CONSTRUCTION LEGAL EDGE

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ARTICLES CONTAINED IN THIS ISSUE OF THE CLE:

Should Companies In The Construction Industry Consider Obtaining Insurance Coverage for Cybercrime?

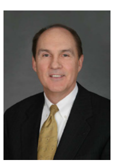
The initial intrusion by hackers into the computer systems of Target Corporation used network credentials stolen from a provider of refrigeration and HVAC systems located in Sharpsburg, PA. At the time of the theft the HVAC Company was monitoring energy consumption and temperatures in Target stores to save on costs and to alert store managers if temperatures were outside an acceptable range, which was predicated on the comfort of shoppers. Target could be facing losses of up to $420 million as the result of the breach.

Specialty insurance products have been developed to address data breach and other cyber related risks. If your company does not have data breach coverage and a claim is asserted against your company for a data breach, you should look to the traditional insurance policies that your company currently has to determine whether or not there is coverage in those traditional policies for at least some of the projected costs, defense expenses, and indemnity payments that may be incurred in responding to the data breach claim. As in all requests for coverage to the insurer, the determination of coverage turns on policy terms (grants and exclusions) as well as specifics of the claim.

A growing number of insurers are offering policies and/or endorsements specially tailored to provide coverage for a variety of cyber risks, ranging from breaches of personal information, to cyber extortion, and to business interruption and reputational damage arising from cyber attacks. Some of these specialty insurance policies have both first-party and third-party insurance coverages. First-party coverage is generally designed to pay an insured that has a data breach for its own costs and expenses in responding to a breach, such as notification costs. Some specialty policies provide first-party coverage for costs associated with mitigating the loss such as credit monitoring, legal advice, and investigation. A number of the specialty policies offer first-party coverage for the company's business interruption losses related to data breaches. Liability insurance coverages for defense costs and losses arising from a claim by a third party for damages arising from a data breach are generally the subject of express coverages under such specialty insurance policies.

Some insurers have begun insuring property damage caused by computer system failures or intrusions not under traditional commercial property coverage but under stand alone cyber policies.

Confidential information of various types is increasingly subject to cyber attacks with resulting losses to the company and its clients/customers. Query: Have you considered the specialty insurance coverages that are currently available in the insurance marketplace?



JOSEPH J. BOSICK SERVES AS THE CHAIR OF THE CONSTRUCTION PRACTICE CONSORTIUM. FOR MORE INFORMATION, YOU ARE WELCOME TO CONTACT JOE BOSICK AT (412) 263-1828 OR JJB@PIETRAGALLO.COM.

Crossing the Panhandle: Risk Shifting and Anti-Indemnity Legislation in Pennsylvania, West Virginia, and Ohio

Construction contracts invariably contain "hold harmless" and "additional insured" provisions favoring the party with the most bargaining power. Owners and developers – who pay for the projects - require and receive complete indemnification from their contractors generally without question by legislatures or courts. Similarly, general contractors seek to shift their own liability and risk to subcontractors, often through broad form indemnification agreements that require subcontractors to indemnify and hold harmless general contractors even for the general contractor's sole negligence. To contractors, broad form indemnification agreements are preferable because they reduce the financial exposure of the contractors to damages claims by injured employees and third parties, thereby reducing the contractor's insurance and legal costs. To subcontractors, such indemnification agreements can increase the costs of a project by shifting the financial responsibility for damages claims to the subcontractors or their insurers. When subcontractors purchase insurance naming contractors as additional insureds, contractors are forced to pay higher insurance premiums for covered losses, even though the subcontractor may not have been negligent or even where the subcontractor may be barred by a workers' compensation statute from any liability.

Seeking to address the inequity of non-responsible parties bearing the liability of responsible parties, many states have enacted anti-indemnity legislation that prohibits or voids provisions in construction contracts that require a subcontractor to indemnify another party for its negligence. Currently, 41 states have enacted some version of an anti-indemnity statute, even though many of these states limit the application of the statute to public projects. Of those 41 states, 27 prohibit a subcontractor from indemnifying a contractor for its sole or partial fault, while 14 only prohibit a subcontractor from indemnifying a contractor for its sole fault. Additionally, at this time only 6 states have enacted statutes that prohibit one party from requiring another party to name it as an additional insured.

Each of the jurisdictions in which anti-indemnity statutes have been enacted provides its own interpretation of the correct public policy. For instance, Texas has enacted an anti-indemnity statute that prohibits broad form indemnification clauses for both sole and partial fault but specifically excludes claims for bodily injury by subcontractors' employees. Similarly, New York also generally bars indemnification provisions in construction contracts, but New York permits subcontractors to be required to indemnify a contractor for claims "arising out of" a subcontractor's work, which courts in New York have interpreted to include the alleged negligence of other subcontractors.

Considering the importance of choosing the jurisdiction in which a construction claim will be litigated or the law which will govern a construction contract, the following is a summary of the status of anti-indemnity statutes in our tri-state region:

Pennsylvania

Pennsylvania remains in the minority of jurisdictions that does not prevent broad form indemnification clauses in construction contracts, with one exception: architects and design professionals are not permitted to contract with owners, contractors, subcontractors or suppliers for indemnification. 68 P.S. § 491. Owners and developers should be aware, however, that architects are still permitted to include limitation of liability clauses in their contracts. Such limitation of liability clauses can limit an architect's liability to a relatively low amount, thus effectively shifting the burden of paying damages claims on to owners and developers. For instance, in Valhal Corp. v. Sullivan Associates, Inc., the Third Circuit approved an architect's contract limiting the architect's liability to $50,000.00. The Court specifically held that the limitation was "a reasonable allocation of risk between two sophisticated parties and does not run afoul of the policy disfavoring clauses which effectively immunize parties from liability." Valhal Corp., 44 F.3d 195, 204 (3rd Cir. 1995).

Contractors should also be aware that while Pennsylvania's legislature and appellate courts do not bar broad form indemnification agreements in construction contracts, it has been the law of the Commonwealth for over 100 years that the language in such indemnification agreements must be stated with precision and in unequivocal terms. Perry v. Payne, 217 Pa. 252, 66 A. 553 (1907). Consequently, general contractors will typically favor Pennsylvania law to govern contracts containing indemnification provisions and should be aware, as discussed below, that even when their contracts contain broad form indemnification agreements, they may be nullified by the law of the jurisdiction in which the project is located unless the contract specifically chooses Pennsylvania as its governing law.

West Virginia

Unlike Pennsylvania, West Virginia has enacted a limited anti-indemnity statute that prohibits subcontractors from indemnifying contractors for their sole negligence. Subcontractors seeking to employ West Virginia law to void such an indemnification clause should be aware however that West Virginia's anti-indemnity statute has been severely limited by West Virginia's Supreme Court. In Dalton v. Childress Service Corp., 189 W.Va. 428 (1993), the Court held that "a just public policy demands that indemnity agreements be permitted unless they go beyond the mere allocation of potential joint and several liability and indemnify against the sole negligence of the indemnity without an appropriate insurance fund, bought pursuant to the contract, for the express purpose of protecting all concerned." Id. at 431. (emphasis added). The Court explained that, "a contract that provides in substance that A shall purchase insurance to protect B against actions arising from B's sole negligence does not violate the statute as public policy encourages both the allocation of risks and the purchase of insurance." Id. (emphasis in original). Consequently, while West Virginia's legislature has specifically prohibited contractors from requiring subcontractors to indemnify contractors for their sole negligence, West Virginia's Supreme Court has effectively nullified the statute by permitting contractors to require subcontractors to purchase insurance in favor of contractors' sole negligence.

Ohio

Of the 3 jurisdictions in our tri-state area, Ohio is by far the most favorable to subcontractors. Ohio has enacted an anti-indemnity statute that prohibits contractors from requiring subcontractors to indemnify contractors for either their sole or their partial negligence. Ohio

Revised Code § 2305.31. Contractors and subcontractors using Ohio's law to govern their agreements, however, must be aware that Ohio's anti-indemnity statute has been held to prohibit only construction indemnity agreements that arise out of bodily injury to persons or damaged property initiated or proximately caused by a resulting from the negligence of the promissee. Stickovich v. Cleveland, 143 Ohio App. 3d 13, 26 (2001). The Court in Stickovich explicitly held that Ohio's anti-indemnity statute, "does not prohibit a construction contractor from indemnifying others for its non-negligent intentional torts." Id. Furthermore, the Court in Stickovich held that, "a mere allegation of negligence is not sufficient to defeat a construction indemnity agreement. Even if there were proof that the party seeking indemnity were negligent, the negligence must still be the proximate cause of the injury." Id. Consequently, in Ohio, a subcontractor may use Ohio's anti-indemnity statute as an affirmative defense, but the subcontractor may still be required to prove that it was faultless in causing the harm to the plaintiff that gives rise to the contractor's indemnity claim.

The legislatures in our tri-state area have taken different approaches to expressing the public policy supporting or rejecting indemnification provisions in construction contracts, and the courts of each state have limited or expanded what was seemingly the intent of each state's legislature. Parties entering into construction contracts should be aware that their indemnification and additional insured clauses should be carefully drafted in conjunction with their choice of law provisions for each particular project. Merely relying on a standard clause or provision in each contract is likely to result in more or less risk transferred depending upon jurisdiction. Contractors often cross state lines and enter into contracts with out-of-state participants or agree to perform work in other jurisdictions. In such situations owners, contractors, and subcontractors may be able to negotiate indemnification, additional insured, and choice of law provisions which take advantage of the law in each particular jurisdiction.

For more information, contact Phillip R. Earnest at (412)263-4374 or e-mail him at PRE@Pietragallo.com.

Outside Counsel Becomes a Construction Client - New Perspective

After 16 years in private practice, I recently resigned from an East Coast insurance defense firm to become the Chief Legal Officer/VP of Risk Management for a large contractor. The company was an active client of mine for construction defect matters, but until I realized why I'd been asked to dinner one night, the thought of moving in-house was never something I actively pursued. Yet without much warning, I walked away from an equity partnership position, but also from the ever increasing pressure to bill hours, the need to cast wider nets to market for more potential business, and the requirement of billing my life in 6 minute increments.

To be certain, I traded one set of stresses for another. I went from being a revenue-generator (which provides you a fair amount of protection in private practice) to a cost center (why, exactly, do we need a lawyer??) overnight. Additionally, in private practice, I largely focused on a few discrete practice areas, and learned them well. Now, the demands change hourly. I may go from a union issue to a conference call with expert geologists within half an hour, and have to attend a zoning hearing board meeting that evening.

Understanding how diverse and evolutionary the in-house counsel position is provides outside counsel with significant clues on how to improve relationships between the two. The sudden switching of priorities/responsibilities has confirmed what several of my best (and most missed clients) have told me for years -- be practical in your approach to me, my company, and our legal matters, and we will get along just fine.

In the short four months that I have been in this job, there are a few truths that apply as between me and the Owner of the company. When I was asked to write this article, it occurred to me while discussing potential content that those five truths will also apply as between me and outside counsel going forward. They are, in fact, many of the same things that my best, and most vocal clients, had already been telling me for years.

My first lesson.

The Owner of the company told me on my first day that the more I avoided talking to him like an attorney, the quicker he could learn to listen to me. Translation -- when I ask you a question, answer it. After that meeting, I immediately recalled my 9th grade history teacher writing "ATDQ" on one of my exams, a practice I doubt very much he could get away with today. The acronym was simple -- it stood for Answer the Damned Question, and he used it frequently. From my Owner's perspective, being a great attorney was no different than writing a good essay on a 9th grade history test. Provide an accurate answer in plain English, and without unlimited qualification.

I realize that because many attorneys, myself included, paid ungodly sums for our educations that we think of ourselves as possessing special knowledge, and that we have to present it in such fashion as to prove that we have thought through every angle, considered every alternative. In reality, the times when that level of analysis is required are few and far between, and we can both agree in advance when those times occur. Generally speaking, a quick, simple and straightforward answer will not only suffice, but is preferred.

My second lesson.

Business interests can trump legal concerns. In the corporate world, something that is a legal truth may still have such an impact on business such that it will never be enacted. Translation -- Once you answer my question, please understand that I am still free to ignore you. You are, after all, giving me legal advice -- but I am making a business decision for my company. Do not be offended if I don't adopt your recommendations entirely, much like I have to learn not to be offended if the company Owner does not always listen to me.

My third lesson.

Although I have not been specifically asked to do this, the truth of it becomes immediately clear in this position. One of my principal jobs here is to make the Ownership and Management look good, and keep them out of trouble. They need to understand the legal implications of something going into a meeting, so I don't have to correct them in front of our clients. You need to do the same. I am asked daily to justify my existence, and the more we are present together, the more it will be questioned why exactly it is that I am here, particularly if you regularly correct me in an open forum. So let's get our story straight first, agree on the advice we will present, and figure out who will handle what. Then, when we are together, we'll both look good, and I will return the goodwill through appropriate feedback to the Owners, and in the next decision to retain outside counsel.

My fourth lesson.

Avoid surprises on bills. Having been in private practice for so long, I am very sympathetic to someone who has to deal with a very difficult Plaintiff's counsel, or someone who must over prepare for a particular judge. But when I arrived here, I was surprised at the level of hostility toward all invoices -- those of counsel, experts, consultants, vendors, etc., but I quickly learned why. The fundamental approach of nearly everyone seems to be that of overkill. Whether it's malpractice fear, too many younger attorneys or expert support looking for work to do, lack of oversight by the partner or expert in charge, or a combination of factors, there is simply too much work being done on most cases.

For me personally, even with complex cases, it is pretty easy to identify key issues and personnel early, and develop a case focusing on those items. Then, at the earliest appropriate time, take at least one significant run at resolving the case, if not two. Settlement is not a sign of weakness; it is a practical reality that will let us close the books on a major expense. If that fails, move the case as quickly as possible toward final resolution, without doubling back and conducting virtually unlimited discovery and other investigation.

My fifth lesson.

Do not be afraid to pick up the phone and ask a question. We can help review documents, we may want to prepare first drafts of discovery responses, and we might be able to get a simple answer from someone who worked on the project rather than have you spending a day reviewing files for the same information. My job is, in part, to make your job easier. Give me a chance to do that, and it will work out better for both of us in the long run.

Chad A. Wissinger is the Chief Legal Officer of W.G. Tomko, Inc.

Decreased Government Construction Funding Leads to Increased Investigations into DBE Fraud

In an era of government spending cuts, including substantial cuts in government construction programs, federal and state agencies are closely scrutinizing money paid to contractors for highway and transit projects. This is particularly true for projects involving Disadvantaged Business Enterprises – commonly known as DBE's – and the contractors that use DBE's to meet participation requirements. The last several years have seen an uptick in federal and state investigations into companies allegedly using DBE's although the purported DBE's perform little or no actual work.

The DBE program was created under Title VII of the Civil Rights Act of 1964 and ensures that businesses owned by minorities, women, and disabled veterans are included in federal and state construction projects. Federal laws and regulations have created DBE's like Women Business Enterprises (WBE's), Minority Business Enterprises (MBE's), and Disabled Veteran Business Enterprises (DVBE's).

The federal DBE program for highway and transit projects is administered by the U.S. Department of Transportation ("DOT") through its regulations found in Title 49 of the Code of Federal Regulations. The regulations require any state receiving federal DOT funds to establish its own DBE program through its transportation agency. Pennsylvania's Department of Transportation, for example, has its own DBE program as well as regulations governing the program. Pennsylvania's DBE program includes the DBE Support Services Center which provides training and guidance to enable DBE's to acquire the expertise and experience to compete with non-DBE's for highway contracts and subcontracts.

Since 1983, federal law has required the DOT to provide at least 10% of highway and transit funds to DBE's. As a result, many federal DOT projects are offered solely to DBE's while other projects require a DBE to perform a specified percentage of the work, termed "participation requirement." Due to these requirements, many contractors and subcontractors seek out DBE's to handle the percentage required under a DOT contract.

Due to the potential for abuse of the DBE program, DOT regulations require a DBE to be a functioning company which actually performs and supervises the work and doesn't serve merely as a pass-through to forward money to a non-DBE company. These requirements are consistent with the DBE program's goals of providing businesses owned by minorities, women, and disabled veterans with opportunities to build their businesses and gain valuable experience. As a result, a DBE must perform a "commercially useful function" as defined in Section 26.55(c)(1)- (3) of Title 49 of the Code of Federal Regulations:

> (1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.
>
> (2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation…
>
> (3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, you must presume that it is not performing a commercially useful function.

These regulations are designed to prevent contractors from using a DBE that only exists on paper. Often such DBE's do not have the employees or equipment to do the work mandated under the participation requirement. In some instances, a DBE's only employee is the president and its work is entirely performed by temporary employees or the prime contractor's employees. The DOT routinely investigates instances where it is alleged that a DBE is not performing a "commercially useful function" and such cases can result in prosecution of both the purported-DBE and the contractor.

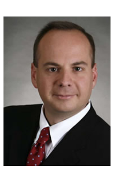
DBE fraud is usually investigated by the DOT's law enforcement arm, the Office of Inspector General ("OIG"), as well as the U.S. Department of Justice and the relevant state's department of transportation. In 2014 alone, two cases involving alleged DBE were announced, which demonstrates significant focus on alleged DBE fraud by federal and state investigators.

In April 2014, the FBI and DOT OIG announced the settlement between federal and state officials and a Connecticut construction company, Manafort Brothers Inc., to resolve a criminal and civil investigation into alleged DBE fraud in connection with a public works project. The investigation revealed that Manafort made false statements to the DOT and Connecticut's department of transportation that a DBE performed work on a federally and state funded highway project when, in actuality, a non-DBE performed the work. The DBE, unnamed by the OIG and FBI, was allegedly used as a pass-through company in that Manafort negotiated for and supervised the work that the DBE was to be doing.

Ultimately, no criminal charges were filed against Manafort or the DBE because the investigation was resolved through a non-prosecution agreement and civil settlement, which required Manafort to pay $2.4 million and implement internal reforms to ensure future compliance with federal and state DBE programs. These compliance measures included creating a position for an ethics and compliance officer, forming a DBE compliance committee, mandating DBE compliance training for Manafort's employees, and continuing to assist law enforcement in the investigation.

In May 2014, it was announced that federal and state officials in New York resolved a criminal and civil investigation into allegations that a contractor, Moretrench American Corporation, and a DBE, Environmental Energy Associates ("EEA"), skirted DBE regulations related to a $1.1 million groundwater removal contract. Although the DBE was required to perform 17% of the overall project, it was actually Moretrench that hired the pump operators, supervised the job site, and assembled the payroll records as the DBE was required to do. In return, EEA retained approximately a 10% mark-up on each invoice for use of its DBE status. Although criminal charges were not filed, the civil settlement agreement required Moretrench to pay $3,050,000 to resolve the civil false claims allegations.

These examples exhibit intent by federal and state investigators to ensure that DBE's are given a meaningful role in federal and state highway and transit projects. Short-sighted attempts to skirt DBE regulations can result in significant criminal and civil penalties as well as debarment from future government projects. Such penalties have significant repercussions on a company as well as its employees, all of which can be avoided through a robust compliance program and internal training.



For more information, contact John A. Schwab at (412) 263-2001 or e-mail him at JAS@Pietragallo.com.

Contractors Beware of Potential Pitfalls under the False Claims Act

As most contractors are aware, contracting with the federal government creates compliance hurdles. Compliance with the Davis-Bacon Act and its requirement to pay prevailing wages to employees is chief amongst those hurdles. Contractors, however, may be unaware of the potential for Federal False Claims Act liability. Liability may arise for the contractor and their subcontractor's failure to pay prevailing wages and the submission of inaccurate certification to the government.

The Davis-Bacon Act requires contractors and subcontractors on federally funded construction projects which exceed $2,000 to pay prevailing wages. The prevailing wage is determined and enforced by the United States Department of Labor. Generally speaking, the wage represents no less than the prevailing wages and fringe benefits for workers engaged in similar projects in the geographical area. Further, each week, contractors must certify that their workers were paid the prevailing wage. Contractors must also include provisions in subcontractor contracts that require the subcontractor to pay prevailing wages and submit wage certifications. Under the Act, an aggrieved party may report the violation to the Department of Labor, but may not personally sue for the violation.

In contrast, under the Federal False Claims Act ("FCA"), an aggrieved party may file suit as a "relator" for failure to pay the prevailing wage and the subsequent filing of an inaccurate certification. This qui tam provision allows the relator to file a suit against a party directly, and the government may intervene and take over the case. If the government declines to take over the case, the relator may continue independently. The FCA is triggered when a person "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." Thus, a relator is required to make a four-part showing in order to succeed on an FCA claim: (1) the defendant made a false statement to the government with actual knowledge, deliberate indifference, or reckless disregard to the truth or falsity of the statement; (2) the defendant submitted a claim to the government; (3) the defendant made the false statement for the purpose of getting a false or fraudulent sum paid by the government; and (4) the false statement was a material fact in the government paying the claim. The relator, however, need not demonstrate that the defendant had a specific intent to defraud. Violators of the FCA face treble damages, civil penalties, and attorney fee awards.

The Davis-Bacon Act's prevailing wage and certification requirements were analyzed in light of the FCA in United States ex rel. Wall v. Circle C Construction, LLC, where the United States Court of Appeals for the Sixth Circuit affirmed a district court's ruling finding a contractor liable for its subcontractor's inaccurate certification and failure to pay prevailing wages. In Circle C, the contractor's agreement with the United States Army required payment of Davis-Bacon prevailing wages. The contractor, however, subcontracted the project's electrical work to a third party. The subcontractor failed to pay prevailing wages to its electricians on the project, and then filed a certification with the government that wrongly represented correct payment of prevailing wages. The district court held that under the Davis-Bacon Act, the prime contractor is responsible for the compliance of its subcontractors. The subcontractors' "wage certifications wrongly certified that the prevailing wages were paid on the… project in violation of the FCA." Further, the court noted that the Army would not have paid the claim if it was aware of the inaccurate certification. Therefore, the court awarded the government $553,807 in actual damages and $1,107,616 in treble damages, thus a total of $1,661,423 in damages.

In order to prevent FCA liability, contractors must take steps to ensure workers are paid prevailing wages on government projects that require compliance with the Davis-Bacon Act. Some of the steps contractors should take include:

1. Covered contractors and subcontractors are required to display a Davis-Bacon Act poster, obtained through the U.S. Department of Labor website, which must be displayed in a prevalent and accessible place in the workplace. The poster contains worker's rights under the Act and contact information for the Department of Labor.
2. Educate payroll, human resources, and contracting departments on Davis-Bacon requirements and potential liability that may arise under the FCA.
3. Implement payroll and accounting systems that compare the prevailing wage with planned wages to covered workers to ensure compliance.
4. When contracting with subcontractors, ensure that the contract contains the Davis-Bacon prevailing wage requirements and mandate compliance.
5. Include audit provisions within subcontractor contracts that permit inspection of subcontractor records to ensure Davis-Bacon compliance.
6. If the contractor learns that a false claim may have been submitted by itself or a subcontractor, thoroughly investigate the claim. The investigation should be done through the assistance of counsel and kept confidential.

For more information, contact Brian Hentosz at (412) 263-4346 or e-mail him at BMH@Pietragallo.com.

Construction Labor Crunch and the Impact of Immigrant Workers

A shortage of qualified construction workers has led to an influx of immigrant construction workers, potentially impacting contractor employers in their compliance with immigration, labor and safety statutes and regulations. As discussed in a previous Construction Legal Edge article, this influx has contributed to higher than average accident rates for immigrant workers and heightened scrutiny by OSHA. This article will address immigration related labor issues confronting contractors.

An April 16, 2014 article in USA Today noted that a building boom in Nashville coincided with a shortage of qualified construction workers. The article quoted the Associated General Contractors of America (AGC) as stating that most of the estimated 2 million construction workers who lost their jobs during the recession either retired or moved to other industries. According to the Bureau of Labor Statistics May 22, 2014 report, in 2013, foreign-born workers were more likely than native-born workers to be employed in service occupations (24.8 percent versus 16.7 percent). Within service occupations, about one-third of the foreign born were employed in building and grounds cleaning and maintenance occupations, about twice the proportion for the native born. Foreign-born workers also were more likely than native-born workers to be employed in production, transportation, and material moving occupations (15.4 percent versus 11.1percent) and in natural resources, construction, and maintenance occupations (12.9 percent versus 8.3 percent).

Federal law requires that every employer hiring an individual for employment in the United States complete a Form I-9, Employment Eligibility Verification. Hiring or continuing to employ a person while knowing that the person is not authorized to work in the United States can result in fines ranging from $375 to $16,000 for each worker depending on the frequency of offenses.

Contractors walk a fine line in complying with immigration regulations. On April 17, 2014, the U.S. Department of Justice issued a press release announcing a settlement with a Dallas based company, Potter Concrete, resolving claims that the company engaged in a pattern or practice of document abuse in violation of the Immigration and Nationality Act (INA). The department's investigation, which was initiated based on a referral from U.S. Citizenship and Immigration Services (USCIS), concluded that Potter Concrete subjected non-U.S. citizen new hires to unlawful demands for specific documentation issued by the U.S. Department of Homeland Security in order to verify their employment eligibility, while U.S. citizens were permitted to present their choice of documentation. The investigation also revealed that Potter Concrete selectively utilized E-Verify to confirm the employment eligibility of individuals they knew or believed to be non-U.S. citizens or foreign born.

The INA's anti-discrimination provision prohibits employers from placing additional documentary burdens on work-authorized employees during the hiring and employment eligibility verification process based on their citizenship status or national origin. Under the settlement agreement, Potter Concrete was to pay $115,000 in civil penalties to the United States, undergo training on the anti-discrimination provision of the INA, revise its employment eligibility verification policies, and be subject to monitoring of its employment eligibility verification practices for one year. Potter Concrete's experience is increasingly a common one, and contractors should be careful not to subject themselves to similar liability until the U.S. Congress acheieves the unlikely goal of making more legal immigrant workers available through statutory reform.

Associated General Contractors recommendations on immigration reform

In an effort to help avoid situations such as Potter Concrete's, the AGC contends that while immigrants represent about 13 percent of the U.S. population, they represent about 22 percent of the construction workforce and complement U.S. workers and fill niches that would otherwise go vacant. Immigration reform has been an AGC legislative priority for about 15 years. The AGC supports reform that strengthens national security and the country's borders, functions efficiently and fairly, and addresses future workforce needs, including a temporary guest worker program for construction, with length of stay long enough to ensure employers' training investments are not lost, renewable visas, and employers are able to sponsor employees for permanent status. AGC recommends a flexible cap, with no arbitrary restrictions on the construction industry. Additionally, AGC supports expansion of the H-2B visa program.

The AGC recommends the following immigration reform measures:

Establish an Opportunity for Earned Legal Status of Undocumented Workers. Amnesty is not an option, but law-abiding undocumented workers already working and paying taxes in the U.S. should have an opportunity to earn legal status. Elements should include fines, proof of work contribution (with a safe harbor for employers lacking knowledge of illegal status), English proficiency, and security checks.

Create a New Visa Program to Legally Alleviate Worker Shortages and Secure the Border. To provide a legal option to illegal immigration and to meet projected future workforce needs, a new guestworker visa program should be established with the following standards:

- visas should be valid long enough to ensure that the employer's training investment is not lost and employer needs are met
- visas should be renewable
- employers should be able to sponsor employees for permanent residency during the term of the guestworker visa
- the cap should be flexible and based on the needs of the marketplace, not arbitrary restrictions on the construction industry
- guestworkers should enjoy the same labor and employment law protections as other employees.

Expand the H-2B Visa Program for Construction Companies. The program needs relief from the statutory cap by exempting returning workers who have followed the law from counting against the limit. The program needs to be more compatible with the distinct needs of the construction industry.

Immigration reform remains a hot-button issue. Pundits credit House Majority Leader Eric Cantor's recent primary defeat to his perceived support of immigration reform. It is doubtful that any immigration reform legislation will be enacted in the near future. Consequently, contractors should be aware of the current law regarding immigrant workers.

The current H-2B visa progam

The Department of Labor issues labor certifications for temporary and permanent employment of foreign workers. Certification may be obtained in cases where it can be demonstrated that there are insufficient qualified U.S. workers available and willing to perform the work at wages that meet or exceed the prevailing wage paid for that occupation in the area of intended employment.

Foreign labor certification programs are designed to assure that the admission of foreign workers into the United States on a permanent or temporary basis will not adversely affect the job opportunities, wages, and working conditions of U.S. workers. Regulations require that the wages attested to on foreign labor certification applications must be the average wage paid to all other workers in the requested occupation in the area of intended employment, also known as the prevailing wage.

In order to receive an H-2B temporary labor certification, the employer must establish that:

• There are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work.

• The employment of H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

• Its need for the prospective worker's services or labor is temporary, regardless of whether the underlying job can be described as temporary. With the exception of a one-time occurrence need that could last up to three (3) years, temporary need will not be approved for longer than 10 months. The employer's need is considered temporary if it is a(n):

one-time occurrence - An employer claiming a one-time occurrence must show that it has:

• Not employed workers to perform the service or labor in the past, and will not need workers to perform the services or labor in the future; or

• An employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

seasonal need - An employer claiming a seasonal need must show that the service or labor for which it seeks workers is:

• Traditionally tied to a season of the year by an event or pattern; and

• Of a recurring nature.

Note: Employment is not seasonal if the period during which the service or labor is needed is:

• Unpredictable;

• Subject to change; or

• Considered a vacation period for the employer's permanent employees.

Employer must also specify the period(s) of time during each year it does not need the services or labor to be performed. **peakload need** - An employer claiming a peakload need must show that it:

• Regularly employs permanent workers to perform the services or labor at the place of employment;

• Needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short-term demand; and

• The temporary additions to staff will not become part of the employer's regular operation.

intermittent need - An employer claiming an intermittent need must show that it:

• Has not employed permanent or full-time workers to perform the services or labor; but

• Occasionally or intermittently needs temporary workers to perform services or labor for short periods

Contractors hiring immigrant workers must make an effort to comply with current U.S. law. Failure to do so, as shown by Potter Concrete's experience, could have significant repercussions. If you currently employ an immigrant labor force and have not recently reviewed your compliance procedures (not to mention the documentation related to your workers), we encourage you to do so immediately.

For more information, contact Mark Caloyer at (412) 263-1833 or e-mail him at MTC@Pietragallo.com.

Foreign Corrupt Practices Act Compliance in the Construction Industry

As the construction industry grows globally, so does the exposure that construction, mining, and oil and gas companies face under the Foreign Corrupt Practices Act ("FCPA"). In just the past two years, companies in the construction industry have reached nine-figure settlements with the government to resolve enforcement actions brought under the FCPA, which prohibits payments or offers to pay anything of value to a foreign official in order to retain business. These settlements include:

- Weatherford International ($250 million);
- Total S.A. ($398 million);
- Parker Drilling Company ($4 million); and
- Alcoa ($384 million)

The FCPA enforcement actions against the construction industry over the last couple of years demonstrate the challenges global companies face and highlight the importance of an effective compliance program.

In the 2012 Resource Guide to the United States Foreign Corrupt Practices Act, the Department of Justice and Securities and Exchange Commission emphasized that FCPA compliance programs should be designed to fit the specific needs and challenges of a particular company. Specifically the Resource Guide stated:

> Individual companies may have different compliance needs depending on their size and particular risks associated with their business, among these factors. When it comes to compliance, there is no one-size-fits-all program.
>
> One-fits-all-compliance programs are ill-conceived and ineffective because resources are spread inevitably too thin, with too much focus on low risk markets and transactions to the detriment of high-risk areas.

See United States Department of Justice and United States Security and Exchange Commission, A Resource Guide To The United States Foreign Corrupt Practices Act (2012) at 56, 58. While companies cannot take a "cookie cutter" approach to compliance, there are certain hallmarks that make a compliance program most effective. These include:

1. Commitment from senior management and clearly articulated policies against corruption;
2. Code of Conduct and Compliance Policy and Procedures;
3. Oversight, autonomy and resources;
4. Risk assessment;
5. Training and continuing advice;
6. Incentives and disciplinary measures;
7. Third party due diligence and payments;
8. Confidential reporting and internal investigation;
9. Continuous improvement, periodic testing and review; and

10. For mergers and acquisitions, pre-acquisition due diligence and post-acquisition-integration.

Id. While each of these is important to ensuring an effective compliance program, there are three areas that can present significant FCPA exposure that are oftentimes overlooked by companies in the construction industry. These are: 1) investigation protocol; 2) pre-acquisition due diligence for mergers and acquisitions; and 3) due diligence of third-parties.

Investigation Protocol

Companies frequently overlook the importance of establishing an investigation protocol for when potential violations occur. They will often have strong policies in place to attempt to prevent violations but do not have adequate (or any) investigation protocols for when a potential violation has occurred. Companies should have in place a protocol for receiving, reviewing and investigating alleged misconduct. Additionally, companies should establish a process for internal reporting of potential misconduct. An employee of an organization should never be left guessing about how to report a suspected FCPA violation.

The company should establish a team within the organization to take the lead in the investigation of the alleged FCPA violation. Such a team typically consists of lawyers, internal auditors and other personnel who could assist in the investigation. In certain instances, however, the company may want to consider retaining outside counsel to retain the investigation. This decision may depend upon the following: who in the company is allegedly involved; the type of alleged misconduct; the size and scope of the alleged misconduct; and the need for an independent viewpoint. For example, if a high ranking executive within the organization is alleged to have orchestrated a complex bribery scheme involving foreign officials of several countries, the company may want to consider retaining outside counsel. If, on other hand, the allegations involved one rogue sales representative, that may be a matter that can be handled internally.

Regardless of whether the investigation will be conducted internally or externally, the company should ensure that a document hold is put in place immediately upon learning of a potential FCPA violation. This is usually accomplished by issuing a company-wide document preservation memorandum. The memorandum should clearly define the parameters of the document hold and also should state that the company is investigating alleged FCPA violations and that the company takes such allegation very seriously.

When a company decides to discipline employees for committing violations as a result of an investigation, it should make sure that the discipline is proportionate to the seriousness of the violation. In determining the appropriate discipline the company should consider whether the employee has committed prior violations, whether the employee had prior training on the issue, and whether the employee cooperated with the investigation.

One of the most difficult decisions that a construction company faces once it uncovers a FCPA violation is whether the organization should voluntarily disclose the violation to the government. Self-disclosure can potentially have certain benefits. For example, the company may be better situated to convince government to formally decline the prosecution or agree to a non-prosecution agreement. Disclosure also increases the likelihood that the government may forgo requiring an external monitor and allow for self-monitoring and reporting requirements.

The most obvious risk of voluntary disclosure is that the company is disclosing violations that the government may never have uncovered otherwise. Additionally, it is unclear whether voluntary disclosure results in any more benefit than if the government learned of the violations on its own. Ultimately, each company must consider its own facts and circumstances when determining whether voluntary disclosure is appropriate, including the individuals involved, the amounts involved and whether there were any prior enforcement actions against the company.

Pre- Acquisition Due Diligence

When a company is looking to merge with or acquire a target entity, pre-acquisition FCPA due diligence is critical. Waiting until after the transaction is complete to evaluate the target's potential FCPA risk and compliance program could be costly. Prior to completing the transaction, the company should, at a minimum, consider the following: visiting the sites of the target's operations; interviewing employees; reviewing all of the target's policies and procedures; and investigate the backgrounds of all high ranking personnel of the target and any subsidiaries.

When conducting such due diligence, the company should be aware of certain activities and/or arrangements, which should raise "red flags." Such "red flags" include:

- A failure to execute contracts describing the services to be rendered prior to performance.
- A high volume of cash transactions.
- Unusually high commissions or the identification of multiple gifts to a single

individual.

- Payments outside the country where the goods or services are rendered or payments to third-parties.
- The use of a third-party, where no prior relationship exists.
- Identification of frequently used one-time vendor arrangements.
- The use of fraudulent invoices.

After the transaction is completed, the acquiring company should work quickly to integrate its compliance program with the target entity. A major part of the integration is making sure that all employees are properly trained and provided with a copy of the code of conduct policy. Depending on the size of the organization, this can be a long process. Accordingly, the company should attempt to complete this process as soon as possible.

<u>Due Diligence of Third-Parties</u>

The company should devote time to developing a comprehensive understanding of its global third-party business relationships. These business relationships could expose the company to FCPA risk if representatives of third-parties come into contact with foreign officials. Therefore, the company must be proactive in evaluating the third party's compliance program and the potential risk that may result from the third-party business relationship. Such evaluation should be completed not only at the beginning of the relationship, but should be on-going. Like any effective compliance program, an FCPA program must constantly be evaluated to ensure that it is taking into account all of the company's specific risks and operating as effectively as possible. This is true with third-parties as well.

Construction companies should demand that their third-party vendors make FCPA compliance a priority. Where exposures exist, the companies should require that their third-party vendors engage in "best practices" in regarding to FCPA compliance and that they establish compliance programs that are, at least, equivalent to theirs. Construction companies should consider including as part of the relationship the ability to monitor and audit periodically the third parties for FCPA compliance.

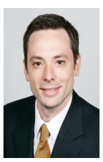
Additionally, companies should seek third-party business relationships with companies where the top level management is committed to preventing bribery to or by persons in the organization. Third-party management should promote a culture in which bribery is never acceptable.

A company should expect that the third-party vendor has its own code of conduct policy with a clear message that bribery is not acceptable conduct for members of the organization. Also, it should provide its employees with a clear direction on how to report potential inappropriate conduct within the organization.

The third-party should have a Chief Compliance Officer (the "CCO"). The CCO should have the trust and support of senior management, as well as have a visible presence at the company. Third-party management should provide the CCO and the entire compliance team with all of the necessary resources and training.

Conclusion

The Resource Guide emphasizes that the adequacy of a company's compliance program can be a factor for the government when deciding whether or not to pursue an enforcement action. It can also factor into how an enforcement action is resolved. See United States Sentencing Guideline Manual § 8B2.1 (2013). As such, it is critical that a construction company with a global presence consistently review and evaluate its FCPA compliance program. This constant critical analysis of its processes and procedures will help to ensure that its FCPA compliance program is specifically tailored to effectively deal with the risks the company faces globally.



For more information, contact Chris A. Iacono at (215) 320-6016 or e-mail him at CAI@Pietragallo.com.

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