For more information about how Venable assists government contractors, please click here. To read more about Venable's White Collar Litigation practice, click here. Venable also assists companies working overseas with Foreign Corrupt Practice Act (FCPA) matters. For more information on FCPA click here.

AUTHORS

Paul A. Debolt
padebolt@Venable.com
202.344.8384

Geoffrey R. Garinther
grgarinther@Venable.com
202.344.4919

Jeffery M. Chiow
jchiow@Venable.com
202.344.4434

DC Circuit's Civil False Claims Act Decision Provides Clarity for Government Contractors

The DC Circuit's December 3, 2010 opinion in ***United States v. Science Applications International Corporation (SAIC)***, provides some welcome guidance for government contractors hoping to understand their potential liability under the Federal Civil False Claims Act (FCA), 31 U.S.C. §§ 3729-33. The FCA, which has been significantly amended over the last two years, provides for civil penalties and treble damages in cases where a party receiving federal funds is found to have sought, received and/or improperly retained such funds through fraud or false statements. Since November 2008, government contractors have been obligated, whenever they have credible evidence of an FCA violation in connection with the award or performance of a government contract, to disclose this violation to the government. To fulfill this obligation, contractors obviously must know what conditions would potentially give rise to FCA liability. The *SAIC* opinion provides some helpful information to government contractors for assessing potential false claims issues.[1]

FACTS

SAIC entered into contracts with the Nuclear Regulatory Commission (NRC) in 1992 and 1999 to provide technical services to the NRC that would help it develop uniform national standards for the disposal of nuclear waste. In connection with those contracts, the company certified not only that it had no organizational conflicts of interest (OCIs), but also that it would alert the government if any potential conflicts of interest arose during contract performance.

DC DISTRICT COURT DECISION

At trial, the jury determined that the company's relationships with companies regulated by the NRC, and an SAIC executive's position with a non-profit, which lobbied the NRC gave rise to undisclosed OCIs. The government argued that had it known of the company's OCIs, it would not have paid anything for its technical advice. As a result, the jury found that the company made false claims and submitted false statements or records to obtain federal funds. It awarded $577,500 in civil penalties along with FCA damages of the full contract value due to the fact that the government would not have knowingly paid for the company's OCI-tainted advice. After trebling the damages, the total verdict was $6,499,096.83.

DC CIRCUIT DECISION

In its December 3rd opinion, the DC Circuit provided clarification in four important FCA areas and delivered at least two setbacks to the Department of Justice. The key topics analyzed by the Circuit were (1) implied false certification liability, (2) materiality, (3) scienter (specifically the government's "collective knowledge" theory), and (4) FCA damages.

Implied False Certification

A contractor may be liable under the FCA where it falsely represents that it is in compliance with an applicable federal statute, regulation, or contractual term. Such a certification may be express, such as when an express certification is incorporated in an invoice. Alternatively, where compliance constitutes an express requirement for payment, the contractor's silence when seeking payment may be deemed an implied certification. Here, although the Circuit determined that payment was not expressly dependent upon compliance with OCI provisions, it held an FCA plaintiff could nonetheless bring a claim if it could show that a contractor withheld information about its noncompliance. Noting the potential for the government and relators to turn every minor contract administration matter into an FCA claim, the Circuit stated that courts should strictly enforce the FCA's materiality and scienter requirements.

Materiality

To establish FCA liability under an implied certification theory, a plaintiff must prove by a preponderance of the evidence that compliance with the requirement in question is material to the government's decision to pay. As with the OCI provision in this case, contracting officers often claim that compliance with any contract clause will materially affect the government's decisions to award contracts and make payments.

Scienter

The Circuit advocated limiting FCA liability to cases where the contractor knowingly made a false certification of compliance. Further, the Circuit expressed its general skepticism about the corporate collective knowledge theory finding that the theory contradicted the FCA's purpose to root out actual knowing fraud. Saying that it was unaware of any contrary precedent, the Circuit cited a Fourth Circuit case which criticized the collective knowledge theory as allowing "a plaintiff to prove scienter by piecing together scraps of innocent knowledge…[where] officials never had contact with each other or knew what others were doing in connection with a claim seeking government funds."

Damages

The Circuit decision emphasized that the government had the obligation to prove its damages, while noting the difficulty in determining damages in this matter. According to the Circuit, damages in an FCA case should put the government in the same position as it would have been if the claims had not been false. Where a contractor agreed to provide goods or services to the government, the proper measure of damages amounts to the difference between the value of the goods or services actually provided by the contractor and what value the goods or services would have had to the government had the government received the benefit of the bargain.[2] Where valuation proves difficult, the measure of damages should be the amount the government actually paid minus the value of the goods or services the government received or used. As part of its analysis, the Circuit refused to create a presumption that services involving expert advice and analysis affected by potential organizational conflicts were categorically worthless.

SUMMARY

The DC Circuit's decision incrementally expanded FCA liability by holding that contractors may be liable for implied false certifications even where the contract does not expressly condition payment on compliance with a law, regulation or contract term. Such liability only arises, however, where the contractor withholds the fact of its noncompliance with a material term. In evaluating FCA claims, the Circuit held that courts must strictly enforce requirements for materiality and scienter. Specifically, the government's collective knowledge theory constitutes an inappropriate basis for FCA liability. With respect to damages, courts must credit contractors for the value of nonconforming goods or services delivered, with the onus on the Government to prove its damages.

Venable has broad experience in litigating and advising government contractors, health care providers and grantees concerning the Civil False Claims Act and government investigations. Our team includes former government acquisition attorneys, government officials and prosecutors experienced in resolving FCA matters expeditiously while managing risk from parallel investigations and litigation. If you would like further information concerning this alert, please contact the authors or another Venable attorney.

---

1. The FCA has been the source of extensive litigation, including many cases before the Supreme Court. Its *qui tam* provision allows whistleblowers to act as private attorneys general ("relators") and bring civil fraud claims against contractors, often under seal. Many important questions about the FCA are still unanswered after *SAIC* including: retroactivity and practical application of the 2009 Fraud Enforcement Recovery Act (FERA) amendments; the public disclosure bar to *qui tam* suits in light of the 2010 Patient Protection and Affordable Care Act (PPACA) amendments; the application of Federal Rule of Civil Procedure 9(b) to relators' complaints; and more. The Supreme Court's 2008 *Allison Engine* decision precipitated the recent FERA amendments and the Court is scheduled to hear a case this term questioning whether the government's response to a Freedom of Information Act (FOIA) request may be the basis of a relator's FCA claim. *See Schindler Elevator Corp. v. United States ex rel. Kirk*, No. 10-188.

2. The Circuit distinguished cases where Government funds are used for the benefit of a third party, as in Medicare, where all amounts paid are recoverable as damages.