A couple of updates on contractors facing FCA suits.

First update concerns CH2M Hill and its work at Hanford. We've written before about CH2M's challenges at that contentious DOE environmental remediation site. In this article, we report that the Department of Justice has declined to intervene in a FCA suit filed against the CH2M Hill Plateau Remediation Co., in which the company was accused by Savage Logistics (a women-owned business) of "knowingly awarding subcontracts set aside for small and HUBZone businesses to companies that did not qualify for the work"—according to **this article** at The Tri-City Herald.

Apparently, the allegations involve some complex nuances of the small business reporting requirements. The Tri-City Herald reported it thusly—

The Small Business Administration determined that Phoenix Enterprises did not qualify as a small business when it was awarded a Washington Closure subcontract because it was too closely linked with Federal Engineers and Constructors, according to the most recent lawsuit.

Salina Savage of Savage Logistics informed CH2M Hill that the Small Business Administration determined that Phoenix Enterprises was not an independent business, but CH2M Hill awarded Phoenix Enterprises a contract worth $795,500, according to the lawsuit.

Federal Engineers and Constructors strongly denied that it was too closely aligned with Phoenix Enterprises or other subcontractors. It said that teaming arrangements among businesses for Hanford work is common and even encouraged.

CH2M Hill also awarded almost $1.5 million to the joint venture of Phoenix Enterprises and Acquisition Business Consultants under HUBZone subcontracts, according to the lawsuit. HUBZone subcontracts are reserved for small businesses in areas designated at Historically Underutilized Business Zones.

The lawsuit contends that both of the businesses in the joint venture would need to qualify as HUBZone businesses for the subcontracts to be valid, and Phoenix Enterprises was not considered a HUBZone business by the Small Business Administration, the lawsuit said. Acquisition Business Consultants had headquarters at the time in Wasilla, Alaska, and did not meet a requirement to have employees in Washington, the lawsuit said.

In related news, The Tri-City Herald also reported that "a month before, the federal government filed a civil lawsuit against another Hanford contractor, Washington Closure Hanford, which accused it of falsely claiming credit for awarding small-business subcontracts in certain categories. The claims of improper subcontracting in that lawsuit also were originally made by Savage Logistics."

The interesting aspect of the Savage Logistics allegations, in our view, is that the gravamen of the suit would seem to be whether CH2M reasonably interpreted the small business rules in its subcontracting, or perhaps whether CH2M recklessly ignored a reasonable interpretation of those rules in making its subcontract awards. Good luck explaining those complex rules to a jury.

Meanwhile, The Tri-City Herald **also reported** that CH2M Hill Plateau Remediation Co. was recently awarded $4.9 million in award fees, equal to a 95 percent award. The article reported, "DOE gave CH2M Hill a rating of "excellent" and said the company had met specific goals for contracting out work to subcontractors and had exceeded all small business subcontracting requirements."

Moving on, the second story doesn't concern a specific False Claim Act lawsuit, exactly; it concerns the practice of KBR of having its employees sign non-disclosure agreements (NDAs) during interviews in internal corporate investigations. According to a **Washington Times article**, the NDAs "required [the employees] to get prior approval from a corporate lawyer before reporting wrongdoing." That requirement "could violate defense acquisition rules and the Federal False Claims Act," according to several Democratic Congresspersons, who wrote a letter to the President of KBR expressing their concerns.

Readers of this blog will recognize that KBR is no stranger to litigation, FCA-related and otherwise. It is no surprise that the company would have built-up internal defenses, processes, and protocols to aid in its legal defense efforts. That being said, this is the first we have heard

of having employees execute NDAs as a part of participating in internal investigations.

The Washington Times article reported that KBR told the Congressfolk that "the company had never invoked the non-disclosure agreement to prevent whistleblower disclosures." The article reported that the lawmakers were not swayed by KBR's response. It said—

Still, lawmakers said they were concerned. 'The personalized nature of this non-disclosure agreement — signed and witnessed by two individuals during an in-person interview — combined with the coercive, explicit threat for failing to comply could chill potential whistleblowers who might report fraud, waste, or abuse involving U.S. taxpayer dollars,' the[y] wrote.

More on this issue as it develops.

To sum this article up, we are frequently reminded of the exposure faced by Government contractors to allegations of FCA violations. In our experience, far too many contractors fail to recognize their exposure, and they fail to properly factor that exposure into their risk analyses when evaluating their internal controls. Here, we report on one contractor facing allegations that its subcontract awards led to FCA violations; and even though the DOJ declined to intervene (always a good sign), the company still has to defend against the relator's allegations. Another contractor has faced so much litigation it has (apparently) developed internal defenses to minimize future exposure—internal defenses that may have gone too far.

Government contractors must realize that their actions will be strictly scrutinized for compliance with contract terms and conditions. The scrutiny will come from current and former employees, or perhaps from competitors, or perhaps from disappointed bidders. If the company's actions seem questionable, then it is very likely those actions will be questioned—and that questioning could very well take the form of a *qui tam* lawsuit under the False Claims Act. Defending against those lawsuits is going to be expensive, and the defense costs may be unallowable in many circumstances --meaning the costs will come out of profit dollars.

Something to think about.