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Dear Public Contract Law Committee Members,

I am excited and honored to Chair the YLD PCL Committee this year. Recognizing the unique challenges in this practice area, I am hoping to focus our events and literature on practical topics that will benefit a newer contract law attorney. At the same time, it is important to keep you updated on the latest news in public contract law, the legal profession, and provide opportunities for advice, mentorship, and networking to bolster your practice and professional development.

I gladly welcome your involvement and feedback this year. There are several way to get involved with the Public Contract Law Committee, and related entities, and I strongly encourage you to step forward. Some of the ways that you can get involved this year include: submitting articles for our newsletter, the 101/201 Series, or The Young Lawyer or volunteer to assist in the preparation of proposals for live and recorded events.

If you have any suggestions about networking events, initiatives, or programming, please feel free to contact me. My contact information is below and includes my email address, which is the preferred and fastest way to communicate with me. If you have general questions about the Committee, please visit our website.

Thank you for your time and interest in public contract law. I hope to make this a valuable year for you all.

Very Respectfully,

MaCayn May
Captain, United States Army

Email: macayn.a.may.mil@mail.mil
Importance of Making Sure Your Corporate Status is Up to Date
By: Michelle S. DiCintio

On September 8, 2015, the United States Civilian Board of Contract Appeals (CBCA) dismissed a claim for lack of jurisdiction when it determined that a contractor was not in good standing with the State of Delaware at the time of the filing, and thus it could not file the claim.

Western States Federal Contracting, LLC (Western States) filed a claim seeking damages from the Department of Veterans Affairs (VA). The VA filed a motion to dismiss, asserting that Western States did not have the right to sue because it was not in good standing in its state of incorporation due to unpaid taxes in the amount of $981.

On several occasions, the CBCA ordered Western States to show that it was in good standing and had the right to sue. Although Western States was not in good standing in Delaware, where it was incorporated, Western States first attempted to show it was in good standing in Arizona, where it was conducting business. CBCA rejected this showing and ordered Western States to show it was in good standing in Delaware. Western States was unable to make this showing.

After Western States paid its overdue tax bill, and regained its good standing in Delaware, it argued that its good standing status should be retroactive. The CBCA found that Western States did not have standing to pursue its damages claim because it was not in good standing when it filed its appeal. In the end, the company lost its opportunity to recover almost $1 million.

In addition to the having the capacity to sue and be sued, here are three other primary reasons why keeping your business in good standing status is good for business.

1. Lenders, Vendors, and Others Might Require a Good Standing Certificate

Lenders sometimes require good-standing status in order to approve new financing. They generally view a loss of good standing status as an increased risk which may increase the cost of financing or even limit the ability to obtain financing. Other businesses might require a Certificate of Good Standing for certain transactions, requests for proposals (RFPs) or contracts. Or, you may need one to sell the business, for real estate closings, or for mergers, acquisitions, or expansions. If a business can’t provide a Certificate of Good Standing, it raises a compliance “red flag” that indicates something’s wrong with the company’s state status.

2. Keeping Your Business in Good Standing Often Saves Money in the Long Run

If a business doesn’t maintain its good-standing status, the state likely will make an involuntary adverse status change for the company, labeling it as “delinquent,” “void,” “suspended” or “dissolved,” depending on the state and the compliance problem. The most common reasons for losing good standing include a missed annual report, problems regarding the company’s registered agent and office, or unpaid fees or franchise taxes. The cost of fixing
these mistakes can add up; preventing these mistakes is not expensive. By simply keeping your LLC or corporation in good standing, you could help:

- Keep overall operating costs lower—filing on time avoids extra fees and fines from sapping your budget.
- Prevent a state from administratively dissolving the LLC or corporation (and then having to try for a reinstatement) or worse yet, have to start all over again because your LLC or corporation has been permanently “purged”.
- Maintain the limited liability protection that an LLC, corporation, or other business entity provides.
- Preserve your rights to your LLC’s or corporation’s legal name in state records.
- Keep your business poised for sudden contract opportunities, bids, or deals with other companies that require a Certificate of Good Standing to pursue or seal the deal.

3. Good Standing Helps When You Expand Into Other States

When you form your LLC or corporation, the state generally considers you to be “organizing” a business “entity”. Your business entity (e.g., LLC, corporation) has the right to do business in the state of organization only. If you want to expand and do business in other states, you’ll need to register to transact business in those states, too. Usually, the new state(s) ask for a Certificate of Good Standing from your formation state (or your “domestic” state) before they’ll let you register.

Checking Your Good Standing

Still, it’s not always easy to know which regulations and obligations apply to your corporation or LLC. Compliance can seem complicated or costly at times. Regulations change. And it can be difficult to keep track of the various deadlines your company must meet. However, compliance can be done easily and inexpensively, relative to the cost of noncompliance. We recommend that at least annually, you or your legal counsel should confirm that your LLC or corporation is in good standing in its state of formation as well as every state in which you are conducting business.

All states allow steps to be taken for a not-in-good-standing corporation or LLC to restore its standing, and if good standing is restored, generally it will be as if the corporation or LLC had consistently remained in good standing.

Michelle S. DiCintio is a Shareholder at Odin Feldman & Pittleman where she is a member of the Corporate and Business Transactions and the Government Contracts practice group. Ms. DiCintio has 20+ years’ experience in top-tier law firms and in-house for large corporations.
Interim Rule Could Expand Already Onerous DFARS Cyber Requirements
By: Kate M. Growley, Maida O. Lerner, and Evan D. Wolff

On August 26, the DoD published an Interim Rule that, if finalized as drafted, would expand the already onerous requirements of the DFARS Safeguarding Clause to a broader array of potentially 10,000 defense contractors. Citing “recent high-profile breaches of federal information,” the DoD’s Interim Rule emphasizes the need for clear, effective, and consistent cybersecurity protections in its contracts.

It seeks to do so primarily by expanding the application of the DFARS Safeguarding Clause, which was once itself a heated point of debate. Currently, the DFARS Safeguarding Clause imposes two sets of requirements on covered defense contractors. First, they must implement “adequate security” on certain information systems, typically by implementing dozens of specified security controls. Second, they must report various cyber incidents to the DoD within 72 hours of their discovery. These requirements, however, apply only to information systems housing “unclassified controlled technical information” (UCTI), which is generally defined as controlled technical or scientific information that has a military or space application.

The Interim Rule would expand that application to information systems that possess, store, or transmit “covered defense information” (CDI). CDI would encompass UCTI, meaning that most contractors subject to the DFARS Safeguarding Clause would remain subject to the Interim Rule. But CDI goes beyond the DFARS Safeguarding Clause by also including information critical to operational security, export controlled information, and “any other information, marked or otherwise identified in the contract, that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Government policies.” Significantly, the Interim Rule lists “privacy” and “proprietary business information” as examples of the latter, leaving many covered contractors to wonder exactly how far the definition of “covered defense information” goes. To keep up with its new application, the Interim Rule would change the name of Clause 252.204-7012 from “Safeguarding Unclassified Controlled Technical Information” to “Safeguarding Covered Defense Information and Cyber Incident Reporting.”

Another notable point of expansion would affect subcontractors. Under the current DFARS Safeguarding Clause, subcontractors suffering a cyber incident must report to the pertinent prime contractor, who then submits the required report to the DoD. Subcontractors do not report directly to the DoD under the current rule. The Interim Rule would continue to require subcontractors to report cyber incidents to their primes, but it would also require subs to submit the required report directly to the DoD, creating the potential for inconsistent reports from the prime and sub regarding the same cyber incident.

Other key provisions of the DFARS Safeguarding Clause, however, would remain same. For example, the Interim Rule would continue to apply to all solicitations and contracts, including those for commercial items. The government would also remain required to protect any proprietary information that contractor reports pursuant to the Interim Rule. The reporting timeline of 72 hours would also remain the same, which the Interim Rule dubs “rapid reporting.” Additionally, and importantly, the Interim Rule would continue to recognize the probability that even information systems with “adequate security” may still suffer a cyber incident. That is, the Interim Rule would explicitly state that the fact that a contractor has suffered a cyber incident...
and submitted a corresponding report would not necessarily mean that the contractor had failed to comply with the Clause’s broader cybersecurity requirements.

The Interim Rule likely does not come as a surprise to many. Congress passed provisions to the National Defense Authorization Acts of 2013 and 2015 that called for the regulations that the Interim Rule now seeks to implement. The Interim Rule has thus been a long time coming, but that the DoD chose to publish it now seems appropriate. The executive branch has been implementing a whirlwind of cyber regulations specific to federal contractors, all in an effort to stem the nation’s cyber vulnerabilities. Just last week, the Office of Management & Budget released proposed cybersecurity guidance that could lead to further amendments to the Federal Acquisition Regulation (FAR).

Comments on the Interim Rule, which separately addresses cloud computer services, are due on or before October 26, 2015.

Kate Growley is an associate in the Privacy & Cybersecurity Group of Crowell & Moring’s Washington, D.C. office. Maida Lerner is senior counsel in the firm’s Washington office. Evan Wolff is a partner in the firm’s Washington office, co-chairman of the firm’s Privacy & Cybersecurity Group, and former adviser to the senior leadership at the Department of Homeland Security.
Whew! That Was Close - D.C. Circuit Reaffirms Application of Attorney-Client Privilege and Attorney Work Product Doctrine in Internal Investigations
By: Matt Turetzky, Bora Rawcliffe, and David Gallacher

On August 11, 2015, the U.S. Court of Appeals for the D.C. Circuit issued a writ of mandamus supporting the robust applicability of the attorney-client privilege and attorney work product doctrines in the context of False Claims Act (“FCA”) investigations conducted under the direction of corporate and outside counsel. This marks a continuation of its repudiation of a 2014 lower-court decision that significantly eroded these privileges. Interpreting the scope of the privileges in the context of internal investigations of potential FCA violations is especially tricky because of the unique roles played by the parties (the Government as a potential plaintiff, the relator as a bounty hunter, and the corporation-as-defendant). This latest ruling from the D.C. Circuit, in a case arising out of wartime contracts in Iraq run by Kellogg, Brown & Root, Inc. (“KBR”) (formerly part of Halliburton), is a breath of fresh air for companies doing business with the Federal Government. The ruling from the Court of Appeals also sends a signal to the trial court that an overly narrow view of the attorney-client privilege and attorney work product doctrine creates unacceptable uncertainty that will ultimately be rejected on appeal.

Background

This is the second time the D.C. Circuit issued a writ of mandamus in the KBR case. The D.C. Circuit’s first mandamus ruling rejected the district court’s overly narrow holding that materials prepared in an internal investigation overseen by non-attorneys in a corporation’s law department, to determine the existence of potential violations of the False Claims Act, were not privileged because they were “undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice.” U.S. ex rel. Barko v. Halliburton Co., 37 F. Supp. 3d 1, 5 (D.D.C. 2014).

KBR appealed the 2014 ruling to the D.C. Circuit on a petition for a writ of mandamus (Latin for “command”). A writ of mandamus is a pre- or mid-trial appeal seeking to correct a trial court’s decision on a specific legal issue by commanding that trial court to reach a different ruling that is better supported by the law. The D.C. Circuit granted the writ, holding that the materials were privileged attorney-client communications or privileged attorney work product (as those privileges have long been interpreted). But the D.C. Circuit also left room for the district court to determine whether the privileges might not apply for some other reason.

On remand, the district court found that the same materials were, notwithstanding the D.C. Circuit’s mandamus ruling, subject to an implied waiver. The district court justified this finding on two grounds: (1) KBR waived attorney-client privilege and work product protection by allowing a witness to review the privileged documents in preparation for his deposition, and (2) KBR waived the attorney-client privilege and work product protection by putting the documents “at issue” in the litigation. KBR again appealed to the D.C. Circuit on another petition for a writ of mandamus, which resulted in the latest ruling (and the latest reversal from the D.C. Circuit).

D.C. Circuit Finds Attorney-Client Privilege and Work Product Protection, Again
Following its earlier precedent from 2014, the D.C. Circuit upheld the attorney-client privilege and attorney work product doctrine, and granted a writ of mandamus in KBR’s favor. With regard to the first issue—whether the privilege was waived by allowing a witness to review privileged documents in advance of his deposition—the Court held that the mere review of a document in advance of a deposition does not waive the privileges that apply to that document. The Court explained,

[Plaintiff] cannot “overcome the privilege by putting [documents arising out of the internal investigation] in issue” at the deposition, and then demanding under Rule 612 [of the Federal Rules of Evidence, which permits an adverse party to use a writing that the witness used to refresh his or her recollection] to see the investigatory documents the witness used to prepare. Allowing privilege and protection to be so easily defeated would defy “reason and experience.”

Slip Op. at 12.

With regard to the second issue—whether the privilege was waived by putting the documents “at issue” in the litigation—the district court held that “KBR injected the [internal investigation document] contents into the litigation by itself soliciting” the deposition testimony on these exact issues. Slip Op. at 14. The district court had held that KBR was “create[ing] an implied waiver by ‘actively’ seeking ‘a positive inference in its favor based on what KBR claims the documents show.” Id. But the Court of Appeals rejected this view and found that “KBR neither directly stated that the [internal] investigation had revealed no wrongdoing nor sought any specific relief because of the results of the investigation.” Id. at 17.

The D.C. Circuit also cautioned that not everything in an internal investigation is attorney-client privileged but that the work of non-attorneys acting at the direction of in-house counsel may be protected by the opinion work product doctrine as long as it is prepared in anticipation of litigation. Slip Op. at 19. This means work product created by non-attorneys is discoverable if it does not summarize a privileged communication with an employee and the opposing side demonstrates “substantial need.” Id. The Court emphasized that “there is nothing to be gained by sloppily insisting on both [the attorney-client privilege and work product doctrine] or by failing to distinguish between them. Id. at 21.

Lessons for Corporate Counsel

The D.C. Circuit’s latest mandamus ruling in the KBR case comes as a welcome relief to government contractors, health care entities, and financial institutions. Oftentimes, the investigation of potential FCA violations can be just as costly as the litigation that follows. Having strong, clear guidance on the application of the attorney-client privilege and attorney work product doctrine will provide needed certainty for companies conducting those investigations. Maybe more importantly, the recent D.C. Circuit decision helps return some normalcy to this case law, calming down the tempest generated by the lower court in its prior, overly restrictive interpretations.

Although the D.C. Circuit has attempted to insert some clarity and predictability in the case law, it is important to keep in mind that courts in most jurisdictions have not reached a consensus regarding the application of the attorney-client privilege and work product doctrines.
in internal investigations. Most jurisdictions treat privilege issues as a factually intense question, the resolution of which varies from case-to-case. Corporate counsel should continue to carefully document and supervise internal investigations by getting involved early in the assessment and investigation of any allegations and retaining outside counsel when feasible. In addition, corporate counsel should oversee compliance functions and should include language in internal communications and policies stating that internal investigations are conducted for the purpose of obtaining legal advice.

Additionally, when a company uses non-attorneys to conduct interviews, in-house attorneys should always supervise, provide direction on the interviews and document reviews, and document the non-attorneys’ actions to show they were taken at the direction of legal counsel in order to provide legal advice to the company and to defend the company against possible litigation. Along the same lines, investigation reports and materials should clearly be marked as attorney-client privilege communications and attorney work product. Investigation reports should also contain a summary of legal issues to be examined.

It is also critical that investigators, whether attorneys or not, issue “Upjohn warnings” to all interview subjects and clearly explain that the interviewers are acting at the direction of legal counsel, that the contents of the interview will be shared with legal counsel, and that the purpose of the interview is to gather information to provide legal advice to the company and defend against possible litigation.

Lastly, companies must avoid public statements (such as in pleadings) that an internal investigation revealed no wrongdoing to avoid any potential privilege waiver issues.

Matt Tretzky, Bora Rawcliffe, and David Gallacher are attorneys with Sheppard Mullin Richter & Hampton, resident in Los Angeles, CA and Washington, D.C. They specialize in government contracting and internal investigations and can be reached at www.sheppardmullin.com.
NEWS AND ANNOUNCEMENTS

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November 12-14
Francis Marion Hotel
387 King St.
Charleston, SC 29403
Explore the development of bridge-building techniques in several of the most contentious areas of partnering with the Federal Government today: new statutory and regulatory compliance requirements, cybersecurity, commercial items contracting and Government acquisition of intellectual property/data rights.

Federal Contract Claims and Appeals Practice: An Introduction
November 20, 1:00-2:30 PM ET
Webinar
This program features a panel discussion on claims practice from the perspective of both private sector and federal agency practitioners. Topics will include an introduction to the Contract Disputes Act, available forums and procedures, claim preparation, appealing a contracting officer’s final decision, the contractor’s approach to an appeal (including potential impact on customer relations), a cost/benefit analysis of appeals forums, and the role of ADR procedures.

Case Management for Lawyers: How to Organize the Chaos and Make More Time for YOU!
November 24,
Webinar and Book
This webinar includes the book The Lawyer’s Guide to Practice Management Software Systems (2nd Ed.).

Introduction to the False Claims Act for Federal Contracts Practitioners
December 15,
Webinar
The Civil False Claims Act (FCA) is a powerful tool to combat fraud, waste, and abuse in federal contracting. It also has unique provisions that make it a major legal and business risk for federal contractors and subcontractors. Hear from FCA practitioners who represent the Federal Government, “qui tam” relators who bring actions on the Government’s behalf, and contractors/subcontractors defending against such actions.