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FEATURE COMMENT: Guarding Against False Claims Act Risk: Your Good Relationship With Your Customer Is Not Enough

COVID-19 has increased False Claims Act risks for Government contractors. Program schedules are upended, places of performance are changed and broad swaths of the workforce are quarantined. Schedule, budget and deliverables that were set prior to the COVID-19 epidemic will all need to be revised. And this process will need to be repeated over and over again across a significant portion of the Government's procurement spend. Mistakes will happen. Some modifications will not be memorialized correctly or be granted orally only. While shortcuts are understandable given the pressures of the moment, contractors should still keep records of their COVID-19 impacts and document their interactions with the Government. Without adequate documentation, contractor actions may be second-guessed by relators, whistleblowers, investigating federal agents and the Department of Justice.

When we defend Government contractors facing FCA investigations and cases, we often hear a statement similar to "this won't go anywhere because we have a great relationship with the customer." While a good customer relationship is helpful in many aspects of a Government contractor's business, it is not as helpful in curtailing the scope, reach or intensity of an FCA inquiry. This article discusses the reasons why, and offers Government contractors common-sense suggestions for ways to reduce potential FCA risk and exposure in the current economic climate.

The Buying Customer Cannot Settle Fraud Cases—While contracting officers have substantial power and authority to bind the Government, their authority has limits. Both the Federal Acquisition Regulation and the FCA proscribe COs' purview over fraud cases. FAR 33.210(b), Contracting Officer's Authority, expressly removes "[t]he settlement, compromise, payment or adjustment of any claim involving fraud" from the authority of the CO. Additionally, the civil FCA itself at 31 USCA § 3730(a) reserves the power to investigate potential violations and bring FCA cases to the Attorney General. Even if they wanted to help, the Government customer—who sits in a buying agency and has contracting authority—lacks the authority to do so.

Agencies Have Erected Separate Structures to Consider Fraud Cases—The acquisition workforce is busy. They are understaffed, overworked and under constant pressure. They do not always have time or incentive to address procurement misconduct. Recognizing this dynamic, a number of agencies (primarily but not exclusively within the Department of Defense) have erected procurement fraud remedies organizations to take charge of these issues. The procurement fraud remedies organizations are not typically staffed with COs. These program analysts and lawyers work at a distance from the acquisition workforce, and often have the power to coordinate the resolution of civil FCA concerns with DOJ on behalf of their agencies.

DOD Instruction 7050.05, Coordination of Remedies of Fraud and Corruption Related to Procurement Activities (DODI 7050.05) (May 12, 2014), *www.esd.whs.mil/Portals/54/Documents/DD/issuances/DODI/705005p.pdf*, is the foundational instruction governing DOD's processes for addressing procurement fraud, including civil FCA concerns. The document's purpose is to "assign responsibilities and prescribe procedures for the coordination of remedies that may be taken in response to evidence of procurement fraud stemming from criminal and administrative investigations

or fraud or corruption relating to DoD procurement activities." DODI 7050.05 at 1.a. The instruction establishes a central point of contact that will assist "[e]ach DoD Component [in] monitor[ing], from its inception, all significant investigations of fraud or corruption related to procurement activities affecting its organization." Id. at 3.a.

Individual military departments have their own procurement fraud instructions as well. For example, the Department of the Navy published Secretary of the Navy Instruction 5430.92C, Assignment of Responsibilities to Counteract Acquisition Fraud, Waste, and Related Improprieties, June 11, 2018, *www.secnav.navy.mil/doni/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-400%20Organization%20and%20Functional%20Support%20Services/5430.92C.pdf*. This Navy instruction identifies the Assistant General Counsel (Acquisition Integrity) under the direction of the secretary of the Navy and the general counsel as the single point of contact for procurement fraud remedies within the Navy. Id. at 1. This official has an office at the Washington Navy Yard, and is substantially removed from the Department of the Navy's buying commands.

DODI 7050.05 and SECNAV Instruction 5430.92C illustrate just how far removed decision making and coordinating authority for FCA cases are from the buying customer. The DOJ Civil Division, the various U.S. Attorney's Offices, and the federal agents assisting these offices with their cases (e.g., the Federal Bureau of Investigation and the various investigative arms of relevant offices of inspectors general) are involved daily and have much more control. And whistleblowers—often current or former employees—typically file these cases. Occasionally the Government's acquisition workforce refers suspicions for consideration, but that is comparatively rare. When a case is filed, it goes directly to DOJ, under seal, and the investigation begins.

Government Knowledge and Materiality Are Better Defenses Against FCA Liability Than the Customer Relationship Is—Because the key Government players are outside of the acquisition chain entirely, Government contractors seeking to reduce FCA risk are well advised to focus on details beyond their relationship with the buying customer. Risk reduction is important because the Government may seek treble damages plus per-claim penalties of between approximately $12,000 and $23,000 under the civil FCA. 31 USCA §§ 3729–3733; Civil Monetary Penalties Inflation Adjustment for 2020, 28 CFR § 85 (2020).

Before we may discuss effective risk mitigation, it is important to understand the elements of an FCA violation. The elements can be summarized as knowingly submitting a false or fraudulent claim for payment by the Government, and the falsity must be material to the Government's decision to pay.

- *Knowledge* is required for FCA liability. A person must have either submitted or caused the submission of a false claim for payment with knowledge of the falsity. The knowledge can be actual, deliberate ignorance of the truth or falsity, or reckless disregard for the truth or falsity. 31 USCA § 3729(b)(1).
- *Claim* means a request or demand for payment made to the U.S. 31 USCA § 3729(b)(2).
- *False or Fraudulent* can refer to the entire claim, or can be found when a record of statement in support of a claim is false or fraudulent. 31 USCA § 3729(a)(1)(A), (B).
- *Material* is a central focus point of modern FCA litigation, and focuses on whether the presence or absence of the condition alters the Government's willingness to pay a claim. *Universal Health Servs. v. U.S. ex rel. Escobar*, 575 U.S. 798 (2016); 58 GC ¶ 219.

These elements will be judged with the benefit of hindsight by individuals outside of the acquisition chain. The enforcement professionals assessing FCA cases will have past experience investigating and bringing enforcement actions, and this will naturally color their perspective on contractor behavior.

To be effective, risk mitigation efforts must help enforcement professionals understand that the FCA elements were not violated. Several common-sense tips for reducing FCA risk follow.

- *Show Your Work*. Whenever contractors make assumptions in support of claims for payment, those assumptions may be misinterpreted. Whenever possible, contractors should show their work, and explain their assumptions. Not only does this reduce the risk of misinterpretation but it also puts the Government on notice of how the analysis occurred. If the Government pays after being put on notice, that is evidence of a lack of materiality.
- *Explain Changed Circumstances*. Contractors are sometimes wary about explaining perfor-

mance issues to the Government. That wariness is problematic, because it is reasonable for the Government to infer that operations remain the same unless they are told otherwise. Instead, when contractors communicate well with the Government buying customer, they are more likely to obtain relief from certain requirements or work out a schedule to address any challenges in collaboration with the Government. A lack of materiality can be shown when the Government continues to pay after being informed of challenges.

- *Seek Advice When Unsure*. Knowledge sufficient for an FCA violation begins as reckless disregard of the truth or falsity. It is comparatively easier to demonstrate reckless disregard when a single individual makes a decision alone. If a course of action is unclear, Government contractors are well advised to seek advice from others. For example, when a contractor discusses an issue with capable counsel and follows their advice, even if the Government disagrees with the course of action, it will be hard pressed to establish reckless disregard.
- *Keep a Well-Documented Contract File*. While after-the-fact oral testimony is helpful, contemporaneous documents are more valuable to reducing FCA risk. A well-documented contract file containing foundational contractual documents and records of communications with, and accommodations granted by, the CO and their representative is perhaps the single most valuable risk mitigation tool for Government contractors. In our experience, robust contract files that show communication, diligence, and candor are tremendously helpful in pushing back on a number of FCA elements and can help show that a claim is not knowingly false.
- *Start Gathering Details*. If contemporaneous documentation was not maintained during the COVID-19 pandemic and the rush to move operations remotely, it is not too late. As businesses pivot towards more normal operations, one work stream can be to retroactively document the impact of the pandemic. This is an important step in preserving contractors' ability to claim additional compensation, time and other consideration from the Government. And it is also an effective risk mitigation technique.
- *Treat Requests for Details as Possible Preludes to Investigations*. Government stimulus and recovery efforts traditionally lead to enhanced enforcement and oversight. The Coronavirus Aid, Relief and Economic Stimulus Act (CARES Act) shows that the response to COVID-19 will be no different. Section 4018(c)(1) created a Special Inspector General for Pandemic Recovery focused on the Treasury Department's distribution of a half of a trillion dollars in aid and relief. Section 15010(b) created a Pandemic Response Accountability Committee of existing IGs to oversee all expenditures under the CARES Act and related stimulus efforts. The Government enforcement apparatus is already primed to consider enforcement cases with Attorney General Barr issuing a memorandum entitled COVID-19—Department of Justice Priorities on March 16, 2020 that "directed" every U.S. Attorney's Office "to prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic." Because Government requests for information may be preludes to enforcement matters, contractors should pause before answering and think how enforcement officials, removed from the acquisition chain, might interpret the response. Taking the extra time to consider the enforcement perspective, and to create self-contained responses sufficient to address the concerns of multiple Government stakeholders, is a worthwhile risk mitigation step.
- *Engage and Use Qualified Counsel.* An external perspective on risks, sufficiency of documentation, propriety of and support for claims, and responses to any Government inquiry is a valuable risk mitigation step in these uncertain times. Advice of counsel, in and of itself, may be a helpful defense against FCA allegations. But more importantly, qualified counsel may be able to spot issues and prevent risks before claims ever reach the Government. This can prevent defense costs and productivity-draining distractions from Government investigations.
- *Focus on Business Ethics and Compliance*. Most Government contractors are required to maintain codes of business ethics and conduct pursuant to FAR 52.203-13. Emphasizing ethics

and compliance during a challenging economic period can help companies prevent and detect internal misconduct before the Government learns of it. These steps can also help a contractor convince the Government that leniency is appropriate if a concern does reach DOJ.

- *Make Use of the Mandatory Disclosure Rule.* The Mandatory Disclosure Rule at FAR 52.203-13 and 9.406 can be challenging to understand because key terms are undefined. However, it affords contractors an opportunity, under color of regulation, to report misconduct to the relevant CO and office of IG. These disclosures are often made out of an "abundance of caution" in order to share the contractor's side of the story and to frame issues and identify salient facts for the Government. It can also be helpful to argue a lack of materiality if payment continues after the CO is on notice of a particular issue.

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