

FEDERAL COURT REJECTS FRAUD CLAIM

Recently, the Sixth Circuit Court of Appeals, the appellate court for Michigan, Ohio, Kentucky and Tennessee, ruled on a case from the Southern District of Ohio, *US ex rel American Systems Consulting, Inc. v ManTech Advanced Systems International*. At issue was whether a court may determine whether a knowingly false statement in a proposal for a government contract was a material misrepresentation under the False Claims Act ("FCA") or if that issue was reserved for a jury. The court ruled that the trial court properly concluded the statement was not material, and the grant of summary judgment was affirmed.

ManTech Advanced Systems International ("ManTech") and American Systems Consulting ("ASC") were competitors. Each responded to a Defense Information Technology Contracting Organization RFP with a proposal. ManTech, as required by the RFP, identified a specific individual as the prospective Program Manager and addressed his skills and qualifications. After the initial proposal was submitted, that individual resigned from ManTech. ManTech did not advise the government and did not modify its proposal even as it submitted subsequent information in support of its proposal.

In its own proposal, ASC identified a prospective Program Manager but did not address his skills and qualifications.

Based upon the higher score received because of the experience of ManTech's proposed Program Manager, ManTech received the contract. ASC filed its FCA action against ManTech, alleging ManTech fraudulently induced the government into awarding it the contract by misrepresenting the identity, skills and qualifications of the person who would act as Program Manager.

During discovery, government contracting managers testified that ManTech would have received the contract even if they had known of the man's resignation. The designation of an individual, they explained, was to show the type of personnel the company could attract and retain; it was not to approve the qualifications of a specific individual. The government considered it in this way because it knew that people change jobs, retire and leave employers for other reasons.

It was also revealed during discovery that the government continued to work with ManTech after it learned of the alleged misrepresentation.

The trial court found, and the Court of Appeals affirmed, that the government's testimony that the alleged misrepresentation had no tendency to influence their decision-making, along with the fact that the government continued to work with ManTech after it learned of the proposed Program Manager's resignation, left ASC without evidence upon which a jury could reasonably find that the alleged misrepresentation was material to the government's decision-making.

The Court of Appeals did reject the trial court's finding that the government's continued work with ManTech after it learned of the resignation necessarily precluded a finding of materiality. Rather, the court stated, it could preclude such a finding in the absence of evidence of other reasons the government might continue with the contract such as investments in reliance upon the agreement, additional costs to find a replacement or unavailability of other contractors.

PRACTICAL TAKEAWAY

Government health care programs are incredibly complicated. Guidance from the government and acts taken with the full knowledge and approval of the government can help ensure compliance with both regulations and expectations. Government knowledge and materiality are common threads in health care FCA cases, ranging from the prohibition against reassignment to Stark and Anti-Kickback allegations. Based upon *ManTech* and similar cases from other circuits, receiving and following guidance from the government can also limit risk and costs in FCA cases, reducing the chances of being a defendant in such a case and allowing for earlier and less expensive pretrial dismissal.

Should you have any questions regarding the False Claims Act or defense against whistleblower actions, please contact:

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Should you have any questions regarding contracting, compliance or government advice and assistance, please contact:

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