apprentice workers at higher journeyman rates and overbilling time spent on a project.

An example of complex false claims is the case involving Daewoo Engineering & Construction Company. Daewoo bid on, and won, a United States Corps of Engineers contract to construct a fifty-three (53) mile road around the Pacific island nation of Palau, not only because of Daewoo's impressive qualifications and history, but also because its bid amount was significantly lower than the next lowest bid. Daewoo immediately ran into trouble completing the planned three-year project, purportedly because of adverse weather conditions, difficulty in compacting the local soil, and logistics of dealing with the lush jungle environment. However, it became clear in subsequent litigation that Daewoo had originally bid low on the project with the intent of making up the difference with requests for equitable adjustments.

After beginning the work, Daewoo submitted an equitable adjustment request of $64 million, 86% of its original bid price on the entire project. When the government denied the claim, Daewoo sued. After the company presented its case, the government filed claims against Daewoo under the False Claims Act and asserted other fraud claims. The court hearing the case found that Daewoo deliberately underbid the contract, thus, obtaining the contract under false pretenses. The Court also found that $50 million of the $64 million claim for equitable adjustment was fraudulent because it had been submitted with the intent to "get the Government's attention".

The court awarded a $10,000 civil penalty against Daewoo for filing the false claim, awarded $50 million to the government under another fraud-prevention law, and also identified 762 other instances where Daewoo had made false claims or relied on false records, including its own soil compaction studies and the overstating of the cost of at least 700 pieces of equipment. Without deciding, the court suggested that the $10,000 penalty then in place for violations of the FCA for each of the 762 separate instances, or $7,620,000, might be appropriate as an additional penalty under the FCA's statutory scheme.

Private Person Filing a Whistleblower Claim

Construction companies need to be aware that one of their own employees can file a False Claims Act Claim. A private person, commonly known as a whistleblower or Relator, who is aware of potential misconduct, normally seeks the assistance of an attorney to file a False Claims Act claim. The reason is that a private individual does not have the necessary knowledge and expertise to file a civil action for false claims and successfully prosecute this type of claim on behalf of the government. When a claim is initially filed in court, it is done under seal, meaning that the alleged wrongdoer and the public are not, at the outset, informed that a lawsuit has been brought. The government then has a sixty (60) day window to review the claim and determine whether to intervene. This period of secrecy may be extended for good cause, and often is, while the government investigates the claims. Intervention by the government limits the Relator's ability to guide the case. On the other hand, the Government's intervention provides significant additional resources to investigate and prosecute the whistleblower's case.

If the case is ultimately successful and the Government recovers, courts will review the degree of assistance provided by a Relator, and determine the Relator's share of the recovery based upon that assistance. Typically, the more work the government has to do to prove the case, the lower the percentage share of the recovery the Relator will receive.

A further requirement in bringing an FCA claim is that the wrongdoing not be publicly known prior to filing of the claim. Public disclosure of the fraudulent claim may serve as a bar against proceeding against a wrongdoer. Further, a Relator's claim will be defeated if the same or related claim has already been filed by another Relator.

The Relator is protected by the provisions of the False Claims Act from retaliation for bringing false claims to light. Penalties for any violation of the non-retaliation provision of the FCA include reinstatement, double back pay, and reasonable attorney's fees.

Procedures that Construction Companies Should Implement With Respect to Government Contracts

With the large dollar exposure to a construction company that is accused of violating the False Claims Act, it is important that extra precautions be taken in projects involving a

governmental entity. Below are some things that a construction company can do to minimize its exposure to a claim under the FCA:

- Implement a written code of business ethics and conduct.
- Periodically review the Contract, Specifications, and other Contract Documents to make sure the company is in compliance.
- Make certain that Certifications such as timely payment to subcontractors, quality of materials, and employee classifications are accurate and complete.
- Assign individual responsibility for Certifications.
- Whenever a Certification of Compliance is issued, have internal controls that are set forth in a written procedure that assure that management "signs off" before the Certification is issued.
- Periodically perform internal investigations to forestall the risk of false claims.
- Periodically perform a fraud risk assessment.
- Evaluate controls designed to prevent or detect fraud, including management override of controls.
- Periodically review billing procedures.

Conclusion

Penalties under the False Claims Act far exceed the cost of investigation and setting up appropriate procedures. Consequently, it is prudent for **construction companies** to take preemptive measures to reduce the probability of being involved in a False Claim prosecution. For those companies that institute appropriate safeguards in projects involving government funding, the False Claims Act levels the playing field by penalizing companies that don't play by the rules.

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THE GOVERNMENT'S INCREASED SPENDING ON FRAUD ENFORCEMENT WILL LIKELY RESULT IN THE EXECUTION OF MORE SEARCH WARRANTS -- IS YOUR COMPANY READY?

Federal law enforcement activity is on the rise across the nation. With more funding on the way for federal law enforcement agencies, this trend will continue. One of the mainstays of any federal criminal investigation is the execution of search warrants during the early-stages of an investigation. Federal agents arrive at the door of a target company, unannounced, search warrant in hand, and demand access to myriad company records. This tried-and-true law enforcement technique will likely increase as the current administration allocates more money to combating fraud and abuse. It is imperative that every company devise a plan of action for responding to search warrants. While no company wants to believe that they could be the subject of a criminal investigation, given the current enforcement climate, this is no time for a company to bury its head in the sand and hope for the best. Companies can and should prepare for the worst by implementing a few basic and inexpensive pro-active methods for responding to a search warrant.

I. THE INCREASED FOCUS ON FRAUD ENFORCEMENT

On May 20, 2009 President Barack Obama signed into law the Fraud Enforcement and Recovery Act of 2009 ("FERA"). The principle objective of FERA is to increase government oversight of financial fraud. FERA authorizes substantial funding for federal law enforcement agencies. Specifically, FERA increases law enforcement funding by allocating:

- $165 million for years 2010 and 2011 for the hiring of fraud prosecutors and investigators at the Department of Justice;
- $75 million and $65 million to the FBI for years 2010 and 2011 respectively;
- $80 million for hiring investigators and analysts at the U.S. Postal Inspection Service, the U.S. Secret Service and the Office of Inspector General for the Department of Housing and Urban Development;
- $20 million for the Securities and Exchange Commission for investigations and enforcement.

The substantial funding authorized by FERA comes in addition to significant funds which have been allocated by the Obama administration to combat health care fraud, which the administration had stated is a top law enforcement priority. Health and Human Services Secretary, Kathleen Sebelius, recently remarked that HHS is committed to turning up the heat on Medicare fraud, and will employ all the weapons in the federal government's

arsenal to target those who are defrauding the American taxpayers. It has been estimated that Medicare and Medicaid fraud cost taxpayers up to $600 billion a year. To combat such fraud and abuse, the Obama administration created a task force comprised of officials from the Department of Justice and the Department of Health and Human Services, as well as state and local investigators, to identify, investigate and prosecute Medicare fraud throughout the country. This task force, known as the Health Care Fraud Prevention and Enforcement Action Team ("HEAT") has already obtained indictments of more than 293 individuals and organizations across the country that collectively billed Medicaid more than $674 million.

The heightened focus on fraud enforcement activity will likely result in the execution of more search warrants. The execution of a search warrant, which frequently comes as a complete shock to executives and employees of the target company, is a primary tool in the government's arsenal when investigating fraud and abuse. With more money and more manpower, this favorite investigative technique will no doubt be on the rise. It is now more imperative than ever, therefore, for your company and its employees to be prepared for a potential surprise knock at the door by federal agents with search warrant in hand.

II. PLAN OF ACTION FOR RESPONDING TO SEARCH WARRANTS

To prepare your company and its employees to effectively respond to a search warrant, as well as to assure your Board of Directors that you have a contingency plan in place should such and unpleasant event arise, we recommend the following practical Plans of Action (POAs) for responding to a search warrant.

While a search warrant scenario is always a fluid situation, our experience has demonstrated that the following POAs should help minimize the inevitable disruption to your business operations, and decrease the risk of your company being perceived by the government as being uncooperative, or even worse, obstructionist. Given the current enforcement climate, all companies, big and small, are best served by devising a plan of action for responding to search warrants well in advance of any hint that it may be the target of a federal investigation.

POA #1: Designate a Manager-in-Charge Who Will Lead the Response Effort

Every company should designate one management-level individual who is tasked with responding to a search warrant. Frequently, this individual is the company's Chief Compliance Officer, or someone in the legal department. Ideally, this individual will be someone who is not frequently out in the field, but is regularly on site and readily available at a moments' notice. It is advisable for this manager-in-charge to designate a proxy who can lead the response effort in the absence of the manager-in-charge. Every employee must be trained as to the identity of the manager-in-charge.

POA #2: Dispatch Experienced legal Counsel to the Scene

Once the manager-in-charge is contacted that law enforcement agents are on the premises, the first thing the manager-in-charge should do is contact the company's outside legal counsel. Getting experienced white collar criminal attorneys on the scene as soon as possible is the best way for a business to protect itself during the execution of a search warrant. A knowledgeable attorney can best protect the rights of both the company and its employees, and is unlikely to succumb to the intimidation and stress of the search warrant process. In addition, an experienced attorney can expedite the search process by directing agents to the precise documents and data that they are authorized by the search warrant to seize.

With today's proliferation of cell phones, pagers, blackberries and other PDAs, it is now more likely than ever that experienced legal counsel can be contacted and dispatched to the scene of the search in a matter of minutes. If counsel is reached and the manager-in-charge knows that he or she is on his way, the manager-in-charge should make a verbal request to the lead agent to temporarily delay the search until counsel arrives. To ensure that the manager-in-charge can quickly contact the company's attorney, the manager must: 1) have all of the contact information for the pertinent attorneys at his/her fingertips; and 2) know that he or she is expected to contact the corporation's attorneys immediately after law enforcement agents arrive at the scene. A corporation, like an individual, is legally entitled to contact its attorney to seek advice on responding to the search warrant.

In a perfect world, the manager-in-charge will immediately made contact with corporate counsel, and politely asked the agent in charge to delay the search until counsel arrives on the scene. Once the attorney arrives, the manager-in-charge will follow the instructions of counsel for the duration of time that the law enforcement agents are on the scene. The manager-in-charge can then contact a pre-designated senior executive of the company to explain what is going on and reassure the executive that corporate counsel is on the scene dealing with the situation. The manager-in-charge can then take a deep breath, grab a bottle of water, and be ready to assist the attorney as directed.

We all know, however, that things do not always go as planned. Companies should have a contingency plan, therefore, for a situation where, for whatever reason, the manager-in-charge is unable to get corporate counsel on the scene, and must, therefore, deal with the execution of the search warrant internally. Preparing for responding to a search warrant must comprise of more than simply identifying the manager-in-charge and training the manager-in-charge to call counsel. To be truly ready for the surprise and shock of law enforcement agents arriving at your door, we strongly suggest also providing training on the following suggested areas.

POA #3: Obtain a Copy of the Search Warrant

Once the manager-in-charge determines that he or she will have to take charge of the scene, without the aid of experienced counsel, he or she should ask the lead law enforcement agent for a copy of the search warrant. The search warrant is the court order that legally permits the law enforcement officers to enter the premises and to take with

them certain enumerated items. The corporation, acting through the manager-in-charge, is legally entitled to receive a copy of the search warrant. In fact, most law enforcement agents will voluntarily hand a copy of the warrant to the manager-in-charge at the outset of the search.

The manager-in-charge should carefully review the search warrant. The warrant must specify the premises to be searched and the items or documents to be seized. The search warrant therefore establishes the boundaries of precisely where the agents can go and what they can take with them. Search warrants authorizing the wholesale seizure of a businesses' records, where only a portion of its records involve alleged criminal activity, have routinely been ruled unconstitutional as overbroad. Specificity as to what may be taken is constitutionally necessary so that nothing is left to the discretion of the law enforcement agents executing the warrant.

By understanding what items the law enforcement officers are permitted to seize, the manager-in-charge may be able to expedite the search by directing the agents to the locations likely to contain items covered by the search warrant. In our experience, law enforcement agents generally appreciate such assistance, and it ultimately shortens the time the agents need to spend on the premises. In addition, even though outside counsel is not physically on the scene, it may be possible for the manager-in-charge to fax a copy of the search warrant to corporate counsel so that he or she may assess its validity. The manager-in-charge should also gather the business cards of as many of the agents as possible. It will be important, after the search, for the corporation's counsel to identify as many of the agents on the scene as possible, and determine which branches of law enforcement were involved.

POA #4: SEND HOME ALL NON-ESSENTIAL EMPLOYEES

As part of its advance planning, the corporation, in consultation with the designated manager-in-charge, should compile a list of all non-essential employees who may be dismissed from work in the event of the execution of a search warrant. This list should be vetted and blessed by the companies' Human Resources Department. On the day of the search, the manager-in-charge should refer to this pre-determined list, and send those non-essential employees on the list home for the day. The employees may leave the premises, but must not remove anything that could potentially be the subject of the search warrant.

One of the primary reasons for sending home all non-essential employees is to reduce the number of people that law enforcement agents potentially can interrogate during the search. Law enforcement officials execute search warrants in dramatic fashion to surprise and intimidate employees, with one goal being to extract from them damaging information about the company. The manager-in-charge can reduce the number of individuals that could potentially give a statement by sending all non-essential employees home. Law enforcement agents should not stand in the way of sending non-essential employees home.

The second benefit to the company of sending home non-essential employees is to minimize the disruption to business operations. After seeing armed law enforcement agents swarming in the doors with a search warrant in hand, employees naturally will feel stressed about the security of their own jobs. The longer the employees stand around while agents rummage through the premises, the more their stress and anxiety will grow. Furthermore, rumors invariably will ensue regarding the reasons that agents focus on a particular person's office or files. These rumors can spread like wildfire throughout the company, often with damaging effects on employee morale, cohesiveness, and productivity. In our experience, employees will appreciate the offer to leave the hectic, overwhelming situation created by the execution of a search warrant.

Prior to sending employees home, the manager-in-charge should speak with all employees, either individually or in a group, to explain what the agents are doing on the premises. Although the manager might not have much information about the investigation, there are a few basic facts they can usually be communicated. The manager should indicate to the employees that the company: 1) has not been charged with or accused of any wrongdoing (assuming this is accurate); 2) has retained competent legal counsel; 3) is cooperating fully with the agents; and 4) will provide further information as soon as practicable. The employees should also be advised that they could be approached by the media, and the manager-in-charge should remind each employee of the company's policy regarding communicating with the media, usually contained in the employee handbook.

All employees, whether they are leaving the premises for the day, or are remaining to assist the agents with the search, will likely have the same question: what should I do if I am approached by a law enforcement agent looking for information about the company? This question is best left answered by the company's legal counsel. Providing a wrong, or even a poorly worded, answer could trigger accusations from the government of a serious crime: obstruction of justice. Given that in our scenario corporate counsel is not present on the scene, the best approach is for the manager-in-charge to simply advise employees that it is each individual’s decision whether or not to talk with law enforcement. The manager-in-charge can also remind the employees that they are free to tell the agents that they would like to consult with an attorney before responding to any questions. It is imperative, however, that the manager-in-charge does not in any way direct employees not to speak with the agents. Such an instruction, while seemingly innocuous and practical at the time, can later be construed by the government as the company impeding its investigation, and could lead to an obstruction of justice charge.

POA # 5: OFFER YOUR COOPERATION TO THE AGENTS

Once all of the non-essential employees have been sent home, the manager-in-charge should locate the agent in charge, and ask him whether there is anything he or she can do to help the agents locate the enumerated items for which they are looking. By then, the manager-in-charge will have reviewed the search warrant and may be able to direct the agents to the location of the items they are authorized to seize. The manager-in-charge should tell the agents that they are free to search within the limits of the warrant and that

he or she will assist them as necessary. Without impeding the search, the manager-in-charge should attempt to determine whether the agents are searching in places and seizing items that are not authorized by the warrant. Such information could prove useful to the company's attorney later in the investigation. At no point, however, should the manager-in-charge disrupt or impede the search.

In addition, although the manager-in-charge should offer his or her assistance, he or she should not engage in a discussion with law enforcement regarding the details of the investigation, or attempt to explain why he or she thinks the organization is innocent. The goal on the day of the search is to get through the process as quickly as possible without compounding the company's problems or creating new ones, and any extraneous communication, albeit in the spirit or cooperation, could potentially harm the company in the long run.

Oftentimes, the files that the government is attempting to seize are located on computer hard drives or servers. The agents at the scene may wish to seize these items. Such drastic action can have a devastating impact on any business by leaving it without access to its critical business records and other crucial data. It is recommended, therefore, that the manager-in-charge, in conjunction with other company leadership, designates an Information Technology employee who will be deemed an "essential employee" the day of the search, and who can thus be on hand to assist the agents in locating computer hard drives and servers, and downloading the pertinent information contained in the warrant. Such assistance may eliminate the need for the agents to seize the hard drives and servers. As the IT professional will likely spend significant time with agents on the day of the search, it is critical that the individual receive proper training, in advance, regarding his or her role in the process, the need to assist the agents in a polite fashion, and that he or she is to avoid unnecessary "chit chat" with the agents regarding the company and its business operations.

POA #6: OBTAIN AND SCRUTINIZE THE SEARCH WARRANT INVENTORY

Once the agents have located and seized the items specified in the search warrant, they are legally obligated to provide an inventory of all items they intend to take with them. The manager-in-charge should carefully review the search warrant inventory and ask any questions he or she might have about the description of the items being seized. Depending on the volume of materials seized, the manager-in-charge may wish to request to make a copy of the seized documents and records before they are taken off-site, to minimize disruption of ongoing business operations. The lead law enforcement officer must sign the search warrant inventory.

POA #7: ONCE THE SEARCH IS OVER, POLITELY ASK THE AGENTS TO LEAVE THE PREMISES

After the manager-in-charge is satisfied with the search warrant inventory, he or she should politely ask the agents to leave the premises. Should the agents linger for any period of time after finalizing the inventory, the manager-in-charge should firmly, but

politely, stress the need for them to leave. Hopefully, by this point, counsel has been able to arrive at the scene and can assist with this process. Once the agents have completed the tasks authorized by the search warrant, in most instances, they no longer have legal authority to remain on the company's premises. Furthermore, ensuring that the agents leave as quickly as possible minimizes their ability to attempt to question those employees who still remain in the office. In addition, until the agents leave the premises, the company cannot begin the process of debriefing its employees and conducting its own review of the agents' actions.

The manager-in-charge must remember that during all contact with the agents, he or she must remain calm, polite, and cordial. It is firmly against the company's interest to have any hostile confrontations during the execution of a search warrant.

POA #8: CONDUCT YOUR OWN POST-SEARCH INVENTORY

As soon as the agents have left the premises, the manager-in-charge should conduct an inventory of the offices to determine precisely where the agents looked during the search. It is important to note any damage that may have been done to the company's property during the course of the search.

The manager-in-charge should take detailed notes regarding his or her findings to be provided to the company's counsel as soon as he or she arrives. No detail is too small to note during this post search inspection. In our experience, it is sometimes the little details that have been noted that later become critical as the government's case progresses.

POA # 9: DEBRIEF ALL EMPLOYEES WHO REMAINED ON THE PREMISES DURING THE SEARCH

The manager-in-charge should speak individually with each employee who remained on the scene during the execution of the search warrant. The employees' personal observations of what the agents were looking at, what they took, and what they said, could prove valuable to the corporations' lawyers. In addition, the manager-in-charge should ask if any employee gave any statements to the agents. If so, the manager-in-charge should make a note for the attorneys. At a minimum, the manager-in-charge should be prepared to provide corporate counsel with a roster of all employees who witnessed any portion of the search.

POA #10: DO NOT LOWER YOUR GUARD ONCE THE GOVERNMENT LEAVES THE BUILDING

In the days, weeks and months following the execution of the search warrant, company management should report any inquiries or other events that they find out of the ordinary to corporate counsel. From our experience, law enforcement agents may pre-arrange telephone calls and meetings using individuals who are cooperating with the government. These calls, meetings, and other encounters may be taped and monitored by the

government as part of its ongoing investigation. The government is obviously looking for the company to say or do something incriminating, or that supports its theory of wrongdoing.

Because searches often occur in the early stages of an investigation, the company should be prepared to deal with the government's typical investigative methods that follow a search. These tactics involve requests to interview employees, issuing grand jury subpoenas to employees, and serving the company with a "clean-up" subpoena for documents not seized during the search. Hopefully, by the time these events occur, the company will have experienced white collar criminal defense counsel who will be prepared to respond.

II. CONCLUSION

The federal government is spending millions of dollars in its effort to detect and deter fraud and abuse. We predict that with the substantial increase in funding being allocated to law enforcement agencies, the use of search warrants during early stages of investigations will be on the rise. An increasing number of companies may find themselves, therefore, facing the unpleasant experience of responding to a search warrant. Companies must be prepared, in advance, to respond calmly, effectively, and legally during the search. Without such advance preparation or decisive decision making at the scene, companies risk committing critical mistakes that can lead to lengthy, expensive, and potentially devastating criminal prosecutions.

To avoid or minimize the risks associated with responding to search warrants, we recommend that every company develop a plan of action for responding to search warrants. Implementing modest, inexpensive contingency plans, such as those detailed in this article, can go a long way to ensuring that your company has a fighting chance of survival when government agents come knocking at your door.

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WITHDRAWING OR CORRECTING A FEDERAL GOVERNMENT BID

With the advent of an unprecedented level of government spending and promises of more spending to come, many contractors who previously only worked for state and local governments now have opportunities to work on federally-funded projects. While this

increase in federal spending presents great opportunities, contractors who desire to benefit from such opportunities should be aware of the many complexities that are inherent in the federal contract process. While many federal contract proposals proceed without difficulty, some responding contractors may need to amend or withdraw their bid based on the discovery of an error in their submitted bids.

Federal projects are governed by federal regulations known as the Federal Acquisition Regulations. These regulations are not, however, the only source of law regarding federal contracts; many agencies or groups within the federal government have their own individual acquisition regulations. For example, contractors performing work for the U.S. Air Force must adhere to the Federal Acquisition Regulations as well as Department of Defense and U.S. Air Force acquisition regulations. Accordingly, projects that are administered by two or more government agencies may result in the application of multiple agencies' acquisition regulations.

I. CONTRACT PROCESS

In order to preserve competition and ensure a fair contract award process, a federal agency that solicits bids is required to use the sealed bidding process if (1) time permits the solicitation, submission, and evaluation of sealed bids; (2) the award will be made on the basis of price and other price-related factors; (3) it is not necessary to conduct discussions with the responding offerors about their bids; and (4) there is a reasonable expectation of receiving more than one sealed bid.

When a federal agency is using a sealed bidding process, the Federal Acquisition Regulations establishes five general steps in connection thereto:

- Preparation of invitations for bids
- Publicizing the invitation for bids
- Submission of bids
- Evaluation of bids
- Contract award

Of these five steps, the contractor first becomes directly involved with the soliciting government agency during the preparation and submission of the bid because that agency is responsible for preparing and publicizing the invitation for bids. The contents and timing of the bid submitted by the contractor are governed by the Federal Acquisition Regulations. Should any errors in the bid arise, the outcome is likely to be unacceptable to the contractor – if the error results in a bid that is inadvertently too high, the contractor is likely to lose the opportunity to perform on the contract; conversely, where the incorrect bid results in a bid that is inadvertently too low, the contractor risks having to perform on the contract. Regarding timing, unless the invitation for bids specifies otherwise, bids or any modification of the bids are due in the applicable agency by 4:30 p.m. on the day specified by the invitation for bids.

A late bid is not usually considered unless, where submitted electronically, it was within

the government's "infrastructure" before 5:00 p.m. on the day prior to the date specified in the invitation for bids, or, with non-electronic or delivered bids, the bid must be within the government's control before the time specified. For example, a bid would not necessarily be considered late where the bid was in the mailroom or front office of the agency but had not yet been delivered to the contracting office by 4:30 p.m. on the day specified.

II. MODIFICATION OR WITHDRAWAL BEFORE BID OPENING

If errors are discovered before the bids are opened, modification or correction of the bid may be accomplished without great difficulty. Bids may be withdrawn or corrected using any method permitted in the invitation for bid, but any modification or correction must be returned to the government agency before the original deadline as set forth in the invitation for bids. However, the government can waive the "lateness" of a bid modification if the terms are favorable to the government.

The Federal Acquisition Regulations establishes safeguards protecting contractors who need to modify or withdraw their bids. For example, if a withdrawal or modification is accomplished in person, the soliciting government agency is required to verify the identity of the person requesting such withdrawal or modification to prevent a competitor from improperly eliminating competing bidders by "withdrawing" or "correcting" their bids. Also, in the case of an electronically submitted bid that is subsequently withdrawn, the government agency is responsible for deleting all electronic data related to the withdrawn bid.

III. MODIFICATION OR WITHDRAWAL AFTER BID OPENING

After the deadline for bid submission has passed and the bids have been opened, contracting officers are required to examine all of the bids for errors. Any apparent mistakes must be clarified by the contracting officer who is required to raise the apparent mistake with the submitting contractor to clarify the intended bid. Mistakes fall into one of two categories – clerical mistakes or material mistakes. Understandably, there is a higher bar to amending a bid after all bids are opened rather than before the opening of the same.

A. Clerical Mistakes

The Federal Acquisition Regulations lists the following as examples of clerical mistakes:

- Obvious misplacement of a decimal point;
- Obvious incorrect discounts (for example, 1 percent 10 days, 2 percent 20 days, 5 percent 30 days);
- Obvious reversal of the price F.O.B. destination and price F.O.B. origin; and
- Obvious mistake in designation of unit [of measurements such as cubic yards versus cubic feet or pounds versus tons.]

In the case of clerical mistakes, the contracting officer is empowered to personally make the correction after verifying the intended bid with the bidder. That verification is then added to the original bid and reflected in the contract award documents.

B. Material Mistakes

In the case of material mistakes, the procedures differ based on how the contractor desires to address the mistake. If the bidder makes a material mistake and wants to correct it, that bidder will have to prove to the agency the existence of a mistake and the bid amount that the contractor actually intended to submit. The contractor's ability to correct or withdraw a bid depends on two factors: (1) the evidence supporting the existence of a mistake and the bid amount that the contractor actually intended to submit and (2) if the contractor's bid was the lowest received.

The contractor may be permitted to modify or correct its bid and thereby displace the otherwise lowest bidder if the invitation for bids and the original bid establish "clear and convincing" evidence of (1) the existence of a mistake and (2) the bid amount that the contractor actually intended to submit. Conversely, despite the presence of "clear and convincing" evidence of (1) the existence of a mistake and (2) the bid amount that the contractor actually intended to submit, the agency may prohibit bid withdrawal if the bid is the lowest bid received both before and after any correction.

Similarly, it is also possible that an agency would prohibit either correction or withdrawal if the evidence does not support (1) the existence of a mistake and (2) the bid amount that the contractor actually intended to submit. However, if the evidence supports only (1) the existence of a mistake but not (2) the bid amount that the contractor actually intended to submit, the agency may permit only withdrawal, not correction. Additionally, withdrawal can also be accomplished where the evidence suggests the bid amount that the contractor actually intended to submit and the presence of the mistake but the evidence does not rise to the level of "clear and convincing."

Should a contractor need to modify or withdraw a bid, the contractor should gather all personnel who prepared the bid, together with all documents and data used to support the bid, in anticipation of developing its request to modify or withdraw its bid. The Federal Acquisition Regulations specifically references submitting statements, affidavits, file copies of the bid, worksheets, quotes from subcontractors, and price lists as examples of the evidence which can be used to support the assertion of a mistake and the intended bid.

Depending on the agency-specific requirements, the request for correction or withdrawal is forwarded into the agency's hierarchy where a final administrative decision is made either to grant or deny correction or withdrawal. If the contractor disagrees with the agency's decision, the contractor can file an appeal to the U.S. Comptroller General which must be submitted within 10 days of the agency's decision unless a more stringent deadline applies. However, one should not expect the agency's decision to be overruled by the Comptroller General without being able to demonstrate that there was not a

reasonable basis for the agency's decision.

A review of the Comptroller General's decisions reveals that many incorrect bids resulted from simple errors in tabulations and formulas in spreadsheets, including omitting certain "cells." Because of this, contractors are cautioned to carefully scrutinize the formulas in spreadsheets and worksheets used in generating a bid. While many bids are compiled and submitted close to the deadline, an "ounce of prevention" in preparing the bid is worth a "pound of cure" – particularly where tens of thousands or millions of dollars are at stake.

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GREEN BUILDING UPDATE

We have previously reported on green building developments and the burgeoning field of green building litigation. While the word "green" has been applied to almost every aspect of life in the last five years from household cleaning products to automobiles, green building has become one of the preeminent issues in real estate development and government policy. The Federal Government passed a commercial building initiative to accelerate the development of cost effective, zero net energy buildings, buildings that produce as much energy as they consume. Other incentives issued by state and local governments include tax incentives for green buildings, grants and low cost loans, and other incentives such as variances from local building codes on height and square footage for green certified buildings. California adopted a green construction code requiring a 15% cut in energy consumption in all new construction and a 20% improvement in water efficiency which became mandatory in 2010.

Green building performance standards are set by non-governmental entities such as the Leadership in Energy and Environmental Design (LEED) green building rating system established by the non-profit U.S. Green Building Council. The U.S. Green Building Council issues certificates designated silver, gold, and platinum based on the council's qualitative standards. These may be applied to new construction and renovations, whether public or private, commercial or residential.

Litigation risks include lawsuits by owners and developers for failure of LEEDs certification or level of certification and consequent tax advantages. These suits may be brought in breach of contract or misrepresentation or breach of warranty. Other litigation may stem from specific performance standards not met including energy efficiency of the building's energy systems and HVAC systems. Manufacturers and distributors of green building products may face exposure due to energy efficient and/or environmentally friendly components not performing up to the degree of standards. Examples of such components are HVAC, roofing and wall panels, and windows and coatings. The failure

of these components to perform up to standards can result in potential product liability claims and warranty claims against manufacturers and sellers. Previous examples of such litigation include mold litigation and Chinese dry wall litigation in the southeast and plywood litigation in the 1990's.

Bloggers and commentators have continued to describe green building and LEED certification as the next big thing in litigation. However, the same Maryland green building suit previously reported in this publication still remains the "tip of the iceberg" in green building litigation. Most reported opinions containing LEED or green building references to date do not include LEED certification or green building standards as the point of controversy.

However, the insurance industry is beginning to respond to the green building trend and its own set of risks. For example, AIG offered a green reputation coverage providing funds to employee crisis management specialists to manage adverse publicity, to guide and counsel key company personnel and to provide other necessary services in restoring a company's reputation in the event of a green building debacle. Fireman's Fund and Travelers have issued property policy endorsements promoting the use of environmentally friendly building materials such as replacement components following a covered loss and for replacement of roof top garden and other green roofing materials. Such endorsements may provide coverage for expenses related to green re-certification or re-engineering. It should be noted that these endorsements do not provide coverage for failure to achieve green or LEED certifications.

Green project design professionals and builders should be sure to pay close attention to contractual language to insure that the documents are clear as to where the risk of loss falls in the event of non-certification or lower-certification. In addition, green standards should be well defined and thought should be given to conflict resolution. Design professionals and builders should also check with their insurance agents and brokers to determine whether their omissions policies adequately cover their performance or green building projects.

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