

Dentons Files Amicus Brief in *Call Henry, Inc. v. United States*

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Dentons, the world's largest law firm, has filed an amicus brief in *Call Henry, Inc. v. United States* (Case No. 16-1732) urging the Federal Circuit Court to side with the appellant to find that government contractors are entitled to a price adjustment for increased costs of providing a defined benefit pension pursuant to the Multiemployer Pension Protection Amendments Act of 1980 (MPPAA). The case is scheduled for oral argument on January 11, 2017.

At issue in the case is whether the Service Contract Act (SCA) and its implementing regulations entitle a contractor performing a fixed-price government contract to a price adjustment resulting from the assessment of withdrawal liability pursuant to the MPPAA. Withdrawal liability is an additional contribution to a multiemployer pension plan that represents the withdrawing employer's share of any unfunded, vested liabilities owed to its employees for benefits accrued under the pension plan.

"We feel strongly that withdrawal liability is recoverable under the SCA and that such recovery is equitable because government contractors are often required by collective bargaining agreements to contribute to multi-employer defined benefit pension plans and the government should not be permitted to dodge its responsibility to pay for the full costs of employee pension benefits on government projects, including withdrawal liability under the MPPAA," said **Steve Masiello**, a partner in Dentons' **Government Contracts** and **Global Public Procurement** practices.

Call Henry's contract with NASA was subject to the SCA and its employees worked under a collective bargaining agreement that required Call Henry to provide certain "fringe benefits," including pension benefits provided through employer contributions to a multiemployer defined benefit pension plan. When Call Henry's employees decertified their union in favor of representation by another union, Call Henry discontinued its contributions to the multiemployer pension plan, which triggered withdrawal liability under the MPPAA. Accordingly, Call Henry sought a price adjustment under its contract for the increased cost of providing the pension benefits to its employees as required by the collective bargaining agreement. NASA denied Call Henry's certified claim for the increased costs, and Call Henry appealed the contracting officer's final decision to the Court of Federal Claims (COFC).

The COFC dismissed Call Henry's appeal based on the COFC's view that pension costs incurred in the form of withdrawal liability pursuant to the MPPAA do not constitute costs of a "fringe benefit." Call Henry appealed this decision to the Federal Circuit. The amicus brief asserts that, consistent with relevant Supreme Court and Federal Circuit precedent, the MPPAA modifies the terms of a collective bargaining agreement to require payment of additional costs to fund a multiemployer defined benefit pension plan when an employer exits the plan and that such increased costs are the costs of providing a "fringe benefit" under the SCA.

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