

Government
Contracts
BACK TO BASICS

SPECIAL COMPLIANCE AND ETHICS CONSIDERATIONS FOR CONTRACTORS

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Civil False Claims Act

- Civil False Claims Act (“FCA”)
 - 31 U.S.C. §3729 *et seq.*
 - Enacted in 1863 to punish contractors who defrauded the Union Army
 - Major amendments in 1986, 2009 and 2010
 - Since 1986, has become Government’s primary enforcement weapon for combating fraud, waste, and abuse
 - Rising number of actions, investigations, and referrals
- Also Criminal False Claims Act

Offenses under the FCA

- **False Claim** – **knowing submission** of a false claim to the Government or a recipient of Government funds, or causing another to submit a false claim.
- **False Record or Statement** – **knowingly making** a false record or statement material to a false claim.
- **Reverse False Claim** – **knowingly making** a false record or statement material to an obligation to pay money to the Government, or **knowingly and improperly avoiding** an obligation to pay money to the Government.
- **Conspiracy** – **conspiring to do** any of the above.

Qui Tam Provisions

- FCA actions may be initiated by individuals under the FCA's *qui tam* provisions
 - “Relators” (a/k/a “whistleblowers”)
- Relator must file a complaint under seal
- Relator must also serve written disclosures on DOJ describing “substantially all material evidence and information the person possesses”
- DOJ has 60 days to investigate and make intervention decision (extensions are common)

Damages and Penalties

- Measure of FCA damages: Difference between what the government actually paid and what it should have paid absent the alleged FCA violation ***trebled***
- FCA provided for penalties of \$5,500 to \$11,000 ***per claim*** and may be applied even in the absence of actual damages
- Increased to \$10,781 to \$21,563 for violations after November 2, 2015

Common FCA Examples

- Labor and Material Overcharging
- False Certifications of Compliance
- Product Substitution
- Unauthorized Substitution of Personnel
- Misrepresentations in Proposals
- Implied Certifications
- Failure to Monitor Subcontractors
- Kickbacks

Key FCA Trends

- Materiality post-*Escobar*
- “Knowing” \neq intent to defraud
- Causation not required; instead tendency to influence
- Implied certifications
- New damages theories and use of statistical sampling

Mandatory Disclosure

- Must disclose in a “**timely**” fashion “**credible evidence**” of:
 - Certain violations of criminal law
 - Violations of the Civil FCA
 - “Significant overpayments” that occur “in connection with the award, performance, or closeout” of a Government contract
- If fail to disclose when required, possible suspension/debarment
- Both a FAR contract clause and a requirement under the FAR suspension/debarment regulations

Suspension and Debarment

- Administrative exclusions from government contracting
- No new contracts, orders, option exercises, or contract extensions
 - Agencies cannot solicit offers from, award contracts to, or consent to subcontracts with
 - No “discussions” or placement in competitive range
 - Cannot act as agent, representative, or surety
- Continuation of current contracts
 - Agencies “may continue contracts or subcontracts . . .” (i.e., termination not required)
 - Prevailing practice is not to terminate
- To protect the government’s business interests and not to punish

Suspension and Debarment

- Key concept is “present responsibility”
 - Generally able to be trusted to deal fairly and honestly with the government customer on a going-forward basis
- Who can be suspended/debarred?
 - Individuals and entities (*e.g.*, corporations, partnerships, divisions, or business units within an entity)
 - Parents and affiliates, if warranted
 - Prime contractors, subcontractors, and/or participants at any tier
- Collateral impacts
 - State and local procurement reciprocity
 - Security clearances
 - Export licenses
 - Commercial customers

Compliance & Ethics Hotspots

- Code of business ethics and conduct
- Gifts, gratuities & entertainment
- Anti-corruption statutes
- Off-limits information
- Hiring decisions



Suspension and Debarment

- Currently active agencies
 - DoD / Army
 - DoD / Navy
 - DoD / DLA
 - EPA
 - SBA
 - GSA
- Recently active agencies currently on hiatus
 - DoD / Air Force
 - Commerce

Service Contract Act

- Applies to contracts
 - In excess of \$2,500 with Federal Government
 - Performed in the “United States”
 - Principally for “service” through the use of “service employees”
- Requirements
 - Pay prevailing minimum wage and fringe benefits in accordance with an *incorporated* wage determination or collective bargaining agreement

Service Contract Act

- Defining “Principally for Service”
- Identifying “Service Employees”
- Compliance Challenges
 - Mapping Issues
 - Calculating Wages and Fringe Benefits
 - Flow-Down Requirements
 - Recordkeeping
 - Penalties

Davis-Bacon Act

- Applicability
 - Contracts in excess of \$2,000
 - With the Federal Government or District of Columbia
 - For Construction, Alteration, Repair
 - SCA/DBA Mixed Contracts
- Coverage
 - Laborers and Mechanics
 - “Site of Work”

Davis-Bacon Act

- Key Requirements
 - Pay wages and fringe benefits in accordance with wage determinations
 - Weekly submission of certified payroll
- DBA v. SCA

Paid Sick Leave Executive Order

- Applicable to certain “new” contracts after 1/1/17
- Coverage: Employees who work “on or in connection with” covered contracts
- Accrual: One hour for every 30 hours worked or 56 hours per year granted up front

A Few Other Obligations

- Federal Minimum Wage for Contractors
- Non-Displacement of Qualified Workers (Service Contracts)
- Anti-Discrimination/Affirmative Action/Pay Equity

QUESTIONS?

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