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ALERT

DOJ Leverages Government Ethics Statute in Civil False Claims Suit

May 9, 2022

WHAT: The U.S. Department of Justice (DOJ) filed a six-count Complaint against a federal contractor, Intelligent Fiscal Optimal Solutions, LLC (iFOS), in the District of Maryland, alleging three violations of the Civil False Claims Act (FCA) as well as counts for breach of contract, payment by mistake, and unjust enrichment. As alleged, the core predicate misconduct for the FCA counts involved an elaborate iFOS plan to conceal from the U.S. Department of Homeland Security (DHS) the fact that it had engaged a former senior DHS official, as a subcontractor/consultant, who was then subject to a one year "cooling off" ban on agency communications, and had permitted the official to violate that communications ban. iFOS allegedly carried out the subterfuge by, among other things, billing DHS for the time worked by the former official while attributing the time and charge to an iFOS employee.

The communications ban stems from a criminal statute, the Ethics in Government Act (EGA), 18 U.S.C. § 207(c), which prohibits certain senior personnel from trying to influence their former agencies about official matters for a period of one year from the end of their federal employment. Thus the popular sobriquet of the ban as a "cooling off" period to prevent actual or apparent impropriety from influence peddling.

WHEN: DOJ filed the complaint on May 2, 2022.

WHAT DOES IT MEAN FOR INDUSTRY: In the Complaint, DOJ marshaled an extensive record of text messages and phone calls between the former official and a senior DHS former colleague during the cooling off period, and set forth a detailed account of the invoices through which iFOS allegedly hid the EGA violations from

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agency contracting personnel, along with a narrative showing how the misconduct corrupted the DHS acquisition process. Reviewing this tale and the array of incriminating evidence supporting it, one might be tempted to draw only the obvious lesson that it's wrong to lie when billing your federal-agency customer to cover up felony-level violations of the U.S. Code. That's a righteous conclusion, but there is more to consider.

iFOS may seem to be a major outlier because of the enormous amount of trace evidence of improper communications and the associated corruption—for example, the Complaint alleges that the former official, on his way out of the agency, helped steer a contract to iFOS by influencing his successor to make the award. But the very grotesquery of the alleged misdeeds is likely to generate wide-ranging notoriety which might, in turn, lead agencies, or qui tam relators, to think of using less egregious EGA violations as grounds for FCA action. It is not a big stretch to conceive that an investigator, stymied in an attempt to persuade a prosecutor to redress an EGA violation through criminal action, might find a more receptive audience for a civil FCA action based on some implied certification theory. This might happen even if the alleged misconduct were not the product of clear corrupt motive and mendacity—even if the problem is an honest mistake or conduct in a gray area, of which there are many in Government ethics.

So a comprehensive, conscientiously applied regimen for managing ethical risks for former officials is even more important now. Key elements of such a program have always been early identification of issues and risks for individual recruitments; careful vetting and review of agency ethics opinions; and clear and documented records that former officials, and their new company supervisors, understand any limitations on the new employees' activities. Firms should take this case as a clarion for renewed assessment of overall company risk in this area, scaled by the number and seniority of former Government officials hired, the adequacy of any existing risk management processes, and how well the relevant personnel understand and comply with those safeguards.