

LEGAL ADVISOR



A PilieroMazza Update for Federal Contractors and Commercial Businesses

Looking Inward: Internal Investigations of Potential False Claims Act Violations

By Ambika Biggs



With the explosion in the number of FCA civil cases filed in recent years, it would behoove government contractors to ensure they are taking all steps necessary to avoid FCA liability. In addition to putting policies and procedures in place to prevent FCA violations from occurring in the first place, contractor's pre-cautionary measures should include conducting thorough internal investigations when a company first learns that it may have an FCA issue.

Under the FCA, anyone who knowingly presents a false or fraudulent claim to the government for payment or approval, or knowingly makes or uses a false record or statement material to a false or fraudulent claim, is civilly liable to the federal government. Anyone found to have violated the FCA must pay a civil penalty of between \$10,781 and \$21,563 for each violation, in addition to three times the damages the government sustains as a result of the violation. Contractors also may be subject to suspension or debarment, and could be held criminally liable for violating the FCA.

The number of civil FCA claims has risen dramatically in recent years, with the number of FCA claims initiated each year more than doubling from 2002 to 2017. Nearly 800 FCA claims were initiated in 2017, and more than \$3.7 billion in settlements and judgments were awarded to the government and *qui tam* relators, who are private citizens who file FCA lawsuits on behalf of the government.

In the context of government contracts, FCA claims can arise in a number of different ways. Government contractors can be held liable under the FCA for

submitting claims for payment for services not performed or products or services that they know do not meet the contractual requirements. Another common allegation is that a federal contractor improperly obtained or performed a contract that was set-aside for small businesses. The false claims could include a large business certifying (whether explicitly or implicitly) its small business or socio-economic status on a request for payment to the government, or a small business misrepresenting that it performed the required amount of work under the limitation on subcontracting when it had in fact subcontracted the work to a large business.

In order to reduce their exposure to FCA claims, companies must ensure that they have policies and procedures in place to prevent false claims or certifications from being made to the government. Contractors also should make sure that all employees are aware of and trained on the policies and procedures, and that they know to whom to report potential FCA violations.

Once a contractor has been alerted to a potential FCA violation, it must work quickly to conduct an internal investigation to determine if the FCA has in fact been violated. Such an investigation should consist of interviewing key employees who have knowledge of the potential violation, and collecting and reviewing relevant documents. Contractors can choose to conduct the investigation in-house themselves. However, a better practice is to hire outside attorneys to conduct the investigation for them, as attorneys well-versed in the FCA will be able to analyze the facts and applicable law and make a determination of whether the FCA has in fact been violated. An investigation conducted by outside counsel is protected by attorney-client privilege in most

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cases, which may not be the case if the investigation is conducted in-house.

After conducting an internal investigation, outside counsel can prepare a report of its findings and recommendations. The report can include advice regarding whether the contractor is required to report the incident to the government since such a determination is not always clear, which Ms. Unger explains in her article on the mandatory disclosure rule.

Furthermore, attorneys can advise clients on any employment actions they should take in the wake of such an investigation. While businesses will want to protect themselves by taking disciplinary actions against the perpetrators of FCA violations, they must be careful not to take any adverse actions against employees who report FCA violations, as the FCA has a provision that prohibits employers from taking any adverse employment action against whistleblowers who take actions to stop an FCA violation. Many FCA cases are initiated by disgruntled employees or former employees because *qui tam* relators can receive between 15 to 30 percent of the recovery in an FCA case.

Contractors must be diligent in protecting themselves from FCA liability. We have extensive experience in advising clients on the policies and procedures they should have in place to avoid FCA violations, as well as conducting internal investigations and advising clients on any actions that they should take based on the results.

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