

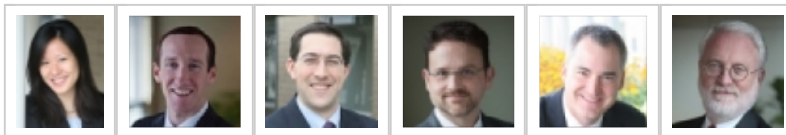
GOVERNMENT CONTRACTS

Legal Forum



Employee's Acceptance of Gratuities Subjects Company to Heightened Liability Under Anti-Kickback Act

By Amy S. Lee, Patrick S. Brown, Peter J. Eyre, David B. Robbins, Stephen M. Byers and Alan W. H. Gourley on February 7, 2017



In *United States ex rel. Vavra v. Kellogg Brown & Root, Inc.* (Feb. 3, 2017), the Fifth Circuit held that under Section 8706(a)(1) of the Anti-Kickback Act — permitting recovery of twice the amount of each kickback plus \$11,000 for each occurrence of a prohibited conduct — corporations are liable “for the knowing violations of those employees whose authority, responsibility, or managerial role within the corporation is such that their knowledge is imputable to the corporation.” In applying this standard to the two Kellogg Brown & Root, Inc. (“KBR”) employees who had accepted meals and entertainment (on 33 occasions) from a supplier, the court found that one employee’s knowledge could be imputed to the corporation because the employee was responsible for supervising the subcontract at issue, for ensuring the supplier met its obligations, including contract performance, and for executing technical evaluations for rebidding the subcontract and therefore “had somewhat significant managerial authority over the sphere of activities in question.” In contrast, the court found the other employee who was neither involved in nor had the authority to take any procurement action regarding the subcontract at issue during the relevant period had only “limited authority” that was not enough to impute his knowledge to KBR.

With respect to whether numerous instances of meals, drinks, and other entertainment constituted “kickbacks” under the Act, the court concluded that “anything of value offered in order to subvert the ‘proper’ process for awarding contracts is a potential kickback,” noting that while merely seeking to develop good will or a good working relationship to gain more business would be insufficient, it was “enough to connect the gratuity with the specific kind of treatment sought in a way that establishes impropriety.” The court found the connection was satisfied with testimony that the supplier provided gratuities, in part, to subvert proper procedures: the supplier employee testified that the KBR employee “was the highest-ranking guy that we dealt with ... [and] the most important [person at KBR] with regard to controlling service issues.” When asked why he provided gratuities, the supplier employee answered that it was because the KBR employee “would bring service issues to us. Specifically he knew me based on entertaining; so, if they had issues, he would bring them to me before they escalated out of control.” The court found the testimony provided sufficient specificity to support a finding that the KBR

employee received gratuities to overlook and/or forgive performance deficiencies in subversion of proper procedures and in violation of the Anti-Kickback Act.

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