Published on *The National Law Review* https://natlawreview.com

The Government Contracts Update - May 12, 2014

Article By:

Alan A. Pemberton

Jennifer L. Plitsch

Susan B. Cassidy

DOE Expects To Offer $4 Billion in Loan Guarantees for Clean Enregy Projects

On April 16, 2014, as reported on Covington's Inside Energy & Environment blog, the U.S. Department of Energy ("DOE") issued a draft Loan Guarantee Solicitation for Applications for Renewable Energy Projects and Efficient Energy Projects, under which DOE would finance innovative energy projects that avoid, reduce, or sequester greenhouse gases. DOE expects the final solicitation to offer up to $4 billion in loan guarantees. The solicitation is intended to foster the development of advanced energy technologies that have not yet been deployed on a commercial scale. DOE has initiated a 30-day comment period and scheduled public meetings regarding the draft solicitation. DOE's website includes an e-mail address to which interested parties may submit questions concerning the solicitation and/or request meetings with DOE officials.

DOL Debars Contractor for Labor Law Violations

On April 24, 2014, the U.S. Department of Labor ("DOL") announced the debarment of a contractor and its president from contracting with any U.S. government agency for three years. DOL debarred the contractor and its president for violating the McNamara-O'Hara Service Contract Act ("SCA"), 41 U.S.C. § 351, *et seq.*, and the Contract Work Hours and Safety Standards Act ("CWHSSA"), 40 U.S.C. § 3701, *et seq*., by failing to pay minimum wages, fringe benefits, holiday pay, and overtime wages to workers hired for a reforestation services contract with the U.S. Forest Service.

A DOL administrative law judge ("ALJ") issued the debarment order pursuant to an SCA provision mandating a three-year debarment for contractors that violate the SCA. *See* 41 U.S.C. § 354(a). The ALJ found that a previous DOL investigation concerning holiday pay put the contractor and its president on notice about the risk of debarment for SCA violations. The ALJ also noted that the contractor's president knew that the payment practices at issue—which involved a production-based pay system—conflicted with the contract's hourly wage requirement.

World Bank to Host Colloquium on Global Suspension and Debarment

On May 15, 2014, the World Bank will host a Suspension and Debarment Colloquium in Washington, DC. The event will examine the purposes of suspension and debarment, the role of decision-makers in suspension and debarment, different approaches to the standard for exclusion and due process requirements, and the relationship of suspension and debarment to other corrective measures and remedies. These topics will be discussed by panelists from around the world, including U.S. and foreign government officials. Covington's Steven Shaw, former Deputy General Counsel for Contractor Responsibility with the U.S. Department of the Air Force, will be a panelist in a roundtable session about the relationship of suspension and debarment to other corrective measures and remedies. To participate in the event, parties must RSVP by e-mail no later than May 12, 2014.

Defense Spending Rising Outside of the West

In light of declining military budgets in the United States and Europe, contractors are exploring business opportunities in other markets where defense budgets are growing. Data on 2013 defense expenditures reflect that, while military spending in the West decreased, military spending in every other region of the worldincreased. The Stockholm International Peace Research Institute ("SIPRI") reported that, excluding the United States, global military spending in 2013 increased by 1.8 percent compared to 2012.

While the U.S. defense budget dipped in 2013, military spending increased in China, Russia, and Saudi Arabia, the three countries with the highest defense budgets in the world other than the United States. China increased its military spending by 7.4 percent; Russia by 4.8 percent; and Saudi Arabia by 14 percent. Saudi Arabia, an important customer for U.S. defense companies, increased its military spending to $67 billion in 2013, thereby surpassing the UK, Japan, and France to become the fourth-highest defense-spending country in the world.

Not all of these markets are open to U.S. defense companies. For example, the U.S. government maintains a comprehensive arms embargo against China, and sales of U.S. defense articles to China could result in civil penalties, criminal fines, and debarment. The U.S. government also prohibits the supply of certain civil or dual-use items to China if the exporter knows or has reason to know that the item is intended for a "military end-use." In addition, as a result of the crisis in Ukraine, the U.S. State and Commerce Departments announced a new policy of denying licenses for exports or re-exports to Russia or occupied Crimea of any high-technology items that could contribute to Russia's military capabilities.

State Dept., USAID Launch Second Quarennial Diplomacy and Development Review

On April 22, 2014, the U.S. Department of State ("State") and USAID announced the launch of the second Quadrennial Diplomacy and Development Review ("QDDR"), a multi-year strategic assessment of foreign aid and development programs. The QDDR is similar to DOD's Quadrennial Defense Review, which reviews DOD strategy and priorities. Former Congressman Thomas Perriello will lead the QDDR process. At the 2014 QDDR launch, Perriello remarked that the review will be a "participatory process that focuses primarily on the substance of the ideas submitted in order to try to do better at all the things that [State and USAID] do."

Case Digest

D.C. Circuit Opinion Reflects Circuit Split on FCA's First-to-File Rule (United States ex rel.

Shea v. Cellco Partnership, et al., No. 12-7133 (D.C. Cir. Apr. 11, 2014))

On April 11, 2014, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of a *qui tam*complaint under the "first-to-file" rule of the False Claims Act ("FCA"), 31 U.S.C. § 3730(b)(5). The first-to-file rule bars a plaintiff from bringing an FCA action based on the same facts underlying an earlier-filed, "pending" action.

In January of 2007, the plaintiff in *Shea* filed an FCA action alleging that a telecommunications company submitted prohibited surcharges to the government. In June of 2009, the plaintiff filed a separate FCA action against the same company. The first action settled in February of 2011. On November 15, 2012, the district court dismissed the plaintiff's second action, holding that it was barred under the FCA's first-to-file rule. On appeal, the D.C. Circuit affirmed.

The D.C. Circuit found that the plaintiff's two FCA actions were "related" for the purposes of the first-to-file rule, because both actions alleged the same scheme of fraud, and the second action differed only in scope, as it included more agencies, contracts, and charges. The court also rejected the plaintiff's argument that the first-to-file rule did not apply because his first action was not "pending." The rule, as codified in the FCA, bars "a related action based on the facts underlying [a] pending action." 31 U.S.C. § 3730(b)(5) (emphasis added). The D.C. Circuit construed the first-to-file rule as barring an FCA action that relates to an earlier-filed action that was once pending, regardless of whether the earlier action is still pending at the time of dismissal. Applying this construction, the court held that the plaintiff's earlier-filed, related FCA action barred his second action, even though the earlier action had settled and was not still pending.

The *Shea* opinion reflects a circuit split concerning the FCA's first-to-file rule. At least one circuit has held, u
a related FCA action must be "pending" to bar a later-filed action. The Supreme Court may soon resolve thi
reviewing a petition for certiorari that includes the question of whether an FCA action must be "pending" to t

National Law Review, Volume IV, Number 132