Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=a62d8157-fb1c-42d2-b43f-d4676cc4a8e4

SHEPPARD MULLIN
SHEPPARD MULLIN RICHTER & HAMPTON LLP
Government Contracts Law BLO
For the latest updates on laws affecting government

Government Contracts Blog

Posted at 6:46 AM on June 11, 2009 by Sheppard Mullin

Render Unto Caesar What Is Caesar's ... Or Else: The Expansion of False Claims Act Liability to the Retention of Overpayments

On May 29, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 ("FERA").[1] FERA implements a number of sweeping changes to the False Claims Act ("FCA"), including a provision that expands significantly the circumstances under which a contractor may be held liable under the so called "reverse false claims" theory.

Prior to FERA, the FCA's "reverse false claims" provision imposed liability on anyone who knowingly made a false record or statement "to conceal, avoid or decrease an obligation to pay or transmit money or property to the Government." FERA extends liability to anyone who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government."[2] In order to be liable under this new provision, a contractor need not make a false record or statement – or take any other affirmative action at all. *Rather, the mere failure to return an overpayment, without more, is now enough to expose contractors to liability under the FCA.*

The expansion of FCA liability to the mere retention of overpayments is separate and distinct from the mandatory disclosure obligations set forth in the December 12, 2008 amendments to the Federal Acquisition Regulation ("FAR"), which added a cause for debarment for:

> Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contractor a subcontract thereunder, credible evidence of … [s]ignificant overpayment(s) on the contract..[3]

There are, no doubt, certain similarities between the new FERA provision and the FAR's mandatory disclosure obligation with respect to overpayments – both relate to overpayments, both punish inaction, and both exempt overpayments that are reconciled in the ordinary course of business.[4] That, however, is where the similarities end.

In particular, contractors should be aware that FERA's new "reverse false claims" provision is substantially broader than the already burdensome obligations imposed on contractors under the FAR's mandatory disclosure rule. For example:

- The FAR rule is limited to procurement contracts. The obligation to return overpayments under FERA, however, applies to overpayments made in virtually any context, including under grants, cooperative agreements, and other non-FAR-based agreements.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=a62d8157-fb1c-42d2-b43f-d4676cc4a8e4

- The FAR's mandatory disclosure rule requires a contractor to disclose "credible evidence" of an overpayment. The act of disclosure satisfies the contractor's obligation and the issue of repayment is left for another day. FERA, on the other hand, creates liability for the mere retention of overpayments, effectively requiring a contractor to return an alleged overpayment or face the risk of treble damages. This endows the Government with an extraordinary weapon in cases where there is a dispute as to whether any repayment is owed. If the Government does not believe that a contractor has a valid basis for refusing to pay an alleged overpayment, the Government now may argue that continued refusal to pay would be "knowing and improper" in violation of the FCA.

- The FAR's mandatory disclosure rule is triggered when a "principal" becomes aware of credible evidence of an overpayment. Under FERA, knowledge of an overpayment by virtually anyone in a contractor's organizational structure arguably is enough to trigger FCA liability.

- There is broad consensus that the FAR's mandatory disclosure rule requires actual knowledge of an overpayment. Under the FCA, however, "knowingly" is defined to include not only actual knowledge, but also "deliberate ignorance" and "reckless disregard."[5] Thus, a contractor may be held liable under the new FERA "reverse false claim" provision for failing to return an overpayment of which it was not aware, so long as its failure to learn of and correct the overpayment was at least reckless. In practical terms, this imposes upon contractors an obligation to ensure the ability of their internal control systems timely to identify and to ventilate for resolution all Government overpayments, or risk treble damages under the FCA.

- A contractor's obligation to disclose overpayments under the FAR rule ends three years after final payment. Under FERA, liability for the failure to return an overpayment would be subject to the FCA's six-year statute of limitations. It is unclear, however, when the FCA's statute of limitations begins to run on a violation that involves inaction. Does it commence on the date the contractor knew or should have known of the overpayment? Or is the failure to return an overpayment in the nature of a continuing violation that exists in perpetuity? FERA does not answer this question.

- The FAR's mandatory disclosure obligation is limited to "significant" overpayments. Under FERA, there is no requirement for the amount of the overpayment to be significant. It appears that any overpayment, no matter how small, will suffice, so long as it meets whatever standard of “materiality,” if any, a given court might choose to acknowledge.

As these points demonstrate, if you think the FAR's mandatory disclosure requirements are burdensome, FERA has made the situation much, much worse. In the words of Bette Davis' character in the movie *All About Eve* (1950), "Fasten your seatbelts. It's going to be a bumpy night!"

Authored by:

Keith R. Szeliga

(202) 218-0003

kszeliga@sheppardmullin.com

---

[1] Pub. L. No. 111-21.

[2] 31 U.S.C. § 3729(a)(1)(G).

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=a62d8157-fb1c-42d2-b43f-d4676cc4a8e4

[3] FAR 9.406-2(b)(1).

[4] Although FERA is not as explicit as the FAR on the latter point, FERA's limitation to "improperly" retained overpayments should be interpreted to negate liability for payments that undergo a reconciliation process.

[5] 31 U.S.C. § 3729(b)(1).