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Whistleblower Defense Client Alert: Using Government Witnesses to Obtain Summary Judgment on a Qui Tam Relator's FCA Claims

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False Claims Act and Qui Tam

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By: Patrick M. Hagan and Daniel E. Shuey

A recent False Claims Act (FCA) decision serves as an important reminder that although *qui tam* relators may “stand in the shoes” of the government for purposes of bringing a lawsuit, they are not entitled to substitute their judgment for that of key government decision-makers to avoid summary judgment. In *U.S. ex rel. American Systems Consulting, Inc. v. ManTech Advanced Systems Int'l Inc.*, Case No. 2:08-cv-733 (S.D. Ohio), the court granted summary judgment to defendants. The court reasoned that when key government employees testify that an alleged misrepresentation was immaterial to the government's decision to pay, a *qui tam* relator may not survive summary judgment by speculating that it was, in fact, material.

In *ManTech*, relators (ASCI) alleged that defendants (ManTech) received a government contract (previously held by ASCI) based, in part, on ManTech's representation that a certain employee would serve as the project manager. ManTech learned later in the bidding process that the employee was leaving the company but did not disclose this fact until after the government awarded the contract.

The trial court held that the “natural tendency” materiality standard governed and that, to survive summary judgment, ASCI had to demonstrate a genuine dispute that the alleged misrepresentation had “the objective, natural tendency to influence a government decision maker.” There is an inherent tension in the “natural tendency” materiality standard between what *could* influence a government decision-maker and what actually *did* influence the decision. The parties in *ManTech* advanced many of the typical arguments made by relators and defendants, and the court's interpretation provides helpful guidance for defendants seeking to focus the materiality analysis on facts showing that the government was not influenced by the alleged false statements.

ManTech presented testimony from the government employees responsible for awarding the contract. These employees testified that the (un)availability of the specific employee was not material to the government's decision to award the contract. The government employees testified that they did not consider the contract to require the bidder to specify an individual who would serve as the project manager and that they did not consider the availability of a particular individual to serve as project manager when awarding the contract. Finally, ManTech introduced evidence of the government's rejection of ASCI's bid protest, in which the government was aware of the unavailability of the individual in question to serve as project manager. This was important because after reviewing the bid protest, the government still upheld the contract award to ManTech.

ASCI was unable to provide any testimony from a government employee to contradict ManTech's evidence. Instead, ASCI argued that the government employees testified that the unavailability of the ManTech employee was immaterial not because it was true but because it was "easier" to do so after the contract had already been awarded; the trial court rejected this argument as "pure speculation." ASCI also offered an expert report from a lawyer who reviewed the contract bidding documents and opined that the unavailability of the witness was material. The trial court stated that the lawyer's report was "rank speculation," and was simply a memorandum of law that improperly contradicted the uncontroverted testimony of "the government employees who were involved in the proposal evaluation and award process." The trial court found that ASCI's speculations did not create a genuine issue of material fact and granted ManTech summary judgment.

This decision is a good reminder that, although the government is technically the real party in interest in a *qui tam* FCA action, "government decision makers" are often a defendant's strongest witnesses. *ManTech* instructs that FCA defendants should seek helpful evidence regarding all three "phases" of the government's decision-making process: (1) that the government did not intend to condition payment on the issues in question; (2) that the government did not consider the misrepresentations at issue when making the payment decision; and (3) that, after being informed of the misrepresentations at issue, the government continued to do business with the defendant. By obtaining comprehensive evidence of immateriality in discovery, a defendant can foreclose any theoretical arguments by the relator that the misrepresentations at issue *could* have influenced the government's payment decision.

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