"Implied Certification" of Government Contract Clauses Lead to False Claims Act Violations

Aerospace & Defense Group Newsletter

AN OVERVIEW OF THE RECENT U.S. COURT OF APPEALS RULING IN *UNITED STATES V. SCIENCE APPLICATIONS INTERNATIONAL CORPORATION* AND WHAT IT MEANS FOR FEDERAL CONTRACTORS

Last December, amid holiday preparations and plans, the U.S. Court of Appeals for the District of Columbia Circuit decided a case that could potentially affect every federal contractor. The ruling affirmatively applies the "implied certification" rule giving federal contractors another serious complication in the government contracting process, with no clear or uniform standards on the specific issue. It highlights the importance of federal contractors having robust, effective contractor compliance systems to minimize the risk of severe penalties. The case is *United States v. Science Applications International Corporation*, 626 F.3d 1257 (D.C. Cir. 2010), and its holding has created a great deal of buzz within the government contracting community. It spread anything but holiday cheer.

United States v. Science Applications International Corporation came about as follows: In 1992, the Nuclear Regulatory Commission (NRC) hired Science Applications International Corporation (SAIC) to provide technical assistance and expert analysis to help it develop scientific criteria to set future standards for the recycling and release of radioactive materials. They signed a contract for several reports and calculations. The contract included Organizational Conflict of Interest (OCI) provisions that were designed to prevent and identify potential conflicts of interest. SAIC agreed to "forego entering into consulting or other contractual arrangements with any firm or organization, the result of which may give rise to a conflict of interest with respect to the work being performed under [the] contract." If SAIC had reason to believe that it or any of their employees had entered into an agreement that involved a potential conflict of interest with the NRC, it had to make an immediate and full disclosure to the NRC.

In 1999, the NRC discovered that SAIC had contracts with two companies for work that placed it in conflicting roles. In these conflicting contracts, SAIC provided consulting work related to the recycling of radioactive materials. The NRC-SAIC agreement was terminated. The government (USG) then filed suit against SAIC under the False Claims Act (FCA), charging SAIC with knowingly submitting false or fraudulent claims by submitting payment invoices while in the conflicting relationships. The USG also alleged that SAIC knowingly made false statements to get false or fraudulent claims paid or approved when the company impliedly certified (by submitting payment requests) that it had no organizational conflicts of interest and that it would immediately inform the NRC if any such relationship developed.

SAIC claimed it did not submit false or fraudulent claims when it submitted payment invoices because the actual invoices did not include any express certifications that there were no conflicts of interest, and no contract provision attached such a certification to a payment request. The trial court let the issue go to the jury. The jury determined that SAIC was liable under the FCA. Accordingly, the District Court found that the company had falsely (impliedly) certified its compliance with the NRC's OCI requirements. The court further found that the OCI requirements were critical to the government's decision to pay the invoices. The jury concluded that the government suffered FCA damages of nearly $2.0 million (the full amount of payments it paid to SAIC). The trial court awarded treble damages and civil penalties totaling nearly $6.5 million.

SAIC understandably appealed. The Court of Appeals for the District of Columbia Circuit affirmed the "implied certification" rule applied by the District Court. In doing so, it held that requests for payment can be false or fraudulent under the FCA when the contractor has violated contractual requirements that are material to the government's decision to pay *even though the contract may not explicitly state that those requirements are a material condition precedent to payment*. Thus, when SAIC submitted invoices for

payment – for work admittedly done and *fully accepted* by the government – it had impliedly certified that it was in compliance with the OCI provisions of its contract, notwithstanding that (1) the invoices contained no certification language, and (2) there was no contract term that provided for any such certification.

IMPLICATIONS OF *SAIC*

With the *SAIC* ruling, the U.S. Courts of Appeals are almost evenly split upon application of the "implied certification" rule. Currently, six out of the eleven U.S. Courts of Appeals – including the Sixth Circuit, which encompasses Michigan – affirmatively apply the "implied certification" rule. Such disagreement among the Circuits speaks of the need for the U.S. Supreme Court to establish a uniform rule for the entire country so that national companies know how to avoid potential FCA violations. Although no one knows which way the Supreme Court will rule, the facts suggest that it will follow the rule set forth in SAIC or some close variant, since the Court of Appeals for the D.C. Circuit (the court that decided SAIC) enjoys considerable *gravitas* among its sister courts. (It is widely considered to be second in prestige only to the Supreme Court.)

After *SAIC*, FCA case law no longer allows for what could have been objectively determined in the past, i.e., the existence of a specific contract provision that requires an explicit certification in particular instances. These determinations are now subjective and open to jury findings. What was previously an objective legal determination that could easily be foreseen with fair precision now becomes a matter for factual determination by a jury, with attendant dispute and argument. This gives federal contractors another serious complication in the government contracting process, and there are no clear standards in this area.

PROTECTING YOURSELF FROM IMPLIED CERTIFICATION VIOLATIONS

Any contract provision required by law or regulation is a "material" provision within the meaning of *SAIC* because a contract may not be formed legally without its inclusion. Even those provisions where a degree of contracting officer discretion is involved, and necessary components associated with those provisions (such as the OCI mitigation plan in *SAIC*), may be considered a "material" provision, as well. Contractors should pay close attention to contract compliance and implement a vigorous compliance program. Although a robust, actively enforced compliance program is not a complete guarantee for avoiding FCA (and other potential) violations, it is certainly safer than having no plan at all. A company will be in a far better position to avoid the more horrific aspects of adverse government actions if it could affirmatively demonstrate that it had taken – and was taking – all reasonable precautions.

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