

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

---

VOLUME 7

NUMBER 11

November 2021

---

<b>Editor's Note: National Strategy</b> Victoria Prussen Spears	349
<b>President Biden Targets Private Employers and Federal Employees and Contractors in His "Path Out of The Pandemic"</b> Amy C. Hoang, David Y. Yang, Erica L. Bakies, Rio J. Gonzalez, and Erinn L. Rigney	352
<b>U.S. Government Defines "Critical Software" for Supply Chain Security Purposes</b> Steven G. Stransky	356
<b>Proposed False Claims Act Amendments Seek to Rein in <i>Escobar</i> and Granston Memo</b> Emily Reeder-Ricchetti and Christian D. Sheehan	361
<b>Bringing Home the (Davis) Bacon—Third Circuit Applies FCA Amendment Retroactively to Wage Dispute</b> John P. Elwood and David Russell	364
<b>D.C. Circuit May Decide How to Calculate FCA Offsets in Interlocutory Appeal</b> Tirzah S. Lollar, Christian D. Sheehan, and Megan Pieper	367
<b>"Rule of Two" Cheat Sheet</b> Merle M. DeLancey Jr.	370
<b>In the Courts</b> Steven A. Meyerowitz	374

**QUESTIONS ABOUT THIS PUBLICATION?**

---

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at ..... 516-771-2169  
Email: ..... heidi.a.litman@lexisnexis.com  
Outside the United States and Canada, please call ..... (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844  
Outside the United States and Canada, please call ..... (518) 487-3385  
Fax Number ..... (800) 828-8341  
Customer Service Website ..... <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or ..... (800) 223-1940  
Outside the United States and Canada, please call ..... (937) 247-0293

---

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2015

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office  
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862  
[www.lexisnexis.com](http://www.lexisnexis.com)

MATTHEW  BENDER

# *Editor-in-Chief, Editor & Board of Editors*

---

**EDITOR-IN-CHIEF**

**STEVEN A. MEYEROWITZ**

*President, Meyerowitz Communications Inc.*

**EDITOR**

**VICTORIA PRUSSEN SPEARS**

*Senior Vice President, Meyerowitz Communications Inc.*

**BOARD OF EDITORS**

**MARY BETH BOSCO**

*Partner, Holland & Knight LLP*

**PABLO J. DAVIS**

*Of Counsel, Dinsmore & Shohl LLP*

**MERLE M. DELANCEY JR.**

*Partner, Blank Rome LLP*

**J. ANDREW HOWARD**

*Partner, Alston & Bird LLP*

**KYLE R. JEFCOAT**

*Counsel, Latham & Watkins LLP*

**JOHN E. JENSEN**

*Partner, Pillsbury Winthrop Shaw Pittman LLP*

**DISMAS LOCARIA**

*Partner, Venable LLP*

**MARCIA G. MADSEN**

*Partner, Mayer Brown LLP*

**KEVIN P. MULLEN**

*Partner, Morrison & Foerster LLP*

**VINCENT J. NAPOLEON**

*Partner, Nixon Peabody LLP*

**STUART W. TURNER**

*Counsel, Arnold & Porter*

**ERIC WHYTSELL**

*Partner, Stinson Leonard Street LLP*

**WALTER A.I. WILSON**

*Partner Of Counsel, Dinsmore & Shohl LLP*

*Pratt's Government Contracting Law Report* is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

# Bringing Home the (Davis) Bacon—Third Circuit Applies FCA Amendment Retroactively to Wage Dispute

*By John P. Elwood and David Russell*

*Under the Davis-Bacon Act, contractors performing federally funded construction contracts must certify their compliance with the Act to the U.S. Department of Labor as a precondition for payment. The authors of this article discuss a recent decision that retroactively applied the False Claims Act to a union's lawsuit alleging a construction company tried to skirt the "prevailing wage" provisions of the Davis-Bacon Act.*

What's in a claim? A lot if you are in the U.S. Court of Appeals for the Third Circuit, where a recent decision retroactively applied the federal False Claims Act ("FCA") to a union's lawsuit alleging that a construction company tried to skirt the "prevailing wage" provisions of the Davis-Bacon Act.<sup>1</sup>

## BACKGROUND

The Davis-Bacon Act "protect[s] local wage standards by preventing contractors from basing their bids [for federally-funded construction projects] on wages lower than those prevailing in the area."<sup>2</sup> Under it, contractors performing federally funded construction contracts must certify their compliance with the Davis-Bacon Act to the U.S. Department of Labor ("DOL") as a precondition for payment.<sup>3</sup>

According to the labor union that served as relator in this case, Farfield construction company falsely certified its compliance with Davis-Bacon despite misclassifying workers; the union claimed the company classified workers as "less skilled" though they performed tasks ordinarily performed by "higher-skilled (and higher-paid) workers."<sup>4</sup> A DOL auditor who investigated while the project was ongoing took no action, and the DOL later declined to take action

---

\* John P. Elwood is a partner at Arnold & Porter Kaye Scholer LLP and is the head of the firm's Appellate and Supreme Court practice. He has argued cases across a broad cross-section of subjects, including environmental law, the False Claims Act, government contracting, and federal criminal law. David Russell is an associate at the firm handling a variety of commercial matters, with an emphasis on white collar crime. The authors may be reached at john.elwood@arnoldporter.com and david.russell@arnoldporter.com.

<sup>1</sup> See *U.S. ex rel. Int'l Bhd. of Elec. Workers Loc. Union No. 98 v. Farfield Co.*, No. 20-1922 (3d Cir. July 13, 2021).

<sup>2</sup> *Id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

when the district court referred the union's allegations to it. Nonetheless, the relator argued, this conduct violated the FCA.<sup>5</sup>

The primary issue was whether the FCA amendments contained in the Fraud Enforcement and Recovery Act of 2009 ("FERA")—which lowered the *mens rea* threshold, thereby making it easier to prove liability—applied retroactively to Farfield's scheme. This was key, because relators did not claim Farfield had intentionally misclassified workers, but only had "recklessly" done so by not inquiring into local labor practices.

FERA included a retroactivity provision which applied to "all claims under the False Claims Act" pending on or after June 7, 2008—two days before the U.S. Supreme Court decision in *Allison Engine Co. v. U.S. ex rel. Sanders* holding that the FCA required proof of specific intent to defraud the government. Because Farfield's alleged conduct ended in 2007, if a "claim" referred to the contractor's submission for payment, the amendment was inapplicable. But, on the other hand, if a "claim" referred to the resulting FCA lawsuit, the amendment applied because the relator's lawsuit was pending by the retroactivity date.

### THE THIRD CIRCUIT DECISION

The U.S. Court of Appeals for the Third Circuit noted a circuit split over the meaning of "claim" under the amendment. The U.S. Courts of Appeals for the Fifth, Ninth, and Eleventh Circuits held that it refers to the underlying claim for payment. The U.S. Courts of Appeals for the Sixth and Seventh Circuits, on the other hand, held that it refers to the resulting lawsuit.<sup>6</sup>

The Third Circuit adopted the latter view. Although the FCA's very title uses "claims" to mean submissions for payment, and another FERA provision defined "claim" to mean "any request or demand . . . for money or property" presented to certain agents or officials, the Third Circuit noted that elsewhere, the FCA "uses 'claims' synonymously with 'cases.'" Also, Congress's use of an effective date just before *Allison Engine* suggested an "intent to undo the effect of" that decision.<sup>7</sup>

*Farfield* is noteworthy also for the novel approach that the court took towards the relator's burden of proof for damages. According to the court, where an FCA case is premised on a Davis-Bacon Act violation, a court should adopt the Fair Labor Standards Act's burden-shifting framework, under which a claimant's

---

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

prima facie showing that employees have been improperly compensated shifts to the employer the burden of “com[ing] forward with evidence of the precise amount of work performed” and the propriety of the payments.<sup>8</sup>

*Farfield* is just the latest in a line of decisions allowing the Davis-Bacon Act to be enforced through the FCA, providing treble damages not available under labor law enforcement procedures. The decision underscores the importance of defendants arguing that their conduct was objectively reasonable, and thus not “false,” where that defense is available. It also underscores the importance of vigorously contesting materiality. The fact that the DOL twice declined to act (once after knowing the union’s allegations) suggests both that the company’s classifications were reasonable and were not material, but the company did little in the briefing to emphasize the significance of the agency’s inaction.

## CONCLUSION

Despite the genuine circuit split on retroactivity, there is a good chance the Supreme Court will not resolve the issue. Because the FERA amendments are now more than 10 years old, the Court may well conclude that the retroactivity question is not cert-worthy because it affects a limited and declining number of cases. The Court has been increasingly selective, and in the two most recent terms, has taken fewer cases than any time since the Civil War. Thus, we may be stuck with the FERA’s uneven application going forward.

---

<sup>8</sup> *See id.*