DO YOU THINK YOU KNOW THE RAMIFICATIONS UNDER THE FALSE CLAIMS ACT? THINK AGAIN!

PART II: ISSUES INVOLVING PENALTIES, "QUI TAM" ACTIONS, AND UNDERBIDDING AS A SOURCE OF LIABILITY

INTRODUCTION

As discussed in Part I, the False Claims Act (FCA) contains significant provisions to discipline parties who defraud the Government. One such provision is a "Qui Tam" provision which allows third parties who are not affiliated with the Government to file actions on behalf of the Government (also called "whistleblowers" or "relators").

Whistleblowers or relators are eligible to receive a portion (usually about 15–25 %) of damages recovered by the Government from violators. Application of the FCA can encompass multiple claims and can include both prime contractors and subcontractors. Liability can also extend to contractors who provide false statements through their estimates. In this second installment about the FCA, we discuss each of these topics and their ramifications.

ISSUES INVOLVING THE NUMBER OF PENALTIES (DEALING WITH SUBCONTRACTORS)

When the FCA is applied to contractors and subcontractors, the number of penalties assessed will be based upon the number of independent claims submitted by a contractor. A decision is based upon individual claims that were submitted together. In *United States v. Bornstein*, 423 U.S. 303, 313, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976) the court evaluated whether a subcontractor should be liable for each claim submitted by the prime contractor or only for acts committed by the subcontractor. It was determined that the number of infractions caused by the subcontractor should be the number of penalties assessed against the subcontractor. Even if a prime contractor submitted multiple false claims based upon one action of a subcontractor, the subcontractor would only be liable for one penalty and the prime contractor would be held liable for the number of multiple false claims it submitted to the Government. (http://www.hg.org/article.asp?id=22065)

Damages authorized by the FCA were increased as part of amendments enacted in 1986 which changed the range of damages from double to triple the amount of the Government's damages. Penalties, under the FCA, also increased from $5,000 - $10,000 to $5,500 - $11,000 per violation. (http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf) For example, if a false claim in the amount of $100,000 is submitted to the Government, the Government may be entitled to recover $300,000 in damages plus $5,500 in penalties.

"QUI TAM" ACTIONS

Another 1986 amendment to the FCA includes a "Qui Tam" provision, also known as the Whistleblower or relator provision which enables another party, who has actual knowledge of the deceitful act, to file a suit on behalf of the Government, when proof of misrepresentation or false claims has been submitted to the Government.

(http://governmentfraud.us/whistleblowers/) The evidence that comes from the relator, however, cannot be *"…from a publicly disclosed source such as a newspaper, TV, magazine, radio, court record, administrative hearing, Congressional hearing, U.S. General Accounting Office report, or Freedom of Information Act request."* (Id.)

An incentive for the relator(s), whether or not they are directly working on a Government project, is that the relator is entitled to receive anywhere from 15-30% of the monetary damages recouped depending upon whether or not the Government "…*intervenes and conducts the litigation*…" The relator may be entitled to 25-30% of recovery if the Government decides not to intervene. (http://fcaexpert.com/articles/FCA-FAQ.html) Section 3730(d)(1) & (2)

Protection for relators under the FCA includes a provision that whistleblowers/relators cannot be:

> "…*discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a [qui tam action], including investigation for, initiation of, testimony for, or assistance in a [qui tam] action filed or to be filed…, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement ... 2 times the amount of back pay, interest ... compensation for any special damages ... including litigation costs and reasonable attorneys' fees.... An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection".*

See the FCA's Whistleblower Protection Provision of the Federal False Claims Act, 31 U.S.C. Section 3730 (h).

Contractors who encounter or suspect that a Qui Tam action has been filed against them can, and often do, require counseling and guidance with respect to § 3730(h) and its effects. In the event this occurs, it is helpful to obtain the services of a knowledgeable consultant or legal professional.

UNDERBIDDING AS A SOURCE OF LIABILITY

In United States ex rel. Hooper v. Lockheed Martin Corp., 688 F.3d 1037, 2012 WL 3124970 (9th Cir. Aug. 2, 2012), the Ninth Circuit Court of Appeals held that "a bidder's false cost estimates, defined to include fraudulent underbidding in which the bid is not what the defendant actually intends to charge, can be a source of liability under the FCA, assuming that the other elements of an FCA claim are met." (*Id.* at 1049)

In this Qui Tam action stemming from alleged fraud by Lockheed Martin against the United States Air Force, Lockheed argued that a purported false estimate could not form the basis of FCA liability because it was essentially an opinion or prediction that could not be deemed as false within the meaning of the FCA. The Ninth Circuit Court reasoned that to establish a cause of action under 31 U.S.C. § 3729(a)(1)(A), "the United States or relator had to prove the following elements:

> (1) a false or fraudulent claim (2) that was material to the decision-making process (3) which a defendant presented, or caused to be presented, to the United States for payment or approval (4) with knowledge that the claim was false or fraudulent." 688 F.3d at 1047

The Court's decision was that Lockheed Martin had knowingly submitted a false estimate and as such, the FCA applied liability related to underbidding in estimates which were false and fraudulent. (http://www.rjo.com/updatesOSZ-JMC-060252013.html)

CONCLUSION

FCA liability can stem from virtually any false or fraudulent statement or claim that is knowingly and deliberately made to the Government. Issues related to the number of claims can be utilized in assessing penalties in cases where a subcontractor is alleged to have committed wrongdoing. This can lead to multiple claims and result in an expensive outcome for subcontractors and for prime contractors.

Given the increasing number of complexities of the FCA, as well as the possibility of whistleblower actions, it would be prudent to enlist the services of an outside consultant such as Excell Consulting International, Inc. By engaging the professional assistance of experts in the field, contractors can rest assured that their rights are being protected and preserved. With Excell Consulting, you will receive professional recommendations after review of all factors that apply to an alleged FCA claim.

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