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NEWSLETTER

What Are You Implying? Under the False Claims Act, Your Certificates of Compliance May Say More Than You Think

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Contractors often submit certificates of compliance when seeking payment from the federal government. The certifications might be incorporated into the contractors' delivered work product or could be included in standalone documents accompanying payment requests. And contractors might be inclined to think the only certifications associated with their payment requests are those that are right there in the documents. But federal appellate courts continue to suggest otherwise, and confusion has grown recently over what other certifications of compliance with statutes, regulations and contract provisions, if any, contractors might implicitly make when seeking payment from the Government.

Contractors should be concerned by this continued uncertainty because certifications made along with payment requests are the types of "claims" for payment that can give rise to liability under the False Claims Act (FCA). The FCA bars federal contractors from, among other things, knowingly making false statements material to a false claim (31 U.S.C. § 3729(a)(1)(B) (2009)) or knowingly making false statements to get false or fraudulent claims paid or approved (31 U.S.C. § 3729(a)(2) (1986)). When contractors have not complied with underlying regulations or contract provisions, the Government has sometimes successfully argued that the contractor made an implied false certification, giving rise to FCA liability under the theory that the implied certification constituted a false statement.

Implied false certifications can be both legal and factual in nature. Thus, a health care provider might be found to be making an impliedly false certification of eligibility to receive Medicare

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reimbursements, even if its compliance certification makes no such statement. Or a government contractor could be found to have impliedly and falsely certified that the products it provided under its procurement contract were of a certain quality designated in its contract, even if the certification made no reference to the products' quality.

In December 2010, the implied certification theory gained more traction when the D.C. Circuit articulated a broad definition of implied certification in its decision *United States v. Science Applications International Corp*. The case involved consulting contracts between Science Applications International Corporation (SAIC) and the Nuclear Regulatory Commission that contained provisions for identifying and preventing organizational conflicts of interest (OCIs). After individuals alleged that SAIC had OCIs as set forth in the contract's terms, the Government sued, alleging that the company had submitted false claims for payment to the Government.

Because SAIC's payment requests had not included express certifications about OCIs, the Government's FCA claims rested on the argument that such certifications were implicit in the payment requests. In its first opportunity to squarely address the implied certification doctrine, the D.C. Circuit held that a contractor could impliedly certify compliance with a contract provision, and that if the contract provision was material to the Government's decision to pay a claim, it could give rise to potential FCA liability. But, adding to confusion, the court offered little guidance on what makes a contract provision material.

Other jurisdictions have further muddled the contours of implied certification in recent months. At the beginning of June, the First Circuit adopted a broad view of FCA liability stemming from false certifications, but refused to distinguish between "express" and "implied" false certifications, reasoning that "these categories may do more to obscure than clarify" the FCA issues before the court. *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, No. 10-1505, 2011 WL 2150191 (1st Cir. June 1, 2011). Later that month, the Third Circuit adopted the implied certification theory of FCA liability, but noted that it "should not be applied expansively," stating that payment of federal funds must be conditioned on compliance for an implied certification to potentially be actionable. *United State ex rel. Wilkins v. United Health Grp., Inc.*, No. 10-2747, 2011 WL 2573380 (3d Cir. June 30, 2011).

Despite the conflicting opinions coming down in various jurisdictions, the Supreme Court has so far offered no guidance on the subject. This past spring, the Court had the opportunity to weigh in on the implied certification doctrine in its decision in *Schindler Elevator Corp. v. United States ex rel. Kirk*, a case in which a whistleblower based his theory of his former employer's implied certification FCA liability on information gleaned from Freedom of Information Act disclosures. However, although an *amicus* brief drew attention to the problematic uptick in whistleblowers bringing false certification cases, the Supreme Court did not discuss the scope of implied certification at all in its May 2011 decision. Instead, it decided the case on narrow jurisdictional grounds.

In short, given that the Supreme Court has yet to weigh in, the current status of implied certification across the country seems to be as follows: the Second, Third, Sixth, Ninth, Tenth, Eleventh and D.C. Circuits have recognized the implied certification doctrine, but have given it varying breadth. The First Circuit seems to have adopted a broad view of FCA liability, but has declined to recognize a categorical difference between

express and implied certifications. The Fourth Circuit has expressed hesitation about the validity of the implied certification doctrine, and the Fifth Circuit has thus far declined to recognize it at all.

Since a government contractor generally cannot control where a whistleblower or the Government will pursue litigation on FCA charges, what can a diligent contractor do to limit the chances that its payment requests-and accompanying certifications-are exposing it to FCA liability? These risks are real and extend to a wide variety of certifications: Appeals courts have allowed FCA claims to go forward alleging that contractors knowingly and falsely certified compliance with provisions such as the Anti-Kickback Act (41 U.S.C. §§ 8701-07); the Medicare-specific anti-kickback statutes (42 U.S.C. §§ 1320a-7b); and the Service Contract Act (41 U.S.C. § § 6702-04). Compliance with these statutes-to say nothing of the myriad regulations incorporated into government contracts-could potentially be deemed impliedly certified through a payment request, if the Government were to contend it was material to its decision to pay.

It sounds obvious, but the best way to prevent such implied certifications from leading to FCA claims is to limit the chances that your company violates applicable statutes, regulations and contract provisions. To do so, you should support and refine the same robust compliance and reporting programs that are already in place to ensure compliance with applicable rules on an everyday basis.

For example, your company may have policies and processes to identify and mitigate OCIs because you know an unreported OCI could serve as grounds for a competitor's successful bid protest. When drafted and implemented effectively, those same policies might ward off FCA liability as well: In SAIC, the D.C. Circuit noted that a jury could find that no false claims were knowingly made if the jurors agreed that the contractor's "compliance system was generally adequate and that individual employees with knowledge of the company's conflicting business relationships honestly and reasonably believed that these relationships created no potential conflicts." The same could be true of the Service Contract Act's wage and fringe benefits requirements or the Anti-Kickback Act's prohibitions: Your company's efforts to ensure compliance with an applicable rule will go a long way toward reducing the risk that your firm knowingly, falsely, and impliedly certifies compliance with that underlying rule-and puts the company at risk of an FCA suit.