Client Alert

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Recent FCA Decision Has Important Implications for Contractor Disclosures to the Government

By Richard J. Vacura, Pablo A. Nichols and Sara Bartel

A recent decision from the U.S. District Court for the Eastern District of Virginia has important implications for government contractors that make mandatory disclosures of improper conduct to the U.S. Government.[1] In *U.S. ex rel. Saunders v. Unisys Corporation*, No. 1:12-cv-00379, the district court held that disclosures by Unisys Corp. to the Department of Defense (DOD) Office of Inspector General (OIG) regarding Unisys's "unacceptable" billing did not qualify as a public disclosure under the False Claims Act (FCA), 31 U.S.C. § 3730(e). Under the district court's reasoning, the public disclosure defense is not available to contractors making disclosures to the OIG, unless the disclosures are also made available to the general public. Moreover, the contractor cannot merely disclose information related to the fraud, but must publicly disclose, at a minimum, the facts from which fraud can be reasonably inferred.

UNISYS'S ALLEGED CONDUCT[2]

In 2007, Unisys began providing information technology services to the U.S. Army under a task order (TO 122) that contained both time and materials (T&M) and firm fixed price (FFP) contract line items. After a few months of billing, Unisys found it was at risk of going over the Army's T&M budget. The Army converted some T&M tasks into FFP tasks, and the company soon realized the new billing practices would render the task order unprofitable. In February 2008, Unisys allegedly sought to restore TO 122 to profitability by implementing the "red/blue" plan, which ensured that 50% of all tasks were billed to T&M and 50% would be billed to FFP regardless of the Army's actual billing designations. It is alleged that the "red/blue" plan resulted in at least $13,474,000 in overcharges to the U.S. Army over the next two and a half years.

Sometime later, Unisys received an internal allegation of unethical billing involving TO 122. In 2010, Unisys conducted an internal investigation and asked relator Michael Saunders, a partner in Unisys's Federal Systems Division, to present the report to the OIG.[3] The report described Unisys's billing practices as "unacceptable," but it did not admit that the practices led to actual overbilling.

Shortly after Unisys filed the final report with the OIG, Saunders learned of several facts that he claims Unisys had concealed from the report and that form the basis of his lawsuit. For example, the alleged conduct that the report failed to mention included: that Unisys's senior managers directed the creation of the "red/blue" plan, a description of how the plan operated, and the plan resulted in $13 million in overbilling. Saunders informed senior

[1] Government contractors are required by 48 CFR 52.203-13 to timely disclose to the agency Office of Inspector General, with a copy to the contracting officer, whenever, in connection with the award, performance, or closeout of a covered government contract or subcontract, the contractor has credible evidence of: a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violation found in Title 18, United States Code, or a violation of the civil False Claims Act (31 U.S.C. §§3729-3733).

[2] Unless otherwise noted, this case summary is based on the factual allegations and legal reasoning found in Judge Gerald Bruce Lee's opinion. *See U.S. ex rel. Saunders v. Unisys Corp.*, No. 1:12-cv-00379 (March 21, 2014).

[3] Saunders was not involved in the creation or implementation of the "red/blue" plan, and he did not partake in the internal investigation.

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officials at Unisys of his discovery and requested that Unisys conduct an additional investigation and make a corrected report to the OIG. Unisys rejected this request and instead terminated Saunders.

THE DISTRICT COURT'S DECISION[4]

Saunders responded to his termination with a lawsuit in federal court in the Eastern District of Virginia alleging that Unisys violated the FCA.[5] Unisys moved to dismiss under the public disclosure bar, as it had disclosed its "unacceptable" billing practices in its report to the OIG.[6] Saunders responded that the public disclosure bar did not apply because (1) the report was made only to the government and was not available to the public, and (2) the report did not reveal the allegations or transactions of fraud. The court agreed with Saunders on both accounts, and held that the public disclosure bar did not apply.

The court reasoned that a qualifying public disclosure must be "placed within the public domain."[7] The court recognized that the Fourth Circuit had yet to rule on the meaning of "public domain," and it examined what it described as a circuit split on the issue. On one side were cases that held that a public disclosure must be made to the "general public, placed in the public domain, or made in a manner such that it is equally available to a stranger to the fraud should the stranger chose to look for the information."[8] Under this line of cases, a disclosure to a government official would not be a qualifying public disclosure. On the other side was the Seventh Circuit, which had held that "'[d]isclosure of information to a competent public official about an alleged false claim against the government' is a disclosure made public under the FCA."[9] The court rejected the Seventh Circuit's approach, and held that "although Unisys's reports were provided to DOD-OIG, they were never placed in the public domain—e.g., on a website—or otherwise made available to the public. Therefore, the reports were not made public within the meaning of the FCA, and the publicity prong of the public-disclosure bar is not met."

Turning to the second argument, the court held that in order to trigger the public disclosure bar, the disclosure must reveal "fraudulent 'allegations or transactions'" and not merely disclose information related to the fraud. Citing solely to the D.C. Circuit's 1994 *Springfield* decision, the court explained that an "allegation of fraud is disclosed when the conclusion that fraud has been committed [] is exposed, while a transaction of fraud is disclosed when 'a misrepresented state of facts *and* a true state of facts' [] are exposed," from which a reader "can infer that a fraud has occurred." Applying this standard, the court held that Unisys's disclosure of "unacceptable" billing did not qualify as a public disclosure:

> Here, Unisys's reports to DOD–OIG did not reveal an allegation or transaction of fraud. Unisys did not inform DOD–OIG that it stood accused of overbilling the Army nor did it inform DOD–OIG of the elements from which a fraud could have been inferred. While Unisys's

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[4] While MoFo addresses here only the public disclosure portion of the district court's decision, it is worth noting that the court also denied Unisys's motion to dismiss the retaliation claim as Saunders had alleged that he was "engaged in protected activity in furtherance of a viable FCA claim and that Unisys had notice of the protected activity."

[5] 31 U.S.C. § 3729 (2010).

[6] Note that the court applied the 2010 version of the FCA public-disclosure bar, which makes an analysis under the bar a non-jurisdictional matter—hence the court's analysis of the motion under the Rule 12(b)(6) standard of review.

[7] Citing *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994).

[8] Citing *U.S. ex rel. Beauchamp v. Academi Training Ctr.*, 933 F. Supp. 2d 825, 840 & n. 28 (E.D. Va. 2013).

[9] Quoting *U.S. ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999).

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> reports discussed accusations of unethical billing, they were silent on whether Unisys had been accused of fraudulent billing. Unisys's reports to DOD–OIG did not disclose a misrepresented state of facts (that FSEs billed in accordance with TO 122) and a true state of facts (that FSEs billed in accordance with the alleged fraudulent red/blue plan), let alone the elements necessary to state a case of fraud.

Thus, because the Unisys report was only disclosed to the OIG and not the general public, and because the report failed to sufficiently disclose allegations or transactions of fraud, the court held that the public disclosure bar did not apply and denied Unisys's motion to dismiss.

IMPLICATIONS FOR GOVERNMENT CONTRACTORS

The facts of this case and the court's reasoning provide several important lessons for government contractors to learn.

- To qualify as a public disclosure under the FCA, it is not enough to make a disclosure to the government. The disclosure must be made available to the general public, such as, for example, through the company's website.
- To qualify as a public disclosure under the FCA, the contractor must publicly disclose the actual allegations of fraud or at least the facts from which fraud can be reasonably inferred. Disclosing only some of the underlying facts that triggered the internal investigation is not enough. As the court stated, "'where only one element of the fraudulent transaction is in the public domain [], the *qui tam* plaintiff may mount a case by coming forward with either the additional elements necessary to state a case of fraud [] *or* allegations of fraud itself."
- If the agency alters the CLIN structure of a government contract, thereby reducing the contractor's profit, the contractor should seek an equitable adjustment and contract modification. The contractor should not unilaterally bill in a manner inconsistent with the contract's CLIN structure to try to recover what it lost.
- Finally, and perhaps most importantly, contractors should fully consider all of the implications of terminating whistleblowers. Terminating (or demoting) a whistleblower is the surest way to turn a well-meaning employee into a litigious and expensive FCA relator.

For more information contact:

Richard J. Vacura
(703) 760-7764
rvacura@mofo.com

Pablo A. Nichols
(415) 268-6653
pnichols@mofo.com

Sara Bartel
(415) 268-6412
sbartel@mofo.com

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