



LORI ANN LANGE



RICHARD T. PREISS

Supreme Court Rules that Contractors Can Be Liable for False Claims under the Implied Certification Theory

On June 16, 2016, the United States Supreme Court in a unanimous opinion held that, under certain circumstances, a contractor can be liable for False Claims Act ("FCA") violations under the implied certification theory. *Universal Health Services, Inc. v. United States and Massachusetts ex rel. Escobar and Correa*, No. 15-7, 579 U.S. ____ (2016). The FCA prohibits, among other things, a person from knowingly submitting or causing to be submitted a false claim to the Government or knowingly making a false record or statement to get a false claim paid by the Government. Under the implied certification theory, a contractor's claim is considered to contain an implied certification that the contractor complied with the requirements of the contract as well as all applicable laws and regulations. If that implied certification is false, the contractor can be held to have violated the FCA.

The federal courts of appeals had been split over the question of whether the implied certification theory is valid. The Supreme Court resolved that split by holding that the implied certification theory can be a basis for liability when: (1) the contractor submits a claim for payment that does not merely request payment but also makes specific representations about the goods or services provided; and (2) the contractor's failure to disclose its noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

The Supreme Court rejected the argument that the contractor's misrepresentation regarding compliance had to relate to a condition of payment. The court stated, "Defendants can be liable for violating requirements even if they were not expressly designated as conditions of payment. Conversely, even when a requirement is expressly designated a condition of payment, not every violation of such a requirement gives rise to liability."

The Supreme Court held that the focus should be on whether the misrepresentation was "material," which the FCA defines as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." Characterizing the FCA materiality standard as "rigorous" and "demanding," the Supreme Court stated that materiality cannot be found where the noncompliance is "minor or insubstantial." The fact that the requirement was a condition of payment can be an indication of materiality and is relevant, but it is not dispositive.

Please Contact

Lori Ann Lange
llange@pecklaw.com
202.293.8815

Richard T. Preiss
rpreiss@pecklaw.com
212.382.0909

To determine whether a misrepresentation is material, the Supreme Court held courts are to look to see whether the Government pays or rejects claims based on noncompliance with the particular statutory, regulatory, or contractual requirement and whether the contractor knew of the Government's position regarding payment. The court stated that proof of materiality can include, but is not necessarily limited to, evidence that the contractor knows that the Government consistently refuses to pay claims based on noncompliance with the particular statutory, regulatory, or contractual requirement. The court also stated that the fact that the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated is very strong evidence that the requirements are not material. It is not enough that the contractor knows that the Government would be entitled to refuse payment were the Government aware of the violation.

The question of whether compliance with a statutory, regulatory, or contractual requirement is material often is not a clear issue. Going forward, it may be more difficult for the Government and *qui tam* plaintiffs to prove that a contractor's noncompliance with a requirement was material. Conversely, it may be more difficult for defendants to have FCA actions dismissed on legal grounds through a motion to dismiss or request for summary judgment. It can be anticipated that there will be a number of legal battles in the future regarding whether noncompliance with specific requirements are material.

Contractors submitting claims (which include payment applications and requests for equitable adjustment) must remain diligent in reviewing their contract performance to see if there are any violations of contract provisions, statutes, or regulations that have not been disclosed to the Government and could be characterized as a material violation.

Please feel free to contact P&A if you would like to discuss how P&A can help you with your compliance needs.

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