Early Application of the False Claims Act's "Implied Certification" Theory Causes Discomfort for Federal Contractors

Aerospace & Defense Group Newsletter

Last month's Alert reviewed the ruling in *United States v. Science Applications International Corporation (SAIC II)*[1] , which announced a clear "implied certification" theory of liability under the False Claims Act (FCA). In that case, the Court ruled that requests for payment can be false or fraudulent under the FCA when the contractor has failed to comply with contractual requirements that are material to the government's payment decision even where the contract itself does not condition payment on such requirements, and may not explicitly state that those requirements are a material condition affecting a contractor's right to payment. In other words, if a contractor submits an invoice for payment, it *impliedly certifies* that it has complied with all material provisions of the contract at all relevant times for which payment is sought. If it later develops that the contractor was not in compliance at any relevant time, FCA liability may arise.

This ruling leaves government contractors with few or no clear standards regarding what contractual provisions may or even could be considered "material" so as to trigger an FCA claim. At what point will simple disagreements over contract interpretations and other routine contract administration issues become the subject of False Claims Act allegations by the government? The courts are just beginning to address this, and the answer is not simple. A recent case that tackles this problem is *United States v. Kellogg Brown and Root Services, Incorporated*[2]. That case was decided by the United States District Court for the District of Columbia last month.

Kellogg Brown and Root Services (KBR) entered into a contract in 2001 with the Army to provide logistical services (e.g., dining facilities, transportation, maintenance, facilities management) in support of military operations around the world, including Iraq. The contract included various provisions concerning security, and it stated that the Army would provide protection for the contractors, that contractor personnel were not allowed to carry weapons unless provided by the government, and that the government would not reimburse KBR for any private security expenses that it may incur. The contract also made KBR subject to all of the sundry (and complex) Army security regulations for contract performance in highly dangerous places, such as Iraq.

Throughout its work in Iraq in 2003 (during the period after the removal of Saddam Hussein and before the Iraqi Interim Government took charge), KBR had hired private security, and it submitted invoices/claims to the government that contained those expenses. The government rejected those expenses, which totaled more than $100 million. The government later filed suit against KBR, claiming violation of the False Claims Act by its hiring of private security and billing those costs to the Army. KBR moved to dismiss the FCA lawsuit, contending that the acknowledged facts of the matter did not support any FCA violation.

To prevail under the False Claims Act, the government must establish three elements. It must show that (1) the contractor submitted a claim to the government; (2) the claim was false; and that (3) the contractor knew that it was false. Everyone – including KBR – agreed that KBR had fulfilled the first element: it had submitted a claim for payment to the government. The remaining, critical questions therefore related to the last two of the required elements: whether the claim was false; and whether KBR knew that it was false when submitted.

The government argued that the claim was false under the "implied certification" theory announced in the *SAIC II* case: KBR's invoices for reimbursement of the disallowed private security costs *impliedly certified* that it was in compliance with the terms of the contract. That implied certification was false because the contract prohibited payment for such security expenses. KBR asserted that the Court should dismiss the case because the contract did not expressly condition payment on compliance with the private security component, and moreover, that aspect of the contract was not material to the contract and the government's decision to pay.

The Court held that the ruling in *SAIC II* controlled KBR's case. The government, therefore, need only show that a contractor withheld information about its noncompliance with material contract requirements. In this instance, the government had tendered adequate proof that the private security component was *potentially* material to the agreement, and that KBR knew that it was material to the contract. It therefore permitted the lawsuit to proceed.

In denying KBR's motion, the Court made clear that not every instance of contractual non-compliance or disagreement concerning contract interpretation constitutes an FCA violation. It stated that, "[i]f a contractor violates an obscure statutory provision or minor contractual term while submitting a claim based on unrelated activities, it should not face the severe penalties of the FCA for merely tangential violations." It reiterated that the Court of Appeals, when ruling in *SAIC II*, had warned that the "implied certification" theory is prone to abuse by the government, and courts must therefore look to a strict enforcement of the FCA's materiality (the violation was material to the agreement) and scienter (actual knowledge of wrongdoing) requirements.

Although the District Court was plainly sympathetic to the dangers and practical effect of applying *SAIC II*, its decision on the KBR motion is small comfort to contractors. This situation obviously will be the subject of future Alerts, as it unfolds at the policy level, in the courts, or in Congress. We will remain vigilent, and every federal contractor should, as well.

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[1] *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010).
[2] *United States v. Kellogg Brown & Root Servs., Inc.*, No. 10-00530, 2011 U.S. Dist. LEXIS 85019 (D.D.C., Aug. 3, 2011).