

Government Contractor Awarded Attorney Fees for Defending Against "Unreasonable" FCA Claim

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by Alan J. Iverson

The U.S. Court of Appeals for the Sixth Circuit recently concluded that a contractor should obtain an award of attorney fees for having to defend against an “unreasonable” False Claims Act (“FCA”) suit. In *United States ex. rel. Wall v. Circle C. Constr. LLC*, the Government sued a contractor that built warehouses for the U.S. Army. During construction, it was alleged that the contractor’s subcontractor paid two electricians \$9,900 less than the wages mandated by the Davis-Bacon Act, a federal law that sets wages on public-works projects. That underpayment rendered false the “compliance statements” that the contractor periodically sent to the Government, and the Government subsequently that the contractor had made a false claim against the United States.

In its lawsuit, the Government sought \$1.66 million in damages. The Government claimed that the contractor’s allegedly false claim of \$9,900 had caused \$554,000 in “actual damages,” which it was entitled to treble under the FCA. The Government argued that the \$9,900 underpayment had “tainted” all of the subcontractor’s electrical work and rendered the total value (\$554,000) of the performance worthless. During a previous appeal, the Sixth Circuit rejected that argument. It held that the underpayment did not “taint” the total value of the electrical work and reversed a \$763,000 judgment for the Government. It remanded for an award of \$14,748—less than one percent of the Government’s demand.

On remand, the contractor sought \$468,704 in attorneys’ fees it had spent defending against the Government’s \$1.66 million claim. The contractor’s demand for attorneys’ fees arose out of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(D), which states that a court must “award to the [defendant] the fees and other expenses related to defending against the excessive demand” if the Government’s original demand was both (1) “substantially in excess of the judgment finally obtained” and (2) “unreasonable when compared with such a judgment.”

The district court denied the contractor’s motion for fees, but the Sixth Circuit reversed, explaining that it would be an “understate[ment]” to say the government’s demand of

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\$1.66 million was “substantially in excess” of the \$14,748 judgment. It also found that the demand was “unreasonable compared to the judgment.” In the FCA context, actual damages are “the difference in value between what the government bargained for and what the government received.” Here, the government bargained for buildings and wages; it got the buildings but “not quite all” of the wages. The shortfall—\$9,900—was the government’s actual damages. The court found that no reasonable person could accept that the underpayment tainted the entire value of the electrical work because the Government benefitted “every minute of every day” in the form of functioning electrical systems.

The Government argued that the contractor was not entitled to fees because its underpayment amounted to “bad faith,” one of the exceptions listed in 28 U.S.C. § 2412(d)(1)(D). The court disagreed and found that the Government failed to show that the underpayment was anything other than “an honest mistake.” The court noted that, unlike many FCA cases, this case did not involve an systematic attempt to defraud the government. Rather, it involved a \$9,900 inaccuracy in a \$20 million project. The court also noted that the subcontractor’s prices did not clearly state how much it paid the electricians and that both of the contractor’s co-owners testified that they submitted “compliance statements” with the honest belief that they were true. Although the district court found that the contractor was “reckless” in not knowing whether its “compliance statements” were accurate, that standard was less stringent than bad faith. The Government also argued that an attorneys’ fee award would “chill[]” its ability to enforce the FCA. In response, the court observed: “One should hope so. In this case the government made a demand for damages a hundredfold greater than what it was entitled to, and then pressed that demand over nearly a decade of litigation, all based on a theory that as applied here was nearly frivolous.” The court then reversed and remanded for an award of attorneys’ fees to the contractor.