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Headline News

Navigating Insurance Coverage Issues For Qui Tam Federal Civil False Claims Act Suits

By Curtis D. Porterfield

Federal Civil False Claims Act lawsuits pose unique issues for obtaining insurance coverage. The element of fraud necessarily alleged in Civil False Claims Act suits presents a hindrance to immediate recovery of the benefits of the policy. Moreover, when False Claims Act claims are brought by a relator in a qui tam action, the ordinary pitfalls to obtaining coverage are underscored by the statutory sealing of the complaint, which makes it impossible even to share the complaint with the insurance carrier in order to tender the claim for coverage. This article will discuss some of the unique aspects of insurance recovery issues related to False Claims Act suits and suggests certain approaches and arguments for coverage.

Available Insurance for False Claims Act Suits

Federal Civil False Claims Act suits generally assert that a corporate contractor or a governmental entity has presented fraudulent claims for payment under government contracts. Corporate contractors generally carry coverage for Directors and Officers liability, which also provides coverage for the entity. In addition, corporate contractors may have Errors and Omissions coverage for negligent or erroneous conduct, giving rise to liability. On the other hand, governmental entities carry Public Officials and Employment Practices Liability Insurance to insure the entity and its officials for liability arising from misconduct while acting in an official capacity. Both the corporate and government policies are similar in both the types of losses covered and the policy form. Each of these policy forms is written on a claims-made basis, i.e., it provides coverage only for claims actually made during the policy year. Most of these policies today also require that the claim must also be reported to the carrier in the same policy period in which the claim was made. Accordingly, when a claim is made, if notice is not given in the policy year, then the policy will expire without further coverage obligation.

Hunton & Williams is proud to welcome **Curtis Porterfield** as a partner in our Los Angeles office. Curtis joins Hunton & Williams' Insurance Coverage Litigation and Counseling group. Curtis and the rest of this group represent clients to secure and maximize recovery of benefits under their insurance policies. With over three decades of litigation experience, Curtis has represented many of the largest defense and government contractors in the world, as well as a broad range of business clients. Curtis, along with new counsel, William Um were formerly with Howrey, LLP. Curtis can be reached at 213-532-2176.

These policies provide coverage for alleged consequences of conduct, i.e., "wrongful acts," which typically are defined as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or employment practice violation by an Insured solely in the performance of duties for the [entity]." Coverage extends to damages and, generally, will not cover allegations seeking solely penalties or disgorgement of wrongfully obtained funds.

Obtaining Coverage for False Claim Act Suits

The first step to secure coverage under a policy is to provide timely notice of the claim to the insurance carrier. This is generally done by tendering the complaint in the action to the carrier as soon as the insured learns of the action. However, in qui tam actions, the complaint is kept under seal while the Department of Justice investigates to determine if it will pursue the claim. 31 U.S.C. § 3730(b)(2003). Thus, although the complaint is brought and the action commenced, the insured cannot provide a copy of the complaint to its carrier during this investigation time period. This investigation period is prescribed to be at least 90 days, but in practice may extend well beyond that period. Indeed, the time during which the complaint is sealed may extend beyond the expiration of the policy period. Thus, the insured cannot wait until the complaint in the action is unsealed before giving notice to the carrier and, indeed, should always tender notice of the claim immediately, even if the complaint cannot yet be shared.

Some carriers have taken the position that a claim cannot be tendered without a copy of the complaint. However, it should be argued that neither the law nor the policy so provides. The complaint is not a sacred talisman, but merely the best source of information providing notice to the parties of the substance of the suit, but not the only source. A carrier's duty to defend is "fixed by the facts which the insurer learns from the complaint, the insured or other sources. A carrier, therefore, bears a duty to defend the insured whenever it ascertains facts which give rise to a potential of liability under the policy." *Gray v. Zurich*, 65 Cal. 2d 263, 276-77 (1966); *see also, CNA Casualty of California v. Seaboard Surety Co*., 176 Cal. App. 3d 598, 606 (1986) ("[T]he insurer must furnish a defense when it learns of facts from any source that create the potential of liability under its policy"). Thus, under the law the complaint is no more important than any other source of evidence. These other sources may include press reports prepared from the filing before the complaint was sealed, court documents that may summarize the claims or simply the insured communicating facts to the carrier. Thus, where the complaint is sealed, the insured should provide notice to the carrier by sharing immediately all the facts that are publicly available or capable of being disclosed by the insured, without revealing the relator or the complaint.

Whether the complaint is available to be shared or the insured provides notice of the claim through extrinsic facts, a carrier's obligation to defend should be triggered immediately. Most carriers, however, will resist this notion and avoid providing a coverage position until the actual allegations of the complaint can enable them to form a comprehensive position on coverage. Carriers taking this position should be pushed to perform their obligation and reserve rights as they deem necessary. As opposed to the unsealing of the pleading, the *filing* of a complaint, even under seal, is the event that has substantial *legal significance*, as it is this point at which the insured has become a defendant and, as such, needs an immediate defense, i.e., the very purpose for which the insurance was procured in the first place. No policy requires that a copy of the complaint is necessary to trigger an obligation because it is the making of the *claim*, not providing a copy of the complaint, that triggers the policy. In fact, these insurance policies will typically define a "claim" as "a judicial proceeding alleging a Wrongful Act that is *filed* against an insured in a court of law or equity." Thus, by the policy terms, the obligation to defend is triggered by the filing of the suit, and just because the complaint is under seal does not somehow excuse the immediate performance of the carrier where sufficient facts can be shown to demonstrate a potential for a covered claim. Any deficiency between the facts and ultimately the complaint can be anticipated by the carrier reserving rights.

Notwithstanding the legal and factual arguments and provisions, some carriers nevertheless will decline to consider tender of a suit without an actual copy of the complaint. In such cases, the insured may reserve its rights and lock in the current policy as the responsive coverage by providing what is known as a "notice of circumstances" during the policy period. When the insured learns, during the current policy year, of facts that may give rise to a claim in the future, but that potential claim has not been formally "made" during the policy year (e.g., because the complaint has not been provided to the carrier), the insured can provide the carrier with a notice of the facts of which it is aware. When the insured does this, should the claim be brought formally in a subsequent period, it will be treated as though brought during the current policy period. To this end, the policies usually contain the following language:

> If during the Policy Period … an insured becomes aware of circumstances which could give rise to a claim and gives written notice of such circumstances to the [insurer], then any claims subsequently arising from such circumstances shall be considered to have been made during the Policy Period … in which the circumstances were first reported to the [insurer].

By using this process, if the carrier (wrongfully) will not consider the claim as brought until the complaint can be shared, this method will, at a minimum, preserve the insured's position under the current policy, even if the policy expires before the case is unsealed. Clearly then, in an abundance of caution, if an insured's policy will expire before the complaint is unsealed, and the insured has not accepted coverage based on extrinsic facts provided, the insured would be well served to always provide a "notice of circumstances" to protect its interests. Another reason to provide the carrier with notice of facts is to avoid allowing the carrier to raise a late notice defense at a later time.

Exclusions, Conditions and Limits

Once notice is given, there are numerous potential exclusions and conditions that carriers may invoke to limit or avoid their obligations. Somewhat unique to False Claims Act suits, which, by definition, allege fraudulent conduct, is the applicability of the fraud exclusion. Typically, the fraud exclusion provides that the policy:

> [D]oes not apply to any Damages, or Claim … alleging fraud, dishonesty, or criminal acts or omissions; however, the insured shall be reimbursed for the reasonable amount which would have been collectible under this policy, if such allegations are not subsequently proven.

Thus, pointing to the fraudulent conduct allegations, in a False Claims Act suit the carrier will argue that the insured is not entitled to anything under the policy unless the plaintiff loses or settles the litigation. This means the carrier often will do nothing for the insured including advancing defense costs as incurred. When this happens, it should be remembered that, because the carrier is not defending nor has agreed to coverage, the insured shares no privilege with its carrier and owes no obligation to the carrier to provide information, reports or copies of ongoing bills. Responding or reporting to the carrier is not only unnecessary, it is fraught with potential difficulties. Sharing the wrong information before the carrier's coverage is defined risks affording the carrier rights to which it is not entitled and with which it will investigate the claim to defeat coverage and jeopardize the protection of privileged information.

Where the carrier asserts that the fraud exclusion excuses its immediate obligation to pay, the insured may recover its reasonable defense fees and costs under the policy once the fraud allegations are adjudicated or settled without a finding of liability. Insureds should note that under the fraud exclusion, the carrier's obligation is to "reimburse the reasonable amount which would have been collectible" under the policy. Thus, it should not come as a surprise that, even though the insured has mounted and paid its own defense expenses, once the carrier's time to pay the defense costs arises, those costs will be subjected to review and possible reduction by the carrier who will inevitably urge that the costs and fees were "unreasonable." With nothing to lose, the carrier will try to pressure their insured to accept payments for less than the full amount incurred. Insureds would be well served to use Hunton & Williams' policyholder insurance coverage counsel, who can advise on the best ways to maximize recovery and secure payment from the carrier.

Often, however, insureds need the immediate use of the superior resources of their carrier to mount a defense in the first place, especially where the DOJ pursues the claim. State law and the terms of the specific policy will govern whether in a given case the carrier may be compelled to advance defense fees immediately. Some states, acknowledging that a defense, even of frivolous claims, is ineffective if not timely, will afford the insured the meaningful immediate use of the policy benefits, subject to recoupment if fraud is proven. Other states, which follow a strict, literal reading of the policy, consider the use of the term "reimburse" in the fraud exclusion to anticipate that the insured must pay in the first instance. Again, experienced insurance coverage counsel can provide guidance on what are the alternatives available to the insured.

Conclusion

In conclusion, False Claims Act lawsuits pose unique challenges to securing the timely benefits of insurance coverage. With qui tam actions, these will also include the difficulties posed by the complaint being sealed, rendering the complaint unavailable to be tendered to the carrier. The nature of False Claims Act suits, which demand allegations of fraud, can subject the insured to an exclusion for fraudulent conduct. While the fraud exclusion requires an actual finding of fraud to preclude coverage, it nonetheless can permit the carrier to withhold all benefits pending conclusion of the case. Reading the policy terms carefully under the applicable state's law will determine whether defense expenses must be advanced immediately under the policy subject to a right of reimbursement. Where the carrier is declining to defend the insured, there exists no shared privilege nor any obligation for the insured to provide anything to the carrier.

It is always advisable to consult experienced insurance recovery counsel to ensure you are getting the maximum benefits under your policy and in as timely a fashion as possible. While the cost of retaining coverage counsel may not be recoverable in some states, often the fees for pursuing the benefits of a contract, i.e., insurance recovery, can be recovered as damages. In sum, triggering, maximizing and recovering the benefits of insurance policies in the False Claims Act and qui tam arenas present complex and sophisticated issues that the insured would be well advised not to oversimplify or underestimate.

Rules

Government Delays Enactment of 3 Percent Withholding Rule

by Georgianna Ramsey

In 2006 Congress enacted a statute that, for the purpose of increasing federal revenue, ordered all federal, state and local governments entering into contracts to withhold 3 percent from all payments made to government contractors. This plan to raid contractors' pockets has been delayed until January 1, 2013. This is good news for contractors. Nevertheless, the plan is still in effect and regulations implementing the withholding requirement were recently published in the Federal Register on May 9, 2011. This article describes the genesis of the withholding plan, what it is meant to do and how it will affect contractors going forward.

Background

Congress enacted the Tax Increase Prevention and Reconciliation Act of 2005 on May 17, 2006. This legislation added § 3402(t) to the Internal Revenue Code. Similar to the requirement that employers withhold a percentage of employee wages, § 3402(t) mandates that all federal, state and local governments withhold 3 percent from payments to persons providing property or services to the government. Here is the statutory language:

> **1) General rule**
>
> The Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) making any payment to any person providing any property or services (including any payment made in connection with a government voucher or certificate program which functions as a payment for property or services) shall deduct and withhold from such payment a tax in an amount equal to 3 percent of such payment.
>
> **(2) Property and services subject to withholding**
>
> Paragraph (1) shall not apply to any payment —
>
> (A) except as provided in subparagraph (B), which is subject to withholding under any other provision of this chapter or chapter 3,
>
> (B) which is subject to withholding under section 3406 and from which amounts are being withheld under such section,
>
> (C) of interest,
>
> (D) for real property,
>
> (E) to any governmental entity subject to the requirements of paragraph (1), any tax-exempt entity, or any foreign government,
>
> (F) made pursuant to a classified or confidential contract described in section 6050M (e)(3),
>
> (G) made by a political subdivision of a State (or any instrumentality thereof) which makes less than $100,000,000 of such payments annually,
>
> (H) which is in connection with a public assistance or public welfare program for which eligibility is determined by a needs or income test, and
>
> (I) to any government employee not otherwise excludable with respect to their services as an employee.
>
> **(3) Coordination with other sections**
>
> For purposes of sections 3403 and 3404 and for purposes of so much of subtitle F (except section 7205) as relates to this chapter, payments to any person for property or services which are subject to withholding shall be treated as if such payments were wages paid by an employer to an employee.

26 U.S.C. § 3402(t). The IRS believes that this legislation will both increase federal revenue and rein in those entities that operate under government contracts but also have outstanding federal tax liabilities. But by targeting *all* government contractors, the statute actually does much more.

When the statute was enacted, Congress intended to make this withholding requirement applicable to payments made on government contracts after December 31, 2010. On December 5, 2008, a Notice of Proposed Rulemaking implementing § 3402(t) was published in the *Federal Register*. *See* Withholding Under Internal Revenue Code Section 3402(t), 73 Fed. Reg. 74,082 (Dec. 5, 2008) (to be codified at 26 CFR pt. 31). The notice describes the proposed regulations implementing §3402(t). Here are some of the relevant details:

- **The new withholding obligations apply to only two types of contracts:** (1) any new contract issued after December 31, 2010; and (2) any existing contract that is "materially modified" after December 31, 2010. Otherwise, the withholding obligations do not apply to existing contracts.

- **Nearly all federal, state and local government entities that enter into government contracts must comply:** The withholding requirements apply to the entire federal government, as well as nearly all state and local government bodies. *See* 73 Fed. Reg. at 74,084.

- **Withholding applies uniformly to all contractors:** Withholding applies to payments made to individuals, trusts, estates, partnerships, associations, companies and corporations.

- **$10,000 Threshold:** The government need not make a withholding on any payment that is less than $10,000. *See* 73 Fed. Reg. 74,092. The Treasury Department and the IRS believe that the burden of withholding on such a low amount outweighs the benefit of increased withholding. This makes sense because the amount withheld on such a low amount would be only $300.

- **The "Anti-Abuse Rule":** The IRS and Treasury are equally concerned that government officials will skirt the payment threshold and thus avoid the bureaucratic nightmare of the new withholding requirement by manipulating payment amounts. Hence, the IRS has created an "anti-abuse rule." This rule applies if a government entity divides a payment into separate portions less than $10,000. If the IRS or Treasury determines that the primary reason for the division into separate payments is related to § 3402(t), the separate payments will actually be treated as one payment for the purposes of the rule. *See* 73 Fed. Reg. 74,092.

- **Payments to the Prime:** The withholding requirements apply only to payments made by the government to prime contractors. It does not apply to successive payments distributed by the prime to its subcontractors.

- **$100,000,000 Threshold:** A political subdivision of a state is not required to withhold on its payments if it does not make $100,000,000 or more worth of payments for property or services annually. *See* 73 Fed. Reg. at 74,094.

- **Penalties for Failure to Withhold:** If the government body fails to withhold properly, it may be liable itself for the payment of the tax to the IRS if it cannot prove that the payee has paid its income tax liability. *See* 73 Fed. Reg. at 74,090.

Following publication of the regulations, Congress passed the American Recovery and Reinvestment Act of 2009, 123 Stat. 115 ("Recovery Act"), on February 17, 2009. President Obama signed it into law shortly thereafter. Among other things, the Recovery Act pushed back the start date for § 3402(t) withholding by one year. The Recovery Act instructs that withholding should begin on payments made after December 31, 2011.

December 31, 2011 is Five Months Away—Now What?

On May 9, 2011, the government published a Notice of proposed rulemaking final regulations on § 3402(t). *See* Withholding on Payments by Government Entities to Persons Providing Property or Services, 76 Fed. Reg. 26,678 (May 9, 2011) (to be codified at 26 CFR pt. 31). The regulations delay enactment of the withholding program yet again. According to the regulations, withholding should begin on payments made after December 31, **2012**. Withholding will apply only to (1) new contracts issued after December 31, 2012 or (2) existing contracts that are materially modified after December 31, 2012. However, the exception for existing contracts terminates after December 31, 2013. After that date, the withholding requirement will apply to all government contracts that are not otherwise excluded under one of the enumerated exceptions.

The final regulations also shed further light on what is considered a "material modification." The language in the proposed 31 C.F.R. § 31.3402(t)-1 indicates that a material modification "includes only a modification that materially affects the property or services to be provided under the contract, the terms of payment for the property or services under the contract, or the amount payable for the property or services under the contract." A renewal of a contract is not a material modification. *Id*. Likewise, if federal, state or local law requires that the contract be modified, that is not considered a material modification for the purposes of the withholding requirement. *Id*.

Where Do We Go From Here?

These successive delays no doubt show that support for the withholding plan is losing momentum. Moreover, Congress is beginning to recognize that this focus on government contractors may be unwarranted. There are currently three separate bills pending in committee that propose to repeal the withholding requirement. Senator David Vitter of Louisiana introduced Senate Bill 89 on January 25, 2011. Senator Scott Brown of Massachusetts introduced Senate Bill 164 that same day. The two bills are identical, except Brown's bill includes a provision that uses available unobligated recovery funds to offset the loss in revenue by the proposed repeal. Representative Wally Herger of California introduced H.R. 674 on February 11, 2011, which also seeks to repeal §3402(t). We will continue to track these bills and provides updates as to whether this program will ever take effect.

Contractors have until August 8, 2011, to make comments or requests for public hearing on the latest proposed changes that were published on May 9, 2011. Comments may be submitted electronically via the Federal eRulemaking Portal, http://www.regulations.gov/ (IRS REG-151687-10). Comments may also be sent to CC:PA:LPD:PR (REG-151687-10), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044 or hand-delivered to CC:PA:LPD:PR (REG-151687-10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, between 8:00 a.m. and 4:00 p.m.

If this program ever takes effect, it will undoubtedly disrupt contractors' cash flows and impose greater administrative burdens on those government agencies performing the withholding. It is difficult to imagine how these increased costs will truly be offset by the increased tax revenue. Nevertheless, in these times, one underestimates the zeal and advocacy of the IRS at one's own risk. We will continue to monitor this program and provide updates as new developments occur.

Case Spotlight

When Government Security Prevents Timely Delivery of Proposals

by Carl D. Gray

Security at federal government buildings can sometimes make it difficult to visit agency employees or make deliveries to the agency. At the same time, many solicitations still require offerors to hand-deliver hard copies of proposals to a designated official at the agency before a certain date and time. As a recent decision from the U.S. Government Accountability Office ("GAO") demonstrates, the offeror usually assumes the burden of navigating agency security and cannot blame the agency when security procedures prevent timely delivery of a proposal.

In B&S Transport, Inc., B-404648.3, Apr. 8, 2011, B&S failed to deliver its proposal to the contracting officer at the Defense Logistics Agency by the 1:00 p.m. deadline on the due date. A videotape provided by the agency showed that B&S's courier arrived at the agency's visitor processing center at 12:50:12 p.m. — less than 10 minutes before the deadline. The agency's security guard would not let the courier through the visitor processing center because the courier was not entered into the agency's visitor notification system and did not have a sponsor at the agency. The security guard told the courier that he needed a sponsor. The courier called B&S. B&S called a contracting specialist at the agency for help getting its courier cleared. But the 1:00 p.m. deadline expired before the entry clearance could be arranged. The agency rejected B&S's proposal as late, and B&S protested to GAO.

B&S raised two issues in its protest. First it argued that the agency was the primary cause of the late proposal. On this issue, GAO applied the rule that "a late hand-carried offer may be considered for award if the government's misdirection or improper action was the paramount cause of the late delivery …." Id. GAO held that B&S's actions were the paramount cause for the late delivery because it did not provide notice to the agency in advance that its courier would be delivering its proposal. The solicitation specified that visitors to the agency were required to be sponsored by an agency official and entered into the visitor notification system. B&S ignored these requirements and sent its courier to the agency unannounced. As a result, GAO found that B&S, not the agency, was responsible for the late delivery.

Second, B&S argued that its proposal should have been accepted because it was under the control of the agency before the 1:00 p.m. deadline. GAO denied this argument because, even though the courier was on the agency's premises, he never relinquished physical custody of the proposal until after the deadline. GAO noted that for a late-submitted proposal to be considered "under the Government's control" prior to the time set for receipt of proposals, the offeror must, at a minimum, have relinquished physical custody of the proposal to the agency. B&S's courier retained physical custody of the proposal while at the agency's visitor processing center awaiting access to the contracting officer. As a result, GAO denied this protest argument.

Recognizing that government agencies maintain secure installations, government contractors should not be surprised to encounter security delays when hand-delivering proposals. Government contractors need to be diligent in reading and understanding the solicitation's instructions for delivering proposals. In most cases, the solicitation will describe in detail the procedures that need to be followed to gain access to the contracting officer at the agency. If there are any questions about the procedures, contractors should ask the contracting officer for guidance long before the deadline for delivering proposals. Also, it is always wise to forego a standard courier and have a company official who understands the nature of the solicitation and proposal hand-deliver the proposal to the agency. A company official is in a much better position than a courier to solve unexpected problems encountered when hand-delivering a proposal.

Did You Know?

The Federal Awardee Performance & Integrity Information System

By Kevin J. Cosgrove

The Federal Awardee Performance and Integrity Information System ("FAPIIS") is intended to provide government contracting officers a unified database to determine the integrity, responsibility and past performance of government contractors. In theory, this should be a good thing. But recent changes to FAPIIS should concern government contractors. This article will discuss several of these changes.

How Did FAPIIS Begin?

Section 872 of the National Defense Authorization Act for F/Y 2009, Pub. L. No. 110-417, required the General Services Administration to formulate a system that would centralize information about contractors' integrity and past performance of federal work. The FAR Council issued a final rule on a new system on March 23, 2010, with an effective date of April 22, 2010. 75 Fed. Reg. 14059 (Mar. 23, 2010). This rule became known as FAPIIS.

To Whom Does FAPIIS Apply?

Contracting officers are required to review the information in FAPIIS before awarding any contract in excess of the simplified acquisition threshold. FAR §§ 9.104-6, 2.101.

What Information is Contained in FAPIIS?

FAPIIS consolidates information from several existing systems such as the Excluded Parties List System ("EPLS"), the Past Performance Information Retrieval System ("PPIRS") and the Contractor Performance Assessment Reporting System ("CPARS"). It also gathers information from contractor self-reporting of criminal, civil and administrative actions and from other sources listed at 75 Fed. Reg. 14059. The data in FAPIIS include determinations of contractor responsibility (or non-responsibility), information regarding contract terminations and administrative agreements to which contractors are parties.

Put simply, the goal of FAPIIS is to amass into a single database all of the information about the responsibility of potential contractors. This information will remain in the FAPIIS database for five years. FAR § 9.104.b(b).

How Should a Contracting Officer Use FAPIIS?

When judging past performance reviews contained in FAPIIS, a contracting officer is required to use the guidelines established in FAR § 15.305(a)(2). Contracting officers are cautioned to use "sound judgment" in evaluating FAPIIS data because "some of [the] information may not be relevant to a determination of present responsibility." FAR § 9.104-6(b).

When a contracting officer makes a preliminary determination that a contractor does not meet the responsibility requirement, the contracting officer shall "promptly request additional information from the offeror" to try to establish the offeror's responsibility. FAR § 9.104.6(c). The contracting officer is also required to document the contract file "to indicate how the information contained in FAPIIS was considered in any responsibility determination as well as the action that was taken as a result of the information." FAR § 9.104-6(d).

Contractor Certifications Under FAPIIS

If the value of a proposed contract is between $150,000 and $500,000, the clause at FAR § 52.209-5 will be inserted into the solicitation. FAR § 9.104-7(a). This clause requires an offeror to certify: (1) if the offeror or any of its principals are presently debarred or proposed for debarment; (2) if they have a civil judgment against them for any of the bad acts listed in the clause; (3) if they are presently under indictment for the same bad acts; or (4) if they have been notified that they are delinquent in the payment of federal taxes for the last three years. These certifications must be entered into the Online Representations and Certifications Application ("ORCA") database.

For contracts exceeding $500,000 the clause at FAR § 52.209-7 will be inserted into the solicitation. FAR § 9.104-7(b). This clause requires an offeror to certify whether it has more than $10,000,000 in current active government contracts and grants. This total is determined by adding together the current value of "all current, active contracts and grants, including all priced options, and the total value of all current active orders including all priced options under indefinite-delivery, indefinite-quantity, 8a, or requirements contracts." FAR § 52.209-7(a)(1-2). If the offeror does not have $10,000,000 in active government contracts, then the self-reporting rules remain unchanged.

If, however, the offeror has more than $10,000,000 in government contracts, the contractor is required to make disclosures and certifications that are more far reaching than those under FAR § 52.209.5. All such contractors "represent, by submission of [the] offer, that the information it has entered into FAPIIS is current, accurate and complete with regard to the following information … ." FAR § 52.209.7(c). This includes:

- whether the offeror, or any of its principals, has within the last five years been the subject of a proceeding at the state or federal level that has resulted in:
- a criminal conviction;
- a civil finding of fault and liability resulting in a payment of at least $5,000;
- an administrative proceeding with a finding of fault and liability resulting in either a fine or penalty payment of at least $5,000 or a damages or restitution payment of at least $100,000; or
- in a criminal, civil or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgment of fault by the contractor if the proceeding could have resulted in one of the three dispositions listed above.

This information must be entered into the Central Contractor Registration ("CCR") database.

This clause, unlike FAR § 52.209-5, requires disclosure of administrative proceedings. It also goes further than FAR § 52.209-5 by requiring disclosure of agreed dispositions of civil, criminal or administrative proceedings if those dispositions contain an acknowledgment of fault and the possibility of the damages or payments listed above.

For contracts in excess of $500,000 and where the successful offeror exceeds the $10,000,000 threshold, the contract clause at FAR § 52.209.9 will be inserted into the contract. FAR § 9.104-7(c). That clause requires contractors to update the certifications required by FAPIIS on a semiannual basis. The law is unclear whether incorrect or late updates will subject a contractor to liability under the False Claims Act. Because of this uncertainty, contractors must carefully monitor their updates and ensure that their certifications and updates are both correct and timely.

Public Access to FAPIIS Data

Originally, FAPIIS contained FAR § 52.209.8, which significantly limited public access to FAPIIS. FAR § 52-209.8(b)(3) contained the following language: "With the exception of the contractor only Government personnel and authorized users performing business on behalf of the Government will be able to view the contractor's record in the system." Since the stated purpose of FAPIIS was "to significantly enhance the Government's ability to evaluate the business ethics and quality of prospective contractors," restricting FAPIIS access to government agents made perfect sense. 75 Fed. Reg. 14059.

But as part of the ongoing efforts of the Obama administration to increase transparency in government contracting, on January 24, 2011, FAR § 52-209.8 was replaced by FAR § 52.209.9. The new clause removed the language restricting access to the contractor's FAPIIS record to government agents. In its place the following language was inserted: "As required by Section 3010 of Public Law 111-212, all information posted in FAPIIS on or after April 15, 2011, except past performance reviews, will be publically available." FAR § 52.209-9(3)(ii). This change raises a number of issues.

Issues for Contractors to Consider Going Forward

Q. What is meant by the phrase "past performance reviews" in FAR § 52-209.9(3)(ii)?

A. That phrase is not defined in FAPIIS. One expects that it will include the reports in PPIRS. Whether it will also include documents attached as exhibits to such reports or other documents contained in PPIRS is unknown at present.

Q. Is information posted in FAPIIS **before** April 15, 2011, also publically available?

A. Some of it will be available via FOIA. FAR § 52.209-9(3)(i) provides that "(p)ublic requests for information posted prior to April 15, 2011 will be handled under Freedom of Information Act procedures …." Contractors might consider serving FOIA requests seeking information about their major competitors. Contractors might also arrange for future, regular FOIA requests to capture anything that might have been missed under the previous requests.

Contractors should also consider arranging to serve a FOIA request **with respect to itself**. Contractors should know what is in the possession of the government and might be released to others pursuant to a FOIA request. The time to figure out what the government has in its files about you is before those files are requested by somebody else.

Q. I own a small business. If a contracting officer determines that my business is not responsible, what are my options?

A. In that case, the contracting officer is required to "refer the matter to the Small Business Administration, which will decide whether to issue a Certificate of Competency." FAR § 9.104-3(d); FAR Subpart 19.6.

Q. FAR § 9.105-2(b)(2) requires the contracting officer to "document the determination of non-responsibility in FAPIIS." What does that mean, exactly?

A. This is another area in which businesses can be damaged. Contracting officers are required to enter into FAPIIS the exact reasons for a determination of non-responsibility. Presumably, this will often involve the posting of various documents supporting that determination. Some of those documents could be internal documents of the offeror that contain sensitive or proprietary information. There is no requirement that the contracting officer give the offeror an opportunity to comment upon or object to the posting of such documents. The contracting officer must post this information on FAPIIS within three days of making the determination of non-responsibility. FAR § 9-105-2(b)(2)(ii).

In such a situation, the only recourse that a business has is to "post comments regarding information that has been posted by the Government. The comments will be retained for as long as the associated information is retained. … Contractor comments will remain a part of the record unless the contractor revises them." FAR § 52.209-9(b)(2). It is doubtful that such postings will have any meaningful impact. Since the contractor will have already been given the opportunity to proffer additional evidence of responsibility per FAR § 9.104-6(c)(1), the postings will probably do little more than repeat comments that have already been deemed unconvincing by the government. And once sensitive business information has been posted on FAPIIS, the genie can never be put back into that bottle.

Conclusion

The recent changes to FAPIIS will undoubtedly lead to additional protests. With the wealth of additional information now available under FAPIIS, creative consultants will be able to find grounds to file protests where none existed before. Given this near-certainty, the prudent contractor should be prepared by having in its files the same information as its competitors. The observation of the nineteenth-century English philosopher Thomas Huxley is appropriate here.

"Logical consequences are the scarecrows of fools and the beacons of wise men."

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