In FCA Case, Court Finds Civil Penalties Would be Unconstitutional

Recently, a federal district court issued a ruling that could have a substantial impact on future *qui tam* claims brought under the False Claims Act ("FCA"). In *United States of America ex rel. Bunk v. Birkart Globistics GmbH & Co., et al*., No. 1:02-cv-1168, 2012 WL 488256, (E.D.Va. Feb. 14, 2012) (Trenga, J.), the Court refused to impose civil penalties where the Relator in an FCA case had failed to prove any actual damage to the government. The Court found that imposing a statutory penalty of between $50-$100 million under such circumstances would be unconstitutional under the Eighth Amendment's Excessive Fines Clause.

The case involved a 2001 solicitation by the Department of Defense Contracting Office for the transportation of military household goods between U.S. bases in Germany, Italy, Belgium, and the Netherlands. The solicitation required that the contractor demonstrate an ability to transport goods between any of these countries, and to indicate which subcontractors it would utilize. After an information session held by the government regarding the solicitation process, at least four potential contractors reached an agreement on a price that each would charge as subcontractors to the company that won the main contract with the Department of Defense. Notwithstanding this agreement, the winning bid, by Gosselin Worldwide Moving, included a certification that it had arrived at the prices in its offer "independently" and without any communications with any other offeror relating to price "for the purposes of restricting competition."

In 2002, a Relator, Kurt Bunk, filed an action under seal, alleging, among other things, that the Gosselin defendants[1] had violated the FCA by falsely certifying that they had arrived at the prices in their offer "independently," when those prices actually resulted from collusion and price-fixing among potential bidders.[2]

On August 4, 2011, a jury found the Gosselin defendants liable under the FCA for the 2001 contract based on the false certification in the bid documents that the prices had been arrived at "independently." At trial, however, the Relator failed to prove that the false claims caused any actual damages to the government. Instead, after trial, the Relator relied on the FCA's civil penalty provision, which provides that a person who violates the False Claims Act is liable to the United States government for a statutory penalty "of not less than $5,000 and not more than $10,000" for each false claim (to be adjusted for inflation). 31 U.S.C. § 3729. The parties had stipulated that 9,136 invoices, or "claims," had been submitted under the contract. Bunk, No. 1:02-cv-1168, at *4.

The Court calculated that the statutory penalty for the 9,136 invoices that had been filed under the contract would result in an award of between $50,248,000 and $100,496,000. Id. The defendants contended that such a penalty would constitute an excessive fine under the Eighth Amendment's Excessive Fines Clause, which has been interpreted to prohibit forfeitures that are "grossly disproportional to the gravity of a defendant's offense." Id.

The Court agreed, noting that there was no evidence that the government would have obtained services from the defendant at a lower cost "absent the subcontract pricing conspiracy." Id. at *5. This, the Court found, was "precisely the type of evidence needed to establish and calculate damages under the FCA." Id.

Given (i) the lack of proof of any actual damage to the government, (ii) that the government had twice chosen to renew its contract with the defendants (even after becoming aware of the Relator's allegations), and (iii) that the defendants

made little profit from the contract, the Court found that the civil penalties under the FCA would be "grossly disproportional" to the gravity of the offense. Id. at *8-11. As a result, the Court refused to impose the civil penalty. Id. at *11.

The Court also found that it did not have discretion under the FCA to award a lower penalty. Id. at *13. Thus, nearly ten years after the FCA case was filed under seal, and despite a victory on liability, the Relator was entitled to no monetary recovery.

This case could be a harbinger of things to come. Should other courts follow suit, companies that are facing FCA claims could have a powerful new weapon in their arsenal for responding to Relators who intend to rely on statutory penalties as a substitute for evidence of actual damage to the government. ◆

Endnotes

1 The "Gosselin Defendants" include Gosselin Worldwide Moving N.V., its successor company, Gosselin Group N.V., and Marc Smet.

2 The Relator filed the FCA case, which included other claims against additional defendants, under seal in 2002. The government chose to intervene in some of the claims in 2008, but did not intervene with respect to the 2001 contract at issue in the present case.

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