Legal Insights: Reach of False Claims Act Expanded
By Ross Crown

On May 20, 2009, President Barack Obama signed into law the Fraud Enforcement and Recovery Act of 2009 (FERA). The primary purposes of the FERA, as stated in the Act, are to improve enforcement of mortgage fraud, securities and commodities fraud, financial institutions fraud, and other frauds related to federal assistance and relief programs, and recovery of funds lost to these frauds. Most of the attention FERA has received is focused on its role in overseeing the vast disbursement of federal dollars through the stimulus plan and the Government’s industry bailouts. The FERA also, however, has particular significance for government contractors. This statute includes a significant broadening of contractor civil liability under the False Claims Act (FCA).

The section of the FERA amending the FCA is entitled, “Clarifications to the False Claims Act to Reflect the Original Intent of the Law.” These “clarifications” are in part a response to recent judicial decisions adopting narrower interpretations of the FCA than the current Congress believes is warranted. Regardless of the particular rationale for the amendments to the FCA, they all share a common objective of discouraging so-called fraud in federal contracting and facilitating the recoupment of federal funds. The most important changes to the FCA are discussed below. Please note that for purposes of brevity, the sections of the FCA reviewed in this article are paraphrased. To determine precisely the changes made to the FCA, it is necessary to read the statute itself.

Acts Giving Rise to Liability

The FCA identifies conduct to which liability attaches. The descriptions of certain of these actions have been expanded by the FERA. The old FCA recited that liability would be imposed on any person who knowingly makes or uses a false statement to get a false or fraudulent claim paid by the Government. 31 USC § 3729(a)(2). The new FCA holds liable any person who knowingly makes or uses a false statement “material to a false or fraudulent claim.” 31 U.S.C. § 3729(a)(1)(B).

By adding a materiality requirement, the new FCA now puts in writing a requirement that was previously implied by some courts in interpreting the old FCA. Unfortunately for contractors, the new FCA defines materiality broadly as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” 31 U.S.C. § 3729(b)(4). This contrasts with narrower definitions of materiality some courts have employed, such as the materiality standard utilized in Costner v. URS Consultants, 153 F.3d 667, 677 (8th Cir. 1998). In that case, the court limited actions subject to the FCA to those “which have the purpose and effect of causing the United States to pay out money it is not obligated to pay, or those actions which intentionally deprive the United States of money it is lawfully due…. .”

Where a contractor has already received payment from the Government, the old FCA imposed liability on a person who knowingly makes or uses a false statement to avoid an obligation to pay money or deliver property to the Government. 31 U.S.C. § 3729(a)(7). Under the new FCA, liability in this circumstance exists where a person knowingly makes or uses a false statement material to an obligation to pay money or deliver property to the Government, or knowingly conceals or improperly avoids an obligation to pay money or deliver property to the Government. 31 U.S.C. § 3729(a)(1)(G). Whereas the old FCA required a false statement by the contractor, the revised statute extends liability beyond false statements to instances where the contractor is found to have knowingly concealed or improperly avoided its obligation to the Government.

Definition of Claim

The old FCA defined a “claim” as including any request or demand, whether under a contract or otherwise, for money or property which is to be spent or used on the Government’s behalf, or to advance a Government program or interest. To qualify as a claim in this situation, the Government must also have provided a portion of the money or property requested or demanded, or will reimburse such contractor, grantee or other recipient for any portion of that money or property. 31 U.S.C. § 3729(b)(2). This revised definition expands the meaning of a claim by including demands made on persons other than Government representatives. The demand must still, of course, be seeking funds or property that originally came from the Government, in whole or in part.

Statute of Limitations

The FCA includes a twofold statute of limitations for civil actions. Such an action may not be brought more than six years after the violation of the Act is committed, or more than three years after the date when facts material to the action are known or reasonably should have been known by a cognizant Government official, but in no event more than ten years after the violation is committed. 31 U.S.C. § 3731(b). Civil actions for violations of the FCA may be brought by the Government or by private persons acting as whistleblowers. These whistleblowers are usually referred to in the context of the FCA as “relators.”

Under the old FCA, there was confusion as to what happened when a relator’s complaint was filed within six years of the violation, but the Government’s follow-on complaint was brought after the six year period. Some courts held that the statute of limitations prevented the Government from pursuing claims that occurred more than six years before the Government filed its complaint. See, e.g., U.S. ex rel. Ramadoss v. Caremark Inc., 586 F. Supp. 2d 668, 701 (W.D. Tex. 2008).

Congress clarified this issue in the new FCA. Now under the FCA, for statute of limitations purposes, any government complaint continued on following page
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shall be deemed to relate back to the filing date of the relator’s complaint, to the extent that the Government’s claim arises out of the same conduct set forth in the prior complaint. 31 U.S.C. § 3731(c).

Protection From Retaliatory Actions

The FCA protects relators from retaliation by the contractor who is the subject of an FCA complaint. Under the old FCA, any employee who was discharged, demoted, suspended, threatened or in any other manner discriminated against was entitled to all relief necessary to make the employee whole. 31 U.S.C. § 3730(h).

The new FCA extends protection from retaliatory actions by any company that is the subject of a relator’s complaint not only to employees, but also to contractors and agents. Such persons are entitled to all relief necessary to make him or her whole should that person be discharged, demoted, suspended, threatened or in any other manner discriminated against. 31 U.S.C. § 3730(h)(1).

Another difference between these old and new anti-retaliation provisions in the FCA is that the prior version of the Act protected relators from retaliation for his/her efforts in furtherance of an action under the FCA. The amended provision provides protection from retaliation for the relator’s efforts to stop one or more violations of the FCA. Thus, the new provision encourages relators to try to halt violations of the Act instead of just protecting their pursuit of a claim. The new provision will likely be read by the courts as broader than the old provision since efforts to stop violation of the Act may arguably not only include the relator’s efforts to halt contractor misconduct, but also initiation of an action under the FCA to remedy such misconduct.

Conclusion

Like other legal developments during the past year, passage of the FERA represents a further challenge for government contractors. Fairly or unfairly, government contractors are more than ever targets of the Government instead of its partners. This new environment demands that contractors be confident in their internal compliance programs. Contractors whose company controls are not state-of-the-art need to upgrade these systems promptly.

Ross is a partner in the Albuquerque office of Lewis and Roca LLP. This article is intended for general information only and should not be construed as legal advice or opinion. Any questions concerning your legal rights or obligations in any particular circumstance should be directed to your lawyer.

The Press Release: A NO BRAINER!

By Ro Saavedra

Issuing a press release to the news media is an easy and free way to promote an important event, invention, or business expansion, as well as simply to announce new hires or promotions within your company, a new location, or recognitions and awards. It’s an ideal opportunity to remind your customers and potential customers of your company’s achievements and those of your employees. If you’re not already doing so, do take full advantage of this means to positively highlight your business.

Unlike a newspaper article that details a news story, a press release is disseminated to specific reporters or media outlets (such as television newsrooms, print newspapers, online news sources, and trade journals) to report your company’s news. If it’s momentous news, such as a new invention or discovery, your purpose would be to encourage the media to develop stories in reporting the noteworthy news. If the content is an announcement rather than hard news, such as a new hire, your purpose is to have the print or online newspaper or magazine include the announcement and photo (always provide a photo) in their “business announcements” section, such as the Business Outlook’s Briefcase page (Monday Albuquerque Journal insert).

The press release format is simple. The masthead must contain the company name (and logo if available) and a contact person including their phone number and e-mail address. It’s a good idea to also include a physical address, Web site address, and fax number.

“FOR IMMEDIATE RELEASE” (all in upper case) should appear at the top left or right of the page below the masthead information. Rarely is there a reason to issue a release that isn’t intended for immediate release, but if that is the case, “HOLD FOR RELEASE UNTIL (date)” is used.

A strong declarative headline follows and should be one sentence that states the content of the release. Center the heading (in bold font) and capitalize the first letter of each word.

The body of the release should be 1.5 or double spaced with paragraphs indented and begin with city, state, country (when appropriate), and date (month, day, year). Written in the third person, a release is generally two to five brief paragraphs totaling no more than about 500 words. The introductory sentence needs to capture the readers’ attention and clearly state the news or announcement. Included in the first sentence and paragraph are the applicable five Ws: who, what, when, where, and why. The remainder of the first paragraph summarizes the release, essentially relating the entire message.

The second paragraph provides supportive and detailed information and might include quotes, figures, impressive comparisons, and other attention grabbing details. The most effective release is an inverted pyramid which contains the most vital information first followed by support data that can be “cut” if necessary. Therefore, the third and following paragraphs include “additional” information such as a Web site that provides further information, experts and their contact information, or an upcoming demonstration. The final paragraph most often is a sentence or two about the company or organization. Lastly, “# # #” indicates the end of the release.

To acquire and retain credibility with reporters and media outlets, be succinct and to the point, use correct grammar, proof the release carefully for typos and other errors, and tell the truth.