

Iraqi Defense Contractor Prevails on False Claims Act Summary Judgment Motion

Last week, a federal district court dismissed a high profile *qui tam* case in which the relators alleged that defendants overcharged for security services at the Baghdad International Airport. (*United States ex rel. DRC, Inc., et al., v. Custer Battles, LLC, et al.*, No. 1:04CV199, 2007 WL 316839 (E.D. Va. Feb. 2, 2007).) The three relators, including a subcontractor and an employee of defendant Custer Battles, alleged that defendants violated the False Claims Act (FCA) by contracting with the Iraqi Coalition Provisional Authority (CPA) to provide 138 security personnel when, in fact, Custer Battles provided fewer personnel.

The relators alleged in their complaint that Custer Battles made a false statement and fraudulently induced the contract award by allegedly stating in its proposal that it "would provide a fixed number of security personnel," in particular "over 138 security and related personnel." The complaint alleged that the CPA's letter contract specifically incorporated Custer Battles' proposal. In its motion for summary judgment, Custer Battles demonstrated that the letter contract did not, in fact, incorporate its proposal. In response, the relators' opposition papers attempted to shift the allegation to the terms of the final contract which did incorporate the proposal.

The court recognized that relators' opposition papers had formulated a new claim not previously asserted. The court correctly observed that this was "an attempt to effect a constructive amendment of the complaint, which, if allowed, would seriously undermine the fairness of the litigation and unfairly prejudice the defendants." The court held that because *qui tam* complaints must comply with Rule 9 (b)'s specificity requirements, constructive amendment of the complaint would "undermine the complaint's primary purpose, namely to guide defendants' discovery and to put 'defendants on notice of the evidence they need to adduce in order to defend against the plaintiff's allegations.'" This particular aspect of the court's holding may help deter *qui tam* relators from the common practice of shifting theories and allegations mid-stream.

In ruling on the summary judgment motion, the court found as undisputed facts that: (1) the CPA's Request for Proposals neither required, nor referred to, the provision of a fixed number of security personnel; (2) Custer Battles' proposal did not refer to a fixed number of security personnel; and (3) Custer Battles submitted a detailed cost estimate which reflected a one year budget based on a salaries of 138.5 security personnel, but that estimate was the only specific reference to "138" security personnel in either the RFP or the proposal.

Accordingly, the court found no false statement had been made in the proposal, but that even if a false statement had been made about the number of personnel intended to be utilized, such statement would not have been "knowingly" false. "Knowingly" can mean actual knowledge, deliberate ignorance of the truth, or acting in reckless disregard of the truth. The record reflected that Custer Battles actually employed more than 138 security personnel at the Airport at the commencement of the contract but reassigned personnel on an as-needed basis. This reassignment and utilization of less than 138 personnel was not in violation of the firm fixed-price contract because the contract did not require a particular number of personnel.

Finally, the court noted that even if Custer Battles had knowingly made a false statement about staffing levels, such statement would not have been material; *i.e.*, it would have had no bearing on the CPA's obligation to pay Custer Battles under the contract. Indeed, the court cited the testimony of one CPA official who wrote the RFP, evaluated the bids and monitored performance who testified that "Custer

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The court's focus on that testimony demonstrates the importance of a defendant's efforts to obtain supportive testimony from the government customer. *Qui tam* actions continue to be brought purportedly on behalf of government agencies that frequently maintain they were not defrauded, often resulting in serious financial consequences for the accused contractor. The court's decision along with its thorough analysis of the elements required to be proved in a False Claims Act action confirms that contractors can successfully contest baseless *qui tam* claims, even in high profile cases.

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