Government contractors beware: increased FCA enforcement in government contracts industry

Bass, Berry & Sims PLC
Lindsey Brown Fetzer , **John E. Kelly** and **Todd R. Overman**

USA
October 30 2014

BASS BERRY + SIMS
CENTERED TO DELIVER.


Author page »


Author page »


Author page »

The False Claims Act (FCA), which prohibits the knowing submission of false claims to the federal government for payment, continues to be a powerful tool in the government's fight against fraud.1 FCA actions arise from federal and state government investigations, Company self-disclosures and, most often, from *qui tam*litigation.2 The *qui tam* provisions of the FCA allow private citizens, acting as whistleblowers, to bring FCA actions and share in the recovery, on behalf of the United States.

The FCA touches all industries that receive any form of federal government money, including the government contracts industry, which, increasingly, has been the focus of FCA enforcement. This uptick in FCA enforcement is not surprising since its origins are in government contracting; Congress enacted the FCA in 1863 to fight fraud perpetrated by Civil War contractors.3

In FY 2013, the federal government recovered $2.9 billion from all investigations involving the FCA across all industries. In cases involving government contractors, the federal government recovered $887 million in settlements and judgments under the FCA representing just over 30% percent of the total recoveries in FY 2013.4 Fast forward to this year, and the government has continued to pursue FCA actions against government contractors with vigor.

A review of some recent civil FCA enforcement activity in the government contracts space provides a glimpse into the nature of the cases being pursued by the government and

whistleblowers under the FCA.

Science Applications International Corporation ("SAIC")

- Allegations of undisclosed organizational conflicts of interest
- $1.5 million settlement

On October 21, 2014, SAIC, now known as Leidos Holdings Inc., agreed to pay $1.5 million to resolve allegations that it knowingly engaged in conflicting business relationships as a contractor with the U.S. Nuclear Regulatory Commission (NRC). The government contended that SAIC, while under contract with the NRC to assist with specific rulemaking efforts, engaged in multiple business relationships with entities that had a financial interest in the outcome of the rulemaking. Such relationships were prohibited by the terms of its agreement with the NRC. The United States further contended that, on multiple occasions, SAIC falsely certified that no such conflicting business relationships existed. The settlement in this case followed a jury verdict in favor of the United States and a subsequent appeal to the U.S. Court of Appeals for the District of Columbia Circuit. In December 2010, the D.C. Circuit affirmed the judgment on the breach of contract claim, but reversed and remanded for a new trial on the FCA claims based on an error in the jury instructions.5 The settlement was reached prior to a second trial on the merits.

Boeing Company

- Allegations of improper billing of labor costs
- $23 million settlement

On October 10, 2014, the Boeing Company ("Boeing") agreed to pay $23 million to resolve allegations that it submitted false claims in connection with contracts with the U.S. Air Force. The government contended that Boeing improperly charged labor costs in violation of the terms of its maintenance contracts for the repair of the C-17 Globemaster aircraft. The improper charges allegedly included time spent by mechanics at meetings not directly related to the contracts. The four relators will share in the whistleblower award of nearly $4 million.6

DRS Technical Services, Inc.

- Allegations of overbilling of inflated labor costs
- $13.7 million settlement

The DRS Technical Services, Inc. ("DRS") settlement also involved allegations of noncompliance with labor obligations. On October 7, 2014, DRS entered into a $13.7 million settlement with the Department of Justice ("DOJ") resolving allegations that it overbilled labor costs and, in furtherance of the purported scheme, submitted false claims to the federal government. More specifically, the DOJ contended that between 2003 and 2012 DRS billed the federal government for work performed by personnel who lacked the job qualifications required under contracts issued by the U.S. Army Communication and Electronics Command and the U.S. Coast Guard. The contracts at issue, which were named Rapid Response or "R2" contracts, were for the purchase of a variety of goods and services to support U.S. forces.7

Samsung Electronics America, Inc.

- Allegations of submission of false claims for products sold in violation of the Trade Agreements Act
- $2.3 million settlement

On August 19, 2014, Samsung Electronics America, Inc. ("Samsung") agreed to pay $2.3 million to resolve allegations that it caused the submission of false claims from January 2005 through August 2013. Samsung sold products to authorized resellers who held General Service Administration Multiple Award Schedule contracts. Under these contracts, vendors are required to certify that all of their products comply with the Trade Agreements Act of 1979 ("TAA"). The government alleged, however, that Samsung knowingly provided to resellers inaccurate information about the country of origin of its products to resellers. As a result, Samsung allegedly caused resellers to submit false claims because the items offered for sale were not TAA compliant.8

The above cases are representative of the issues and monetary recoveries that are being seen with greater frequency in civil FCA settlements involving government contractors. Equally noteworthy are the administrative remedies that are increasingly part of any such resolution. Earlier this year, DOJ leaders announced a "renewed emphasis" on securing nonmonetary remedies—including, corporate integrity agreements, suspensions, and debarments—as part of FCA settlements.9 Because certain administrative remedies serve to exclude entities and individuals from further contracting or business with the government, these often prove to be more burdensome and cause greater harm to a contractor than civil monetary penalties.

FCA enforcement activity in this space promises to continue throughout 2014 and beyond. Indeed, on October 16, 2014, the DOJ announced that it decided to intervene in a FCA case against another aerospace company, Sikorsky Aircraft Corporation ("Sikorsky"), and two of its subsidiaries. The complaint alleges that Sikorsky overcharged the Navy on an Aircraft Maintenance Contract and violated the FCA. More specifically, the DOJ contends that Sikorsky approved an illegal cost-plus-a-percentage-of-cost subcontract and used the contract to overcharge the Navy.10

In light of the foregoing, it would be prudent for government contractors to review—and, where appropriate, bolster—compliance programs in an effort to reduce the risk of potential FCA exposure.

To view all formatting for this article (eg, tables, footnotes), please access the original here.

Tags USA, Projects & Procurement, Bass, Berry & Sims PLC

---

one of the best e-resources that I have encountered in 21 years of practicing Employment Law. The information is timely, helpful and easy to navigate. Thank you for offering it and please continue it indefinitely!!"

Philip I. Weis
Director and Senior Counsel
Boehringer Ingelheim
