Avoiding False Claims Act Liability in Government Contracts Responding to COVID-19

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The U.S. Government has enacted the Coronavirus Aid, Relief, and Economic Security (CARES) Act, a $2 trillion COVID-19 relief package intended to bridge the economy and provide additional funding for strategic measures to stop the spread of COVID-19. The size and scope of this relief package are unprecedented in our country's history. Within the Act are authorizations for massive distribution of federal funds to provide relief to private companies and individuals and to contract for the provision of such relief. Further federal relief packages are expected to be proposed and passed in the coming weeks that will provide additional funding for the COVID-19 response effort.

With so much federal funding at stake, and being distributed in emergent, challenging, and ever-changing circumstances, improper claims for funds—both intentional and unintentional—are inevitable. This article addresses how those entering into contracts with, or seeking grants from, the federal government for such funding can insulate themselves from liability for such improper claims.

Liability Under the False Claims Act

The False Claims Act (FCA)[1] creates and defines potential criminal and civil exposure to liability for such improper claims. Thus, understanding the bases for and ways to avoid FCA liability is critical for those who may enter into government contracts to provide relief services, or who seek grants from the government for funding, under the CARES Act.

The FCA generally establishes civil liability for anyone who:

1. Knowingly presents (or causes to be presented) a false or fraudulent claim to the federal government for payment;
2. Knowingly makes, uses, or causes to be made or used, a materially false record or statement to support a false or fraudulent claim for payment made on the federal government;
3. Knowingly makes, uses, or causes to be made or used, a materially false record or statement to conceal, avoid, or decrease an obligation to pay money or transmit property to the federal government; or
4. Conspires with others to commit a violation of the False Claims Act.[2]

Those entering into contracts with the United States government typically must agree to a set of specific requirements, including certification obligations with respect to how taxpayer money is spent. When improper claims for payment under such contracts are made, the FCA provides for both criminal and civil liability, and allows for treble damages and other penalties. The

1 31 U.S.C. §§ 3729-3733.
2 31 U.S.C. § 3729(a)(1).

FCA is thus one of the most powerful tools by which the federal government can recover money improperly paid to its contractors. Indeed, in 2019 alone, the United States recovered over $3 billion in FCA claims.[3]

The FCA also has a *qui tam* provision that allows private individuals to pursue FCA litigation on the government's behalf. This furthers the power of the FCA to aid the government in identifying and redressing improper claims by expanding the potential for lawsuits to address such claims and broadening the potential exposure of companies contracting with the United States government. The FCA creates an incentive for *qui tam* suits by giving whistleblowers (or those who purport to be whistleblowers) a stake (up to 30 percent) in any recovery. Indeed, most false claims actions are filed under the FCA *qui tam* provisions; in 2019 alone, of the more than $3 billion the United States recovered in FCA claims, $2.1 billion arose from lawsuits filed under the FCA's *qui tam* action, and whistleblowers were awarded $265 million during the same period.[4]

Notably, while the civil False Claims Act uses the term "knowingly," contractors must remember that the knowledge component is different from the scienter requirement for criminal fraud. "Knowingly" in the context of the civil False Claims Act merely requires "reckless disregard for the truth on the matter asserted." Roughly, this standard would equate to "gross negligence" in the context of a civil case. When applied by auditors and AUSAs throughout the country during an investigation, however, the applicable standard will be much closer to simple negligence. Thus, contractors and grantees should know that during this time, issues that were once deemed matters of contract administration may now serve as the basis for a claim under the civil False Claims Act.

Department of Justice History of Using the FCA to Address False Claims for Disaster Relief

Congress knew of the potential for fraudulent or otherwise improper claims associated with the expenditure of large sums of money when drafting the CARES Act. For example:

- The Act itself establishes an Office of the Special Inspector General for Pandemic Recovery, which will be headed by a presidentially appointed, Senate-confirmed Special Inspector General. This office will have a $25 million budget and a five-year mandate to conduct, supervise, and coordinate audits and investigations of the making, purchase, management, and sale of loans, loan guarantees, and other investments made under the Act.[5]
- Several members of Congress have already called upon the Department of Justice to establish a task force specifically charged with monitoring and investigating violations of the False Claims Act under federal programs supporting the response to COVID-19.[6]

Similar oversight and enforcement measures have been undertaken with past relief efforts, relying on the FCA as the principal tool to address the misuse of government relief funding.[7] These efforts and provisions reflect the U.S. government's

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3 January 9, 2020 Department of Justice press release, *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019.

4 *Id.*

5 H.R. 748 (CARES Act) § 4018, *available at* https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf

6 March 24, 2020 letter from Members of Congress, including two co-chairs of the Whistleblower Protection Caucus to Attorney General William P. Barr, *available at* https://raskin.house.gov/sites/raskin.house.gov/files/DOJ%20coronavirus%20task%20force%20to%20combat%20fraud.pdf.

7 For example, in connection with the Hurricane Katrina recovery effort, the U.S. Department of Justice established the Hurricane Katrina Fraud Task Force in coordination with the Federal Bureau of Investigation (FBI), the Federal Trade Commission, the Postal Inspector's Office, and the Executive Office of the United States Attorneys. (See September 8, 2005 Department of Justice press release: https://www.justice.gov/archive/opa/pr/2005/September/05_ag_462.html.) Similarly, in response to Hurricane Harvey, the Acting United States Attorney for the Eastern District of Texas announced the creation of a Disaster

acknowledgment that its substantial expenditures to address the impact of COVID-19 will invite fraudulent or improper behavior. Those contracting with the government in connection with COVID-19 relief should expect heightened scrutiny once the pandemic passes and the auditors begin to review how the funds were spent with the clarity of "twenty-twenty" hindsight.

FCA cases arising out of prior relief efforts likewise demonstrate that the United States will doggedly pursue actions against contractors providing disaster relief, even if such efforts take years. For example:

- *U.S. v. Lighthouse Disaster Relief et al.*[8] – The United States filed this action against Lighthouse Disaster Relief and its partners ("Lighthouse"), alleging that Lighthouse breached its contract to build and operate a base camp to house and feed Hurricane Katrina first responders. The complaint alleged that Lighthouse made false statements to Federal Emergency Management Agency (FEMA) employees in order to be paid prematurely, and then failed to build for and house the number of first responders required by their contract. After more than three years of litigation, in April 2009, the government finally settled its claims against Lighthouse for $5.3 million, which included a judgment of $4 million on top of another $1.3 million already garnished by the government.
- *United States ex rel. Jacquet Construction Services.*[9] – A whistleblower filed a *qui tam* action against Jacquet Construction Services (JCS), alleging FCA violations for claims made during the first two months of JCS's multi-year federal contract for maintenance and deactivation of facilities used by FEMA in response to Hurricane Katrina. Specifically, the whistleblower alleged that JCS submitted claims for payment for work that JCS knew its subcontractor had not performed. Although the Department of Justice ultimately declined to pursue criminal charges against JCS, the United States nevertheless intervened in the *qui tam* plaintiff's civil FCA suit in June 2011, four years after the initial suit was filed. The parties settled the case (for an undisclosed amount) in December 2012, six and a half years after the alleged violations occurred and five and a half years after the initial FCA suit was filed.

What this means is that many months, and often years, after the dust has settled on the COVID-19 pandemic, when the frenzy and urgency of providing our first responders and healthcare workers with much-needed supplies, infrastructure, and resources passes, the government may second-guess response efforts by contractors. Moreover, many contractors and recipients may be found to have failed to meet a general, yet arguably material obligation, and, as a result, may be accused of violating the FCA. Accordingly, it is critical that contractors and grantees take steps now, at the outset of receiving this large infusion of federal government contracting dollars, to protect themselves and militate against the horde of auditors and investigators that will ultimately come along, seeking to recover funds and potentially assessing significant penalties.

Five Important Steps to Avoid FCA Liability

The *Lighthouse* and *Jacquet* cases are just two examples reflecting the seriousness of the government's efforts, over many years if necessary, to recover for improper claims submitted in connection with disaster relief. As these cases and others make clear, it is imperative that those contracting with the government to aid in the response to COVID-19 take the following steps to ensure that their claims for federal funds are proper and appropriate:

Fraud Task Force, comprising local, state, and federal agencies, to combat disaster relief fraud activity. (See October 19, 2017 United States Attorney's Office for the Eastern District of Texas press release: https://www.justice.gov/usao-edtx/pr/hurricane-harvey-ravaged-eastern-district-texas-establishes-disaster-fraud-task-force.)

8 M.D. La., Case No. 06-161.

9 E.D. La., Case No. 07-3584.

- *First*, carefully review any government solicitations before entering into contracts with or accepting grants from the government. Contractors or recipients at any tier must be aware *from the outset* of:
  1. The particular and specific requirements of any contract or grant award, including the cost principles and procedures of FAR Part 31 and the Office and Management and Budget's uniform guidance on cost principles and audit requirements at 4 C.F.R. § 200;
  2. What work is covered by the contract, and therefore is appropriate for submission of claims for payment; and
  3. What potentially related work may not be covered by the contract and therefore is not appropriate for submission of claims for payment.
- *Second*, contractors and recipients should establish *at the outset* a detailed plan for compliance with the specific performance requirements in the contract. This detailed plan should include the identification of specific personnel who are expressly responsible for reviewing each claim for payment (including those that will be submitted on behalf of subcontractors) to ensure compliance with the contract terms and requirements *before* the claim is sent to the government. Contractors without prior experience performing government contracts should consider hiring personnel with federal contracting experience to perform this compliance-monitoring function.
- *Third*, contractors and recipients must maintain detailed written records of:
  1. The contract documents, including proposal documents, the contract, task orders, purchase orders, change orders, amendments, and modifications;
  2. The work performed for which the government is being billed;
  3. Any communications with government personnel regarding performance under the contract;
  4. Verification that contractor personnel dealt with a federal employee who had the actual authority to bind the government; and
  5. The contractor's efforts to ensure compliance with the contract terms and any other requirements.
- *Fourth*, if subcontractors are hired to perform any of the contracted services, the subcontractors must be thoroughly vetted to ensure not only that they have the appropriate personnel and requisite experience to perform work in accordance with the terms of the contract, but also that they have the skills and experience to properly comply with documentation and reporting requirements under the terms of the contract and consistent with any other federal requirements that have been flowed down to the subcontractors. Contractors should identify specific personnel responsible for monitoring work performed by subcontractors to ensure compliance and require subcontractors to periodically certify that they have complied with their compliance obligations.
- *Fifth*, to the extent any questions or concerns arise during the course of contract performance, contractors should immediately consult with government contract professionals and, where necessary, legal professionals. In many cases, the issues that eventually lead to FCA exposure could have been corrected in the course of performance if they had been addressed promptly.

While it is no secret that the government and the country need all available help to fight against COVID-19, contractors and grant recipients need to be aware of the challenges of working with the federal government in the midst of this crisis and the importance of taking steps to protect their organizations from the eventual audits and investigations, as well as the second-guessing, that accompany this process.