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False Claims Act cases involving set-aside contracts held to more stringent requirements following *Escobar*

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Two years have passed since the U.S. Supreme Court issued *Universal Health Services, Inc. v. United States ex rel. Escobar*, a key False Claims Act ("FCA") case that resolved a circuit court split regarding the scope and validity of the implied false certification theory and established that the materiality standard for FCA cases is "demanding."

Since that time, lower courts have been implementing those standards to varying effects. The trend has been favorable for companies facing FCA cases that allege false certifications related to qualifications to participate in socio-economic contracting programs.

Under the FCA, anyone who knowingly presents a false or fraudulent claim to the government for payment or approval or knowingly makes or uses a false record or statement material to a false or fraudulent claim is civilly liable to the federal government

Anyone found to have violated the FCA must pay a civil penalty of between $10,781 and $21,563 for each violation, in addition to three times the damages the government sustains as a result of the violation.

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In addition, the Supreme Court held that misrepresentation about compliance with statutes and regulations must be material to the government's decision to pay in order for there to be FCA liability and that the "materiality standard is demanding."

At the beginning of this year, the U.S. District Court for the Western District of New York dismissed an FCA claim that alleged that the defendants had schemed to create a company and nominally appoint a service-disabled veteran as the president and majority owner so that the company could qualify as a service-disabled veteran-owned business ("SDVOSB").

The government claimed that the defendants had submitted false statements about the company's SDVOSB status in an offer for a contract, in online representations and certifications, and in response to a U.S. Department of Veterans' Affairs ("VA") inquiry.

The court ruled that, while these representations were related to the company's eligibility to participate in the contracting programs, the government had not alleged that they were connected to the government's decision to pay for work the company performed under the contracts at issue.

In addition, the government had not alleged that the defendants had evidence that the VA consistently refuses to pay claims based on non-compliance with SDVOSB contracting requirements.

Therefore, the court held that the govern-ment had not alleged that the false representations caused the VA to pay on the contracts and thus had not adequately alleged materiality.

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In *United States ex rel. Hedley v. ABHE & Svoboda, Inc.*, a case that the U.S. District Court for Maryland ruled on this spring, a contractor was awarded a contract to clean and repaint a bridge. The contractor was required to submit a plan to utilize disadvantaged businesses on the contract, and the contract had a goal of having such businesses perform 15 percent of the work.

The contract, however, did not require the contractor to actually meet the goal, but rather just make a good faith effort to meet the goal.

A *qui tam* relator filed suit alleging that the disadvantaged business that the contractor had listed in its plan did not perform any commercially useful function and that the prime contractor and another subcontractor had performed the work.

The district court granted summary judgment to the defendant contractor, following Fourth Circuit precedent established in the wake of *Escobar* that required strict enforcement of the FCA's materiality standard.

Since the contract did not require the contractor to meet the 15 percent goal; the agency had not insisted on quarterly reports showing how much work the disadvantaged business was performing; the contract allowed for a range of sanctions for non-compliance; and the agency did not begin to withhold payment until most of the contract had been performed, the court held the claim did not meet the strict materiality standard.

These cases are in line with prior district court cases issued after *Escobar.* For instance, in *A1 Procurement, LLC v. Thermcor, Inc.*, the relator alleged that the defendants had made misrepresentations to the SBA about a company's eligibility to participate in the 8(a) program.

The U.S. District Court for the Eastern District of Virginia held that, since the certifications were made to the SBA and not to the contracting agencies, the submissions were not claims for payment and therefore not material to the payments.

Furthermore, since the SBA had certified the company to participate in the 8(a) program, it had not misrepresented its status as an 8(a) company, even if it was not 8(a) compliant.

However, the U.S. District Court for the District of Columbia issued an outlier opinion in a relatively recent case in which the relator alleged that the defendants falsely certified their eligibility to participate in certain set-aside programs.

The court held that the allegations were sufficient to state an FCA claim, but notably the opinion did not focus on the materiality standard or whether the alleged misrepresentations were material to the government's decision to pay, as the other cases did.

Escobar is still a fairly new U.S. Supreme Court opinion, and the lower courts are still figuring out how to apply it. So far, courts ruling on cases involving set-aside programs typically have been enforcing *Escobar*'s strict materiality ruling and focusing on whether the plaintiff has alleged facts that show that the alleged misrepresentation was central to the government's decision to pay.

While this is favorable to defendants, the best practice of course is to ensure that all representations regarding eligibility and status for set-aside programs are accurate, which will reduce the risk that a company will face an FCA claim.

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