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WHAT'S INSIDE

FALSE CLAIMS ACT

Telecom contractor ends false-claims inquiry for $13.7 million

By Catherine A. Tomasko, Esq., Senior Legal Writer, Westlaw Journals

A Virginia-based telecommunications and security company has agreed to pay the United States $13.7 million to resolve allegations it overbilled for labor on U.S. Army and Coast Guard contracts.

The payment by DRS Technical Services Inc., of Herndon, Va., ends the federal government's claim that the company's bills contained inflated labor rates for employees who lacked contractually mandated qualifications for such billing rates, the Justice Department said in an Oct. 7 statement.

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FALSE CLAIMS ACT

Shipyard pays Justice Department $1 million to end small-business fraud case

The United States has agreed to a $1 million payment from a Florida shipyard to end its lawsuit alleging the company fraudulently obtained Coast Guard contracts by posing as a small firm owned by service-disabled veterans.

United States ex rel. Yerger et al. v. North Florida Shipyards et al., No. 11-CV-464, settlement announced (M.D. Fla. Oct. 29, 2014).

The Justice Department said in a statement that the payment by North Florida Shipyards in Jacksonville and President Matt Self resolves allegations that the company violated the False Claims Act, 31 U.S.C. § 3729.

The law is the federal government's primary tool for fighting procurement fraud.

The Justice Department said NFS used another company as a front to win five Coast Guard vessel repair contracts awarded as part of the Small Business Administration's service-disabled, veteran-owned small-business program.

The program offers service-disabled veterans the opportunity to obtain government contracts if their companies meet certain criteria.

To participate in the program, a business must be a small firm, and a service-disabled veteran

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'Public disclosure' bar, insufficiency of pleadings doom FCA allegations

A medical device salesman's allegations that his former employer knowingly caused the submission of false Medicare reimbursement claims by promoting the "off-label" use of two of its products were not sufficiently pleaded, a Massachusetts federal judge has ruled.

United States et al. v. EV3 Inc. et al., No. 10-11822, 2014 WL 4926369 (D. Mass. Sept. 30, 2014).

The claims Jeffrey D'Agostino raised under the False Claims Act, 31 U.S.C. § 3729, against EV3 Inc. also were prohibited by the law's "public disclosure" bar, U.S. District Judge Richard G. Stearns of the District of Massachusetts said.

He dismissed D'Agostino's third amended complaint with prejudice.

The medical devices at issue are the Onyx liquid embolic system and the Axium detachable coil system. Both were manufactured by defendant Micro Therapeutics Inc., which subsequently merged with EV3.

Onyx, used as a presurgical treatment in brain surgery, is a synthetic liquid that blocks the flow of blood. Axium, which involves a coil attached to a delivery pusher, is used to embolize intracranial aneurysms, according to the opinion.

D'Agostino alleged that during the Food and Drug Administration approval process, the agency expressed concerns that Onyx might be marketed for the off-label treatment of other types of vascular disease. He said that in response, Micro Therapeutics assured the FDA that surgeons would be trained in the device's proper use.

The suit alleged that EV3 supplied training at facilities that lacked surgeons with practices requiring the on-label use of Onyx, and the company paid doctors to train their colleagues on the device's off-label uses.

REUTERS/Jason Reed

The FDA expressed concerns that defendant EV3 Inc.'s Onyx, used as a presurgical treatment in brain surgery, might be marketed for the off-label treatment of other types of vascular disease, according to the complaint.

D'Agostino alleged that because the defendants fraudulently induced the FDA to approve Onyx, any Medicare claims for off-label reimbursement were tainted.

He also alleged that Micro Therapeutics licensed the right to make the liquid material from which Onyx was manufactured to Boston Scientific, which used it to make Enteryx, a treatment for acid reflux.

According to D'Agostino, there were potentially fatal complications with the use of Enteryx, and EV3 bore responsibility for failing to alert the FDA of the problems.

> Onyx, used as a presurgical treatment in brain surgery, is a synthetic liquid that blocks the flow of blood.

D'Agostino alleged that EV3 knew about manufacturing defects concerning Axium. Because an adulterated or dangerous device cannot be considered medically reasonable and necessary for purposes of obtaining a Medicare reimbursement, the suit said, EV3 caused hospitals and doctors to submit false claims by knowingly selling defective Axium coils.

In response to the defendants' motion to dismiss, Judge Stearns said the threshold question in a FCA case is whether the court lacks jurisdiction to hear the matter under the public disclosure bar.

Under the bar, codified at 31 U.S.C. § 3730(e)(4), public disclosure occurs when the essential elements exposing a particular transaction are in the public domain.

The opinion says the public disclosure bar precluded D'Agostino's allegations that Micro Therapeutics fraudulently omitted safety information about Enteryx and the substance of its training programs for Onyx.

Many of D'Agostino's allegations about Enteryx were based on materials previously disclosed by the FDA, the opinion says.

The allegations regarding EV3's training program were precluded because the FDA had put the information in the public domain before D'Agostino started working for the company, so he could not have been the original source of the information, according to the opinion.

The public disclosure bar did not divest jurisdiction over D'Agostino's off-label marketing allegations, but those claims were barred because they were not specific enough to satisfy the requirement for pleading fraud or detailed enough to survive the motion to dismiss, the opinion says. WJ

Related Court Document:
Opinion: 2014 WL 4926369

See Document Section D (P. 31) for the opinion.

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Earlier suit bars allegations of Cephalon's 'off-label use' promotion

A suit by former Cephalon Inc. sales representatives alleging the pharmaceutical company violated the False Claims Act by promoting the "off-label" use of a pain drug intended for breakthrough cancer pain is barred by the law's "public disclosure" provision, a federal judge has ruled.

United States ex rel. Boise et al. v. Cephalon Inc. et al., No. 08-271, 2014 WL 5089717 (E.D. Pa. Oct. 9, 2014).

Allegations by Bruce Boise, Keith Dufour and Andrew Augustine that Cephalon improperly marketed the pain drug Fentora mirrored those in a previous suit, U.S. District Judge Thomas J. O'Neill Jr. of the Eastern District of Pennsylvania said.

The company's off-label promotion caused false claims to be submitted to government programs for reimbursement because the programs only reimburse for Food and Drug Administration-approved uses of medications, the plaintiffs alleged.

According to the judge's opinion, the plaintiffs filed their original complaint in January 2008 and a first amended complaint two years later.

The first amended complaint noted that the FDA approved Fentora for treatment of cancer-related debilitating pain but provided no history regarding the FDA and Fentora. The complaint also alleged that Cephalon engaged in a widespread off-label promotion of Fentora, but did not provide details of the marketing effort, the opinion says.

In June 2013, another Fentora-based complaint was filed against Cephalon in the Southern District of New York, but was transferred to the Eastern District of Pennsylvania in March. *Cestra v. Cephalon Inc.*, No. 14-01842, *complaint filed* (E.D. Pa.).

According to the opinion, the complaint in the *Cestra* suit provided a detailed history of FDA monitoring of Fentora and included specific allegations of Cephalon's alleged widespread off-label promotion of the drug and payment of illegal kickbacks that led to the submission of false claims.

According to the opinion, the complaint in the *Cestra* suit provided a detailed history of FDA monitoring of Fentora and included specific allegations of Cephalon's alleged widespread off-label promotion of the drug and payment of illegal kickbacks that led to the submission of false claims.

The Boise plaintiffs filed a second amended complaint in February that was identical in many respects to the *Cestra* complaint, following the same structure and using the same content, the opinion says.

The Boise plaintiffs did not dispute that the specific details of fraud in their second amended complaint were publicly disclosed in *Cestra*, the opinion says.

Cephalon moved to dismiss the second amended complaint for lack of subject matter jurisdiction, asserting that it was precluded by the public disclosure bar, which says "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations ... unless ... the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A).

According to Judge O'Neill, the plaintiffs failed to establish that they were the original source having direct knowledge of the alleged fraudulent conduct. Boise was fired before the FDA approved Fentora and could not have firsthand knowledge of the claims asserted in the complaint, and the complaint included no basis for any knowledge that Augustine and Dufour might have about Fentora, the opinion says.

> The public disclosure bar applies to amended pleadings that rely on publicly disclosed information coming after the original complaint but before the amended complaint, the judge said.

The plaintiffs did not dispute that their second amended complaint contained identical language and details from the *Cestra* complaint, but they argued that their original complaint preceded *Cestra's* second amended complaint.

Judge O'Neill said the public disclosure bar applies to amended pleadings that rely on publicly disclosed information coming after the original complaint but before the amended complaint.

He concluded the plaintiffs' claims in their second amended complaint were based on allegations that were publicly disclosed in the *Cestra* second amended complaint and thus were foreclosed by the public disclosure bar. WJ

Related Court Document:
Opinion: 2014 WL 5089717

See Document Section E (P. 39) for the opinion.

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Novartis ordered to face U.S. lawsuit over doctor kickbacks

(Reuters) – A federal judge said Novartis AG must face a U.S. government lawsuit accusing the Swiss drugmaker of paying multimillion-dollar kickbacks, including a $9,750 dinner for three at a Japanese restaurant, to induce doctors to prescribe its drugs.

United States et al. ex rel. Bilotta v. Novartis Pharmaceuticals Corp., No. 11-0071, 2014 WL 4922291 (S.D.N.Y. Sept. 30, 2014).

U.S. District Judge Paul Gardephe in Manhattan on Sept. 30 let the government pursue its entire lawsuit, brought under the federal False Claims Act. He also said New York can pursue most of its state law claims in a related lawsuit.

Julie Masow, a Novartis spokeswoman, said the Basel-based company is reviewing Judge Gardephe's 90-page decision and will continue to defend itself against the allegations.

The federal government's lawsuit is one of two it filed in April 2013 against Novartis, seeking triple damages over alleged kickbacks to doctors.

Authorities claim that Novartis caused Medicare and Medicaid to pay millions of dollars in reimbursements from 2002 to 2011 based on kickback-tainted claims for drugs such as Lotrel and Valturna to treat hypertension, and the diabetes drug Starlix.

They said these resulted from the East Hanover, N.J.-based Novartis Pharmaceuticals Corp. unit having lavished hefty speaking fees on doctors to appear at thousands of sham programs that were merely "social occasions," where little work got done.

Authorities said Novartis also feted some doctors at high-end restaurants such as the Japanese restaurant Nobu in Dallas, Smith & Wollensky in Washington, and the three Michelin-starred L20 in Chicago, while others dined at the lower-end Hooters.

Novartis allegedly spent over $65 million and conducted more than 38,000 speaker programs for Lotrel, Valturna and Starlix alone over a decade. One doctor was allegedly paid to speak at his own office eight times.

REUTERS/Arnd Wiegmann

"The pleadings explain in detail why the speaker events were shams and how they served as a vehicle for kickbacks," Judge Gardephe wrote. "Novartis has cited no case demonstrating that the government entities' pleading of particular false claims is deficient."

Masow said Novartis is committed to "high standards of ethical business conduct," and that speaker programs "can help educate other health care providers about the appropriate use of medicines so they can make informed prescribing decisions."

In the other Novartis case, U.S. District Judge Colleen McMahon in August let the government pursue most claims over reimbursements for Myfortic and Exjade, respectively used by patients with kidney transplants and patients who get blood transfusions. *United States ex. rel. Kester et al. v. Novartis Pharms. Corp.*, 2014 WL 4230386 (S.D.N.Y. Aug. 7, 2014).

The Lotrel, Valturna and Starlix case was originally brought in January 2011 by former Novartis sales representative Oswald Bilotta. On Sept. 30 Judge Gardephe let Bilotta pursue part of his own lawsuit, which raises additional claims.

A spokeswoman for U.S. Attorney Preet Bharara in Manhattan declined to comment. A spokesman for New York Attorney General Eric Schneiderman was not immediately available for comment. Eric Young, Bilotta's lawyer, said his client is pleased his case will continue.

The federal government often joins False Claims Act lawsuits that it believes have greater merit. Whistleblowers share in damages that are recovered. WJ

(*Reporting by Jonathan Stempel in New York; additional reporting by Karen Freifeld; editing by David Gregorio*)

Related Court Document:
Opinion: 2014 WL 4922291

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Nurse entitled to discovery against home care agency before date her employment began

A registered nurse who accused her former employer of health care fraud was entitled to discovery of documents dating back six years, not just for the 28 days of her employment, a federal magistrate judge has ruled.

United States ex rel. Fiederer et al. v. Healing Hearts Home Care Inc. et al., No. 13-cv-1848, 2014 WL 4666531 (D. Nev. Sept. 18, 2014).

Limiting Eva Fiederer's discovery rights to the period of her employment would weaken the False Claims Act, 31 U.S.C. § 3729, by placing limits on *qui tam* actions that do not apply to government-initiated actions, Magistrate Judge Cam Ferenbach of the U.S. District Court for the District of Nevada said.

The *qui tam* provision of the False Claims Act allows private citizens, called relators, to file suit on behalf of the government in cases involving federal funds fraud and to share in any consequent settlement or court award.

According to the magistrate's order, Fiederer began working for Healing Hearts Home Care Inc. on May 14, 2013. She alleges an administrative assistant advised her that every patient's chart should indicate that the patient was hard of hearing, incontinent, homebound, confused and visually impaired, regardless of the patient's actual condition.

The agency's director also allegedly advised Fiederer to edit charts to ensure they could be submitted to a Medicare carrier for reimbursement. Based on these and similar incidents, Fiederer resigned June 11, 2013, the order says.

Fiederer filed a *qui tam* complaint Oct. 10, 2013, alleging that Healing Hearts, its director and Dr. Brian Lee, a physician she says received financial bonuses for referring patients to the agency, violated the False Claims Act by knowingly submitting inaccurate documentation for reimbursement.

With the case now in the discovery phase, Fiederer served the defendants with two requests for production of documents seeking all patient intake records for six years

before the date of the filing of her complaint and all records on payments made to Lee.

The six-year time frame corresponds to the False Claims Act's statute of limitations. The defendants provided Fiederer with documents only for the 28 days of her employment.

She filed a motion to compel, asserting she is entitled to six years of documents. The defendants countered that Fiederer had to plead actual knowledge of their actions during the six-year period in order for the documents to be discoverable.

Judge Ferenbach rejected that assertion, saying Federal Rule of Civil Procedure 26 allows discovery of any non-privileged matter that is relevant to any party's claim or defense. The judge also said Fiederer's two discovery requests were directly relevant to the government's right to prosecute fraudulent claims.

He further found that the False Claims Act empowers private individuals to "step into the government's shoes and litigate claims on the government's behalf."

The defendants agreed the information was relevant but contended Fiederer's complaint failed to satisfy the heightened pleading requirements for fraud allegations.

Even if this were so, Judge Ferenbach said, the defendants' concern was redressable by a motion to dismiss, not by failing to respond to a discovery request.

> Limiting discovery rights to the period of employment would weaken the False Claims Act by placing limits on *qui tam* actions that do not apply to government-initiated actions, the judge said.

Fiederer was not required to allege all facts supporting every instance of alleged fraudulent billing, the judge said, but must offer only representative examples, which she did by citing four instances of billing fraud.

The defendants objected to allegations in the complaint and discovery requests based on "information and belief," with no supporting facts, the judge noted.

Fiederer, however, alleges illicit activity with specificity and detail, and her discovery requests were related to those allegations, the order says. WJ

Attorneys:
Plaintiffs: Nevada Attorney General Donna R. Rohwer and Roger W. Wenthe, U.S. attorney's office, Las Vegas; Ava Bessel, Jacob A. Reynolds and Todd L. Moody, Hutchison & Steffen, Las Vegas

Defendants: Joseph T. Nold, Accelerated Law Group, Las Vegas

Related Court Document:
Order: 2014 WL 4666531

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U.S. jury convicts ex-Blackwater guards in 2007 Baghdad killings

(Reuters) – A U.S. federal jury found three American former Blackwater guards guilty of manslaughter and weapons charges Oct. 22 and a fourth of murder in connection with the 2007 killing of 14 unarmed Iraqis at a Baghdad traffic circle.

United States v. Slough et al., No. 08-CR-360, defendants convicted (D.D.C. Oct. 22, 2014).

The decision closes an emotional chapter in a case that outraged Iraqis, inflamed anti-American sentiment across the globe and touched off debate over the role of private security contractors working for the U.S. government in war zones.

A court clerk read the jury's verdict to a packed courtroom after a two-month trial and more than seven weeks of deliberations. The defendants sat and listened silently.

Paul Slough, 35, Dustin Heard, 33, and Evan Liberty, 32, were convicted of voluntary manslaughter in connection with at least 12 deaths at Nisur Square, where the heavily armed four-truck Blackwater Worldwide convoy had been trying to clear a path for U.S. diplomats.

The Washington jury also found the three guilty of attempted manslaughter in connection with the wounding of at least 11 Iraqis. They face at least 30 years in prison.

A fourth guard, Nicholas Slatten, 30, was convicted of murder in connection with the first death at the circle and faces a life sentence.

> Prosecutors flew 30 Iraqis to the United States to testify, including some who were wounded in the shooting, and drew on the testimony of nine other guards in the unit.

"I don't think the jury understood what it was like to be in a war zone," David Schertler, a lawyer for Heard, told Reuters.

Lawyers for Liberty of New Hampshire and Heard of Tennessee said they planned to appeal.

REUTERS/Jonathan Ernst

Former Blackwater security guards Evan Liberty (L) and Dustin Heard (R) leave the federal courthouse in Washington on Jan. 6, 2009, with their legal team. They were convicted with a colleague on manslaughter charges for the killing of 14 unarmed civilians in a 2007 shooting in Iraq. A fourth defendant was convicted of murder.

Lawyers for Slatten, also of Tennessee, and Slough of Texas did not immediately respond to a request for comment.

The massacre Sept. 16, 2007, stood out for its brazenness, even during a war replete with grisly incidents, and formed a tense backdrop to talks between the United States and Iraq over the rules governing the continued presence of U.S. forces in Iraq.

"This verdict is a resounding affirmation of the commitment of the American people to the rule of law, even in times of war," said Washington U.S. Attorney Ronald Machen, whose office prosecuted the case.

Prosecutors flew 30 Iraqis to the United States to testify, including some who were wounded in the shooting, and drew on the testimony of nine other guards in the unit. One former guard, Jeremy Ridgeway, pleaded guilty to voluntary manslaughter in 2008 and testified against his former colleagues.

100 QUESTIONS

During trial, the government sought to portray the guards as recklessly unleashing massive firepower, including multiple grenades not designed for use in urban areas, on innocent Iraqi civilians, including women and children.

Lawyers for the guards had argued that while the loss of life was unfortunate, the men were operating in a volatile war zone and had used their weapons only in response to incoming fire and a vehicle that appeared to be a car bomb.

The defendants' lawyers presented four of their own witnesses but extensively cross-examined government witnesses and tried to draw attention to inconsistencies in the testimony. Jurors during deliberations considered nearly 100 different questions about the shooting.

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Much of the case turned on whether the unit was facing incoming fire or whether a white car realistically appeared to be a car bomb bearing down on the convoy. Slatten had been charged with the murder of the driver of the car.

The trial came after years of stumbles and false starts, as the case has dragged on amid problems with evidence, much of it due to a flawed investigation by the U.S. State Department.

"We certainly respect the court's decision in this case," State Department spokeswoman Marie Harf told reporters.

A grand jury first indicted five guards on manslaughter charges in 2008. A federal judge dismissed the charges the following year, saying prosecutors had relied too heavily on statements the guards gave to State Department investigators, which were explicitly not to be used for criminal prosecution.

An appeals court later reinstated the case, and prosecutors brought new charges against four of the guards last year.

But in April, prosecutors faced another setback, when an appeals court panel ended the manslaughter case against Slatten, saying prosecutors had waited too long to charge him.

The U.S. attorney's office responded by obtaining in May the murder indictment against him, which is not subject to a statute of limitations but is harder to prove.

North Carolina-based Blackwater was sold and renamed several times. It is now called Academi, based in Mclean, Va. In June, Academi merged with another security contractor, Triple Canopy, which now has the same State Department contract to protect officials in Iraq that Blackwater had in 2007. WJ

(*Reporting by Aruna Viswanatha and Julia Edwards; editing by Jason Szep and Cynthia Osterman*)

CRIMINAL LAW

Contractor gets 7 years in prison for $2.7 million battery scheme

The owner and CEO of a California battery distributor has been sentenced to 87 months in a federal penitentiary for supplying the U.S. government with about $2.7 million worth of counterfeit batteries for use in Navy vessels.

United States v. De Nier et al., No. 2:12-cr-00496, defendant sentenced (C.D. Cal. Oct. 15, 2014).

"America's warfighters deserve the very best to perform their jobs, and the taxpayers expect nothing less," Chris Hendrickson, special agent in charge of the Defense Criminal Investigative Service's Western Field Office, said in a statement. "Fraud committed by defense contractors not only takes away precious resources necessary for the protection of our brave sailors, solders, airman and marines, it also undermines the confidence of the American public who demand that tax dollars are used responsibly."

Didier De Nier, 64, formerly of Simi Valley, Calif., was convicted in April on five counts of wire fraud and one count of conspiracy following a jury trial before Judge Dolly M. Gee in the U.S. District Court for the Central District of California.

De Nier and ex-wife Lisa De Nier, also known as Lisa Boyd, operated Powerline Inc., according to the Justice Department. The company secured several contracts between 2004 and July 2011 to supply the Defense Department with specific types of batteries for use on nuclear aircraft carriers, minesweepers and ballistic submarines.

REUTERS/Photographer

Prosecutors say contractor Didier De Nier secured low-quality knock-off batteries from China for use on U.S. nuclear aircraft carriers, minesweepers and ballistic submarines. Here, the minesweeper USS Patriot arrives in Hong Kong's Victoria Harbour.

Instead of providing batteries from government-approved manufacturers, prosecutors say, Boyd and De Nier secured low-quality, knock-off batteries from China and then affixed phony labels and packaging to make them appear legitimate.

De Nier and Boyd also directed Powerline's employees to make up fake documents such as invoices and packing slips indicating the

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batteries came from legitimate sources, the Justice Department said. In addition, employees allegedly used chemicals to strip "made in China" markings from the batteries.

Powerline allegedly sold more than 80,000 of these inferior products to the government over the life of the scheme, and the Defense Department installed the batteries in naval vessels.

> The defendants sold the Navy low-quality knock-off batteries and then stripped off the "made in China" labels, prosecutors say.

The charges claimed De Nier used the proceeds from these illegal sales to buy a yacht, pay his mortgage and fund trips to the Caribbean and French Riviera. Prosecutors say De Nier, who has dual U.S.-French citizenship, used the yacht to flee to the island of St. Martin in French waters when federal agents raided Powerline's offices in July 2012. He was arrested in October 2013 after sailing to the U.S. Virgin Islands.

In addition to prison time, Judge Gee ordered De Nier to pay more than $2.7 million in restitution to the Defense Department.

"As this sentence makes clear, military procurement fraud is a serious crime with repercussions that extend far beyond the financial losses to the Department of Defense and U.S. taxpayers," Claude Arnold, special agent in charge of Homeland Security Investigations in Los Angeles, said in a statement. "HSI will continue to aggressively target those who willfully jeopardize our nation's security and the welfare of those devoted to protecting it."

The Justice Department said Boyd pleaded guilty in the District Court in February 2013 to one count of conspiracy and is awaiting sentencing. WJ

Related Court Document:
Indictment: 2014 WL 8282736

CRIMINAL LAW

Former FBI agent, childhood friend plead guilty in obstruction case

A former FBI special agent and his childhood friend have pleaded guilty in a Utah federal court to obstruction of justice and related charges for their roles in attempting to hinder a fraud investigation into a security company doing business with the U.S. government.

REUTERS/Zohra Bensemra

The Defense Department was investigating defendant's company for possible fraud in the awarding of government contracts to train Afghan special forces. Here, members of the Afghan special forces survey the site of an attack in Kabul.

United States v. Lustyik et al., No. 2:12-cr-00645, pleas entered (D. Utah, Cent. Div. Oct. 1, 2014).

"No one is above the law, no matter what rank or badge a person might hold," Assistant U.S. Attorney General Leslie R. Caldwell said in a statement. "Corruption by those entrusted to enforce the law strikes at the heart of our criminal justice system, and it will not be tolerated."

Robert G. Lustyik Jr., 51, of Sleepy Hollow, N.Y., a 24-year veteran of the FBI, and his friend Johannes W. Thaler, 50, of New Fairfield, Conn., entered their guilty pleas Oct. 1 before U.S. District Judge Tena Campbell of the District of Utah.

Lustyik pleaded to eight counts of wire fraud and one count each of conspiracy, obstructing a grand jury proceeding and obstructing an agency proceeding, while Thaler pleaded guilty to conspiracy to commit bribery, obstruction of a federal grand jury proceeding and obstruction of an agency proceeding. Both men are scheduled to be sentenced Jan. 5.

According to an indictment filed in the Utah federal court Oct. 18, 2012, Lustyik, Thaler and Michael L. Taylor, principal of Boston-based American International Security Corp., entered into a business arrangement between June 2011 and September 2012 involving the pursuit of government contracts in the Middle East and Africa.

Prosecutors say Taylor's company was under investigation by the Defense Department and a federal grand jury in Utah for alleged fraud in the award and performance of a series of government contracts to train the Afghan special forces worth about $54 million. The investigation included a probe of money laundering operations to conceal the proceeds of that fraud.

At the time, Lustyik was a counterintelligence special agent in the FBI's field office in White Plains, N.Y., the indictment said.

Thaler is described in the indictment as "a conduit between Taylor and Lustyik."

Taylor allegedly told the other two men that he would make them "more money than you

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can believe" in exchange for their help in obstructing the Utah federal investigation, according to the indictment. Lustyik then opened a file on Taylor as a confidential informant and argued to prosecutors and law enforcement that Taylor was more valuable as a cooperating witness than as a convict, the indictment said.

The indictment details numerous text messages and emails sent between Lustyik and Thaler discussing how to go about "freeing" Taylor from prosecution, as well as kickbacks Taylor was to pay to Thaler as an intermediary for the three parties.

Lustyik at one point told Thaler to "blatantly" ask Taylor for money because "he knows we are keeping him outta jail," the indictment notes. Prosecutors also pointed to emails between Taylor and Lustyik in which they discuss obstructing prosecution witnesses and messages Lustyik sent Taylor describing his efforts to usurp the authority of prosecutors in Utah.

According to the indictment, Lustyik bragged about the obstruction in communications with Thaler, telling him in one text that, "At this point IF he is indicted there is NO WAY he gets convicted even though he Probs did it. Too many former people like me testifying on his behalf."

Taylor pleaded guilty in November 2013 to wire fraud for his role in the Afghan special forces contract scheme. He is also scheduled for sentencing Jan. 5.

"This case lays bare a disgraceful attempt by a veteran FBI agent to get rich by thwarting an ongoing investigation," Assistant U.S. Attorney General Caldwell said. WJ

Related Court Document:
Indictment: 2012 WL 7677289

SMALL BUSINESS CONTRACTING

New SBA plan promotes contracting in HUBZones

The Small Business Administration is taking action to increase federal contracting opportunities for small firms located in distressed urban and rural communities.

The agency said in an Oct. 16 statement that its "Destination: HUB" initiative will highlight these neighborhoods as places where government contractors should do business.

The SBA's Historically Underutilized Business Zones program gives small businesses located in economically disadvantaged areas priority in securing some federal procurements. The HUBZone program aims to increase economic development and job growth in distressed communities.

"More than any other SBA initiative, the HUBZone program has been a critical resource, creating jobs, alleviating poverty and reducing unemployment in our nation's most vulnerable communities. The program has had a transformational effect on small businesses all across the country," SBA administrator Maria Contreras-Sweet said in a statement.

Destination: HUB will help HUBZone firms obtain government contract opportunities, the SBA said. Under the initiative, the agency will work with federal officials, government buyers, prime contractors and local economic development boards to increase the number of contracts reserved for HUBZone companies.

The plan was formulated after small firms in HUBZones received only 1.7 percent of federal contracts in 2013. The SBA's goal was 3 percent, Contreras-Sweet said.

The SBA's work under Destination: HUB will involve three steps, the first of which will have the agency evaluating the successes and needs of the HUBZone program.

Second, the SBA will look at situations that would be ideal for using market research and partnerships between public and private entities to bring more small companies into the HUBZone program.

REUTERS/Jonathan Ernst
SBA administrator Maria Contreras-Sweet

Finally, a grassroots educational project will be implemented to drum up interest in the program. The agency said it will work with community groups, religious leaders and local economic development organizations to accomplish this step.

The SBA said its new initiative should empower small business owners and entrepreneurs in distressed communities by increasing their chances to become part of the federal supply chain. WJ

Eligibility requirements for the Small Business Administration's HUBZone program

- A company must be a small business.
- The business must be owned and controlled by U.S. citizens, a community development corporation, an agricultural cooperative or an Indian tribe.
- Its principal office must be located within a HUBZone.
- At least 35 percent of its employees must reside in a HUBZone.

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Problems abound for highway contract bid process, report says

The Federal Lands Highway Office does not have adequate processes in place to evaluate whether a contract bid is at a reasonable price, according to a report from the U.S. Department of Transportation inspector general's office.

The Federal Highway Administration, or FHWA, is responsible for all of the nation's federal highway programs, and the Office of Federal Lands Highway, or FLH, provides resources and technical assistance to the agency, the Oct. 9 report says.

According to the inspector general, FHWA's bidding process for awarding contracts does not currently meet guidelines from the Federal Acquisition Regulation and the American Association of State Highway and Transportation Officials. As a result, the federal government may be paying unfair and unreasonable prices, the report says.

> The inspector general said the Federal Highway Administration's bidding process for awarding contracts does not meet federal guidelines, meaning the government may be paying unreasonable prices.

The guidelines require that the FHWA employ price reasonableness determinations for contracts to ensure the agency does not overpay.

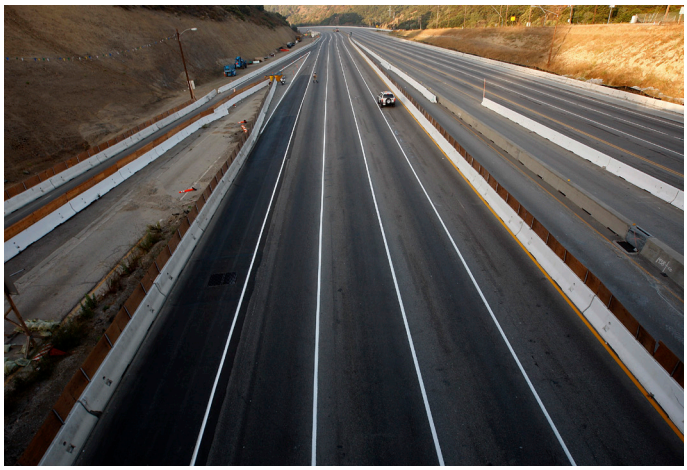
According to the report, the FLH awarded $305 million in road-project contracts between October 2012 and September 2013, representing 53 percent of the highway administration's total fixed-price contracts. The bids are sealed and evaluated by the agency before contracts are awarded.

Table 1: Examples of FHWA's Recommended Practices for Conducting Bid Reviews under the Federal-aid Program

Topic	Recommended Practice
Bid reviews	Consider factors such as comparisons of total bids and unit bid prices, the distribution or range of bids, and the urgency of the project.
Agency estimates	Test the accuracy of agency estimates over time. Generally, the agency estimate should be within plus or minus 10 percent of low bids for at least 50 percent of the projects awarded over a given time period.
Unbalanced unit bid prices[a]	Ensure that bids have not been materially unbalanced in order to take advantage of errors in the plans or specifications, which may also occur on lump-sum items.
General guidelines	Develop general guidelines for determining whether to award the contract or to reject all bids. These guidelines should be tied to the size and scope of the project.

Source: FHWA, *Guidelines on Preparing Engineer's Estimate, Bid Reviews and Evaluation*, 2004.

[a] FHWA's Guidelines do not provide a definition for unbalanced bid prices. According to the FAR, however, unbalanced pricing exists when, despite an acceptable total price, the price of one or more contract line item is determined by price analysis to be significantly over or understated. The FAR also states that the Government shall analyze all offers with separately priced line items to determine if the prices are balanced. If price analysis indicates that a bid is unbalanced, the Government shall consider whether awarding the contract will result in paying unreasonably high prices and may reject the bid if the lack of balance poses an unacceptable risk. (FAR 15.404-1(g))



REUTERS/David McNew

The inspector general's office conducted the self-initiated audit between April 2013 and August 2014. It looked at 13 randomly selected contract files from a pool of 37 and interviewed both FHWA and FLH employees, the report says.

It found that on several occasions the FHWA and FLH did not properly conduct bid evaluations before making awards as required by the guidelines.

In one instance, a contract with a bid price 20 percent higher than the agency's estimate was awarded, and the inspector general did not find evidence that the agency's employees conducted a bid evaluation, the report says.

"FHWA's lack of bid-evaluation policies and procedures for FLH diminishes the usefulness of the agency's price reasonableness determinations for FLH's contracts. As a result, FLH cannot be sure that it is getting the best prices possible for its contracts," the report said.

The report recommended the FHWA develop policies and procedures to follow the FAR and AASHTO guidelines when evaluating bids and to establish internal controls to make sure the personnel abide by the policies.

The report is available http://1.usa.gov/1welbPE. WJ

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Telecom contractor

CONTINUED FROM PAGE 1

DRS, which handles satellite and wireless networks, telecommunication services, and security systems, agreed to the out-of-court settlement without admitting or denying wrongdoing. The company did not respond to a request for comment on the case.

Federal prosecutors alleged DRS violated the False Claims Act by knowingly overbilling on federal contracts between Jan. 1, 2003, and Dec. 31, 2012.

The FCA, 31 U.S.C. § 3729, is the government's primary tool for fighting procurement fraud. Congress enacted the statute during the Civil War to combat contractors that supplied defective goods to the Union Army. Today, the United States uses the law to recover federal funds paid to entities who submit false or fraudulent claims under contracts or government programs such as Medicare.

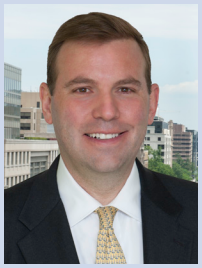
The Justice Department announced in December 2013 that it had obtained $3.8 billion through settlements and judgments under the statute for the fiscal year that ended Sept. 30, 2013. The majority of the cases involved health care and defense contract fraud.

The agency said the 2013 fiscal-year recovery brought the government's FCA recoveries since January 2009 to $17 billion. The United States is expected to release its totals for fiscal year 2014 FCA cases in December.

The statute also allows private citizens who suspect fraud to sue on the government's behalf and share in any recovery.

Nicholas Woodfield, a principal at **The Employment Law Group** in Washington, who is not involved in the DRS case, said the False Claims Act promotes the security of the public fisc.

"The FCA's beneficiaries are not simply the whistleblowers, but rather people who pay taxes and/or receive federal services, as the FCA promotes efficiencies in the spending of government money so that tax dollars have the greatest impact possible," Woodfield said.



Nicholas Woodfield, a principal at **The Employment Law Group** in Washington, comments on the importance of the False Claims Act:

The False Claims Act rewards people to bring lawsuits on the government's behalf to recover monies fraudulently procured from the U.S. government. Simply stated, Congress uses the FCA to incentivize citizens to protect the national fisc from opportunists seeking to fleece the Treasury. Hence the FCA's beneficiaries are not simply the whistleblowers, but rather people who pay taxes and/or receive federal services, as the FCA promotes efficiencies in the spending of government money so that tax dollars have the greatest impact possible.

The current total federal government spending for 2014 is projected to be $3.5 trillion. This means that the federal government will expend $3,500,000,000,000 on defense, medicine, medical treatment, salaries, infrastructure, etc., in 2014. Almost all of these expenditures are through electronic systems, and it will receive invoices electronically for much of the money expended. It is simply impossible for the government to verify that each of the invoices submitted are for work performed properly (or at all) or for good that comply with contractual requirements.

As such, the government relies on auditing and stiff penalties for keeping government contractors honest. However, most government contractors are aware that the odds of getting caught are in their favor should they bill for nonconforming services or goods. It is this temptation that the FCA is intended to address, as government contractors don't just have to worry about the government catching them anymore. Rather, the FCA allows for contractors to be policed from the inside out, and it does so on a rewards basis so that fraudulently procured monies are recovered at no additional cost to the government.

Adam Smith, the world's first free-market capitalist, would have been a staunch supporter of the FCA as it promotes the efficiency of capital accumulation and distribution through incentivizing individuals to work in their own best interests. And he would have chuckled at the irony that the real beneficiaries, however, are the taxpayers who benefit from FCA whistleblowers' efforts to make sure tax dollars are spent as efficiently as possible.

ALLEGATIONS AGAINST DRS

The Justice Department alleged DRS overbilled on an Army Communication and Electronics Command contract to provide a variety of services and supplies to the U.S. military in Iraq and Afghanistan. The contract was called "R2," or Rapid Response, since the company was contracted to supply the goods and services quickly.

DRS also inflated its bills on a contract with the Coast Guard Aviation Logistics Center for aircraft maintenance, according to the charges.

Both contracts were of the "time and materials" variety, which means contractor time is paid at a fixed hourly rate, and the company is reimbursed for materials' actual cost. The federal government uses time-and-materials contracts when it is not possible at the time of contracting to accurately estimate the extent or duration of the particular work or to anticipate costs with a reasonable degree of confidence.

The government alleged that DRS had certain contract work performed by employees whose qualifications did not match the labor rates they were billed under. By submitting these employees under a higher labor rate,

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the company increased the amount of its billings on its time-and-materials contracts, the Justice Department said.

"Contractors that fail to provide qualified labor as promised are not entitled to bill the government as though they had," acting Assistant Attorney General Joyce R. Branda of the Justice Department's Civil Division said in a statement. "The Department of Justice will pursue contractors that claim taxpayer funds to which they are not entitled."

The Justice Department did not disclose the exact labor rates and worker qualifications at issue in the case. WJ

False Claims Act: What the experts are saying

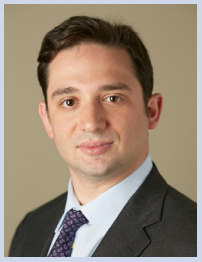
Robert W. Sadowski
Sadowski Fischer PLLC

"Apart from health care fraud, defense contract fraud is one of the most common predicates for False Claims Act liability.

"Since its enactment, the government has used the False Claims Act as a highly effective tool against companies that contracted with and then defrauded the United States military by providing defective arms and equipment and substandard or improper services."

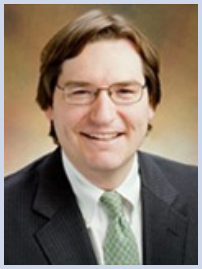
Andrea Fischer
Sadowski Fischer PLLC

"Whistleblowers coming forward and uncovering the fraud is key to the government's tremendous recoveries under the False Claims Act. Of the $3.4 billion recovered under the False Claims Act by the government, $2.9 billion resulted from actions filed by whistleblowers."



Raphael Katz
Sadowski Fischer PLLC

"Bottom line — as the [U.S.] Supreme Court said — 'Men must turn square corners when they deal with the government.' And False Claims Act lawsuits commenced by whistleblowers are the government's most forceful and effective tool to prosecute fraud."



Lathrop Nelson
Montgomery McCracken Walker & Rhoads

"The False Claims Act provides an extremely effective tool for the government to combat fraud in federal contracting matters. The False Claims Act relies upon whistleblowers and insiders to help ensure that those federal dollars are not improperly spent or siphoned off by contracting agencies and individuals. Given that the government spends hundreds of billions of dollars each year on federal contracts, the government cannot possibly rely on its own law enforcement and investigating agencies to make sure that each and every dollar is properly spent. By providing significant financial incentives to whistleblowers, the False Claims Act enlists corporate insiders and citizens to make sure that federal funds are spent properly."

Glenn Whitaker
Vorys, Sater, Seymour & Pease

"The FCA is certainly a very important tool for the government to combat fraud. However, because the FCA is such a powerful enforcement weapon for the government, contractors often settle these cases for substantial amounts even when they sincerely believe that they've done nothing wrong. Particularly when the government has intervened, the potential for treble damages, civil penalties, serious disruption of business operations, and administrative remedies such as suspension or debarment creates significant incentives for companies to resolve matters before trial. This is one of the major reasons that it's critical for companies to investigate any allegation of fraud immediately and to marshal facts demonstrating to the government that no fraud occurred or that there was limited damage to the federal fisc."

Christopher R.J. Pace
Jones Day

"As the federal government enlarges its role in huge areas of the economy such as health care and infrastructure construction, the government cannot afford to ignore the billions of dollars that fraud ... costs taxpayers every year. As a result, the increase in False Claims Act cases and investigations in recent years is likely the new norm as opposed to an aberration. So, too, therefore, is the need for companies that deal with the federal government to be ever vigilant in complying with government contracts and regulations as well as investigating credible reports of possible fraud by their employees and contractors."

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Small-business fraud

CONTINUED FROM PAGE 1

must own more than 50 percent of the company and manage its daily operations. The company also must perform at least 51 percent of the labor on awarded contracts.

NFS employees Robert Hallstein and Earle Yerger sued the company in 2011 in the U.S. District Court for the Middle District of Florida. The complaint alleged that between 2009 and early 2010, NFS set up a shell company called Ind-Mar Services Inc., purportedly a service-disabled, veteran-owned small business.

NFS falsely listed two of its own disabled-veteran employees as Ind-Mar's owners, and NFS, acting through Ind-Mar, won the Coast Guard contracts starting in January 2010 and running through December 2013, the suit said.

Hallstein and Yerger alleged that Ind-Mar did not do any work on the contracts, and NFS performed the jobs and obtained the contract payments in violation of the FCA.

The United States intervened in the suit Oct. 1 and negotiated the $1 million settlement.

"This settlement sends a strong message to those driven by greed to fraudulently obtain access to contracting opportunities set aside for deserving small businesses owned and operated by service-disabled veterans," SBA Inspector General Peggy E. Gustafson said in a statement. "We are committed to helping ensure that only eligible service-disabled, veteran-owned small businesses benefit from that SBA program."

Hallstein and Yerger will split $180,000 of the settlement funds. The FCA allows private parties who sue on behalf of the United States to obtain part of any recovery obtained.

NFS and Self agreed to the settlement without admitting or denying any wrongdoing and consented to pay Hallstein and Yerger more than $15,000 to cover attorney fees, court records say. WJ

Related Court Documents:
Complaint: 2011 WL 12522604
Notice of intervention: 2014 WL 5490381
Settlement agreement: 2014 WL 5490382

See Document Section A (P. 17) for the complaint, Document Section B (P. 23) for the notice of intervention and Document Section C (P. 25) for the settlement agreement.

NEWS IN BRIEF

NAVY PICKS FLORIDA FIRM FOR $10 MILLION CONSTRUCTION JOB

Whitesell-Green Inc. has won a $9.9 million Navy contract for construction work on two residence facilities at Florida's Naval Air Station Pensacola, the Defense Department said in an Oct. 22 statement. Under the contract, the Pensacola-based company will perform interior demolition work, minor structural repairs, replace drywall, and install windows and a fire suppression system. Whitesell-Green will also build exterior walkways and handle plumbing tasks and electrical work. The Defense Department said the company, which beat out six other bidders for the contract, should finish the work by May 2016.

VIRGINIA FIRM WINS $10 MILLION MOTORCYCLE SAFETY CONTRACT

Manassas, Va.-based Information Sciences Consulting Inc. will provide motorcycle traffic safety training courses for the Navy under a contract worth more than $10 million, according to an Oct. 24 statement from the Department of Defense. The company will perform the contract work in various locations in the continental United States and Hawaii until Oct. 26, 2015. The DOD said the Navy has the option to extend the life of the contract for four additional one-year periods, which would raise the job's value to more than $36 million. The government restricted the bidding for the contract to small businesses and chose Information Sciences over four other companies.

5 COMPANIES TO WORK ON NAVY RESIDENCE BARGES

The Defense Department announced Oct. 24 that the Navy has allotted a total of $24 million so five companies can maintain and repair its residence barges. Colonna's Shipyard Inc., Davis Boat Works Inc., East Coast Repair & Fabrication LLC, Lyon Shipyard Inc. and Tecnico Corp. will provide management and administrative services while also handling troubleshooting, refurbishment and modernization of the barges, the department statement says. The companies, which will each receive an initial $72,000 payment, will perform the work in Norfolk, Va., and should finish the jobs by November 2015, according to the government.

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CASE AND DOCUMENT INDEX

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