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False Claims Act

Don't Mistake Payments For Approval, U.S. Attorneys Say

BY DANIEL SEIDEN

Contractors must not be let off the hook solely because a government agency knew about their alleged misconduct and continued to pay anyway, U.S. attorneys have been telling district courts.

Ceaseless payments to a government contractor don't necessarily show that an agency approved of or was indifferent to misconduct. That factor may not tell the whole story of whether a defendant has violated the False Claims Act, they said.

BP Exploration, for example, recently defeated a case by showing that the Department of the Interior allowed it to keep drilling for oil despite knowledge of regulatory noncompliance.

The attorneys have hit back at this "they-didn't-care" defense by filing statements of interest with courts, such as the statement acting U.S. Attorney for the Southern District of New York Joon H. Kim filed May 8 in support of a whistle-blower's effort to revive a case against Moody's Corp.

The defense shouldn't be a silver bullet, Kim and other U.S. attorneys have said, because an agency continuing to pay in the face of fraud claims could mean an agency:

- wants to avoid excessive costs associated with terminating contractual payments;
- lacks the resources to take action against fraud;
- prioritizes the need for uninterrupted public services, such as health care and public safety;
- may not view interrupting a long-running contract as being advantageous to the government; or
- prefers to allow its contractor to make its case in court.

The decision to keep paying a fraudulent contractor, therefore, may have nothing to do with the government's interest in seeing that contractor held accountable, the U.S. attorneys said.

Range of Factors "[Whistle-blowers'] attorneys agree with the statements of interest, which have stressed that the question of materiality involves looking at a range of factors in each case, including whether the violation goes to the essence of the bargain with the government," Claire Sylvia, partner at whistle-blowers law

Contractor Pay Considerations

Four reasons an agency might continue to pay contractor despite misconduct, according to U.S. attorneys.

*Avoiding excessive costs
associated with terminating
contract payments*

*Seeking alternative for fraud
such as administrative
penalty*

*Lacking resources
to take action*

*Prioritizing uninterrupted
health, public safety services
over confronting fraud*

Source: Bloomberg BNA

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firm Phillips & Cohen LLP, San Francisco, told Bloomberg BNA.

Defense attorneys "are wrong to argue that the government's continued payment when it is on notice of an alleged violation of a contract, law or regulation demonstrates that the violation did not matter," she said.

The effectiveness of these statements of interest varies depending on the judge in a case, said Eric W. Sitar-chuk, partner with Morgan, Lewis & Bockius LLP in Philadelphia. However, the Supreme Court in *Universal Health Servs., Inc. v. United States ex rel. Escobar* has been crystal-clear that it's an effective argument to say that no liability can attach if the government continued to pay despite knowledge of noncompliance, he said.

These U.S. attorney statements "are efforts to back pedal and re-argue the Supreme Court case, as opposed to dealing with a proper interpretation, and I hope will not get a lot of traction," said Sitar-chuk, a former U.S. assistant attorney.

Answers Coming for Strategy Continuing to pay a contractor despite knowledge of noncompliance is "very strong evidence" that the noncompliance wasn't material to the government's payment decisions, the Supreme Court said in *Universal Health*.

Highway guardrail provider Trinity Industries Inc. said the Federal Highway Administration's ceaseless approval of its products demands tossing a \$663 million verdict. Meanwhile, a helicopter provider said bribery by an associate didn't stop the Army from seeking its services in pending appeals.

However, courts still need to appreciate the myriad reasons why an agency might continue to pay a contractor it believes submitted false claims for payment, the U.S. attorneys say.

A government agency may want to avoid further cost or simply wish to afford an accused party the opportunity to be heard in court instead of confronting misconduct by cutting off payments, said U.S. attorneys in their statement supporting a Medicare fraud case.

There are "many good reasons, including important public health and safety considerations, why the government might continue to pay" a noncompliant defendant, U.S. attorneys said in another statement.

Serving the public interest may require an agency to maintain payments to avoid harming health care beneficiaries or depriving soldiers of needed supplies, Sylvia said.

Government Acquiescence If the government agency to which an allegedly false claim was submitted makes a payment in response, it provides evidence that the company didn't know and couldn't know that the claim it submitted was false, said Timothy J. Heaphy, chair of Hunton & Williams LLP's white-collar defense and internal investigations practice in Richmond, Va., and Washington.

Government acquiescence undercuts the prosecutor's intent requirement, said Heaphy, a former U.S. attorney for the Western District of Virginia.

"While there may be circumstances when the prosecutor can justify the payment, the mental state of the defendant will be harder to prove" in cases of payment despite noncompliance, he said.

Full Knowledge A recent U.S. attorney statement of interest concerning alleged weapons proficiency fraud focused on the importance of courts considering whether the government has full knowledge of how a contractor satisfied or fell short of contractual requirements.

Continued payments shouldn't excuse contractors from liability unless the government agency has full knowledge of relevant facts, and the government affirmatively accepts the defendant's noncompliance conduct, said then-acting U.S. Attorney General Dana J. Boente.

A level of communication must exist such that "the contractor knows that the government knows" about the alleged misconduct, he said.

The focus of these cases should be the extent to which a defendant has been open with the government, said Reena Dutta, a partner with Hodgson Russ LLP in Buffalo, N.Y.

Because the government can't monitor the satisfaction of every regulation that could be at issue, a contractor would be well-served to keep the government fully informed about its performance, particularly when dealing with an ambiguous contract or regulation, or a change in performance, she said.

"We tell clients, the more disclosure the better," Dutta said. "If you're in doubt as to whether something constitutes noncompliance or a violation of the relevant requirements, disclose."

"There may come a day when the government claims that something was improper, and you'll have a paper trail to show that's not the case, and the government accepted your conduct with full knowledge of the circumstances surrounding the claim," she said.

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