KATZ, MARSHALL & BANKS, LLP

Court Allows Army Translators to Proceed with Qui Tam Suit

November 11, 2019

A federal district court's recent denial of a motion to dismiss a False Claims Act suit provides useful analyses of several recurrent issues in FCA cases, including the "original source" rule, pleading standards, and properly stating claims against multiple defendants. A group of 29 whistleblowers (known as qui tam "relators") who worked as linguists, translators, and interpreters for U.S. military and intelligence-gathering operations in the Middle East brought an FCA qui tam suit against their employer.

Whistleblowers' Allegations Against Government Contractor

Their suit included allegations of fraud by Global Linguist Solutions, LLC ("GLS"), a joint venture of AECOM National Security Programs, Inc. ("AECOM"), and DynCorp International, LLC ("DynCorp"), along with several affiliated companies (collectively, "the Defendants"). The case, *United States ex rel. Fadlalla v. DynCorp Int'l LLC*, No. 8:15-CV-01806-PX, --- F.3d. ---, 2019 WL 4221476 (D. Md. Sept. 5, 2019), involved contracts the United States Army Intelligence and Security Command ("INSCOM") awarded to GLS to provide "linguists to support U.S. military and intelligence-gathering efforts in the Middle East." Among other things, the whistleblowers reported that GLS was failing to comply with contractual requirements that it subcontract a number of the positions to small businesses, including those owned by veterans, women, and those considered "disadvantaged." Specifically, the whistleblowers alleged that GLS had its own employees sign sham employment contracts with various small businesses while, in fact, they remained employed by GLS. The INSCOM contracts implicated by this fraudulent activity were worth over $14.3 billion in total.

The whistleblowers described a system in which "GLS managers interacted with Relators almost exclusively . . . GLS oversaw the recruitment and hiring process, paid for Relators' training, coordinated background investigations and medical testing, determined where Relators were deployed, and managed Relators' transportation to Kuwait," while the small businesses nominally employing the whistleblowers "did not know, at any given time, which Relators were on their payrolls." The Defendants moved to dismiss on several grounds, nearly all of which were denied by the court. Three of the arguments for dismissal were particularly noteworthy.

Court Finds that Whistleblowers were Original Sources

The Defendants argued that the whistleblowers' claims were foreclosed by the "public disclosure bar," which prohibits qui tam suits based on fraud that has already been publicly disclosed in certain venues, including government hearings and news reports, unless the whistleblowers qualify as the "original source" of the information. The court found that it was

true that a public disclosure occurred when, prior to the whistleblowers filing the qui tam suit, allegations similar to those alleged in the qui tam were the subject of a Congressional hearing and related media coverage. However, the court determined that the whistleblowers had "direct and independent knowledge" of the information on which they based their allegations – in other words, the source of their allegations was not the public disclosure – and they had "voluntarily provided the information to the Government." Accordingly, the court found that the whistleblowers were "original sources" and denied the Defendants' motion to dismiss on this ground.

The Defendants also argued that the whistleblowers had failed to meet the heightened pleading requirements set forth under Federal Rule of Civil Procedure 9(b) for allegations of fraud, which require whistleblowers to describe "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." Broadly speaking, the whistleblowers claims fell into two theories of liability: (1) "false certification," i.e., that the Defendants had been required to comply with certain contractual terms and had falsely certified such compliance; and (2) that GLS obtained the contracts through "fraudulent inducement."

The court ultimately determined that both theories were pleaded sufficiently to survive a motion to dismiss, finding that "[b]ut for the false representations regarding the subcontractors' work, INSCOM would not have awarded Contract 1 or Contract 2 to GLS." The court further rejected Defendants' argument that the whistleblowers had relied on "collective knowledge" rather than identifying specific wrongdoers, noting that their general averments of actual knowledge are sufficient to survive a motion to dismiss. Finally, the court emphatically rejected the Defendants' argument that the fraud alleged by the whistleblowers was not material because the government learned of the subcontracting issues during the Congressional hearing and continued to proceed with the contracts. The court stated, "It is simply implausible to conclude that after the CWC Hearing, as alleged, the Government knew the truth about the subcontracting fraud. But more fundamentally, as to materiality, the CWC Hearing highlights that the subcontracting arrangement was indeed material to the contract award."

Finally, the court took up separate motions to dismiss by AECOM and DynCorp. The companies argued that their liability as alleged in the complaint was based solely on the fact that GLS was a joint venture between DynCorp and AECOM. With respect to AECOM, the court found that the whistleblowers had not adequately pleaded the "existence of a 'joint venture' that extends liability to each by virtue of the corporate relationship." The whistleblowers had alleged a joint venture based solely on U.S. Securities and Exchange Commission filings and related press releases and the court held that those allegations did not convert a limited liability company, with protections against suit against its members, into a general partnership without such protections. Thus, the court dismissed the FCA claims against AECOM, but did so without prejudice, enabling the whistleblowers to submit an amended complaint containing additional allegations that might establish AECOM's liability. With respect to DynCorp, the court found that the company was effectively an "alter ego" of GLS because they shared a "unity of interest," as evidenced by DynCorp's close control over GLS's operations. Thus, the court permitted the claims against DynCorp to proceed.

The decision by the District of Maryland District Court is useful for practitioners because it

includes analyses of the public disclosure bar, and pleading standards for fraud, materiality, and claims against entities with complex corporate structures. More fundamentally, the allegations against GLS are remarkable for the size and audacity of the fraud: if true, the whistleblowers have identified a brazen attempt by a joint venture of two large, publicly traded companies to violate a key term of over $14 billion in government contracts even after a Congressional hearing into related misconduct. For individuals interested in fraud by defense contractors, this case will be one to follow closely.