Retroactivity of DOL SCA Investigations

It is not uncommon for the U.S. Department of Labor ("DOL") to show up for an investigation and learn that the contracting agency has made a wage and hour error during its procurement. Typically, this involves leaving out either the Service Contract Act ("SCA") wage determination ("WD") or the SCA contract clauses, or both. In these instances, DOL has the discretion not to apply the SCA retroactively, or to proceed to order the contracting agency to retroactively modify its contract to include the omitted items. Most DOL district offices also follow the DOL ordinary enforcement policy of only seeking back wages going back two years from the start of their investigation. This white paper discusses those policies and their application.

Under the Fair Labor Standards Act ("FLSA") there is an ordinary two-year limitations period. As DOL states on its website:

> Generally, a two-year statute of limitations applies to the recovery of back pay. In the case of willful violations, a three-year statute of limitations applies.
>
> Back wages also are available for underpayments to employees under the Davis-Bacon and Related Acts and the Service Contract Act, among other laws enforced and administered by the Wage and Hour Division.

https://www.dol.gov/general/topic/wages/backpay.

The two-year period is also applied as an enforcement policy under the SCA. Here is one place online where it is discussed:

> Enforcement of Service Contract Act
>
> …The statute of limitations for government actions has been interpreted to be six years. See 28 U.S.C. § 2415; 29 C.F.R. § 4.187. However, DOL general enforcement policy is to just go back two years absent willful or repeated violations.

http://wrmanual.dcejc.org/wp-content/uploads/2014/07/Chapter-2.pdf at page 32.

The same principle is also cited in my book, *The Federal Contractor's Guide to Employment Law*, para. 297 and page 391(BLR 2015) where I state, "assuming contractor cooperation, DOL's internal procedure is that [SCA] investigations of establishments not previously investigated will normally extend back two years…. (FOH § 51a05)."

There is also legal precedent for "prospective" application only of the SCA. The FAR specifically provides that upon discovery of solicitation errors, the Administrator of the Wage and Hour Division "**may** require retroactive application of the wage determination.' FAR 22.1015 (emphasis added). *See also* 29 C.F.R. 4.5(c) (using the same language). Please note both regulations use the permissive "may" language, rather than mandatory "shall" language. This gives DOL the discretion not to make compliance retroactive, which we understand often is often the case with these kinds of agency problems when contract performance has been completed.

Here is an example of that "prospective only" practice in which DOL expressly stated that retroactive application of the SCA is not required and upheld the Administrator's decision to apply the SCA prospectively to only the last two years of the contract, commencing after the ruling. (See https://www.scribd.com/document/1749952/Department-of-Labor-03-017 , reprinting IN THE MATTER OF: RAYTHEON AEROSPACE DISPUTE CONCERNING WAGE DETERMINATIONS FOR RAYTHEON AEROSPACE EMPLOYEES WORKING FOR THE UNITED STATES AIR FORCE ON CONTRACT F34601-94-0950 AT SCOTT AFB, IL, AND OTHER U.S. AIR FORCE L, ARB Case No.03-01703-019, 2004 WL 1166284 (May 21, 2004) at *8-11). As noted by the DOL Administrative Review Board:

> Thus, the plain language of this regulation *requires* a contracting agency to *prospectively apply* the Act within 30 days of notification by the Administrator that the agency erroneously concluded the SCA did not apply to a service contract. However, ***retroactive*** *application* is not required by this regulation; it merely provides that the Administrator *may* require **retroactive** application. Furthermore, the regulation does not provide specific criteria constraining the Administrator's decision regarding **retroactive** application".

Id. at *9.

Furthermore, in this case, the Board upheld the administrator's decision to prospectively apply the SCA to only the last 2 years of the contract which followed the decision:

> The Administrator's final determination that the C-21A was subject to the **SCA** contract was consistent with the Act and applicable regulations. Moreover, her conclusion was well-reasoned and supported by the results of her extensive investigation. Finally, her determination to require only prospective application of the Act's provisions was also a reasonable decision, based on the USAF's good faith belief in the validity of its PCA-coverage decision, the amount of contract time elapsed, and the apparent general comparability of SCA wages and actual wages-paid.

Id. at *12. Accordingly, we respectfully suggest than retroactive application may not be necessary or appropriate in the public interest and may adversely impact and even disrupt these sensitive national security contracts.

This "retroactivity" subject has been debated for many years. DOL has considerable discretion over retroactivity. However, DOL has said it would evaluate the good faith of the contracting agency before ordering retroactive application of the SCA. Here is what DOL said long ago in 46 Federal Register 4320, 4323 (Jan. 16, 1981):

> The Department of Defense (DOD) objected to the requirement that a contract agency either include the Service Contract Act provisions in a contract or cancel or terminate a contract, when DOL finds that the agency erroneously did not apply the Act to that contract. DOD believes that DOL should make allowances for good faith disagreements; it also contends that

> the court cases cited in this subsection do not indicate that DOL has the authority to require cancellation or termination of the contract.
>
> The General Services Administration (GSA) opposed § 4.5(c)(2) on the ground that the potential for disruption of a contract far outweighs the "benefits" derived from the retroactive inclusion of the Service Contract Act in some situations. GSA argues that if the contract has been substantially performed, the decision whether to amend the contract should be left up to the contracting officer based upon the particular facts in the case, or at least, DOL should take this into consideration.
>
> The Council of Defense and Space Industry Associations and the National Council of Technical Service Industries stated that the procedures in this section do not adequately protect the contractor by failing to require the contracting agency to reimburse the contractor for unanticipated costs.
>
> The AFL-CIO, IATSE, the Center to Protect Workers' Rights, and the International Brotherhood of Electrical Workers all commented in favor of this section, stating that it would help insure the retroactive application of wage determinations to contracts where the agency has omitted the SCA requirements and would prevent employees from losing the protections of the Act.
>
> **In the case of a substantially completed contract, the Department of Labor has and will consider whether a contracting agency made a good faith decision not to include the required provisions of the Act in a particular contract and the possible disruptions to a procurement in deciding on remedies in each individual case.** Accordingly, we do not believe that any changes in the regulation are justified.

(Emphasis added).

In addition, the DOL Administrative Review Board ("ARB") has also spoken of DOL's discretion with respect to the retroactive application of the Davis Bacon Act (a sister law to the SCA) and that ruling, while subsequently reversed on other grounds, remains informative here. This is what the ARB had to say:

> … considered as a whole, we cannot say that the Administrator abused the authority the regulations. Accordingly, we affirm the Administrator's decision to apply the DBA's prevailing wage and labor standards requirements starting with the first pay period immediately following her June 17, 2011 final ruling.

APPLICATION OF THE DAVIS-BACON ACT TO CONSTRUCTION OF THE CITYCENTERDC PROJECT IN THE DISTRICT OF COLUMBIA, ARB Case nos. 11-074, 11-078, and 11-082 (ARB April 30, 2013).

Accordingly, when a DOL investigator tries to apply the SCA back for more than a two-year period from the start of his or her investigation, some push back is likely warranted by the contractor and the contracting agency. Of course, repeated, egregious contractor violations of the SCA should get no safe harbor. But correction of inadvertent procurement errors, should get some interagency comity. It is likely that DOL's back pay should be limited to two years, at most, and some evaluation should be done to see whether no retroactivity is appropriate.