No Contractor Liability For False Statement Gov't Didn't See

Law360, New York (April 25, 2017, 12:16 PM EDT) What happens when an employee of a government contractor falsifies a record that is entered into an internal database that is subject to government review, but the contractor discovers the record and rectifies the situation before the record is actually reviewed or otherwise presented to the government? Could an aggressive prosecutor pursue the contractor for a criminal false statement?

Title 18 U.S.C. Section 1001 provides:

> Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully – (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry shall be fined under this title [and/or] imprisoned not more than five years.

"Material" is defined as having the propensity to influence the government; actual influence is not required. Neder v. United States, 527 U.S. 1, 16 (1999). The U.S. Department of Justice has gone so far as to say that a false statement is actionable if the false statement is made in a business record that may be subject to government review.[1] A number of circuit courts of appeal have applied this approach to false statements located in internal files reasoning that the purpose of the internal files was to provide an audit trail for the government. See, e.g., United States v. Rutgard, 116 F.3d 1270 (9th Cir. 1997) (false entries in Medicare patients' charts that a doctor kept on file); United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995) (false invoices that a nonprofit kept on file); United States v. Hooper, 596 F.2d 219 (7th Cir. 1979) (forged signatures for a federal student aid program that a university kept on file).

Other courts, however, have limited the government's reach under Section 1001. "The Government would stretch the definition of materiality well beyond the existing case law by asserting that a statement is material even when the likelihood is minimal that the decisionmaker will view it or take it into consideration." United States v. Chase, 2005 WL 3288731 (D. Vt. 2005) (granting motion for judgment of acquittal with respect to counts under Title 18 U.S.C. Section 1035, the health care analog to Section 1001). Timely correction of a false statement, in fact, can eliminate materiality under Section 1001 entirely.

The case of United States v. Cowden, 677 F.2d 417 (8th Cir. 1982), provides a good example. In Cowden, the defendant arrived at Twin Cities International Airport in Minnesota via England and declared on his customs form that he was carrying less than $5,000 in cash. A customs agent began a routine inspection of the defendant's briefcase and felt a parcel beneath the flap, but he

[1] U.S. Attorney's Criminal Resource Manual § 907, accessed on April 12, 2017, available at: https://www.justice.gov/usam/criminalresourcemanual907statementswarrantingprosecution.

did not remove it. The agent later testified that he did everything possible to avoid arousing the defendant's suspicions. The agent asked the defendant if there was anything else he wished to add to his declaration. The defendant answered, "No." The inspector then asked the defendant if he was carrying over $5,000 in cash. The defendant answered, "Yes, I would like to amend my declaration at this time." The defendant, however, was not allowed to amend his declaration and his luggage was moved to a secondary inspection point where over $15,000 in cash was found. The defendant was subsequently convicted under Section 1001.

The Eighth Circuit reversed the defendant's conviction because his false declaration to the customs agent was "almost immediately corrected by a true oral statement." The Eighth Circuit explained that the inspection should have been conducted so that the probable result was compliance with the law instead of eliciting a violation of the law, and that the defendant should have been allowed to amend his declaration. Cf. United States v. Salas-Camacho, 859 F.2d 788 (9th Cir. 1988) (distinguishing timely correction from defendant's "delayed admission" only after his vehicle was moved to a secondary inspection point and the customs agent informed him that he was aware of his prior smuggling conviction was actionable under Section 1001).

Aggressive prosecutors could argue that a Section 1001 violation is complete as soon as a falsified record is entered into a government contractor's internal database. But the Cowden and Salas-Camacho cases provide contractors with a ready counterpoint: Since correcting a false statement actually received by a government agent can eliminate materiality, then, a fortiori, there should not be any materiality and therefore no Section 1001 violation when a falsified record is discovered and corrected before it is reviewed or otherwise presented to the government.

The case of United States v. Cannon, 41 F.3d 1462 (11th Cir. 1995) illustrates this point. In Cannon, the defendant was convicted under Section 1001 because he allegedly presented a government quality assurance representative ("QAR") with a testing certification that stated that ballistically tested titanium had been used when nonballistically tested titanium had actually been used, and this caused the QAR to sign off on the corresponding DD250 form (a form on which the government declares that the contract specifications have been satisfied and payment is due). When the government seized the testing certification, however, it stated that nonballistically tested titanium had been used. The Eleventh Circuit explained that "no reasonable trier of fact" could find the defendant guilty of "using false documents or representations" under Section 1001 when the testing certification accurately reflected the materials that had been used at the time the government first saw it.

The take-home message from Cowden, Salas-Camacho and Cannon is clear: Where the documents do not lie at the time they are viewed by the government, there should be no liability for a false statement because there has been no harm to the government.