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Column: SBA Continues to Focus on Fraud in Set-Aside Programs

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During the past few years, the number of False Claims Act (FCA) civil cases has grown exponentially. While most of this growth has come from an increase in the number of actions involving fraud in the health care industry, plaintiffs also have found the U.S. Small Business Administration's set-aside programs to be fertile ground for FCA claims.

As a result, the government has focused its resources on investigating fraud in these programs.

Numerous Cases of Fraud

In its Congressional Budget Justification for fiscal year 2019, the SBA Office of Inspector General noted that the audits and investigations it has conducted have found numerous instances in which companies that did not meet the criteria for "small" or "disadvantaged" businesses had improperly obtained contracts that were set aside for those types of firms.

The justification stated that in fiscal years 2018 and 2019, the SBA OIG will focus on investigating allegations that ineligible companies are benefitting from SBA programs for small businesses. The SBA OIG has indicated that it expects the number of *qui tam* actions related to the SBA's small business and socio-economic contracting programs to increase during the next fiscal year.

The SBA OIG stated that it had nearly 90 open government contracting cases as of Sept. 30, 2017, with potential losses of more than $20 billion. It has numerous fraud investigations open related to the 8(a), HUBZone, and Service-Disabled Veteran-Owned programs, and noted that the Women-Owned Small Business program may also be vulnerable to false certifications.

Potential Hefty Damages and Penalties Lead to Settlements

While most legal disputes end in settlement, the steep potential damages and penalties companies face for FCA violations provide even more incentive for businesses to settle these matters.

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Furthermore, under the presumed loss rule, there is a presumption that the government lost the full amount it expended on the contract if a company willfully sought and received a contract by misrepresenting its size or socio-economic status.

In addition, violators must pay a civil penalty of between $10,781 and $21,563 for each violation of the FCA, which could include each invoice it submitted for payment on contracts for which it misrepresented its status.

Recent Settlements

In August 2017, in one of the largest settlements involving allegations that a company had misrepresented its small business status, defense subcontractor ADS Inc. and its subsidiaries paid $16 million to settle allegations that they violated the FCA by submitting false claims for payment related to contracts set aside for small businesses.

ADS was alleged to have conspired with a subsidiary to falsely claim that it was an eligible SDVOSB and with two subsidiaries to claim that they were qualified under the SBA's 8(a) program. In addition, the subsidiaries were alleged to have concealed their affiliation with ADS.

Similarly, last fall Zoladz Construction Company Inc., Arsenal Contracting LLC and Alliance Contracting LLC paid $3 million to settle allegations that they improperly obtained contracts set aside for SDVOSBs, in violation of the FCA.

The U.S. government accused the companies' owners of recruiting a service-disabled veteran to serve as the figurehead of Arsenal, while the business actually was managed and controlled by non-veterans.

In addition, the government alleged that Arsenal subcontracted almost all of the work to companies that were not SDVOSBs.

These cases are in line with other settlements that companies facing allegations of misrepresentation of their size or socio-economic status have made in past years. Contractors also can face criminal liability for FCA violations, as well as suspension and debarment.

Conclusion

Allegations that a company violated the FCA can have a significant impact on a business, even prior to litigation or trial.

Responding to an FCA investigation can be expensive, time-consuming and disruptive to a business's operations. Thus, companies should have policies and procedures in place to root out fraud and ensure that its certifications to the government regarding its eligibility to participate in set-aside programs are accurate.

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