Reuters Legal News

False Claims Act: a tool increasingly used to revitalize the defense industrial base

By Todd R. Overman, Esq., and Scott Gallisdorfer, Esq., Bass, Berry & Sims PLC

DECEMBER 21, 2023

The U.S. government has increasingly turned to federal contractors to address national security concerns. Specifically, the Biden administration has prioritized revitalizing the U.S. Defense Industrial Base (DIB) while emphasizing that its health is critical to U.S. national security prerogatives. For example, a September 2022 Executive Order (https://bit.ly/48pLuIG) clarified that the Committee on Foreign Investment in the United States should consider a transaction's risk to the health of the DIB as part of its review criteria.

The administration also lobbied for, and signed into law, a transformative investment in American semiconductor manufacturing capabilities. And the administration views Ukraine aid as a tool for strengthening the DIB. While some agency secretaries may see efforts to safeguard national security as reflecting a "strong and vibrant partnership with our private sector," these efforts also come with significant compliance and enforcement risks for contractors. See Remarks by U.S. Secretary of Commerce Gina Raimondo on the U.S. Competitiveness and the China Challenge," U.S. Department of Commerce, Nov. 30, 2022.

Consider the False Claims Act (FCA), a costly vector of potential liability for federal contractors. The law imposes liability on an individual who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval [or] knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729.

The law's *qui tam* provision allows private individuals and entities — frequently current or former employees or a company's competitors — to sue on behalf of the United States government and share in the monetary award if successful. Historically, the FCA has been used to recover more than $72 billion in improperly paid claims and penalties.

In Fiscal Year (FY) 2022 alone, FCA settlements and judgments topped $2 billion, and the Department of Justice (DOJ) resolved over 350 individual matters — the second-highest number ever. More recently, DOJ announced through remarks by Deputy Attorney General Lisa Monaco (https://bit.ly/4atewsm) a "surge of resources to address a troubling trend: the intersection of corporate crime and national security."

Alongside these growing FCA enforcement efforts, domestic preference requirements are also increasingly being used as another tool to strengthen the DIB. Most notably, the Biden administration has increased (https://bit.ly/3GNiQVR) domestic content thresholds under the Buy American Act (BAA) with the hope that the federal government's purchasing power can help bolster DIB capabilities.

The Biden administration has prioritized revitalizing the U.S. Defense Industrial Base (DIB) while emphasizing that its health is critical to U.S. national security prerogatives.

An increasingly complex web of domestic preference requirements are becoming more confusing and more strictly enforced. An alphabet soup of acronyms like BAA, BABA (Build America, Buy America Act), and TAA (Trade Agreements Act), as well as the Berry Amendment, all are "material" requirements for purposes of the FCA. And as seen in one recent settlement between DOJ and a Virginia-based provider of textile-based tactical products, violating their requirements can be costly.

The Buy American Act (BAA)

The BAA is a preference program that obligates the U.S. government to prefer procurement of "domestic end products" for government contracts. Under the statute, a product not consisting wholly or predominately of iron or steel is defined as a "domestic end product" if it is manufactured in the United States and more than 60% of the costs of its components are mined, produced, or manufactured in the United States. FAR § 25.003. The domestic content threshold will increase (https://bit.ly/3TvSlff) to 65% in 2024 and 75% in 2029.

As for domestic end products consisting wholly or predominantly of iron or steel, domestic components must represent at least 95% of the costs to qualify. *Id.* Practically, the BAA acts as a "pricing penalty," such that offers to sell foreign products are evaluated as if they cost 50% more than the offered price.

Thomson Reuters is a commercial publisher of content that is general and educational in nature, may not reflect all recent legal developments and may not apply to the specific facts and circumstances of individual transactions and cases. Users should consult with qualified legal counsel before acting on any information published by Thomson Reuters online or in print. Thomson Reuters, its affiliates and their editorial staff are not a law firm, do not represent or advise clients in any matter and are not bound by the professional responsibilities and duties of a legal practitioner. Nothing in this publication should be construed as legal advice or creating an attorney-client relationship. The views expressed in this publication by any contributor are not necessarily those of the publisher.

THOMSON REUTERS®

The Trade Agreements Act (TAA)

The TAA requires contractors to supply goods to the government that are either wholly manufactured or "substantially transformed" in the United States or countries with which the United States has a trade agreement. Born from nondiscrimination obligations under the World Trade Organization Agreement on Government Procurement (GPA) and U.S. Free Trade Agreements, the TAA requires government contractors to stipulate that only U.S.-made or designated country end-products will be delivered to the U.S. government. FAR 52.225-5.

A successful compliance infrastructure includes the development of FCA policies and procedures, tailored to the risk profile of the business.

The TAA effectively waives BAA preferences for products from designated countries. In addition, products from non-designated countries must be clearly evidenced in the contractor's original offer. Contractors who falsely certify goods as TAA compliant cannot legally submit a claim to the government, and receiving payments for non-compliant claims may trigger FCA liability.

The Berry Amendment

Designed to support U.S. industry and advance national security imperatives, the Berry Amendment prohibits DOD from procuring certain textiles, clothing, and fabrics grown or manufactured outside the United States. Unlike under the BAA and TAA, suppliers cannot submit certificates of noncompliance; nonconforming products are simply prohibited from government procurement. Submitting a claim to the government after supplying non-Berry compliant materials or goods will necessarily violate contract terms and, possibly, the FCA.

The London Bridge settlement

While the BAA, TAA, and Berry Amendment differ slightly in their application, failure to comply with their terms can result in significant civil and criminal penalties under the FCA. A recent settlement (https://bit.ly/3tgGqYa) between DOJ and London Bridge Trading Company, Ltd. illustrates the risk.

On Nov. 20, DOJ announced a $2.1 million settlement between London Bridge, the United States, and a *qui tam* relator. According to the complaint, the relator had witnessed incoming shipments of fully manufactured products, such as loadout bags and backpacks with "Made in China" or "Made in Peru" labels. She watched as London Bridge employees removed these labels and replaced them with "Made in USA" stickers. Some of these items were then sold through the GSA [General Service Administration] Advantage website with the representation that "[a]ll items are manufactured in the USA."

The relator alleged that, since 2008, London Bridge sold almost $3 million worth of textile products to the United States government, much of which was noncompliant with the BAA, TAA, and Berry Amendment. According to the relator, by falsely certifying foreign manufactured products as "Made in USA," and by failing to comply with material obligations of the BAA, TAA, and Berry Amendment, London Bridge submitted false and fraudulent claims to the United States in violation of the FCA.

Several basic steps can help insulate contractors from FCA risk arising from confusing domestic preference rules

While the misconduct alleged in connection with these settlements may seem obvious, the bevy of domestic preference rules, many of which are frequently changing, can make compliance confusing and difficult — even for the most diligent contractors. And yet there are several basic steps companies can take to help ensure they do not run afoul of the FCA.

Establish compliance policies and training

First, companies doing business with the government should implement a robust compliance program. A successful compliance infrastructure includes the development of FCA policies and procedures, tailored to the risk profile of the business. These policies should include an established process for disclosing credible evidence of potential legal and contractual violations to the relevant federal agency.

Trainings should complement policies to ensure employees throughout the organization are well-versed on the obligations the FCA imposes on government contractors. In addition, compliance policies should not just be left on the shelf to collect dust. Instead, companies should conduct regular audits to ensure policies are working effectively and to assess the need for updates and modifications.

Compliance hotline

Contractors should also consider establishing an anonymous compliance hotline that allows employees to report potential violations. Hotlines can help companies identify FCA violations before the government begins an investigation or a whistleblower files a *qui tam* complaint. Hotlines can help facilitate early self-disclosure of potential violations to the government, possibly saving a company significant amounts in penalties and damages.

Contractors should also view the implementation of a compliance hotline as an opportunity to foster a culture of compliance. "Tone from the top" is important. Indeed, it's a critical factor DOJ considers when evaluating contractor compliance programs in connection with FCA investigations. Executives should extol the importance of compliance and make the issue a C-suite priority by routinely addressing the subject in settings like board meetings, earnings calls, and all-staff discussions.

Designate a specific compliance officer

Given the complexity of domestic preference requirements and the many other regulatory and contractual obligations facing

 ©2023 Thomson Reuters

government contractors, companies should consider designating a specific individual with responsibility for implementing and overseeing its compliance program.

Having a designated compliance officer provides employees and management with an established point of contact for any FCA or other compliance-related issues that may arise. Compliance officers also function as a source of knowledge and expertise with respect to relevant legal, regulatory, and contractual requirements.

Conclusion

With the viability of the U.S. DIB being a priority of the Biden administration, even well-intentioned government contractors can find themselves in the enforcement crosshairs. The FCA has proven a powerful and convenient tool for DOJ when it comes to rooting out corporate misconduct and furthering U.S. national security interests.

As domestic preference programs increase in complexity, risks associated with noncompliance have only grown. DOJ contends that contractors "are on the front lines of today's geopolitical and national security challenges" and, "[i]ncreasingly, corporate criminal investigations carry profound national security implications." Contractors should take steps to shore up their FCA-tailored compliance programs now, before the government or a *qui tam* whistleblower comes calling.

About the authors

Todd R. Overman (L) is the chair of the government contracts practice group at **Bass, Berry & Sims PLC** and managing partner of the firm's Washington, D.C., office. He counsels companies on government contracts, bid protests, and False Claims Act litigation. In addition, he has extensive M&A experience advising on more than 50 transactions involving the purchase or sale of a government contractor over the last decade. He can be reached at toverman@bassberry.com. S**cott Gallisdorfer** (R) is a member at the firm in Nashville, Tennessee, where he focuses his practice on complex litigation and government and internal investigations. He has significant experience in False Claims Act (FCA) litigation and health care fraud and abuse investigations, and he has handled government and internal investigations for clients in a variety of other industries, including defense contracting and federal procurement, financial services, transportation, and energy. He can be reached at scott.gallisdorfer@bassberry.com.

This article was first published on Reuters Legal News and Westlaw Today on December 21, 2023.

© 2023 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit legalsolutions.thomsonreuters.com.