VENABLE LLP

government contracts update

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AUTHORS

**Bill Walsh**
wlwalsh@venable.com
703.760.1685

**Scott Hommer**
jshommer@venable.com
703.760.1658

**Lars Anderson**
leanderson@venable.com
703.760.1605

**Peter Riesen**
pariesen@venable.com
703.760.1981

**Patrick Quigley**
prquigley@venable.com
703.760.1602

**Keir Bancroft**
kxbancroft@venable.com
703.760.1653

# Federal Courts Hold That Failure To Disclose An OCI May Result In False Claims Act Liability

Government contractors should be aware of recent holdings by federal courts that False Claims Act ("FCA") liability may arise from the failure to disclose organizational conflicts of interest ("OCIs"). In one of the most recent decisions, issued by the United States District Court for the District of Columbia, the court held that a contractor's nondisclosure of an OCI under contracts with the Nuclear Regulatory Commission ("NRC") amounted to implied false certification, for which the Government may maintain an FCA claim. *United States v. Science Applications Int'l Corp* No. 04-1543 (D.D.C. May 15, 2008). The recent decision reflects the confluence of two key issues affecting the government contracting industry: an increase in OCI issues, and the Government's renewed focus on fraud in government contracts. Contractors should be aware of this confluence, particularly given the dual criminal and civil penalties available under the FCA, including the potential for treble damages for any injuries the Government sustains as result of a false claim. *See* 31 U.S.C. § 3729.

**Organizational Conflicts of Interest:** An OCI may exist where a firm's work under one government contract requires the firm to develop policies and regulations that may affect products manufactured by that firm or its competitors. This type of conflict might bias a contractor's judgment, and is known as an "impaired objectivity" OCI. Other types of OCIs include "unequal access to information," in which a firm gains access to nonpublic information that may provide the firm a competitive advantage in bidding for later government contracts, as well as "biased ground rules," where a firm sets the ground rules for a later government contract as part of its performance on a current contract. Contracting officers must include in the solicitation any conditions of award or restraints designed to prevent OCIs that are applicable to the contract, and winning firms are therefore responsible for compliance with these terms.

**False Claims Act:** The FCA imposes liability on any person who "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." 31 U.S.C. § 3729(a)(2). To establish an FCA claim, the plaintiff or "relator" must identify the statement that is alleged to be the false claim, then prove: (1) the defendant

made the statement to receive money from the government; (2) the statement was false; and (3) the defendant knew the statement was false. *United States ex Rel. Gross v. AIDS Research Alliance-Chicago*, 415 F.3d 601, 604 (7th Cir. 2005).

- The false claim no longer needs to be an express statement. Instead, the relator may argue that the defendant's false certification of compliance with a law, regulation, or contract provision should be "implied." Relators have invoked the implied certification doctrine in cases where a party that has certified its compliance with certain conditions of payment impliedly certifies its continued compliance with those conditions each time it submits an invoice, or where contractors violate applicable statutes, regulations, guidelines, manuals and contract provisions relating to the government contract at issue.

- Specific intent to make a false claim is not required for FCA liability to attach. Under the FCA, a person acts knowingly if he has actual knowledge of the information, acts in deliberate ignorance of the truth, or acts in reckless disregard of the truth.

***United States ex. Rel. Harrison v. Westinghouse Savannah River Co.***, 352 F.3d 908 (4th Cir. 2003): In *Savannah River*, the defendant held a contract with the Department of Energy ("DOE") to develop a $500 million In-Tank Precipitation facility to store radioactive waste. As part of the contract, the defendant worked with employees from another company, General Physics Corporation ("GPC"), to develop a training program for the employees who would eventually operate the facility. After acquiring DOE approval to subcontract the training program, the contractor awarded the subcontract to GPC, which was determined by the jury to have created an OCI. The jury thereafter found that the contractor had impliedly made false certifications that no OCIs existed each time it submitted an invoice to the Government. The district court then assessed a penalty of $7,500 to each of the twenty-six funding requests, for a total penalty of $195,000. Id. at 912-13. On appeal, the Fourth Circuit held that the contractor had acted with the requisite scienter since at least one employee knew of facts that made the no-OCI certification false, regardless of whether that employee knew the contractor was submitting the no-OCI certification. *Id.* at 919-20. Further, the Court found that FCA liability attached despite the fact that the employee who actually submitted the no-OCI certification lacked any knowledge of the OCI. *Id*. In light of the *Savannah River* holding, contractors certifying no OCIs must be vigilant of actions that may result in an OCI and must implement policies to ensure that employees share any knowledge of a potential OCI.

***United States v. Science Applications Int'l Corp.*** In the recent decision by the D.C. District, the defendant had two contracts with the NRC: one to assist the NRC in developing scientific standards for the release of low-level radioactive materials, and another to assess regulatory alternatives regarding the release of reusable low-level radioactive materials. Both contracts stated the importance of the contractor's neutrality and independence. For

each contract, the contractor certified that it did not have any OCIs and promised to forego entering into consulting or other contractual arrangement with any organization that would create an OCI. The Government alleged that the contractor made implied false OCI certifications by contracting with organizations that created the appearance of bias. In denying the contractor's motion for summary judgment, the court held:

- A contractor's failure to disclose an OCI constitutes a false claim under the FCA. *Id.* at 21. The court cited *Savannah River*, for its explicit rejection of a contractor's claim that the falsity of the no-OCI certification was not material to the government's decision to fund the contractor.

- Although some jurisdictions require the relator to prove that compliance with the statute, regulation, or contractual term was an express condition of payment by the Government, in D.C., the "express condition precedent" rule does not apply; rather, the D.C. courts consider whether the implied false certification is "information critical to the government's decision to pay." *Id.* at 20 (internal citations omitted). Because the contracting officer stated that he would not have requested payments for invoices had he known of the OCI, the court held that the OCI certification was in fact material.

- The contractor's assertion that the OCI certifications were not false was unconvincing since the contractor, although claiming it was unaware that another company was regulated by NRC, had stated in a letter to the NRC that the company was regulated. Further, a lack of actual bias apparent from the ultimate work produced is not determinative. Evidence that a company may have been biased was sufficient.

- At least one employee had knowledge, which is enough to survive the summary judgment motion. Additionally, the court noted that the collective knowledge doctrine may be applied "to conclude that a company's fraudulent intent may be inferred from all the circumstantial evidence including the company's collective knowledge." *Id.* at 32 (internal citations omitted).

**Practitioner Tips:** Federal agencies continue to focus on OCIs and may police OCI contract clauses more closely in the future. The large scale penalties available under the FCA, even where the Government is unable to prove damages, warrants government contractors' attention.

- Companies should be aware of OCI certification clauses in their government contracts and in all solicitations for which they prepare a bid. In certifying that it has no OCI, the company must be aware of any employees who know of potential OCIs affecting the company. Further, companies must be mindful that mere reckless disregard for the truth or falsity of information presented to the government triggers the knowledge requirement for FCA liability.

- A thorough and well-planned Avoidance and Mitigation Plan is recommended. If a company identifies a potential OCI, it should consider submitting an Avoidance and Mitigation Plan with its proposal, especially since contracting officers are independently required to identify potential OCIs "as early in the acquisition process as possible."

- OCIs might be mitigated by declining to seek award of a particular task order, particularly under a multiple award Indefinite Delivery Indefinite Quantity ("ID/IQ") contract.

- While seldom granted, OCIs might be mitigated by securing a waiver from the contracting officer.


Venable office locations

BALTIMORE, MD
750 E. PRATT STREET
NINTH FLOOR
BALTIMORE, MD 21202
**t** 410.244.7400
**f** 410.244.7742

LOS ANGELES, CA
2049 CENTURY PARK EAST
SUITE 2100
LOS ANGELES, CA 90067
**t** 310.229.9900
**f** 310.229.9901

NEW YORK, NY
ROCKEFELLER CENTER
1270 AVENUE OF THE
AMERICAS
TWENTY-FIFTH FLOOR
NEW YORK, NY 10020
**t** 212.307.5500
**f** 212.307.5598

ROCKVILLE, MD
ONE CHURCH STREET
FIFTH FLOOR
ROCKVILLE, MD 20850
**t** 301.217.5600
**f** 301.217.5617

TOWSON, MD
210 ALLEGHENY AVENUE
TOWSON, MD 21204
**t** 410.494.6200
**f** 410.821.0147

TYSONS CORNER, VA
8010 TOWERS CRESCENT DRIVE
SUITE 300
VIENNA, VA 22182
**t** 703.760.1600
**f** 703.821.8949

WASHINGTON, DC
575 SEVENTH STREET NW
WASHINGTON, DC 20004
**t** 202.344.4000
**f** 202.344.8300