

Reproduced with permission from Federal Contracts Report, 107 FCR, 1/24/17. Copyright © 2017 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Claims

Why Certify If the False Claims Act Could Apply?

BY DANIEL SEIDEN

One contractor's red tape is another contractor's effective rule.

Although the Contract Disputes Act (CDA) has long required contractors to certify that certain claims for payment are accurate and complete, some say certification is unnecessary given the fraud deterrent the False Claims Act (FCA) provides.

Reliance on the FCA to combat contractor fraud has grown immensely since the CDA became law.

The Justice Department obtained more than \$4.7 billion in cases under the FCA in fiscal 2016 — a \$1 billion jump from fiscal 2015. Twenty years ago, recoveries didn't top \$100 million.

Perhaps the FCA now looms large enough to incentivize honesty in contractors' claims and eliminate certification.

"Since we have the False Claims Act, I think the CDA certification requirement is redundant and needlessly complicates the process," Jason Workmaster, who is of counsel at Covington & Burling in Washington, told Bloomberg BNA. "Claims, in my opinion, should be considered on their merits — without getting bogged down in whether the claim was certified or not."

Others doubted the FCA's power in this regard and touted the benefits of certification.

"The prospect of civil or criminal prosecution under the FCA is too remote and detached" to eliminate certification, said Daniel Kelly, a partner with McCarter & English LLP in Boston.

Certification was designed not only to deter frivolous claims "but to streamline the claims resolution process by forcing a contractor at the very early stages — prior to litigation — to gather all necessary supporting data and accurately state the amount of the claim," he said.

Claims Get Tossed. The FCA holds contractors liable for knowingly presenting a false or fraudulent claim for payment or approval. Damages and penalties can be terribly costly.

If the FCA is enough to deter fraudulent or even sloppily packaged contractor claims, could the certification hurdle be thrown away as redundant red tape?

The CDA and Federal Acquisition Regulation (FAR) 33.207(c) require that government contractors submit-

ting a claim for payment to certify that they filed their claim (exceeding \$100,000):

- in good faith;
- with accurate and complete supporting data; and
- the amount sought is accurate.

Claims that may otherwise be meritorious are routinely dismissed for lacking certification, as shown by the Armed Services Board of Contract Appeals' recent dismissal for a certification's lack of a handwritten signature.

The absence of certification isn't a defect a contractor can correct after an appeal has been filed, the board has said.

Certification "only matters to government lawyers down the road who are looking for a way to avoid addressing the merits of the claim," Workmaster said.

Strongest Enforcement Mechanism. Certification isn't really necessary from a fraud perspective because the FCA provides the "strongest enforcement mechanism," said Luke Levasseur, counsel with Mayer Brown LLP in Washington.

The purpose of certification, as described in a 1983 Government Accountability Office report, is to push a contractor to take steps it would not otherwise take to ensure claim accuracy, he said.

However, certification can only cover so much ground.

Even though certification is necessary only for claims greater than \$100,000, FAR 33.209 requires contracting officers to refer a suspected fraudulent claim to an inspector general regardless of the claim's size, Levasseur said.

The FCA also applies the same way to uncertified \$95,000 claims and certified \$105,000 claims, he said.

Consequences Used to Be Worse. Neil O'Donnell, a shareholder with Rogers Joseph O'Donnell PC in San Francisco, said certification isn't necessary, but also doesn't pose a significant problem.

"Fortunately, the days when a certification problem could undo years of litigation are over," he said. "So while I believe it might make sense to get rid of the rule that a claim must be certified as unnecessary, this is way down on my list of things that need to be changed in government contracting."

O'Donnell referred to a 1992 CDA amendment allowing contractors to repair some defective certifications and keep their claims alive.

The change ended cases "where after 10 years of litigation a court would decide that there had been a defect in the original certification, meaning no jurisdiction

from the outset and the need to start back at the beginning,” O’Donnell said.

Benefits to Dispute Process. Certification may have benefits the FCA doesn’t provide, despite the breadth of the act.

“If the only purpose of certification was to minimize false claims, then maybe the FCA would be enough,” said Shlomo D. Katz, counsel at Brown Rudnick LLP in Washington.

Certification spurs contracting officers to action, he said.

Contractors can submit requests for equitable adjustment or other proposals to initiate discussions on claims, he said, but “contracting officers all too often drag their feet in responding to them.

“In contrast, submitting a ‘certified claim’ tells the government that the contractor is through negotiating

and is ready to take the government to court,” Katz said.

He also said certification imposes a 60-day deadline for contracting officers to respond to claims, and starts the clock running on the government’s obligation to pay interest.

Certification “forces a contractor intoxicated with the belief that the government has done it wrong to sober up and take a hard look at the claim,” Kelly added.

Certification also helps the acquisition process by preventing unnecessary and prolonged litigation, “and keeps all the parties honest,” he said.

To contact the reporter on this story: Daniel Seiden in Washington at dseiden@bna.com

To contact the editor responsible for this story: Jerome Ashton at jashton@bna.com