SESSION 10

MANDATORY DISCLOSURE FOR GOVERNMENT CONTRACTORS

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I. OVERVIEW OF MANDATORY DISCLOSURE REQUIREMENTS ("MDR")

A. The MDR's Implementation

The Mandatory Disclosure Rule, published by the FAR Councils on November 12, 2008, requires Government contractors to disclose to the Government certain potential violations of criminal and civil law (as well as instances of significant overpayment). 73 Fed. Reg. 67064; *see* 50 GC ¶ 439 (Dec. 17, 2008). The Rule included a new FAR clause addressing business ethics and conduct, applicable to certain covered contracts and requiring disclosure of potential wrongful conduct. The Rule also included a new definition of "present responsibility" providing that federal contractors and subcontractors, regardless of whether they are subject to the new FAR clause, can be suspended or debarred for failure to timely disclose potential wrongful conduct or significant overpayments. Six years have passed now since the Rule took effect on December 12, 2008, and many questions and issues still remain regarding the Rule's application.

B. Overview Of Mandatory Disclosure Obligations

1. Clause 52.203-13, the "Contractor Code of Business Ethics and Conduct" clause, which sets forth the mandatory disclosure obligations, must be included in all federal contracts and subcontracts that are expected to exceed $5 million and take 120 days or more to perform. A failure to comply with this clause, i.e., a failure to make a mandatory disclosure, therefore results in a breach of contract.

2. The clause imposes several requirements with respect to the Code of Business Ethics and Conduct, including (1) a requirement to have a written code of business ethics and conduct and make a copy of the code available to each employee engaged in performance of the contract; (2) a requirement to exercise due diligence to prevent and detect criminal conduct, and a requirement to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law; and (3) a requirement to timely disclose, in writing, to the agency Office of Inspector General (OIG), with a copy to the Contracting Officer, whenever the contractor has "credible evidence" that a principal, employee, agent, or subcontractor has committed certain violations of law.

3. The MDR, as implemented in FAR 52.203-13(b), requires disclosure, to the OIG and CO, of "credible evidence" of the following conduct "***in connection with award, performance, or closeout***" of a federal Government contract (or subcontract at any tier): (A) a violation of Federal criminal laws involving fraud, conflict of interest, bribery, or gratuity violations found in U.S.C. Title 18 – most commonly, 18 U.S.C. § 287 (false claims), § 1001 (false statements), § 1031 (major fraud against the United States), § 371 (conspiracy); or (B) a violation of the civil ***False Claims Act ("FCA")***.

4. The MDR, implemented in FAR 52.203-13(c), also requires (with certain exceptions for small businesses and awards for commercial items) that, within 90 days after contract award, the contractor shall establish (1) an ongoing business ethics awareness and compliance program, and

(2) an internal control system, each with specific requirements. For example, the compliance program must include an effective training program, and the internal control system must include an internal reporting mechanism, such as a hotline, which allows for anonymous reporting by employees of suspected instances of improper conduct.

5. As explained below, the MDR, as implemented in FAR 9.406-2 and 9.407-2, also imposes an obligation to timely disclose, to the Government, credible evidence of a significant overpayment.

6. Debarment and Suspension (Present Responsibility) considerations in FAR 9.406-2 and 9.407-2, as articulated in FAR 3.1003(a), impose obligations on contractor principals to timely disclose credible evidence of relevant violations (including credible evidence of a significant overpayment):

> "***Whether or not the clause at 52.203-13 is applicable***, a contractor may be suspended and/or debarred for ***knowing*** failure by a ***principal*** to ***timely disclose*** to ***the Government***, ***in connection with*** the award, performance, or closeout ***of a Government contract*** performed by the ***contractor or a subcontract*** awarded thereunder, ***credible evidence*** of a violation of Federal criminal law ***involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18*** of the United States Code or a violation of ***the civil False Claims Act***. Knowing failure to timely disclose credible evidence of any of the above violations remains a cause for suspension and/or debarment ***until 3 years after final payment on a contract*** (see 9.406-2(b)(1)(vi) and 9.407-2(a)(8))."
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> "The Payment clauses at FAR 52.212-4(i)(5), 52.232-25(d), 52.232-26(c), and 52.232-27(l) require that, if the contractor becomes aware that the Government has ***overpaid*** on a contract financing or invoice payment, the contractor shall remit the overpayment amount to the Government. A contractor may be suspended and/or debarred for ***knowing failure by a principal to timely disclose credible evidence of a significant overpayment***, other than overpayments resulting from contract financing payments as defined in 32.001 (see 9.406-2(b)(1)(vi) and 9.407-2(a)(8))."

FAR 3.1003(a)(2)-(3) (emphasis added); *see also* 53 GC ¶ 250 (Aug. 3, 2011) (noting increased OCI disclosure obligations under proposed FAR rule); 53 GC ¶ 35 (Feb. 2, 2011) (discussing evolving DFARS OCI disclosure rules).

II. OPERATION OF THE MDR PROGRAM TO DATE

A. Number of Disclosures (DOD and GSA)

1. DOD IG reported in its Semiannual Report to Congress that it received 106 disclosures in the first half of FY 2014. The vast majority (75) of DOD disclosures continue to be related to labor mischarging,

accounting for 71% of the total disclosures. Other recurring issues include nonconforming parts, significant overpayments, and false certification. *See* Office of Inspector Gen. U.S. Dep't of Defense, Semiannual Report to Congress 80 (June 23, 2014). The Semiannual Report to Congress for the latter half of FY 2014 (April 1, 2014 - September 30, 2014) had not been published at the time this article was authored.

2. GSA IG reported in its two Semiannual Reports to Congress dated May 30, 2014 and October 31, 2014 that it received 17 disclosures in FY 2014. The IG concluded its evaluation of 27 existing disclosures resulting in $45,782,598 in settlements and recoveries to the Government. Issues include: billing errors, excess labor charges, false representation of eligibility, employee fraud, unqualified labor, and failure to comply with contract requirements related to CSP disclosures, billings, price reduction monitoring, and the Trade Agreements Act. *See* Office of Inspector Gen. U.S. Gen. Servs. Admin., Semiannual Report to Congress 31(Oct. 31, 2014); Office of Inspector Gen. U.S. Gen. Servs. Admin., Semiannual Report to Congress 30 (May 30, 2014).

3. The total number of disclosures for all agencies since inception of the MDR program in December 2008 exceeds 1100.

4. Total number of disclosures to GSA since the program's inception (December 2008): 138.

B. DOJ Recoveries

1. Total False Claims Act recoveries in FY 2014: $5.69 billion. *See* Press Release, U.S. Dep't Justice, *Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014*, Nov. 20, 2014, http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014; 56 GC ¶ 390.

- **a.** Health care fraud: $2.3 billion
- **b.** Housing and mortgage fraud: $3.1 billion
- **c.** Procurement fraud (related primarily to defense contracts): Over 135 million
- **d.** *Qui tam* recoveries: $3 billion
  - i. Whistleblower recoveries: $435 million

2. Total False Claims Act recoveries since January 2009: $22.75 billion. *See id.*

3. *Qui tam* suits filed in FY 2014: Over 700. *See id.*

C. Some Observations By The Offices Of The Inspectors General Regarding The MDR Program

1. To be effective, disclosures must be detailed and thorough; contractors should address the true potential violations at issue,

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providing names, dates and documents that will facilitate meaningful investigation.

2. IGs note that some contractors appear to submit disclosures because the contractors become aware that the Government has discovered (or is about to discover) the issues.

3. Some IGs have expressed frustration that 1) the total number of disclosures filed has not been significantly higher; 2) some contractors are filing disclosures that involve minor matters but are not filing disclosures that involve significant matters; and 3) when contractors have filed disclosures that involve significant matters, (some) contractors have focused on downplaying the significance rather than cooperating with achieving a resolution.

4. Some IGs saw a problem in the early years of the program with lack of detail and lack of quality in disclosures. However, IGs generally comment now that the level of detail and quality of most disclosures has improved.

D. DOD Process

1. Upon receiving a disclosure, DOD distributes it to as many as 14 stakeholders, including:

- **a.** Department Of Justice (Main Justice)
- **b.** Defense Contract Audit Agency (DCAA)
- **c.** Other Officials Within the Agency(s) Affected, including the Agency Office of Suspension-Debarment (OSD)

E. Agency Investigation

1. When the disclosing entity is a "Top 100" DOD Contractor, DOD automatically refers the matter to DCIS for investigation; DCIS, (and DOJ if it elects to participate) coordinates the investigation with the relevant agency investigative authorities (*e.g.*, Air Force Office of Special Investigations, Navy Criminal Investigative Service; Army CID).

2. DOD IG on occasion issues subpoenas either on its own, or at DOJ's request.

F. Defense Contract Audit Agency

1. The disclosure is usually assigned to the DCAA field office for review and a recommendation regarding appropriate restitution.

2. Procedures are designed to have DCAA "test" the adequacy of the restitution a contractor offers; some contractors report that DCAA pursues its own theories of restitution without regard to the method for determining restitution proposed by the contractor. Some contractors report that DCAA has become more aggressive in attempting to gain access to contractor work product and privileged information in assessing allowability of contractor compliance

costs, and that DCAA auditors on occasion have sought to expand the scope of disclosures.

G. Department Of Justice

1. Upon receiving a disclosure, Main Justice distributes a copy to its Civil and Criminal Divisions.

2. In most instances, DOJ has allowed the agencies to investigate and resolve the disclosures themselves; however, even where DOJ elects not to pursue a disclosure, it often reserves its options, taking a posture of "we'll wait and see" what turns up through the agency investigative process.

3. In the past, DOJ has assumed first chair responsibility for investigating possible criminal activity or civil false claims liability as to approximately 10% of the disclosures that have been made to DOD. That percentage likely has decreased slightly in recent years.

4. A small number of disclosures are referred to AUSAs (Assistant US Attorneys) directly by agencies or investigators. Main Justice typically has no role in resolving these matters.

H. Non-DOD Agencies

1. Usually have many fewer stakeholders involved than DOD does. For example, GSA IG uses its own auditors (rather than DCAA) for assessment of restitution and its own investigators (rather than DCIS and/or AF OSI).

2. IGs remain concerned that contractors have submitted fewer disclosures than the IGs expected would have been submitted to date, and that the dollar amount involved in restitutions is smaller than seems reasonable.

I. Other Considerations

1. OSD (Office of Suspension and Debarment): the OSD for the Agency designated as the lead Agency relative to the subject of a disclosure, *e.g.*, Air Force, Navy, Army OSD, is given a copy of the disclosure as soon as DOD IG receives it. OSD must sign off before a disclosure can be closed.

2. Disclosures submitted to date have rarely resulted in suspensions or debarments, and to our knowledge there have been no suspensions or debarments that have been based on what an IG considers to be a "true" or "legitimate" disclosure. Some contractors have been suspended or debarred for alleged fraud discovered by the Government *and* failure of contractor principals to disclose the matter to the Government. While few contractors have been suspended or debarred by reason of making, or failing to make MDR disclosures, many individuals have been suspended or debarred as a result of contractor (and subcontractor) disclosures.

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3. Close Out Notice: DOD IG and GSA IG state that they generally provide formal, but brief, written notice to the contractor once the agency decides to close its handling of a disclosure. However, many contractors and attorneys state that they have not received closeout notices relative to the disclosures they have submitted.

a. IGs close a disclosed matter only after DOJ, OSD, auditors, and other stakeholders have agreed to closure (which may require restitution from the contractor);

b. Closure is conditional, *i.e.*, assuming no new facts of interest come to the attention of the IG.

4. Average Time to Closure

a. Varies substantially depending upon:

i. The nature of the issue(s) disclosed, how much detail the contractor has provided initially and how fast the contractor responds to investigator requests for information ("full cooperation") – IGs report that the more detail a contractor provides, the more quickly they are able to resolve a disclosure.

ii. Auditor input (some contractors feel that DCAA's mounting workload is beginning to slow the closure process); on the other hand, other contractors express concern that DCAA auditors on occasion have attempted to expand the scope of a disclosure audit (discussed further below).

b. IGs have in the past reported that, depending upon the factors above, they typically resolve a disclosure of moderate complexity roughly in 6 months. However, many contractors and attorneys state that they believe IGs are taking longer, sometimes substantially longer, to close matters.

J. DCAA Guidance in Contract Audit Manual

1. DCAA audits, among other things, the amounts defense contractors should be reimbursed for administering their compliance programs. DCAA has issued guidance to its auditors regarding how to assess contractor compliance with the Mandatory Disclosure Rule, which has been incorporated into the DCAA Contract Audit Manual or DCAM, in DCAM Section 5-300, Audit of Internal Controls – Control Environment and Overall Accounting System Controls, and Section 5-306, Integrity and Ethical Values. The Guidance references the specific requirements in FAR 52.203-13.

2. According to DCAM 5-306.1, Codes of Business Ethics and Conduct, although the FAR does not detail the specific areas that should be covered in a contractor's written code of conduct, the code should generally address ethical business practices and expected standards of ethical and moral behavior, and should cover dealings

with customers, suppliers, employees, and other parties. The DCAM instructs auditors that in evaluating the adequacy of a contractor's written code of conduct, they should consider whether codes address compliance with Government contracting requirements, such as conflicts of interest, illegal or other improper payments, anticompetitive guidelines, insider trading, procurement integrity, handling of classified information, and recruiting and employing current or former Government personnel. Auditors should also consider whether codes clearly establish acceptable and unacceptable behavior, cite consequences for violation, and are periodically acknowledged by all employees.

3. DCAM 5-306.2 discusses the requirement for an effective training program, noting that the FAR requires that the training be provided to the contractor's principals and employees, ***as well as to the contractor's agents and subcontractors, as appropriate.*** According to the DCAM, an example of an agent or subcontractor to whom it would be appropriate to provide this training is a consultant providing a support service to the prime contractor. The DCAM states that contractors generally do not need to provide this training to a true subcontractor because contractors are required to flow down the requirements of the FAR clause to the subcontract level. As a result, subcontractors should have their own ethics awareness and compliance programs, which would include providing effective training to their employees. The DCAM instructs auditors to evaluate the contractor's ethics awareness and compliance training materials to ensure they cover the contractor's code of business ethics and conduct (5-306.1). Auditors are also instructed to test the implementation of the program by requesting completed training documents.

4. DCAM 5-306.3 discusses the Business Ethics Awareness and Compliance Internal Control System. DCAA here states minimum requirements for compliance with FAR 52.203-13(c)(2)(ii), including (which means that costs are wholly or partially unallowable if the systems they support do not include): assignment of responsibility at a sufficiently high level, procedures to ensure individuals who previously engaged in conduct that conflicts with the contractor's code of conduct are not appointed as a principal of the company, at least annual evaluations of the program's effectiveness, and disciplinary action for improper conduct. DCAM also requires an internal reporting mechanism by which employees may anonymously or confidentially report suspected instances of improper conduct, timely disclosure in writing to the agency OIG, and full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.

5. The DCAM provision on timely disclosure to the OIG and CO elaborates that "Auditors should ensure that the contractor's policies and procedures include a reasonable definition of credible evidence, and a reasonable timeframe for disclosure once credible evidence is obtained. Contractors are allowed to take time for pre-

liminary examination of the evidence to determine its credibility prior to disclosure. Once the contractor has had sufficient time to take reasonable steps to determine that the evidence is credible, the contractor should disclose the violation in a timely manner. ***Auditors should verify that the contractor did not delay disclosing the violation once it was determined that credible evidence exists. If the auditor finds that the contractor failed to disclose the violation in a timely manner, an internal control deficiency should be reported. Review any disclosures reported to the OIG and contracting officer and ascertain if the contractor has taken the necessary corrective actions to protect the Government's interests. If the contractor has not taken the appropriate corrective action, the auditor should report this as an internal control deficiency.*** If any deficiencies are identified related to the requirement for timely disclosure to the agency OIG (FAR 52.203-13(c)(2)(ii)(F)), the DCAA Justice Liaison Auditor (DCAAHQJLA@dcaa.mil) will be included on the distribution for the audit report."

III. CONTINUING ISSUES FOR THE GOVERNMENT CONTRACTS COMMUNITY

A. Confidentiality

1. Are investigation materials protected by attorney-client privilege?

There may be no issue more important to the continued vitality of the Mandatory Disclosure program than the issue of whether or not materials produced and information gathered during investigations can enjoy legal privileges in proper circumstances. This was the issue the courts faced in ***In re Kellogg Brown & Root, Inc.,*** 756 F.3d 754 (D.C. Cir. 2014); 56 GC ¶ 224. The district court balked, finding that since the MDR ***required*** the contractor to conduct the investigation at issue, the materials prepared and information gathered could not be subject to attorney-client privileges. The D.C. Circuit reversed. (*See* discussion below in IV.F).

2. Are disclosure materials protected by attorney-client privilege?

The comments to the MDR specifically state that a contractor may assert the privilege with regard to MDR materials. However, it is fairly (if not certainly) clear that the disclosure itself cannot be subject to privilege once it is submitted. The issue is one of ***confidentiality***, not legal privilege. DOD and GSA IGs have exerted efforts to protect the confidentiality of disclosures, and have assured contractors that they will fight efforts to require them to release disclosures to those seeking release using Freedom of Information Act or similar vehicles. However, the OSDs generally are taking a different view, one that is being widely accepted and acknowledged within the bar. The OSDs have been suspending individuals at a considerable rate based on information contractors submit in disclosures. Item 1 in an OSD's administrative record prepared in

support of a proposed suspension or debarment is often a contractor's mandatory disclosure. Reluctantly, contractors are facing the reality that their actual disclosures are subject to release.

3. DCAA access to contractor mandatory disclosure files.

"In the years following the Newport News decisions, DCAA continued to seek access to contractor internal reports, claiming that those reports were necessary to its audits even though the Newport News decisions cut against this claim. In fact, DCAA has even claimed that it must access contractors' internal documents for purposes such as determining whether contractors are taking appropriate corrective action when they identify irregularities, are not overcharging the Government, and are making appropriate disclosures in compliance with the FAR." David Nadler and Justin Chiarodo, *DCAA Access to Information--What You Need to Know and Strategies for Protecting Your Business*, 56 GC ¶ 261 (2014).

B. Double (Civil) Jeopardy And The Risk Of Gathering Evidence For *Qui Tam* Relators

The issue in A above invokes another issue -- contractors remain concerned that, even where the content of their investigative efforts remains privileged, they can be required to defend *qui tam* suits i) in relation to a matter they have already disclosed to the Government, and ii) in relation to which the Government has decided to take no action.

C. *De Minimis* Exception

One complaint about the current Mandatory Disclosure Rule and its implementation takes top billing -- *there is no de minimis provision*. Some contractors report that they disclose every matter discovered, no matter how small the dollar amount involved (the most notorious perhaps is a $9 disclosure by a large contractor). The request from the contracting community for creation or recognition of a *de minimis* threshold that establishes a disclosure obligation is swelling. However, so far, Government authorities have not bitten: DOD's Deputy Inspector General for Policy and Oversight, reportedly stated in a recent interview that such an exemption would weaken the rule. "It would be counterproductive because contractors do not always calculate loss in the same manner that DOD does, so if they were making a decision as to whether they should disclose based on some artificial line in the sand, they may not disclose, and the government would not know of the problem," said Randy Stone, DOD's deputy inspector general for policy and oversight. "Our philosophy has always been disclose and let us decide whether the government has been damaged and the extent." Dietrich Knauth, *DOD Doesn't Want Exemption for Small Fraud Disclosures*, Law 360, Sept. 29, 2014, http://www.law360.com/articles/580320/dod-doesn-t-want-exemption-for-small-fraud-disclosures.

D. New Mandatory Disclosure Frontiers For Companies Receiving Federal And State Funds

1. State false claims acts and state mandatory disclosure provisions.

Government contractors are increasingly finding that they are being subjected not only to suits brought under the federal civil False Claims Act, but also to companion suits brought under state civil false claims acts. Since 1986, more than 30 states have enacted their own false claims acts, generally modeled after the federal FCA. Most state FCA suits the healthcare area--state FCA laws have been used mostly to recover losses resulting from Medicaid fraud. In 2005, Congress passed the Federal Deficit Reduction Act (42 U.S.C. § 1396h) and included a provision giving states a financial incentive to enact false claims laws that were "at least as effective" as the federal FCA in recovering losses from Medicaid fraud. *See* Am. Bar Ass'n, A Practitioner's Guide to the False Claims Laws of the Various States 1-2 (Brad Leneis, Patricia Davis & Rob Vogel eds., 2014). At the same time, some states are beginning to implement their own versions of mandatory disclosure provisions either through regulation or standard contract provisions. Most states' provisions do not track exactly with the federal MDR and provisions.

2. New applicability to projects receiving federal grant funding.

The Office of Management and Budget, through the Council on Financial Assistance Reform ("COFAR") recently adopted guidance requiring recipients of federal awards to disclose in writing any violations of federal criminal law involving fraud, bribery, or gratuity violations in Title 18 of the United States Code. The text of the mandatory disclosure obligation is as follows:

> "The non-Federal entity or applicant for a Federal award must disclose, in a timely manner, in writing to the Federal awarding agency or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Failure to make required disclosures can result in any of the remedies described in § 200.338 Remedies for noncompliance, including suspension or debarment."

OMB Mandatory Disclosures, 2 C.F.R. § 200.113 (2013).

3. Rise in HHS disclosures?

"Whistleblowers are increasingly bringing False Claims Act suits alleging Medicare Advantage plans and providers are ripping off taxpayers by exaggerating patient illnesses, according to attorneys and court records, suggesting that another multibillion-dollar front in the government's anti-fraud fight is looming." Jeff Overly, *Medicare Advantage Is FCA's Next Frontier*, Law 360, June 4, 2014, http://www.law360.com/ articles/ 537336/medicare-advantage-is-fca-s-next-frontier.

IV. A FEW CASE STUDIES BASED ON RECENT FALSE CLAIMS ACT CASES

A. *Legal Falsity In FCA Distinct From Elements Of An Anti-Kickback Act Violation: Kellogg Brown & Root Services, Inc. v. United States*, 728 F.3d 1348 (Fed. Cir. 2013) *opinion corrected on denial of reh'g, 563 F. App'x 769* (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 167 (2014); 55 GC ¶ 292: The U.S. Court of Appeals for the Federal Circuit reversed the Court of Federal Claims ("COFC") in one area, finding that KBR was liable under the Anti-Kickback Act ("AKA") for its mid-level employees' acceptance of bribes from a subcontractor, while at the same time affirming the COFC in another area, finding that the invoices KBR submitted with regard to the subcontractor's work did not constitute false claims under the FCA. The significance is that the Federal Circuit stated in this case that liability under one fraud-related statute does not automatically translate into liability under the FCA.

Before the March 2003 invasion of Iraq, KBR entered into multiple contracts with the U.S. Army for the provision of dining facility ("DFAC") services in Iraq. The contract at issue was for DFAC services at Camp Anaconda, one of the largest U.S. military bases in Iraq. In August 2003, KBR subcontracted with Tamimi Global Company to provide DFAC services in Anaconda. The DCAA engaged in audits of multiple DFAC subcontracts and with respect to Anaconda, the DCAA ultimately concluded that KBR had charged the Government $41.1 million in unreasonable costs for services provided in 2004 and declined to pay that amount to KBR. KBR sued in the COFC, alleging the Government unreasonably withheld the suspended $41.1 million. The Government brought multiple counterclaims, including claims under the AKA and FCA. The court dismissed the majority of the Government's counterclaims including FCA claims, but awarded $38,000 to the Government on its AKA claim.

The parties filed cross-appeals. On appeal, the Government argued two reasons why the COFC incorrectly dismissed its FCA counterclaims. The first was that the invoices for the Camp Anaconda dining services subcontract were false or fraudulent because the subcontract itself was "tainted by kickbacks." The Federal Circuit rejected this argument, observing that "the Government does not argue here and did not argue below that the invoices themselves were false or fraudulent, a showing that is required for a FCA claim to be successful." The Federal Circuit stated that the Government "must claim the threshold requirements under the FCA, i.e., that a false or fraudulent claim was submitted and that KBR knew of its falsity." The Government also argued that its allegations were sufficient because the invoices at issue should be presumed to be inflated by at least the amount of the kickback, if not more. The Federal Circuit rejected this argument also: "[a]s the Court of Federal Claims held: 'Defendant must allege facts showing that the costs actually inflated the contract price.'"

The *KBR* decision highlights difficulties contractors and attorneys face as they attempt to determine what conduct and evidence might, or might not, constitute credible evidence of a FCA violation that requires disclosure under the FCA. In this case, the court finds that KBR was liable under the AKA, but not under the FCA. (It should be noted that the AKA imposes a disclosure obligation on contractors that is distinct from the MDR's disclosure obligation).

B. ***Alleged Regulatory Violations: United States ex rel. Spicer v. Navistar Defense, L.L.C.***, 751 F.3d 354 (5th Cir. May 5, 2014); 56 GC ¶ 237: The Complaint in this case alleged that the defendant, Navistar, had violated the civil False Claims Act when it delivered Mine-Resistant Ambush Protected (MRAP) vehicles that did not comply with the applicable contract requirements. The plaintiff's allegations were based on inspection requirements contained in FAR 52.246-2, which required Navistar to "provide and maintain an inspection system acceptable to the Government covering supplies under [the] contract" and "tender to the Government for acceptance only supplies that ha[d] been inspected in accordance with the inspection system and ha[d] been found by [Navistar Defense] to be in conformity with contract requirements." Navistar moved to dismiss the suit on the basis that plaintiff had failed to allege in the Complaint that Navistar had submitted a false certification. The plaintiff argued that Navistar falsely certified when it delivered the MRAP vehicles, as it was certifying with delivery that the vehicles complied with the contract requirements. The court rejected plaintiff's argument, following precedent in the Circuit that has refused to allow FCA allegations to proceed unless plaintiff alleges that the Government's payment to the defendant was specifically conditioned and relied upon the defendant's false certification. In this case, there was no certification, nor did plaintiff allege that there was. The court ruled that the FCA claims "are therefore doomed—without the requirement of certification in this context, there is no false statement under the FCA. In essence, all that [relator] has alleged . . . is a breach of contract."

This is another decision in the long-running debate that rages among the Circuits regarding implied certifications under the FCA and when non-compliances with contract requirements can properly form the bases for civil FCA suits. The disparity in treatment of the issue among the circuits makes analysis of MDR obligations particularly difficult. Contractors and counsel have difficulty determining when certain non-compliances might meet the MDR's "credible evidence" test with regard to FCA liability.

C. ***Alleged Regulatory Violations: United States ex rel. Smith et al. v. The Boeing Co. et al.***, No. 05-1073, 2014 WL 5025782 (D. Kan. Oct. 8, 2014): On October 8, 2014, the U.S. District Court for the District of Kansas granted summary judgment for Boeing and dismissed an FCA suit alleging that Boeing misrepresented how certain aircraft parts were made. Three ex-employees claimed

that Boeing and one of its suppliers manufactured and used non-conforming parts in Boeing 737 airplanes while falsely certifying that the parts adhered to contract specifications and FAA regulations. Primarily, the relators alleged that fuselage parts failed to conform to specifications because they were produced with manually controlled machine tools rather than computerized tools, as the Contract required.

The relators asserted elements of both express and implied false certification theories, and sought treble damages of $4.8 billion based on a total purchase price of more than $1.6 billion for 24 aircraft. Boeing argued that it was not required to certify compliance with all FAA regulations; that the alleged regulatory violations were known by the Government and were not material; and that at most, the relators had advanced a dispute about how certain engineering drawings should be interpreted. The court found that the FAA had investigated the allegations and accepted the companies' methods for producing the parts, and that the FAA's evaluation deserved deference by the courts. The court found that while FAA certification of the airplanes was a critical feature of the purchase contracts, the relators failed to provide evidence that Boeing knowingly and falsely certified its compliance with the agency regulations. "The FAA specifically examined relators' allegations and essentially concluded that Boeing's interpretation was correct," the court stated, finding that the relators provided no evidence than any non-conforming parts were ever installed on planes delivered to the Government and that, in any case, Boeing's alleged misrepresentations were not material to the Government's decision to purchase and pay for the 737 aircraft.

This may represent another situation in which a possible deviation from contract requirements may be no more than that, and possibly known to the Government. A non-compliance with contract requirements may well warrant disclosure to and discussion with Government representatives, but not always through MDR channels.

D. ***Public Disclosure Bar: United States ex rel. Saunders v. Unisys Corp.***, No. 1:12-cv-00379, 2014 WL 1165869 (E.D.Va. Mar. 21, 2014); 56 GC ¶ 136: The court found that disclosures to the DoD Office of Inspector General did not constitute public disclosures for purposes of the False Claims Act public disclosure bar, 31 U.S.C. § 3730(e)(4)(A). The decision, if accepted by other courts, would mean that a mandatory or voluntary disclosure to an agency OIG may itself become the subject of an FCA qui tam complaint.

Until 2011, the relator Saunders was employed in the Federal Systems Division of Unisys, which provided radio-frequency identification ("RFID") services to the U.S. Army. In 2007, Unisys received Task Order 122 which contained both a T&M element and a firm-fixed-price award fee element, and required Unisys's field-service

engineers to bill time as T&M or FFP depending on the specific task performed. According to the decision, in early 2010, Saunders learned that Unisys had received an internal allegation of unethical billing and that the Company had begun an investigation into TO 122 billing. In late 2010, Unisys issued a preliminary report on the results of its investigation to the DoD OIG, and Saunders was asked to present the report to the Army. The preliminary report stated that while Unisys's time-billing practices were "unacceptable," they did not lead to overbilling. The final report was issued in 2011 and reiterated the findings of the preliminary report. Shortly after that, Saunders was asked to terminate two program managers, but he refused. According to Saunders's complaint, those individuals informed Saunders that Unisys's reports to the OIG concealed crucial facts concerning billing for TO 122, and that Unisys had overcharged the Army by more than $13 million, contrary to Unisys's claim that the time-billing practices had not led to overbilling. Unisys later terminated Saunders.

Unisys filed a Motion to Dismiss asserting that its submission of the mandatory disclosures to the OIG invoked the FCA's public disclosure bar and thus warranted dismissal of the suit. The court denied Unisys's Motion to Dismiss "because its reports to DOD-OIG were not public disclosures triggering the public-disclosure bar. Unisys's reports were not public disclosures within the meaning of the FCA because (i) the reports were not made public and (ii) the reports did not reveal the allegations or transactions of fraud. Rather, Unisys's reports were made solely to the government and disclosed 'unacceptable' billing practices but expressly denied that Unisys engaged in false overbilling."

The court stated that under E.D.V.A. precedent, a disclosure triggers the public-disclosure bar "if the disclosure (i) was made through a statutorily identified mechanism, (ii) was made public prior to the filing of the complaint, and (iii) revealed essential allegations or transactions." The court found the second and third prongs were not met. With respect to the publicity prong, the 4th Circuit had not construed the meaning of the statutory phrase "publicly disclosed," but here the court adopted the construction of certain other circuits, which find that "publicly disclosed" means "that a disclosure has been made to the general public, placed in the public domain, or made in a manner such that it is equally available to a stranger to the fraud should the stranger choose to look for the information." Under this standard, "providing information to a public official is not a public disclosure."

Unisys urged the court to adopt the position of the Seventh Circuit, which holds that "[d]isclosure of information to a competent public official about an alleged false claim against the government" is a disclosure made public under the FCA. The E.D.V.A. declined to adopt Unisys's argument "because other circuits do not appear to follow the Seventh Circuit on this point." Thus, in the Fourth Circuit, the trial courts are likely to rule that voluntary or mandatory

disclosures to OIGs or other Government officials do not place the information disclosed "within the public domain" for purposes of assessing the applicability of the public disclosure bar. This means that the disclosures themselves and/or their underlying allegations may become the subject of an FCA suit. This prospect, however, does not reduce a contractor's obligation to make appropriate disclosures under the MDR.

E. ***Settlement Concerning Mischarging: United States ex rel. Cradock et al. v. The Boeing Co. et al.***, No. 5:07-cv-00880 (W.D. Tex. filed Oct. 29, 2007); 56 GC ¶ 390: It was reported on October 10, 2014 in Law360 that The Boeing Company paid $23 million to settle a civil False Claims Act suit concerning its maintenance of the U.S. Air Force's C-17 Globemaster transport aircraft over a four-year period at Boeing's San Antonio facility. The federal Government intervened in the lawsuit at the time of the settlement. Concurrent with the settlement, the district court unsealed key documents filed in the suit, including a qui tam complaint filed in 2007 by aircraft mechanics and technicians who worked for Boeing. The employees alleged that Boeing overbilled the Government by directing employees to work on 1) unplanned tasks, billed at higher rates, when employees were performing planned tasks, 2) on-airplane tasks when employees were performing off-airplane tasks, and 3) jobs that had been canceled or completed.

From the *Did I/He/She Really Send That Email* File -- The Law 360 story states that the unsealed Complaint revealed "part of an email from a senior manager with the subject 'STUFF!' that refers to the overcharging practice saying, 'We ALL know this is happening and someday somewhere somebody will have to answer to an auditor for it!'"

According to the Law360 article, a spokesman for Boeing told Law360 that the company "had notified the government about improper charging on labor packages related to the C-17 in 2006." The spokesman told Law360 that "Boeing cooperated fully with the U.S. Government in its examination of the company's charging of those labor packages. As the investigation revealed, this is a matter of inadequate charging discipline in the past, not of any deliberate wrongdoing," and that Boeing "immediately implemented improved charging practices in San Antonio several years ago in response to its internal investigation." Brandon Lowrey, *Boeing Pays $23M to End FCA Whistleblower Suit in Texas*, Law 360, Oct. 10, 2014, http://www.law360.com/articles/586451/boeing-pays-23m-to-end-fca-whistleblower-suit-in-texas.

F. ***Attorney-Client Privilege: In re Kellogg Brown & Root, Inc.***, 756 F.3d 754 (D.C. Cir. 2014), *rehearing en banc denied*, No. 1:05-cv-1276 (D.C. Cir. Sept. 2, 2014), *cert. filed*, No. 14-637 (S. Ct. Nov. 25, 2014); 56 GC ¶ 224: Harry Barko filed an FCA complaint against KBR in 2005 alleging that KBR and certain subcontractors inflated costs and accepted kickbacks in wartime Iraq. During

discovery, Barko sought documents related to KBR's prior internal investigation into the alleged fraud. KBR had conducted that internal investigation pursuant to its Code of Business Conduct, which is overseen by the company's Law Department. KBR argued that the internal investigation had been conducted for the purpose of obtaining legal advice and therefore the internal investigation documents were protected by the attorney-client privilege. Barko argued that the documents were not privileged business records. After reviewing the disputed documents in camera, the district court determined that the attorney-client privilege protection did not apply because, among other reasons, KBR had not shown that "the communication would not have been made 'but for' the fact that legal advice was sought." KBR's internal investigation, the court concluded, was mandated by FAR and corporate policy: "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice."

The D.C. Circuit disagreed, finding that "[m]ore than three decades ago, the Supreme Court held that the attorney-client privilege protects confidential employee communications made during a business's internal investigation led by company lawyers [citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)]. In this case, the District Court denied the protection of the privilege to a company that had conducted just such an internal investigation. The . . . decision has generated substantial uncertainty about the scope of the attorney-client privilege in the business setting. We conclude that the District Court's decision is irreconcilable with *Upjohn*. We therefore grant KBR's petition for a writ of mandamus and vacate the District Court's . . . document production order."

The D.C. Circuit noted that the district court had distinguished *Upjohn* on a variety of grounds. First, in *Upjohn* the internal investigation began after in-house counsel conferred with outside counsel, whereas in KBR's case the investigation was conducted in-house without consultation with outside lawyers. The circuit court responded: "But *Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply." Second, the district court noted that in *Upjohn* the interviews were conducted by attorneys, whereas in KBR's case many of the interviews in KBR's investigation were conducted by non-attorneys. Of this ruling, the circuit court stated: "But the investigation here was conducted at the direction of the attorneys in KBR's Law Department." Third, the district court pointed out that in *Upjohn* the interviewed employees were expressly informed that the purpose of the interview was to assist the company in obtaining legal advice, whereas in KBR's case employees were not so informed. The circuit court stated that "none of those three distinctions of *Upjohn* holds water as a basis for denying KBR's privilege claim."

Perhaps most important for our purposes, the D.C. Circuit rejected the District Court finding that legal privilege could not attach to

the internal investigation documents "on the ground that KBR's internal investigation was undertaken to comply with DoD regulations that ***require*** defense contractors such as KBR to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing" (emphasis added). The District Court concluded that "***the*** purpose of KBR's internal investigation was to comply with those regulatory requirements rather than to obtain or provide legal advice" (emphasis added). The circuit stated that the district court's analysis "rested on a false dichotomy. . . [s]o long as obtaining or providing legal advice was ***one of*** the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation ***and even if the investigation was mandated by regulation*** rather than simply an exercise of company discretion" (emphasis added).

The D.C. Circuit recognized that "[b]ecause defense contractors are subject to regulatory requirements of the sort cited by the District Court, the logic of the [District Court] ruling would seemingly prevent any defense contractor from invoking the attorney-client privilege to protect internal investigations undertaken as part of a mandatory compliance program," citing the MDR's contract clause, 48 C.F.R. § 52.203–13. The D.C. Circuit thus recognized the important role the attorney-client privilege plays in facilitating contractor ability to conduct internal investigations and to comply with the MDR. The privilege issues in this case had yet to be resolved at the time this paper was authored. On December 17, 2014 (as this paper went to press), the district court issued two orders. The first order found that KBR had waived its privilege. The second order stated that regardless of the waiver, the factual summaries included in the investigation reports did not themselves make any conclusions or suggest litigation strategy. The district court found, therefore, that these portions of the documents constituted merely "fact product," not covered by legal privilege, and ordered their production under the substantial need exception.

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