We haven't followed the case of Circle C and government allegations of violations of the False Claims Act, but we did hear the news that the company emerged victorious after a long battle. In the **words** of the company's attorneys at Crowell & Moring: "*FCA Defendant Wins Attorneys' Fees and the Government Gets Stuck with the Bill*
."

We followed **the link** in the Crowell summary over to the Sixth Circuit, where we learned about the case. Circle C was a prime contractor that built 42 warehouses for the U.S. Army. One of its subcontractors, Phase Tech, failed to pay two electricians the wages required by the Davis-Bacon Act, which was a clause in the prime contract that was "flowed-down" to Phase Tech. (The value of the underpayments was $9,900.) The government alleged that the failure of a subcontractor to comply with a contract clause made Circle C's statements that it had complied with contract requirements a falsity, meaning that every single invoice that Circle C had submitted to the Army was a false claim.

In the words of Judge Kethledge—

As a result, the government thereafter pursued Circle C for nearly a decade of litigation, demanding not merely $9,900—Phase Tech itself had paid $15,000 up front to settle that underpayment—but rather $1.66 million, of which $554,000 was purportedly 'actual damages' for the $9,900 underpayment. The government's theory in support of that demand was that all of Phase Tech's electrical work, in all of the warehouses, was 'tainted' by the $9,900 underpayment—and therefore worthless. 'The problem with that theory,' we wrote in the last appeal, was that, 'in all of these warehouses, the government turns on the lights every day.' We therefore reversed a $763,000 judgment in favor of the government and remanded for entry of an award of $14,748—less than 1% of the government's demand.

(Internal citation omitted.)

Because the final judgment was so much less than the damages sought by the government, Circle C asked the court to have the government reimburse it for the nearly $500,000 in legal fees it paid during the decade of litigation concerning the $9,900 underpayment of the subcontractor's two electricians. The district court declined to make that award and Circle C appealed. Its appeal was upheld and the district court's ruling was overturned by the Sixth

Circuit.

Judge Kethledge discussed at length whether the government's demand for $1.66 million was reasonable and concluded that it was not. Therefore Circle C was entitled to its attorneys' fees unless it had acted in bad faith. We are going to quote the decision's discussion of that aspect because we suspect it can be applied to other FCA litigation matters.

The government has not shown that the conduct giving rise to Circle C's $14,748 of liability in this case was driven by a sinister motive rather than the result of an honest mistake. Unlike many cases under the False Claims Act, this case did not involve a large-scale, systematic effort to defraud the government. Compare, e.g., *United States v. Rogan* 517 F.3d 449, 451 (7th Cir. 2008). Instead, Circle C submitted compliance statements that were inaccurate as to $9,900 of particulars in a project costing more than $20 million. Moreover, one of Circle C's co-owners, John Cates, testified that Phase Tech gave Circle C a 'set price' for each building, which obscured the amount that Phase Tech paid each electrician. And both of Circle C's owners, Frances and John Cates, testified that they submitted the certifications on the honest belief that they were true. The government cites no evidence that shows otherwise. …

Under the False Claims Act, however, 'knowingly' is itself a term of art, which refers to three mental states: 'actual knowledge,' 'deliberate ignorance,' or 'reckless disregard.' The district court found that Circle C was reckless—the least culpable of these states—as to whether its compliance reports were accurate regarding the wages paid to Phase Tech's electricians (actually, on this record, just two of them). But 'recklessness is a less stringent standard than bad faith[.]' And on this record we see no reason to depart from that rule. …

In this case the government made a demand for damages a hundredfold greater than what it was entitled to, and then pressed that demand over nearly a decade of litigation, all based on a theory that as applied here was nearly frivolous. The consequences for Circle C included nearly a half-million dollars in attorneys' fees. Section 2412(d)(1)(D) makes clear that the government must bear its share of those consequences as well.

(Internal citations omitted.)

We noted that there was a dissent, from Judge Rogers. He would have found that the

government's position was reasonable because it was upheld by two district courts before being overturned on appeal.

So congratulations to Circle C and to its law firm of Crowell & Moring on their litigation victory.

In the meantime, while the False Claims Act continues to be a "big stick" in the government's compliance arsenal, it does seem to have limits. In particular, where a court sees government overreach in terms of damages sought, that overreach could cost the government its case – as well as the defendant's legal fees.

Of course we are not attorneys, so if you have a serious situation with respect to litigation, please see one and do not rely on some layperson's thoughts in a blog.