The Impact of FCA Enforcement on Federal Procurement Law and Other Nontraditional Areas – Time for a Change?

Marcia G. Madsen
Michelle E. Litteken
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
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I. Introduction

When the U.S. Government enters into a contract to procure goods or services, the contracting party is the federal agency whose needs are to be fulfilled. Under the statutes and the Federal Acquisition Regulation ("FAR"), the agency will have engaged in procurement planning – consistent with its mission, determined available resources, issued a request for proposals ("RFP") (or a proper non-competitive justification), and entered into a contract.

The procurement process is regulated by the procurement statutes and regulations, which contain myriad requirements running the gamut from type of contract, whether and how competition is required, provision of past performance information, submission and review of cost or pricing data, document retention and audit provisions, socioeconomic clauses, ethics and compliance requirements, and many others. Measures also are provided to protect the integrity of the process and the ability of contractors to address legitimate disputes with their government customers (*e.g.*, bid protests and contract performance disputes). The entire process is structured and managed through the FAR and its supplements. A large number of procurement professionals are engaged in overseeing the FAR and its supplements. Agency personnel control their programs and contracts consistent with their needs and mission goals. Relationships with the contractors are key to accomplishing their objectives – the Government largely does not self-execute its programs.

Recognizing that contracting parties may have disagreements from time to time, Congress historically has provided mechanisms for agencies and their contractors to resolve disputes – but with the process running through the contracting agency, *e.g.*, claims are decided under the Contract Disputes Act by the Contracting Officer and defense of claims – at the Boards of Contract Appeals – is by agency counsel; protests at the Government Accountability Office ("GAO") are defended by agency counsel, and suspension and debarment actions are initiated and processed by the agency. Forums have long existed that provide special expertise in government contracts as a means for addressing disagreements, but with due regard for the agency's mission. The GAO, Boards of Contract Appeals, and the Court of Federal Claims all have developed extensive expertise in dealing with disputes related to contracts. Additionally, some agencies, such as the Air Force, have taken additional steps to provide agency controlled forums for addressing contract disagreements, including a vigorous alternative dispute resolution mechanism.

Civil false claims cases under the False Claims Act ("FCA") 31 U.S.C. §§ 3729-33, on the other hand, involve a different path. The emphasis for such cases is recovery of damages by the Department of Justice ("DOJ") or a *qui tam* relator. These cases are typically not within the procurement system, and neither the agency's mission needs nor the agency/contractor relationship are at the forefront. They are litigated as fraud cases in the district courts and courts of appeal and may place a particular procurement statute or regulation under a microscope, without regard to its historical application

and use in practice, or the business understandings that have been followed by the parties.

II. FCA Procurement Cases at District Courts and Courts of Appeal

The litigation of FCA cases in district courts and courts of appeal necessarily calls on courts with little expertise in the field to rule on issues of federal procurement law and interpret government contract provisions. The courts are put in this awkward position because the merits of an FCA claim are often intertwined with the underlying (and often arcane) law or contract provision. Asking district courts and courts of appeal to resolve these procurement issues conflicts with the long-standing view that issues of procurement law should be resolved by tribunals with expertise that can provide uniformity in the subject matter.[1] Furthermore, in some circumstances, litigating FCA cases in district courts and courts of appeal allows DOJ to effectively make or shift procurement policy without input from the regulators.

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[1] In 1996, when Congress passed The Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996) ("ADRA"), which removed bid protest jurisdiction from the District Courts, the proclaimed purpose was to further uniformity in the law and to place jurisdiction for those cases in a forum with expertise. *See* 142 Cong. Rec. S11848 (daily ed. Sept. 30, 1996) (statement of Sen. Cohen) ("It is my belief that having multiple judicial bodies review bid protests of Federal contracts has resulted in forum shopping as litigants search for the most favorable forum. Additionally, the resulting disparate bodies of law between the circuits has created a situation where there is no national uniformity in resolving these disputes."); *see also Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1242-43 (Fed. Cir. 2010) ("The legislative history of the ADRA indicates that the enactment § 1491(b)(1) was motivated by a concern with forum shopping and fragmentation of government contract law.").

A. Implied Certification

The theory of implied certification has been one of the primary avenues used to bring FCA cases in non-procurement forums. Under this theory, a claim for payment under a contract is false when the claim implicitly relies on a false representation of compliance with an applicable statute, regulation, or contract term. *See United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010).[2] For example, in *Science Applications International Corp.*, the Government alleged that the defendant submitted false claims under its contract to provide technical assistance and expert analysis to the Nuclear Regulatory Commission because it was violating contract provisions governing potential conflicts of interest while it was performing the contract. The court rejected the defendant's argument that liability for a false certification claim requires the certification to be a prerequisite for payment, stating:

> [W]e hold that to establish the existence of a "false or fraudulent" claim on the basis of implied certification of a contractual condition, the FCA plaintiff – here the government – must show that the contractor withheld information about its noncompliance with material contractual requirements. The existence of express contractual language specifically linking compliance to eligibility for payment may well constitute dispositive evidence of materiality, but it is not, as SAIC argues, a necessary condition.

Id. at 1269.

Notably, the implied false certification theory has not been universally accepted by the courts of appeal. The Ninth and Tenth Circuits have taken an approach similar to

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[2] Alternatively, under the express false certification theory, an entity is liable for falsely certifying that it is in compliance with regulations that are prerequisite to payment.

the Court of Appeals for the District of Columbia Circuit – holding that a false certification claim is actionable only if leads the Government to make a payment it would not have made but for the falsity. *See Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010); *United States ex rel Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1169 (10th Cir. 2010). However, the Fourth Circuit has declined to find an FCA violation without an affirmative certification of compliance. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787 n.8 (4th Cir. 1999). The Fourth Circuit has required a relator to establish that the contract or program required compliance with certain conditions as a prerequisite to receiving a government benefit and that the defendant falsely certified compliance with the conditions. *United States v. Jurik*, 943 F. Supp. 2d 602, 610 (E.D. N.C. 2013) (citing *Glynn v. EDO Corp.*, 710 F.3d 209, 216 (4th Cir. 2013). Likewise, the Fifth Circuit has required that the certification be a prerequisite or condition to obtaining a government benefit. *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997).

In at least once case, the Government brought an implied certification case when there was no documented precondition to submitting a claim. In *United States v. Jurik*, 943 F. Supp. 2d at 606-07, the Government alleged that the defendant, the president and largest shareholder of a company that provided medical equipment and remodeled homes to accommodate special needs of veterans under a Department of Veterans Affairs ("VA") program, submitted numerous false claims by submitting claims for payment on work that had not yet been completed and for prosthetics and sensory aid services that had not been provided. The Government argued that the claims were

falsely certified because the VA prohibited charging for home modification and medical equipment until the work had been completed. However, the Government did not cite a statute, regulation, or contract provision that supported its position. Because the Government did not identify any the basis for any prerequisite to payment, the court granted the defendant's motion to dismiss. *Id.* at 611-12.

In contrast, the District Court for the District of Columbia declined to dismiss a complaint when there was no contract provision or law setting forth a condition for payment. In *United States v. Honeywell International, Inc.*, 798 F. Supp. 2d 12 (D.D.C. 2011), the Government brought an FCA action against a subcontractor that manufactured allegedly defective panels that are incorporated in bulletproof vests. Honeywell conducted tests that revealed substantial declines in ballistic integrity and degradation of the material, but it only disclosed favorable test data to the prime contractor. After the Government performed its own ballistic tests, which confirmed the performance problems, it decertified the product and brought an action. The Government argued that it believed it was purchasing vests that met the industry-standard five-year warranty against defects, and it would not have purchased the vests if it had known of the defects. *Id.* at 20. However, the contract did not contain express provisions requiring five-year warranties against defects. Instead, the Government asserted that there was an ***understanding*** that satisfying the industry-standard warranty was a condition of payment, and the court held that the "allegations are sufficient to

state an implied certification claim with respect to a contractual condition." *Id.*[3] If the Government or a *qui tam* plaintiff can bring an implied certification claim without establishing that the defendant was subject to ***any*** actual contractual or legal certification requirement, one wonders if there is any limit to implied certification claims.

B. Circuit Split – Whether a Reasonable Interpretation Precludes a False Claim

Another issue that divides the courts of appeal is whether a reasonable interpretation of a contract provision or procurement law precludes an FCA claim. This issue can make or break an FCA case because it affects whether the defendant ***knowingly*** submitted a false claim. If a contractor reasonably believed that it was complying with a contract provision, statute, or regulation when it submitted a request for payment, is it liable under the FCA? The answer may depend on which court hears the case. This issue is particularly pertinent in procurement cases because the legal framework is complex and imposes vast requirements on contractors.

In *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463 (9th Cir. 1999), the relator, a former accountant for The Parsons Company, alleged that Parsons violated the federal Cost Accounting Standards by using a wholly owned subcontractor to perform the contract and categorizing the subcontractor's labor costs as other direct costs, which increased the overhead rate billed to the Government. The district court

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[3] The *Honeywell* Court noted that the Government satisfied Rule 9(b) by identifying the time, place, and content of the false representations and individuals involved in the complaint. 798 F. Supp. 2d at 20.

held that the relator failed to satisfy the falsity element of the FCA because Parsons had made a reasonable interpretation of an ambiguous accounting standard. The Ninth Circuit reversed and remanded, finding that a reasonable interpretation of a regulation does not preclude falsity. The Ninth Circuit emphasized that the regulations at issue were not discretionary, and their ultimate meaning was a question of judicial interpretation. *Id.* at 463. Although the reasonableness of the company's interpretation could affect whether Parsons ***knowingly*** submitted a false claim – the scienter element - it did not affect the question of falsity.

The Seventh Circuit took the opposite approach in a case issued the same year. In *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013 (7th Cir. 1999), the relator alleged that the City of Green Bay lied to the Federal Transit Administration about its efforts to transport local school children on public buses to receive federal transportation grants. The relator based his claim on the city's alleged failure to comply with transit regulations. The district court granted summary judgment for the defendant, and the Seventh Circuit affirmed. The Seventh Circuit rejected the relator's theory of the case, stating "imprecise statements or differences in interpretation growing out of a disputed legal question are similarly not false under the FCA," *id.* at 1018, and "the FCA is not an appropriate vehicle for policing technical compliance with administrative regulations. The FCA is a fraud prevention statute; violations of Federal Transit Act regulations are not fraud unless the violator knowingly lies to the government about them. " *Id.* at 1019.

The Court of Appeals for the District of Columbia Circuit also declined to find FCA liability when it was unclear whether the defendant violated a statute during contract performance. *United States ex rel. Siewick v. Jamieson Science and Eng'g, Inc.*, 214 F.3d 1372 (D.C. Cir. 2000). In that case, the relator argued that the company violated the "revolving door statute," 18 U.S.C. § 207, by hiring a former contracting officer for the Strategic Defense Initiative Organization while performing and bidding on contracts for the same agency. Specifically, the relator argued that the company knew the contract was void or voidable when it submitted requests for payment under the contract. The court reviewed the history of cases brought under § 207 and determined that the law was too ambiguous and unsettled for the company to definitively know whether the contract was invalid because of the alleged § 207 violation. The court drew attention to the policy concerns of using the FCA as a means of contract enforcement stating:

> The implications of Siewick's position are extraordinary. Disputes arise between the government and its contractors every day. Contractors do not win every penny they claim. On Siewick's theory, any contracting party that misunderstands its legal entitlements and therefore fails to recover on an invoice in full would be liable under the False Claims Act – except in instances where it was unaware of the facts that led it its failure to recover in full. This is not a prescription for fair or efficient contracting.

Id. at 1378.

By declining to find FCA liability when a contractor relied on a reasonable interpretation of a procurement law or contract provision, the Seventh Circuit and District of Columbia Circuit limited the ability of *qui tam* plaintiffs and prosecutors to drive the interpretation and application of procurement law. However, the Ninth

Circuit has not taken the same restrained approach. If the Ninth Circuit continues on its path, and other circuits follow its lead, the procurement system could be negatively affected. Contractors will potentially be held liable under the FCA for actions taken based on a reasonable understanding of a complicated legal regime. And, these courts will shape procurement law for all of the courts that follow their decisions – even though the courts lack procurement law expertise.

C. Cases Illustrating How FCA Cases Cause Non-Procurement Forums to Rule on Procurement Law

One of the most noteworthy instances of a court of appeals weighing-in on an issue of procurement law occurred in *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037 (9th Cir. 2012). In a case that lasted nine years, the relator alleged that Lockheed Martin intentionally submitted unreasonably low estimates in its bids for a cost reimbursement plus award fee contract with the Air Force. In 2010, the district court granted Lockheed Martin's motion for summary judgment, finding that FCA liability could not be premised on false estimates. The Ninth Circuit Court of Appeals, citing decisions from the First and Fourth Circuits, disagreed and held that false estimates – meaning that the bid is not what the defendant actually intends to charge – can be a basis for FCA liability. *Id.* at 1049. The court found that there was a question of material fact as to whether Lockheed Martin had actual knowledge, deliberately ignored the truth, or acted in reckless disregarded the truth when it submitted its bid. The parties addressed the issue of whether Lockheed Martin's estimate could serve as a basis for FCA liability in a second round of summary judgment motions late last year. Lockheed Martin

argued that the relator could not establish falsity because the Government participated in calculating its proposed costs, and there was no evidence that it ever submitted a false claim. Notably, DOJ filed a statement of interest, in which it argued that a statement can be false under the FCA even if it is not a lie and that Government knowledge is irrelevant to determining falsity. The district court denied the motions for summary judgment, and the case proceeded to trial in 2014. At trial, the relator focused on the fact that the contract had been modified (with the agency's agreement) and that costs had increased, and contended those facts suggested fraud. Despite the DOJ's statement of interest, Air Force personnel testified that contract modifications were expected, explained the reasons for the cost increases, and discussed how they worked together with Lockheed Martin to develop the estimates. The trial resulted in a jury verdict for Lockheed Martin. However, one can imagine a jury, with individuals who have never been exposed to government contracts, being persuaded by a relator's argument that was not based on sound principles of procurement law. Notably, the forums designated to resolve contract disputes do not utilize juries.

In FCA procurement cases in non-procurement forums, courts are often called upon to resolve issues of FAR interpretation and application – a difficult task for even the most brilliant jurist if he is not well acquainted with the FAR. In *United States v. Newport News Shipbuilding, Inc.*, 276 F. Supp. 2d 539 (E.D. VA 2003), the Government argued that the defendant violated the FAR by misclassifying $74 million as Independent Research and Development ("IR&D") costs. Specifically, the Government argued that the defendant submitted false claims for progress payments and false

certifications because they contained IR&D charged for efforts associated with a commercial tanker program that were not allowable as IR&D under the FAR. *Id.* at 542. Essentially, the Government argued that the defendant falsely charged the majority of the engineering work performed under contracts for commercial ships to the Government as IR&D. The FAR does not allow a contractor to charge efforts "required in the performance of a contract: to IR&D. *Id.* at 547 (citing FAR § 31.205-18). The defendant argued that it solicited and obtained opinions on how to charge IR&D from an attorney and an expert and followed the advice. As such, the defendant argued that even if the charges were improper, it could not have knowingly submitted false claims. The court spent three pages discussing the debate over the proper interpretation of the FAR IR&D provision and noted: "[d]espite the long controversy over the proper interpretation and application of the regulatory phase 'required in the performance of a contract,' the case law on this issue is spare and ultimately not helpful." *Id.* at 553. The court acknowledged a 1997 GAO report stating that there was a broad intergovernmental debate over the meaning of the IR&D provision. Nonetheless, despite the fact that the Government could not agree on an interpretation, the court provided its interpretation of the regulation, applied it to the facts, and held that the defendant failed to comply with the FAR. The court turned to the defendant's motion for summary judgment and denied it, stating:

> The record further indicates that the debate regarding the proper interpretation of the regulatory phrase "required in the performance of a contract" has been an ongoing and unresolved question since that time . . . Nor has any other published opinion squarely addressed this question. Finally,

> the record contains no indication of consistent government enforcement of the FAR phrase "required in the performance of a contract" that might have signaled to NNS the proper interpretation of the phrase.
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> In sum, this history of agency and industry dispute and doubt over the proper interpretation and application of the FAR definition of IR&D arguably points persuasively away from a conclusion that NNS must have known, at any time between 1994 and 1999, that its general Double Eagle charging practices were in violation of the FAR. Yet, the plain language of the disputed provision and its legislative history suggest the contrary. Because the current record on this issue must be viewed in the light most favorable to the government as the non-movant and because it is clear that this issue merits further factual development, it is therefore not amenable to summary disposition.

Id. at 563-64 (citations and footnotes omitted). Furthermore, the court stated that evidence of reliance on the advice of counsel or an expert does not necessarily bar a finding that the contractor acted in reckless disregard of the truth because the advice could be unreasonable.

An Illinois district court waded into the FAR thicket in *United States v. Kellogg Brown & Root Services*, No. 4:12-cv-4110-SLD-JAG, 2014 WL 1282275 (C.D. Ill. Mar. 31, 2014). There, the Government argued that Kellogg Brown & Root Services, Inc. ("KBR") and its subcontractor inflated the costs of providing living quarters for troops in Iraq. KBR's subcontractor submitted requests for equitable adjustment ("REA"). The REAs were allegedly for the cost of leasing land, cranes, trucks, and other equipment and hiring additional personnel. KBR concluded that some of the costs were unreasonable and sought less than its subcontractor claimed from the Government. For instance, KBR used a daily rate of $7 to $20 for drivers – rather than the $100 its subcontractor claimed.

KBR billed the Government $48.7 million, which the Government paid. The Government filed an FCA claim, contending that the subcontract incorporated FAR § 31.201-2, which requires allowable costs to be reasonable, and the FAR also holds contractors responsible for appropriately accounting all costs, including maintaining supporting documents. KBR moved to dismiss, arguing that neither the FAR nor its contract required it to verify its subcontractor's actual costs when it settled the claims with the subcontractor or sought federal reimbursement. KBR further asserted that in determining which costs were reasonable, it merely adopted an interpretation over which reasonable minds could differ. *Id.* at 6. The court examined the FAR and the subcontract and found that KBR was required to verify its subcontractor's costs and settle the claim in accordance with the FAR, and KBR failed to do so. The court rejected KBR's argument that allowing the FCA claims to proceed would allow the Government to misapply the FCA, stating:

> KBR argues that allowing the Government's FCA claims to proceed would open the door to abuse, allowing the Government to freely transform disputed issues in cost reimbursement contracts into fraud claims. Consequently, the forum for Government contract disputes would shift from the ASBCA and Court of Federal Claims to federal district courts in contravention of Congressional intent.
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> However, under KBR's approach, even the most egregious cases of fraud under the FCA would be dismissed where the contractor merely alleged a "reasonable interpretation" of a contract term to justify its false demand for payment. Moreover, the Court finds that the FCA's knowledge requirement grants contractors some protection from the proliferation of fraud claims. . . contractors who, in good faith and without contrary information, seek reimbursement

> for claims that are later revealed to be inflated will not meet the "reckless disregard" benchmark.

Id. at *9 (citations omitted). The court evidenced little concern with the policy implications of district court and courts of appeal interpreting and applying FAR and contract provisions.

A long debated issue in government contracts law is whether fraud at the inception of a contract taints all performance that occurs under the contract. This is an issue that has broad implications for the procurement system, and a district court addressed it in *United States ex rel. Longhi v. Lithium Power Technologies, Inc.*, 513 F. Supp. 2d 866 (S.D Tex. 2007). In that case, the Government alleged that Lithium Power Technologies, Inc. ("LPT") made false statements in its proposal for contracts under a federal Small Business Innovative Research Program, including misrepresenting its corporate history, the key personnel it would use, and claiming to have facilities that were not yet built. *Id.* at 577-79. The court granted partial summary judgment for the Government because the statements LPTI made in its initial proposal were false and material, and the falsity tainted all four contracts and any invoices submitted under them during the six years of performance. *Id.* at 889.

III. Reverse False Claims Expand Potential FCA Liability

Reverse false claim actions have also afforded courts of appeal and district courts an opportunity to address issues of procurement law. In a reverse false claim, liability attaches for concealing, avoiding, or decreasing an obligation to pay or transmit money or payment to the Government. *See* 31 U.S.C. § 3729(a)(7). Reverse FCA actions often

involve government contracts because courts have consistently held that a reverse FCA claim cannot be based on a failure to comply with a generally applicable statute or regulation. Rather, the obligation must arise out of an economic relationship with the Government – like a contract - and cannot be contingent or speculative. *See United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 657-58 (5th Cir. 2004) (reversing the denial of a motion to dismiss a complaint alleging that the defendant falsified emission reports to avoid fines because liability does not extend to potential obligations to pay fines or penalties that are not based on an economic relationship). Additionally, the obligation cannot be a potential liability – there must be a present duty to pay.

As such, in reverse FCA actions, the nature of the relationship between the defendant and the Government is critical. In *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234 (11th Cir. 1999) (*en banc*), the Government brought a reverse FCA action against the defendant, an aircraft maintenance contractor that had contracts with the Air Force. The company had five aircraft wings that belonged to the Government, and when it submitted an inventory to the Government, it used the stock numbers for older, obsolete wings. The Government agreed to sell the company the wings for less than $2,000 based on the stock numbers that the company provided, but the total actual market value of the newer wings was at least $2 million. *Id.* at 1236. The defendant sold two of the wings for almost $1.5 million. The Eleventh Circuit, en banc, reversed the dismissal because the defendant had a contractual obligation to account for full value of Government's property. *Id.* at 1237-38.

Like other FCA claims, reverse FCA claims have implicated the FAR. In *United States ex rel. Capella v. Norden Systems, Inc.*, No. 3:94-CV-2063 (EBB), 2000 WL 1336487 (D. Conn. 2000), the relator alleged that the defendants falsely reported that they purchased insurance coverage from an outside insurer when they were actually self-insured, which the relator argued violated the FAR and the FAR's Cost Accounting Standards ("CAS"). Under the FAR, self-insurance costs are allowable as long as the contractor's self-insurance program is approved, which requires the submission of certain disclosures. The relator alleged that the defendants never sought approval of their program but nonetheless charged the Government for the self-insurance costs. The court found that allegations of FAR noncompliance were actionable because without approval, which the defendants falsely certified, the costs were not allowable. However, the court found that noncompliance with CAS was not actionable because the CAS govern what losses can be based on and do not speak to allowable charges. *Id.* at *7-8. In his reverse FCA claim, the relator argued that the defendants falsely certified compliance with CAS to avoid repaying insurance costs to the Government, but he did not rely on the FAR. Because the court had found noncompliance with CAS was not actionable, it dismissed the reverse FCA claim. *Id.* at *11.

The Government and relators have brought reverse FCA claims based on violations of trade regulations, an area of concern to some government contractors. For example, in *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189 (10th Cir. 2006), the relator alleged that Conagra employees routinely altered export certificates issued by the Department of Agriculture to avoid paying a fee for replacement certificates. The

district court granted summary judgment for Conagra, finding that the relator did not demonstrate that Conagra was required to pay for replacement certificates because the cited regulations did not require a payment every time a change is made. *Id.* at 1197. The Tenth Circuit reversed. The court of appeals reasoned that although a new certificate is not required in every instances, the regulation required a replacement when the changes are major or significant. Because new certificates are sometimes required, Conagra would have been required to obtain a replacement certificate when its employees made a significant change. The Tenth Circuit further held that the amount of the obligation need not be fixed for a reverse FCA claim to arise. *Id.* at 1201. Instead, the focus is on whether ***an*** obligation arose and whether it arose from a source independent of the act taken to avoid it. In the case of export certificates, the obligation arose from determining that there was an error in the original certificate requiring correction. *Id.* at 1202. Thus, Conagra wrongfully avoided an existing obligation when it avoided paying a fee for a required replacement certificate. The Tenth Circuit reversed and vacated the district court's decision.

In another import-export case, which also is an area with specialized forums, *United States ex rel. Winslow v. PepsiCo, Inc.*, No. 05 CIV. 9274(CLB), 2007 WL 1584197 (S.D. NY May 31, 2007), the relator brought a reverse qui tam action, claiming that PepsiCo intentionally misclassified soft drink concentrate to avoid import duties. The relator asserted that PepsiCo classified the concentrate as "Mixtures of Odoriferous Substances used in the Manufacture of Non-Alcoholic Beverages" when it should have

been classified as "preparations for the manufacture of beverages." *Id.* at * 1.[4] PepsiCo moved to dismiss, arguing that because the Harmonized Tariff Schedule includes more than 10,000 possible legal classifications, the proper classification was a question of legal interpretation, and a reasonable interpretation of a regulation could not constitute a false statement. The court disagreed, finding that because PepsiCo certified that the statements made to Customs were true, and the relator pled that the misclassification was intentional, the misclassification, if true, would be sufficient to constitute a false claim. *Id.* at * 7.

United States ex rel. Huangyan Import & Export Corp. v. Nature's Farm Products, Inc., 370 F. Supp. 2d 993 (N.D. Cal. 2005), is another trade-related case. The Government alleged that the defendants evaded customs duties on imports by falsifying the products' country of origin. One of the defendants was an importer of canned mushrooms, and the other defendants were packagers, banks, and other companies involved in the scheme. The Department of Commerce, International Trade Administration ("ITA"), imposed a 148.51% antidumping duty on the defendant's mushrooms imported from Chili because they were being sold at less than fair value. *Id.* at 995. To avoid the duty, the defendant shipped drums of mushrooms from Chili to Canada, where they were canned and labeled as products of Canada and imported into the U.S. duty-free. For each shipment, the defendants submitted a customs form that designated Canada as the country of origin and declared that no duty was owed. In all,

[4] The Government did not intervene, but it did file a statement of interest stating that the Government relied on importers to supply accurate information, including the applicable customs classification. *PepsiCo*, 2007 WL 15847197 at * 1.

the Government alleged that the defendants evaded $7.8 million in antidumping duties. The defendants moved to dismiss, arguing that a reverse FCA claim must be based on a present, existing legal duty to pay a fixed sum of money when the false statement is made. The antidumping duty attaches when the goods are imported – the same time the alleged false statements were made – thus the obligation did not preexist the statement. *Id.* at 999. The court acknowledged that potential obligations, e.g. fines and penalties, that are contingent upon the exercise of discretion or an intervening act by the Government do not give rise to FCA liability. *Id.* at 1000. However, in this case, the legal obligation existed when the ITA issued its order establishing the duty, and payment was contingent on importation – not a discretionary Government act. Accordingly, the court denied the motion to dismiss.

IV. Conclusion

The House and Senate Armed Services Committees recently have asked industry, non-profit groups, trade associations, and others with an interest in the procurement process for recommendations on reducing the cost of defense procurement. While there is no panacea and the procurement process has many inefficiencies, establishing a consistent body of procurement law should be at the forefront of this effort. Both contractors and the Government waste countless hours and resources dealing with contract disagreements that should not be treated as false claims and that are litigated for years in forums that lack background and expertise in federal procurement. A suggestion would be to require that all FCA cases involving federal procurement be consolidated in the Court of Federal Claims. This approach would be

consistent with the need, recognized over decades, for specialized expertise and uniform jurisprudence in this area.