The False Claims Act – Investigative and Litigation Support Services

CHESS CONSULTING LLC

Complex Accounting Disputes
Investigations
Regulatory Compliance

Overview of the False Claims Act

The False Claims Act (the "FCA" or the "Act"), 31 U.S.C. § 3729 – 3733, was passed in 1863 and is sometimes referred to as the "Lincoln Law." The Act, which was amended most recently in 2010, has been and is one of the most potent and imposing tools available to the U.S. Government (the "Government") to combat fraud, waste, and abuse in federal contracting. Due to the severe nature of its penalties, in some cases its application may be considered reasonably inequitable and unjust (e.g., when it is applied due to a contractor's mistake or oversight in trying to comply with a contract's numerous and complex requirements).

Under the FCA, liability is incurred by anyone who "knowingly" presents, or causes to be presented, a false or fraudulent claim for payment or approval; or makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim. 31 U.S.C. § 3729(a). To establish the knowledge required for liability, a plaintiff must show that the defendant, with respect to information, acted with: (1) "actual knowledge" of the falsity, (2) deliberate ignorance of the truth or falsity of the information, or (3) reckless disregard of the truth or falsity of the information. It is noteworthy that the Act states that "no proof of specific intent to defraud" is required. Please refer to the Act for a more complete explanation of the requirements, including descriptions of actions in addition to those cited below that can subject a contractor to liability under the Act. 31 U.S.C. § 3729 (b)(1).

Government contractors, grantees, and others (hereafter "contractors") accused of violating the FCA may be pursued independently by the Department of Justice (the "DOJ") as well as by private plaintiffs, known as "relators." Frequently, relators are employees or former employees of the defendant. These relators, often referred to as "whistleblowers," bring qui tam (Latin for "[w]ho sues on behalf of the king as well as himself") actions in the name of the government. In fact, one of the original objectives of the FCA was to encourage whistleblowers to bring suits on behalf of the government, which is encouraged by a monetary incentive. While this incentive may cast doubt on the credibility of whistleblowers, it seems to have accomplished that goal.

In a qui tam action, the relator receives between 15% and 30% of any recovery, depending on whether the Government elects to intervene. 31 U.S.C. § 3730(d)(1) and (2). Thus, relators are incentivized to file FCA actions. Likewise, members of the plaintiff's bar are incentivized to accept qui tam cases as they often receive a portion of the relator's recovery as a contingent fee, in addition to the statutory attorney fees and costs. The number of qui tam actions has risen in recent years. For example, the DOJ has reported that over 700 cases were filed in both 2014 and 2013, an increase from 652 cases in 2012 and 635 cases in 2011. Approximately two thirds of the cases in each of these years involved matters in which the Department of Health and Human Services was the primary government agency. Only 6.5%, 8.7% and 10.3% involved Department of Defense matters in 2011, 2012, and 2013, respectively (http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf).

An FCA violation can have huge consequences for a federal government contractor. The Act currently requires payment of both treble damages (i.e., three times the actual damages sustained by the Government) and civil penalties in a range of $10,781 to $21,563 per "claim," irrespective of actual damages. It is notable that, for purposes of the penalty provision, some courts have interpreted a "claim" as constituting each individual invoice or request for payment submitted to the Government. Accordingly, the penalties assessed to a contractor can be massive (e.g., hundreds of millions of dollars), especially given that under some government contracts, thousands of invoices may be submitted to the Government throughout the performance of the contract. In view of the magnitude of the potential financial consequences, coupled with significant ambiguities in the way various courts have interpreted certain aspects of the Act, it is not surprising that most contractors facing an FCA suit decline to take the government to court even when the allegations are weak or without merit. To avoid a court judgment, contractors often agree to substantial settlements with the government, which also benefit relators and their legal counsel. As one court noted "[b]ecause the risk of loss in an [FCA] case causes potentially devastating penalties, unlike most litigation or even an administrative recoupment, companies are discouraged from even attempting to defend themselves in court." Ohio Hosp. Ass'n v. Shalala, 978 F.

Supp. 735, 740 n.6 (N.D. Ohio 1997), aff'd in part, rev'd in part, 201 F.3d 418 (6th Cir. 1999).

Additionally, the Supreme Court's decision in *Universal Health Services v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016), has resulted in the expansion of the FCA to include not only expressly false statements, but any "statement that misleadingly omits critical facts." In its decision, the Supreme Court limited these claims to include only violations where "the Government would be entitled to refuse payment were it aware of the violation," As a result of this decision, it is expected that the number of FCA cases will increase. Also, companies will need to review their contracts to ensure they are not making any false implied certification that could result in an FCA case.

The Chess Consulting Advantage

Chess Consulting's highly experienced team of government contract accounting, investigation, and regulatory compliance experts has worked with contractors and their legal counsel on a multitude of FCA matters over many years. Our clients have included some of the largest government contractors in the country spanning a wide variety of industries, including aerospace and defense, healthcare, construction, technical services, and higher education. Our experience also includes expert testimony in court on behalf of a large aerospace and defense contractor, as well as testimony before the U.S. House of Representatives Committee on Energy and Commerce on behalf of Stanford University.

Given the nature of FCA actions, we work under the direction of the contractor's legal counsel to provide investigative services, including technical accounting; internal control and government contract regulatory guidance and analysis; data collection review and analysis; interview support; and other services that counsel may require. Our engagement teams are comprised of Certified Public Accountants, Certified Fraud Examiners, forensic accountants, corporate governance specialists, and regulatory experts. We understand how to work with and communicate effectively with legal counsel, management, and boards of directors. We specialize in combining government contracting and industry knowledge and experience with investigative techniques to uncover and interpret the facts surrounding alleged FCA violations and effectively convey those facts to legal counsel and others, as appropriate. Our professionals also analyze and, if necessary, reconstruct books and records, evaluate the application of government contract accounting cost and pricing principles, and evaluate the design and operating effectiveness of internal controls and business systems relevant to the alleged FCA violations. We also assist counsel with other aspects of the litigation process, including negotiation and settlement support and providing expert testimony.

Risk Assessment, Compliance, and Monitoring

In addition to helping contractors and their legal counsel to respond promptly and effectively after an FCA allegation has been made or a suit initiated, we also help contractors identify and remediate FCA compliance risks before they lead to a violation or alleged violation of the Act. Through comprehensive risk assessments, often conducted in conjunction with legal counsel, we give clients the tools and knowledge to understand their vulnerabilities and to design and implement policies, procedures, and controls to remediate and mitigate their risks. Additionally, we help contractors identify, assess, and mitigate the FCA compliance risks associated with potential mergers, acquisitions, and strategic alliances. We also specialize in educating contractor employees about red flags and response strategies, helping to ensure prompt detection through automated systems, and in developing effective mechanisms for internal reporting of potential FCA violations, thereby helping contractors to meet their FCA compliance requirements, as well as their responsibilities to their employees, shareholders, and other stakeholders.