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FEATURE COMMENT: False Claims, Presentment And The Possible Future Of Iraqi Reconstruction Litigation

Late last year, the U.S. Court of Appeals for the Sixth Circuit rejected a U.S. Court of Appeals for the D.C. Circuit interpretation of the False Claims Act stating that, to be liable for an FCA violation under 31 USCA § 3729(a)(2), a contractor must present a false claim to the U.S. Government. See *U.S. ex rel. Sanders, et al. v. Allison Engine Co., et al.*, No. 05-3502 (6th Cir. Dec. 19, 2006) (rejecting the interpretation of 31 USCA § 3729(a)(2) found in *U.S. ex rel. Totten v. Bombardier Corp. and Envirovac, Inc.*, 380 F.3d 488 (D.C. Cir. 2004)). Instead, the Sixth Circuit held that the plain language and legislative intent of the FCA does *not* require that the false claim be presented to the Government if a person “knowingly makes ... a false record or statement to get a false or fraudulent claim paid or approved by the Government.” This FEATURE COMMENT discusses this decision and its implications, particularly for contractors doing business in Iraq, and offers several practitioners’ points.

Background—The FCA, 31 USCA § 3729(a), provides, in relevant part:

Any person who:

- (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; [or]
- (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

... is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus three times the amount of damages which the Government sustains because of the act of that person ...

Passed in 1863, revised in 1982 and amended in 1986, the FCA is designed to curb fraud against the Government by, among others, contractors engaged in the performance of Government contracts. Importantly, the statute is enforceable not only by the U.S. Government, but also by private citizens who learn of fraud against the Government (relators). As part of the 1982 revisions, the text set out above was separated from a single paragraph into the numbered sections that exist today. Of interest here, the text of § 3729(a)(1) specifically requires that a false claim be presented to the Government for payment, while the text of § 3729(a)(2) contains no such explicit requirement.

The Totten Decision—In *Totten*, the D.C. Circuit interpreted § 3729(a)(2) to require that a person must use a false record or statement to get a false claim paid by the Government and present such a record or statement to the Government. While § 3729(a)(2) does not mention a presentment requirement, the *Totten* court found that the history of the FCA, along with several canons of statutory construction, requires that the words “*by the Government*,” included at the end of § 3729(a)(2), be interpreted as Congress’ way of “referring back to the presentment requirement of section 3729(a)(1).”

Toppling Totten: The Allison Engine Decision—In *Allison Engine*, the plaintiff-relators provided evidence that several false claims were knowingly submitted by lower-tier subcontractors and were ultimately paid with Government funds. The relators did not, however, provide evidence that these claims were presented to the Government. Following the *Totten* decision, the U.S. District Court for the Southern District of Ohio determined that no liability exists absent proof of presentment. As a result, the court granted the defendant’s motion for judgment as a matter of law.

On appeal, the Sixth Circuit rejected the *Totten* conclusion, holding instead that the plain language of § 3729(a)(2) does not specifically require that a false claim be presented to the Government. The *Allison Engine* court pointed out that 31 USCA § 3729(c) defines a “claim” as “any request ... for money or property ... if the United States provides any portion of the money or property which is requested or demanded [or any money which is used to reimburse a contractor] ...” The court concluded that this language, in conjunction with § 3729(a)(2), demonstrates that “so long as it can be shown that the claim was paid with government funds,” there is “nothing in [the] language to suggest that the claim must have been shown to have been presented to the government.”

The *Allison Engine* court buttressed its interpretation of the statutory text with citations to legislative history indicating that the FCA “is intended to reach all fraudulent attempts to cause the Government to pay out sums of money,” and that “a false claim is actionable ... [even though] the claims ... were made to a party other than the Government, if [such payment would result] in a loss to the United States.” The court distinguished the meanings of §§ 3729(a)(1) and 3729(a)(2), finding that § 3729(a)(1) deals with presenting a false claim to the Government, regardless of whether the claim is paid, while § 3729(a)(2) addresses the situation in which a contractor is paid with the Government’s money, in reliance on the contractor’s fraudulent record or statement. This, the *Allison Engine* court believed, effectuates the Supreme Court’s interpretation that the FCA is a remedial statute and should be construed broadly to protect the public fisc from fraudulent claims in any form.

Since the Southern District of Ohio granted the defendant’s motion for judgment as a matter of law on the ground that the relators did not provide evidence of presentment, the Sixth Circuit reversed the district court and remanded the case so that the jury could decide whether the defendants had violated the FCA.

Practical Implications of the *Totten/Allison Engine* Divergence—The practical implications of the *Allison Engine* decision are wide-ranging. The decision’s broadest interpretation allows for FCA liability if a false claim is submitted to any entity, so long as that entity is paying any percentage of such false claim with Government funds. This includes submitting fraudulent statements or records to prime

contractors, subcontractors, organizations operating under federal grants, and even foreign entities that are wholly or partially financed by the U.S. Government. This last set of recipients is of paramount importance in the wake of recent events.

One of the most high-profile, continuing, contemporary issues concerns the abuse, both real and perceived, of the contracting processes used in Iraqi reconstruction. Several instances of alleged contractor abuse have garnered national media coverage, and the new Democratic-controlled Congress has made review of Iraqi reconstruction contracts one of its top priorities. Considering that, in the chaotic environment of modern Iraq, non-governmental agencies are contracting with private companies, one should expect that FCA litigation will increase and that the divergence of opinion between the *Totten* and *Allison Engine* courts will spur litigation that might otherwise be discouraged if actual presentment to the Government were held uniformly to be a requirement under § 3729(a)(2).

To illustrate, consider a recent contracting abuse case that arose from reconstruction in Iraq: *U.S. ex rel. DRC, inv., et al. v. Custer Battles, LLC, et al.*, 444 F. Supp. 2d 678 (E.D. Va. 2006). In that case, Custer Battles contracted with the Coalition Provisional Authority to provide support services for the CPA’s Iraqi Currency Exchange project, which sought to replace the currency previously used in Iraq. For this effort, the CPA paid Custer Battles an advance that was partially funded by the U.S. In attempting to meet its contractual requirement to justify this advance, Custer Battles allegedly submitted false claims to the CPA. Following *Totten*, the U.S. District Court for the Eastern District of Virginia held that because Custer Battles presented false claims to the CPA and because those claims were not in turn submitted to the U.S. for payment, Custer Battles did not violate § 3729(a)(2).

Had the Eastern District of Virginia decided *Custer Battles* with the benefit of the subsequent *Allison Engine* opinion, the case may have come out quite differently. The *Custer Battles* defendants submitted alleged false statements to a non-governmental entity and, in return, received monies provided by the U.S. Government. Because presentment is not required under the Sixth Circuit’s formulation, the relator’s ability to show that Government money was used to pay the false claim would arguably be sufficient to violate § 3729(a)(2). Thus, the implica-

tions of *Allison Engine* for Iraq contracting are obvious: a contractor doing business with virtually any entity operating in Iraq may be subject to allegations of FCA violations if the entity pays the contractor with U.S.-provided funds.

Practitioners' Tips for a Changing Environment—Because *Allison Engine* removed the presentment requirement from § 3729(a)(2), at least in the Sixth Circuit and, perhaps, in other circuits that have not considered the issue, it will embolden relators' efforts to pursue recoveries under the FCA qui tam provision. Further, the *Allison Engine* court's expansive language on the scope of the FCA anti-fraud provisions may inspire future decisions to construe that statute more broadly. To protect your company against a qui tam suit, we recommend the following tips any time federal funds are involved:

- Ensure that contract and program personnel fully understand the terms of any agreement before representing to the Government, a prime contractor or other organization that your company has met all applicable requirements governing the expenditure of Government funds.
- Document any disputes with the Government or other customers concerning the meaning of contract terms or performance requirements, so you can demonstrate later why your company believed it performed satisfactorily under its interpretation of the contract.
- Fully document your performance of your agreement as it relates to billings. Remember the phrase, "if you cannot justify, you cannot bill that guy."

- Remember that under *Allison Engine*, any false communication that may arguably relate to an invoice or payment requirement could be construed as a false record or statement. Consider channeling all communications between your company and the contracting entity through as few people as possible to ensure that only personnel educated about the FCA are making substantive representations regarding the performance of the contract.
- Educate your employees about the penalties associated with an FCA violation. For each infraction, a contractor is liable for a civil penalty of \$5,500 to \$11,000, plus three times the damages suffered by the Government as a consequence of the false claim. Criminal penalties also may apply in some cases.

Conclusion—Pending Supreme Court resolution of the split between the Sixth and D.C. Circuits, uncertainty over the vitality of the presentment requirement's applicability to § 3729(a)(2) will continue. This uncertainty will open the door to future litigation, which, in turn, will drive up contractors' costs and make contracting with the Government an increasingly risky business. Contractors should exercise caution and take steps that will allow them to *win* any possible litigation that may show up on their doorstep.



This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by Paul A. Debolt, partner, and Jackson T. Reams, associate, of the Government Practice Group at Venable LLP.

