A Relator's Perspective: Common Challenges and Solutions Involving Government Contractor Fraud

By Renée Brooker and Eva Gunasekera

Benjamin Franklin wrote in his memoirs, "there is no kind of dishonesty into which otherwise good people more easily and frequently fall, than that of defrauding government of its revenues." For this reason, the False Claims Act was enacted to guard against government contractor fraud during the Civil War. The United States Department of Justice is still carrying out this mission with the help of whistleblowers known as qui tam relators.

Some of the more common violations of the False Claims Act by government contractors involve:

- failing to comply with cybersecurity requirements
- obtaining contracts through false statements made in solicitation documents
- misrepresenting the cost of a project or intentionally "underbidding" on contracts
- bid-rigging or paying kickbacks in connection with bids on government contracts
- cross-charging or allocating improper costs whereby costs incurred by the contractor in connection with one contract (for example, a fixed price contract or a commercial contract) are improperly charged to a cost-plus contract
- delivering products or services to the government that do not meet the actual contract specifications while certifying that they do
- billing for services (or goods) not rendered or provided
- violating small business contracting, set-aside, GSA schedule, Best Pricing, or Trade Agreements Act requirements
- failing to properly declare or pay mandatory customs or trade duties
- conflicts of interest and bribery

Since the enactment of the False Claims Act, the government has continued its judicious pursuit of fraud involving the purchase of goods and services in connection with U.S. military and other government contracts. Fraud in government contracting not only squanders precious limited taxpayer funds, but also potentially puts servicemembers and others at risk. Best put by one senior U.S. Department of Justice official, "[g]overnment contractors must turn square corners when billing the government for costs under government contracts" and the Department remains committed "to hold accountable contractors that knowingly overcharge the government and enrich themselves at the expense of the American taxpayers."

Evaluating allegations of government contractor fraud comes with its own set of common challenges which are different than challenges presented by health care fraud cases which may also involve government contractors in the managed care context. But it is important to spot and address these challenges rather than throw up your hands and walk away because they have commonsense solutions and government contractors must be held accountable to the taxpayers who fund them.

- **Relator does not have copies of the government contract to evaluate falsity.**

It is important to conduct a preliminary analysis of the government contracts in evaluating whether to file a qui tam case even when your relator-insider does not have copies of the government contracts. Doing so will maximize efficiency on your end and help you determine how best (or whether) to spend your time and resources on the case. It also helps to foster a helpful relationship with the Department of Justice when they see your analysis and more informed efforts and appreciate that you have a more credible basis for the allegations. Naturally, relator's counsel may be somewhat limited to what is publicly available but there are numerous data sources and services to obtain information about government contract awards or copies of the contracts themselves.

Further, government contracts often incorporate basic rules and regulations from the FAR, DFARS, FEDRAMP and other requirements and you should become conversant in these. Thus, even without copies of the government contracts, you can specify when the allegations relate to failures to comply with any of these material requirements which are likely to be incorporated into the contracts. Relator may have legitimate access to internal company documents such as training materials, presentations, and communications that likely include general or specific references to the contract requirements. Consider also U.S. Court of Federal Claims proceedings that may reference or attach contract documents and reiterate government requirements pursuant to the contracts while of course, being mindful of any applicable protective orders. Bottom line is to take some or all these measures to maximize the likelihood that you are bringing material violations of contracting requirements to the government for investigation and have performed due diligence.

- **Relator cannot establish materiality.**

As with the government contracts themselves, when evaluating whether to file a qui tam case, relator's counsel should perform all possible due diligence on the question of materiality. It will assist the civil prosecutor for whom the case may be one of first impression, maximize everyone's time and resources, and bolster credibility for the case. Of course, explore whether relator had any insight into the government contractor's communications or disclosures (or lack of these) with government contracting officials. If not, there are still meaningful other steps to take. Determine whether other False Claims Act enforcement actions have resolved similar allegations or liability theories thereby demonstrating materiality and share those with the civil prosecutor who can reach out to the Department of Justice team that handled the other case to maximize learnings and information-sharing. Also,

review other agency actions or warning letters relating to procurement practices or debarment, or GAO/OIG/CRS reports finding similar allegations material. From our experience, there are always statements made in one or more of these various contexts to bolster the materiality of the allegations your relator is bringing to light.

- **The civil prosecutor likes the qui tam case, but the (defrauded) agency does not.**

Make no mistake about it, the agency matters. Multiple agencies may be at play including the contracting agency (e.g., DoD) and the agency or agencies (e.g., U.S. Army) receiving the goods or services. These agency officials are responsible for every aspect of defense contracting, from solicitation, to award, to administration, to payment. Action or inaction by the agency officials coupled with knowledge of what allegedly made the claim false may help or conversely hinder your argument that the false claim was "material" under the False Claims Act. If these agencies are not in agreement with your theory of the case or its materiality to the agency rules and regulations, it will be more challenging for the success of the case.

Pre-disclosure discussions can be pivotal and can motivate the agency early on or ward away the filing of a qui tam case. Relator's counsel do not wish to waste their time and resources, or the civil prosecutor's time and resources, on a case that is dead on arrival, or allow a would-be whistleblower to stick their neck out for a case that is dead on arrival. Test the water with your civil prosecutor who in turn can test the water with the agency before filing. In addition, encourage the civil prosecutor to reach out to the contracting officials immediately after filing, understand the additional evidence necessary to evaluate FCA liability before issuing a subpoena or civil investigative demand, wait for production of documents before sending agents to interview witnesses, and amass an investigative team to include DCIS, OIG, and agency counsel.

- **The government knowledge defense**

Virtually every government contractor will try to avail itself of this defense in a qui tam case. Parsing this defense will likely be the most critical aspect of the government investigation. The civil prosecutor with the assistance of relator's counsel must get into the weeds. For one thing, government knowledge is a misnomer because the contractor needs to prove government knowledge and approval of the allegedly fraudulent conduct. Also, the government as a monolith is not the appropriate target for proving this affirmative defense. Only certain officials, normally the government contracting official, are authorized to approve contract terms or contract modifications. If the claim of government knowledge and approval is placed squarely on the appropriate official's action or inaction, then you are in the right arena for the fight. However, this is rarely the case from our experience. The fight often centers around the knowledge of those on the receiving end of the government contracts whether it's a recipient of the goods or the machinist who is installing parts, but their knowledge is unlikely to be relevant because these are not the government officials who are knowledgeable of the government contracts or regulations or who approved the government contracts. No one person including those on the ground can authorize a deviation from the contract specifications. Contract specifications (and subsequent modifications) are the result of a detailed and precise process often codified in the FAR or DFARS. Accordingly, contracting officials and those on the receiving end of the government contracts, as well as others along the chain, have different responsibilities and information depending on where they fall in these extensive processes.

- **Throwing the government contracting official under the bus**

Much can be said about this subject because so much responsibility is placed on the contracting official in False Claims Act cases involving government contracts. And from our experience, such placement is usually unwarranted. In the first instance, the government (including the contracting official) does not have the expertise involving the goods or services provided under the government contract. In fact, this is precisely why the government pays government contractors enormous sums (at taxpayer expense) to provide the goods and services. Think about it. The government (even as a monolith) does not have the expertise of building fighter jets or providing cybersecurity protections for government data, for example. The government relies almost entirely on specialized government contractors and has no choice but to trust a contractor's representations about their goods and services. Government contracting officials typically take contractors at their word as to whether they can perform and have performed the contract obligations; they do not normally look behind those representations because it is not feasible for them to do so.

Further, in evaluating fraud schemes, some of which are quite complex to unpack, it is important to get into the weeds of precisely what information the contractor provided the government official to obtain approval for the deviation from the contract terms and whether an argument can be made that the official was exploited. Consider whether the facts demonstrate the contractor was fully transparent with the contracting official. And if there was a violation of the contract or a regulation, did the contractor clearly inform the contracting official that it intended to deviate from or violate the contract or regulation and obtain approval from the official after full disclosure of the implications. Explore all the facts to whether the disclosure was full and transparent and whether the contracting official had the expertise, background, and knowledge of the surrounding legal rules to understand or appreciate the details. The goal is to evaluate whether the contractor was honest as a matter of law.

- **The Government continues to contract with and pay claims to the defendant.**

Plenty of caselaw has made clear that it is inappropri-

ate to rely on continued payments as evidence of non-materiality when the extent of the government's knowledge is disputed. Thus, if the government contractor does not expressly waive the government knowledge defense, as a practical matter the government likely has little choice but to continue to do business with the contractor during the pendency of an investigation and litigation. Normally, satellite litigation on the same underlying facts is also counter-productive as all parties would normally agree. Further, the False Claims Act is not intended to put a contractor out of business but rather to recover misspent funds and deter future misconduct.

- **Damages cannot be precisely calculated, or the government got what it paid for**

Damages under the False Claims Act may be liberally calculated to ensure that the government is at least made whole, and it is well accepted that the computation of damages does not have to be done with mathematical precision but, rather, may be based upon a reasonable estimate of the loss. The multiplier is intended to deter future misconduct.

Further, this is what settlements are for and by their very nature, settlements are compromises. From our experience, it is the rare (or non-existent) case in which damages can be assessed at the time of filing before all the elements of the False Claims Act have been assessed (falsity, materiality, scienter). However, it is still possible for relator's counsel to propose potential damages theories or models at the time of filing to inform the civil prosecutor and help to direct the investigation. Certain cases present more challenges but even those are not without commonsense solutions. As one example, dozens of highly successful False Claims Act small business cases have been resolved even where the government got what it paid for in terms of goods or services were provided. As another example, in a case alleging the failure of cybersecurity protections, we can think of at least three ways damages can be assessed: (a) the entire contract value if all sensitive government data used on cloud computing or in software may have been compromised; (b) contract valuation for guaranteeing the cybersecurity of sensitive government data, including what it would have cost the contractor to provide the necessary protections and personnel promised; (c) cost of remediation and response efforts to these cyber incidents, including the thousands, of hours required from government information technology specialists to respond and recover from these incidents.

In short, there is no set formula or practical limitations for determining the government's actual damages for a False Claims Act case. Sometimes the parties (including contractors that acknowledge litigation risk) must put on their thinking caps and be creative in calculating damages for settlement. Simply put, there is no commonsense argument that where fraud occurred, or litigation risk exists for the government contractor, one cannot possibly assess the financial impact to the government.

Anyone who has investigated or litigated government contractor fraud cases knows, the devil is in the details. But notably, all these challenges outlined above, are routinely overcome as demonstrated by the government's continuing successes to hold government contractors accountable under the False Claims Act qui tam provisions. Below are recent examples.

- In one of the largest procurement settlements ever, Booz Allen Hamilton Holding Corporation paid $377 million to resolve relator's qui tam allegations that it improperly billed its government contracts for costs incurred in its non-governmental commercial and international contracts. Booz Allen was alleged to have obtained taxpayer funds for the costs of non-governmental activities that provided no benefit to the United States.
- Raytheon Company paid $428 million to resolve relator's qui tam allegations that it knowingly provided false cost and pricing data when negotiating with the U.S. Department of Defense for numerous government contracts and double billed on a weapons maintenance contract, leading to Raytheon receiving profits greater than the negotiated rates.
- Sikorsky Support Services Inc. and Derco Aerospace Inc. agreed to pay $70 million to resolve relator's qui tam allegations that they overcharged the Navy for spare parts and materials needed to repair and maintain the primary aircraft used to train naval aviators.
- DynCorp agreed to pay $21 million to resolve relator's qui tam allegations of inflating costs on U.S. State Department contract to train civilian police forces in Iraq.
- Consultants (Guidehouse Inc. and Nan McKay) agreed to pay over $11 million to resolve relator's qui tam allegations they failed to comply with cybersecurity requirements in a federally funded contract.

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