

Unmitigated OCI Leads to FCA Settlement

Written by Nick Sanders
Monday, 25 August 2014 09:54

Government contractors settle False Claims Act (FCA) lawsuits nearly every single day. Government contractors settle FCA suits routinely; but it is *exceedingly* rare for a Government entity to settle an FCA suit via payment of a multi-million dollar amount. It is rare for such an entity to be sued in the first place, let alone to settle such a suit.

Think about it for a second. In order to be accused of violating the False Claims Act, an entity must have (allegedly) knowingly submitted false or fictitious claims for money to a Federal agency. In order for a Government entity to be accused of violating the FCA, it must have (allegedly) knowingly submitted false or fictitious claims to another Government entity. How does that work?

But before we get into the whys and wherefores, let's discuss organizational conflicts of interest (OCIs).

We have discussed OCIs before, notably in [this article](#). We discussed the three "flavors" of OCI – "biased ground rules," "impaired objectivity," and "unequal access to information." When OCIs are alleged to have occurred, the allegations must be investigated by the awarding Contracting Officer. OCIs can be waived by the Contracting Officer, or else they can be mitigated by the bidder (with the efficacy of that mitigation being reviewed by the Contracting Officer). But the allegations must be investigated and the resulting actions, and rationale, must be documented. The facts and circumstances are subject to legal review for the reasonableness of the resulting actions.

Hang on to that thought. We'll get back to OCIs in a minute.

Now we are on the same page, and we are ready to discuss *United States, Virginia and the District of Columbia, ex rel. Shahiq Khwaja v. Washington Metropolitan Area Transit Authority, et al*, Case No. 1:12-cv-00268-RJL (D.D.C.).

In this case, a Government entity was sued under the FCA by a *qui tam* relator, a former employee of that very same entity, who alleged that the entity misused Federal Transit

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Administration (FTA) grant funds by inappropriately awarding work under other than “full and open competition” procedures, in violation of certifications to the FTA that the entity would comply with statutes and regulations covering awards of work when using the FTA funds.

Would you like to know more?

The entity in question is the Washington Metropolitan Area Transit Authority (WMATA or “Metro”), which is (according to Wikipedia) a Government agency created by an interstate compact between the State of Maryland, the Commonwealth of Virginia, and the District of Columbia. The compact, which was approved by Congress, provides that WMATA is legally incorporated in the District of Columbia. In addition (according to Wikipedia), the compact grants WMATA “sovereign immunity by all three jurisdictions in which it operates, and except for certain limited exceptions, the authority cannot be successfully sued unless it waives immunity.”

Well, one of those “limited exceptions” must be in the case of alleged fraud, because WMATA’s former employee, Shahiq Khwaja, filed suit under the FCA. Apparently, his suit was complex, because the WMATA settlement only addresses the Federal allegations related to alleged misuse of FTA grant funds. Khwaja’s suit also included allegations on behalf of Virginia and the District of Columbia, which were not resolved. In addition, Khwaja also sued WMATA for “violating the American Recovery and Reinvestment Act’s (ARRA) provisions protecting whistleblowers [by alleging] that WMATA terminated him from his position as an information technology functional manager because he expressed concerns about the manner in which WMATA was financially and technically administering the integration project which was funded, in part, with ARRA funds.”

Regardless of the complexity and multiple issues involved, the allegations can be expressed in a couple of paragraphs. As usual, we quote from the DOJ [press release](#) announcing the settlement.

In or around August 2009, WMATA awarded Metaformers, using full and open competition procedures, a relatively modest contract valued at approximately \$256,000 to assess WMATA’s financial system. Less than one year later, in July 2010, WMATA awarded Metaformers the \$14 million contract to integrate the Authority’s financial and business systems. WMATA awarded the contract non-competitively and allegedly without legitimate justification for doing so, foreclosing an opportunity for other contractors and companies to

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submit proposals for the lucrative project. WMATA's conduct was allegedly in violation of its certification – and commitment - to administer the FTA grant funds using full and open competition.

In awarding the \$14 million integration contract, WMATA also allegedly violated 'conflict of interest rules' governing use of FTA grant funds. WMATA's noncompetitive award to Metaformers was based, in part, on the work completed by Metaformers under the assessment contract. By competitively awarding the smaller assessment contract and then non-competitively awarding the far more lucrative integration project both to the same contractor, WMATA violated federal procurement conflict of interest rules by giving one contractor an advantage over others who might have been interested in competing for the integration project.

Because of WMATA's conduct, contractors who might have been interested in submitting proposals or bids for the integration project never had the opportunity to do so. Thus, WMATA's conduct was allegedly in violation of its certification and commitment to administer the FTA grant funds avoiding conflicts of interest in procurements.

WMATA agreed to pay \$4,240,341 to resolve the allegations with respect to the FTA funds it allegedly misused. According to the press release, Mr. Khwaja will receive approximately \$996,480 as his share of the recovery. In addition, "WMATA negotiated with Mr. Khwaja's counsel to resolve Mr. Khwaja's wrongful termination claim for \$390,000."

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Possible problems with procurement awards? Check.

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Employee who reported concerns with procurement awards? Check.

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Employee who is subsequently terminated? Check.

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Now disgruntled employee who contacts attorney? Check.

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Multimillion dollar settlement? Check.

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Unfavorable news stories? Check.

Yep. Same old story.

Happens nearly every single day.

When will we learn?