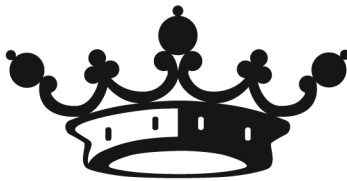


I N S I D E   T H E   M I N D S

# Government Contracts Settlements and Negotiations

*Leading Lawyers on Analyzing and Discussing  
Contracts, Resolving Disputes, and Addressing the  
Unique Challenges of Negotiations with the  
Government*



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The False Claims Act:  
Strategic Considerations  
for Government  
Contract Negotiations

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## Introduction

In my practice, I defend government contractors who are alleged to have violated the False Claims Act, 31 U.S.C. §§3729-33 (FCA). The FCA is the principal device the U.S. government uses to recover damages and penalties where it feels it has been defrauded. It is a very fearsome device, as the penalties are severe: the government is entitled to triple damages, as well as a penalty between \$5,500 to \$11,000 for each claim or fraudulent piece of paper submitted in order to get a false claim paid. 31 U.S.C. §3729(a)(1)-(7). Certain types of contractors, such as those who provide Medicare services, submit lots of paper, every page of which carries a potential penalty. By contrast, a defense contractor who is manufacturing a product for the Department of Defense needs to be more concerned with the triple damages provision than penalties, because it would usually only submit a DD250 form, and perhaps a certification. Thus, it may submit only two pieces of paper, whereas a Medicare provider may submit thirty to forty pieces of paper for each claim.

This statute works differently, depending on the variety of contractor you are dealing with. I supervised health care fraud cases for a number of years at the Department of Justice (DOJ), and I have been in private practice since 1995. One unique element of the FCA is that individuals can bring cases. These are the so-called “whistleblower” or *qui tam* cases (31 U.S.C. §3730), where a case can be initiated against a government contractor, but it is kept secret (or “under seal”) while the government conducts an investigation. The government may prosecute the case itself, or it can decline and the whistleblower (or “relator”) can litigate the case. Either way, the whistleblower shares substantially in any recoveries the government may win. Many cases, in fact, deal with individuals who bring these cases, turn them over to the government, whereupon the government prosecutes, while the whistleblower gets a nice share of the proceeds.

I spent a lot of time at the DOJ, and I am very conversant with not only how it approaches these cases, but how the agencies approach these cases as well. The agency is the client of the DOJ that has to approve any settlement or litigation action. I also do substantial testimony as an expert witness in FCA cases. Thus, I explore new areas in this field on a regular basis. Most of what I do, however, is either health care fraud or

government procurement fraud. As an expert witness, I am exposed to new theories of the FCA as applied in areas I would not ordinarily otherwise become involved with.

### **Client Mistakes**

The biggest problem I see giving rise to government contract suits happens when I am brought into what I call the “tyranny of the unanticipated situation.” This is when nobody, either the contractor or the government, foresaw the eventual problem when they negotiated the contract. In many contractual situations, a problem can pop up out of nowhere. If the government is alleging merely a breach of contract, the issue can be resolved through the normal methods of government contracting. The more substantial risk is that the government will conclude that a violation of the FCA has occurred. Then you are dealing with the serious damages and penalties prescribed in the FCA. How does one persuade the government that the dispute only involves a breach of contract and not the FCA? That is the challenge counsel faces. In addition to penalties and damages, allegations under the FCA give rise to serious concerns about debarment or suspension of the contractor, which are very severe sanctions. So anytime the FCA emerges as an issue in resolving a dispute, the contractor faces a very serious situation.

A common problem occurs when employees act contrary to their instructions, or when they have no instructions and do what they think is best. For example, take a person who regularly meets with a contracting officer. A question comes up. Can we do this, or use this component rather than another one? Instead of going back to the superiors within the contracting organization, the employee makes a decision that is later seen as an attempt to defraud the government. Even if the contracting offer agrees to the employee’s proposal, the contracting officer may be acting beyond his or her authority and the government will argue that his or her assent is no defense to a damaging FCA action.

Ambiguities in contract language can also pose a problem. For this reason, I encourage clients—even those who have been government contractors for decades and know the terminology—to make their language as precise as possible. This is because when there is a disagreement as to the

interpretation of the contract, the government may conclude it is an FCA violation, leading to a plethora of unpleasant consequences. I remember one case where I assisted outside government contracts counsel involving a large pharmaceutical manufacturer who had a number of federal supply schedule contracts with the Department of Veterans Affairs. A dispute arose over the “price reduction” clause and its intended scope and meaning. Now, nearly every government procurement contract contains such a clause and the language is pretty standard. Yet neither the company nor the DOJ could agree upon exactly how it was meant to operate within the framework of this contract. Rather than litigate the matter and possibly face debarment or suspension, the client chose to pay a large settlement to resolve the issue. This is not an uncommon situation.

## **The Art of Negotiation**

My objective in negotiation is very straightforward. It means either persuading the government not to take an adverse action (e.g., instituting an FCA case or a suspension or debarment) or mitigating any action the government does decide to take. In other words, I use persuasion to get the best result for my client, but always bearing in mind that the worst thing one can do is antagonize those in the government that you are negotiating with. When in negotiations with government employees, a patronizing posture can ruin an entire case. The best lawyers in this area approach negotiations as if the client and the government face a joint problem, and that teamwork with the government is necessary for resolving that problem in a way so the client is adequately and fairly treated.

### *Strategic Considerations for Negotiations*

When entering into a negotiation, my strategy is first to always be well prepared. This may seem obvious, but it is surprising how many times I have witnessed government or outside counsel who lack the necessary preparation. I approach negotiations the same way I approach a case. I want to know the facts inside and out. If there are key documents, I want to have read them and have highlighted all the key provisions (what the government is concerned about, and what is causing them to evidence displeasure with my client). Once I know the problem, I want to find out what the factual basis for it is.

It is important that when you assert a position in a negotiation, you must have a solid reason for that assertion. The worst thing you can do is simply say, “We are going to offer this amount of money to resolve this.” The question the government naturally asks, following such an offer is, “Why this amount and not another?” Interestingly, many people do not have an answer to that question. If you have persuasive reasons supporting your negotiating position, the government may disagree, but it cannot claim you lack a reasonable foundation. This technique also enhances your negotiation credibility.

In line with this, it is also wise to make some concessions when the other side makes a good point. When the other side presents a solid argument, simply acknowledge that it is a good point and that everyone needs to consider it in the resolution of the problem. This strategy serves several purposes. It makes your opponent feel good, deflates the importance of the issue, shows you are willing to be reasonable, and shows you are confident in your own position. Often, taking a hard-line position prompts the other side to become more aggressive, and an arms race mentality ensues.

### *Personal Negotiating Style*

Lawyers should negotiate from their own personality strengths, and they should not try to adopt an uncomfortable style they have seen used by someone else. Personally, I believe “take it or leave it” negotiation is almost always ineffective. I never like to close the door completely. Often there are ways to get around roadblocks without making absolute demands. Humor can be a very effective device, especially when facing government negotiators who may try to intimidate adversaries. Keeping the tone light and using humor shows you are not intimidated, and it maintains a good environment for trying to work out problems together.

Listening is crucial. Many people fail to listen to what the other side is saying in a negotiation. I keep a writing tablet out, and I write down the points made as well as the facts supporting those points. This practice takes time, but it also allows you to methodically sift through the arguments to see if there are any serious disagreements. More generally, understanding the other side’s position is critical in a negotiation. This means knowing not what you think they are saying, but what their position is in reality. The way

to do that is to ask them to explain their positions along with their supportive reasoning.

### *Working with Clients during Negotiations*

Generally, it is a terrible idea to have a client present when in a negotiation. For example, when working in the DOJ, I once had a case involving defective medical equipment. The client was present on the other side, and their lawyers' negotiation style was brutally "Russian." Representing the client was a large, very well-known law firm, but their "take it or leave it" position to me was completely unreasonable. I started folding up my papers to leave, and I could see the client was horrified at what had happened. My colleague and I left. We returned to our offices, and I predicted we would get a call within a day or two. The call came within an hour from the client himself, without the law firm being involved at all. From that point on, the client and I negotiated a resolution that probably cost it more money than it would have spent if their counsel had acted responsibly during the negotiations. Nonetheless, even at the "inflated" settlement amount, it was a good deal for the client, who avoided an FCA action and possible adverse action by the Office of Inspector General of the Department of Health and Human Services.

Settlement is really the best option for these types of cases. Litigation is extremely undesirable, particularly in health care fraud cases. I never want to have a client in a U.S. district court as a defendant in an FCA action. Even with a 95 percent degree of assurance that the case is a winner, I do not want to go to litigation because the potential penalties are so severe under the FCA for health care providers that even a 5 percent chance of losing can be too damaging. What I try to do instead is negotiate my way out of the problem to begin with. If I absolutely have to get into litigation, I try to get the case out on motions. If that fails to work, I try to settle, even though it may be bad timing on the negotiation end.

### *Preparing for Negotiations*

The first step I take when preparing to negotiate is to make sure I understand the problem completely. Is it a contractual provision everyone is arguing about? Is it a statute or regulation? Is the government alleging out-



and-out fraud? The second step is to discuss the problem in detail with inside counsel. They usually have a thorough grasp of the necessary facts, as well as the negotiation history. They know who to talk with within the company, and they may have been down a similar road before with the agency in question, or have good ideas about dealing with the issue.

I usually am brought in when the FCA rears its head, even when the client already has a major law firm handling the contracts aspect. They conclude that the situation demands someone with FCA and DOJ expertise, so I enter and confer with the outside counsel as to their view of the situation. A combination of inside and outside counsel is best. I have found that by the time I have gone through this process, I have a very good grasp of the problem. After this, I talk to the government to see what they think the problem is, and try to figure out what they are after. Sometimes the government is interested in money, and sometimes they are interested in having an excuse to terminate the contract. Most of the time, however, I find that the agency is most concerned with fixing the problem to avoid it happening again in the future.

At times, one effective technique is to ignore the DOJ as much as possible if they are involved. Instead of focusing on them, try to involve agency counsel to a greater extent. This is because agency counsel is usually more interested in working out a pragmatic solution. Once I have talked to the government, I then sit down and talk with the client and any other outside counsel to decide the best way to proceed.

FCA cases are a very challenging ball game when you are litigating. It is far better to resolve such cases through negotiation. If you are going to negotiate, you want to take time to develop a comprehensive negotiation strategy. You do not want to walk in and improvise. Rather, you need to very carefully think out what your positions are, and you want to make sure you are in command of the facts, have thought about all of the pertinent legal theories, and have assessed what the legal risks may be. No “shooting from the hip” is a good rule to follow.

When you finally begin negotiating, you have to have patience. It is easy to think progress is not being made, and that the negotiation is wasting time.

Yet the next time you get together something may click, moving you dramatically toward a resolution.

In some cases, I also like to suggest alternative solutions when negotiating with the government. For example, if the government is upset about something and they want to go forward with alternative A, which the client does not want, I will suggest resolving the problem by doing alternative B or C. The final step, if negotiations fail, is litigation. However, if you have done your negotiation preparation the right way, and followed the above steps, you will be in a much better position to litigate, having already done much of the spade work necessary for effective litigation.

### *Commonly Negotiated Items*

The use of certain phrases drawn from acquisition regulations often cause problems. Acquisition regulations are written to be general, and they often are stuck into contracts irrespective of specific fact patterns. The result is that each side has a different understanding of what that clause means, even though it is a clause or a phrase that has been used for generations in government contracting. Over time, misunderstandings may emerge from these alternative readings.

If you are at the point where you have not been able to persuade the government, and need to do something to make the government happy, offering money through a settlement is often the best way to get out. If you are resolving an FCA case, the question becomes what constitutes a reasonable settlement, as damages can escalate very quickly. I once had a case at the DOJ where the damages were well into the billions of dollars, and we knew we could never litigate a case for billions of dollars. There were thousands of pieces of paper, each with a penalty of \$5,500 to \$11,000. Thus, it is common to spend a lot of time negotiating how much a reasonable financial settlement for the government will be.

### **Defining a Reasonable Settlement**

I have some insight into the government's perspective, as I used to work on settlements at the DOJ. The great thing—from the government's standpoint—about the FCA is that you have plenty of tactical devices to

negotiate a bundle of money. The DOJ can manipulate dollar numbers with the large amount of flexibility it enjoys. For example, the DOJ can argue as to what it believes the single damages are and what a reasonable settlement compromise might be (e.g., double damages instead of triple). Moreover, the DOJ can suggest how many false claims or fraudulent documents it believes were submitted. Typically, large numbers of those identified will disappear in order to settle the case, with penalties being proposed for a smaller number. Finally, the DOJ can suggest what penalty figure between \$5,500 and \$11,000 it would recommend. The amount of penalties and the number of penalties are excellent negotiation targets for defense counsel, since they are so fluid. Just have solid arguments prepared to support your position. Bear in mind, as well, that DOJ settlement agreements don't specify how much of the settlement figure is for damages and how much is for penalties—only what the total amount of the settlement is.

When on the defense side of the table, the first thing to recognize is that the DOJ attorney you are negotiating with is the one who makes the recommendation to his or her superiors as to settling the case. They write a settlement memo that follows a prescribed form. In the memo, they have to lay out all the facts, litigation risks, and all of the considerations that lead them to believe the amount they are proposing is a reasonable one. Therefore, it is important to realize that the DOJ attorney is the one you have to persuade, because their recommendation will carry a great deal of weight as it goes up the line.

The DOJ attorney can manipulate the numbers to some extent when they write the memo, and they will in any way that is advantageous to the position they want to take. This is why it is important to always maintain a good working relationship with the DOJ. People who undertake warfare approaches, in my opinion, are cutting their own throats in this field.

One area where attorneys spend a good amount of time negotiating involves corporate integrity agreements. While in the DOJ, I was told that it is good to get a fat settlement, but better to prevent a reoccurrence of the problem. Compliance plans were stressed so the involved company would stay out of trouble in the future. In virtually every health care fraud settlement, then, the government wants to talk about a corporate integrity agreement.

Negotiating a settlement entails more than money. It involves administrative considerations and keeping an eye on possible criminal actions. The FCA has a provision (31 U.S.C. §3731(d)) stating that if you admit anything in a criminal plea agreement, this automatically forecloses you from defending against that allegation in any subsequent FCA action. Whenever dealing with the government, you have to think about the three possible miseries that can be inflicted upon your client. These are civil, administrative, and criminal. When in the midst of one of these, you do not want to go forward with any action that will negatively affect your client in the other two areas. For this reason, one always has to be conscious of the entire process before making commitments.

### **Defining a Successful Negotiation**

My definition of a successful negotiation is straightforward. The question is, did I do as well for my client as I think could have been done? In other words, you do not make the situation you come into, and judging yourself on an absolute measure is inappropriate. I am not responsible for the situation before I walk into it. If my client has had tense negotiations with the government, or has done something to antagonize the government and the DOJ attorney is fed up, I am consoled in knowing I did not construct the situation, and all I can do is get the best possible result for my client. Sometimes this means the client leaves having no problems, and other times it means the client leaves with a lesser problem. In the end, I ask myself if someone else could have done a better job, and whether there was something I should have done that I failed to do. This is the standard I apply in determining the success of my actions in a negotiation.

### **Compliance and Response Plans**

The best thing a contractor can do is be proactive about their situation. This means having an effective compliance plan, thinking about compliance ahead of time, and investing the necessary resources to have an effective compliance plan. It is better to avoid problems than to face a possible FCA case or debarment action. If you have problems, it is better that you find out about them while you can still correct them at a lesser expense, rather than letting the problems fester. Compliance plans have become very important, and there are national organizations like the Health Care

Compliance Association and various ethics and compliance officers associations that can help in this area. Some compliance officers are certified, and these people are worth their weight in gold, as they undertake a number of responsibilities in educating employees, establishing internal audit schedules, and organizing companies to maximize their compliance. When I was in the government, I would put contractors facing difficulties in two categories: those who did not have compliance plans, and those who did. Compliance officers are very good people to help negotiate, and help develop expertise.

Response plans are likewise essential. The response plan designates one person to deal with the government. These people help your company by, for example, segregating all privileged documents into one area, and then labeling them as privileged documents. If you get a search warrant served, the government then knows you are claiming these documents as privileged. If the Federal Bureau of Investigation shows up and wants to begin a search, some of the best sources of information are employees. However, it is obviously better to have a response plan in effect that designates the liaison to the government. This person checks search warrants to make sure everything is being done correctly, and they know to ask for a listing of all things that are taken during the course of the search. They know to call counsel immediately, and to get them alerted as to the situation.

Compliance plans are good for avoiding problems, and response plans are very valuable in that you never know when you will have a warrant executed, and the result is that you are ready for it with no inadvertently disclosed information or employee confusion.

## **Pertinent Criminal Statutes**

### *Obstruction of Federal Audit*

18 U.S.C. §1516 is particularly important to home health providers, since audits are the primary tool used by the government to monitor home health provider performance, as well as usually the initial step in any investigation. The statute imposes substantial penalties upon any person or entity that receives in excess of \$100,000 from the government in any year and “with

intent to deceive or defraud the United States, endeavors to influence, obstruct, or impede a federal auditor in the performance of official duties” relating to that person or entity. Of particular importance is the rather expansive language of “influence, obstruct, or impede” employed in the statute. Certain parameters are clear—for example furnishing bogus checks and bank statements to auditors triggers the statute. *United States v. Henry*, 1993 U.S. App. Lexis 31191 (1993). However, it would appear that any effort to mislead or confound auditors could conceivably also invoke liability under the statute. However, the statute has seldom been employed, and there are only two reported decisions addressing it. (In the *Henry* case, *supra*, during an audit, defendants attempted to conceal fraud by creating and submitting false checks and bank statements. In the second case, *United States v. Leo*, 941 F.2d 181, 198 (3d Cir. 1991), §1516 is mentioned only in passing.)

#### *Making False Statements in Connection with Medicare or State Health Care Programs*

42 U.S.C. §1320a-7b(a) is a provision of the Social Security Act, which renders it a felony to make or cause to be made “any false statement or representation of a material fact” in any application for payment, or for use in determining rights to any such payment. The operative language is “any false statement or representation” of a material fact, which encompasses requests for reimbursement, cost reports, certifications that services were performed by licensed physicians, as well as practically every other kind of representation to Medicare or Medicaid. As noted above, the DOJ has adopted the position that a provider, in effect, has certified the truth and accuracy of *any* representation to Medicare or Medicaid made in connection with receiving payment.

#### *Making False Statements with Respect to Conditions or Operations of Institutions*

42 U.S.C. §1320a-7b(c) is also of particular import to home health providers. It imposes criminal sanctions for making misrepresentations in connection with gaining initial certification or recertification as, among other designations, a home health agency where such certification is necessary in order to participate in Medicare or under a state health care program. The statute mentions explicitly the making of false statements or representations of material fact in connection with “the conditions or operation of any

institution, facility, or entity...” The statute also targets any false statements or misrepresentations made in connection with information required to be furnished by virtue of 42 U.S.C. §1320a-3a, which mandates the disclosure of related ownership or control interests.

### *Kickbacks*

The Medicare/Medicaid Anti-kickback Statute, 42 U.S.C. §1320a-7b(b), mandates severe criminal penalties or mandatory exclusion from the Medicare and Medicaid programs. According to a 1994 OIG Fraud Alert, “The anti-kickback statute penalizes anyone who knowingly and willfully solicits, receives, offers, or pays a remuneration in cash or kind to induce or in return for:

- a. Referring an individual to a person for the furnishing or arranging for the furnishing, of any item or service payable under the Medicare or Medicaid program; or
- b. Purchasing, leasing or ordering, or arranging for or recommending purchasing, leasing or ordering, any good facility, service, or item payable under the Medicare or Medicaid program.”

Kickbacks recently have become a rather significant enforcement target for the federal government. In part, this is a result of the statute’s expansive language (e.g., remuneration “in kind”; “recommending”), which has a very broad reach. The August 1994 indictment of Caremark International Inc., alleging that it paid more than \$1.1 million in kickbacks to a physician to encourage him to prescribe the company’s growth drug, and the company’s June 15, 1995, agreement to pay the government \$161 million and enter criminal pleas in connection with these and other kickback and fraud charges, illustrate why this is one of the most critical statutes affecting health care providers, including the home health industry.

### *Disclosure of Ownership or Control in Related Organizations*

42 U.S.C. §1320a-3 mandates that a Medicare or state health law provider must disclose to the Department of Health and Human Services the identity of any person with an ownership interest, or identify any subcontractor in which the entity has a 5 percent or greater interest. The

purpose of this provision is to ensure all contractual transactions are truly at arm's length and do not involve subversion of bargaining by the two supposedly separate parties actually being controlled by the same individuals or entities. Any failure to make full, complete, and accurate disclosure subjects the provider to prosecution under 42 U.S.C. §1320a-7b(c).

### *Mail Fraud and Wire Fraud*

18 U.S.C. §§1341, 1343, and 1345 make it a *separate* violation of federal criminal law to utilize either the mails or private or commercial interstate carriers (such as Federal Express) or wire communications (such as faxes, telephones, and e-mail or electric forms of transmission) to accomplish an illegal act, such as presenting a false claim to Medicare or a state health plan. A fundamental advantage to the government in utilizing the mail fraud statute is that §1345 provides for injunctive relief to stop an alleged fraud and freeze the defendant's assets.

### *Presenting False, Fictitious, or Fraudulent Claims*

18 U.S.C. §287—frequently referred to as the criminal false claims act—is generic in that it applies to any kind of false claim submitted to the government, including those relating to Medicare and state health plans. Criminal liability attaches from the submission of any claim “upon or against the United States...knowing such claim to be false, fictitious, or fraudulent...” Compare the “knowing” criterion governing this section with the more rigorous “willful” standard employed in §1001.

### *Conspiracy to Defraud the Government*

18 U.S.C. §286 adds a significant dimension to §287. It mandates that whoever enters into “any agreement, combination, conspiracy to defraud the United States...by obtaining or aiding to obtain the payment...of any false, fictitious, or fraudulent claim” shall be subject to a *separate* criminal penalty. Once again, the language is subject to an expansive reading, since any one “aiding” the payment of false claims conceivably becomes liable.



### *Making False Statements to the Government*

18 U.S.C. §1001 is a real workhorse in federal prosecutions against health care providers. It attaches criminal liability to anyone who “knowing *and willfully* falsifies, conceals, or covers up...a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry...” Section 1001 frequently is employed to prosecute individuals or entities who make misleading or false statements to, or conceal facts from, federal investigators during audits and investigations. In this regard, it is vital to note that the statute reaches concealment or falsification of a material fact, as well as affirmatively making false or fraudulent statements. However, the state of mind requirement is somewhat stringent, in that the government must prove the defendant acting “willfully.”

### **Conclusion**

One must be careful in the selection of outside counsel when dealing with the FCA. When I was in the government, criminal lawyers were frequently hired by contractors to negotiate, and said they knew about fraud, but criminal fraud is completely different from the civil FCA. Thus, you must always be careful to match the expertise of the counsel with the particular area. You want to ensure the background of your outside counsel is correct for the job. This person also has to be someone with whom you are comfortable. My view is that you want someone who is well primed to present and advocate effectively on behalf of your position, but who does not do so in a threatening fashion.

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