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Tenth Circuit Holds that the False Claims Act's Materiality Requirement Has Teeth in Granting Summary Judgment to Government Contractor Defendant

On April 22, 2016, in a decision issued before the Supreme Court's *Escobar* opinion, the Tenth Circuit addressed the question of what a relator must show to meet the materiality requirement in an implied false certification-based claim under the False Claims Act ("FCA"). In *United States ex rel. Thomas v. Black & Veatch Special Projects Corp.*, 820 F.3d 1162 (10th Cir. 2016), the Tenth Circuit held that the defendant was entitled to summary judgment because even if the relators could prove the defendant had violated its contract with the United States Agency for International Development ("USAID"), the relators could not prove that the violation was material to USAID's payment decisions under the contract. Thus, any such violation did not give rise to an FCA violation.

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Background

The defendant, Black & Veatch Special Projects Corp. ("BVSPC"), was awarded a contract from USAID in 2010 to build an electrical plant in Afghanistan. After final completion and acceptance of the work, and "[u]pon compliance by [BVSPC] with all the provisions of [the Contract]," USAID was required to pay BVSPC any remaining funds owed.

The relators – former BVSPC employees – discovered copies of forged documents that had been submitted to the Afghan government as part of the application process by which the defendant obtained visas for its employees. The relators reported their discovery to a supervisor and, two days later, provided copies of the forged documents to the USAID Office of Inspector General ("OIG"). Shortly after learning of the forged documents, the defendant met with the OIG, requested from the Afghan government copies of all documents it had submitted as part of the visa process, and launched an internal investigation to determine the origin of the forgeries. The government did not take any adverse action against the defendant in response and continued to make payments to the defendant in full. In fact, USAID amended the contract to provide the defendant with additional work.

The relators filed suit against BVSPC in 2011, alleging that BVSPC violated the FCA by presenting claims to the United States for payment for work performed by employees who had obtained work visas and permits as a result of fraud. Under an implied false certification theory, the relators argued that BVSPC had falsely certified to the government its compliance with all terms of the contract, including more than one hundred regulations incorporated by reference, by submitting a claim for payment. The district court granted BVSPC's motion for summary judgment, holding that the relators could not prove that BVSPC's alleged violations were material to USAID's decision to pay BVSPC for the work performed. The district court based its ruling on two principal facts. First, USAID continued to pay BVSPC after learning of and investigating the altered documents. Second, USAID did not demand a refund or take any other adverse action against BVSPC.

Tenth Circuit's Holding

The Tenth Circuit affirmed the lower court's ruling and, in doing so, provided its view of what is required to satisfy the materiality requirement in implied false certification cases. The Court took the position that, under the FCA, a relator may establish materiality either "by demonstrating that the defendant violated a contractual provision that undercut the purpose of the contract," or, where the defendant has violated only a minor contractual provision, "by

coming forward with evidence indicating that, despite the tangential nature of the violation, it may have persuaded the government not to pay the defendant.” *Black & Veatch Special Projects Corp.*, 820 F.3d at 1171. Applying that standard, the Court dismissed the relators’ argument that the submission of forged documents undercut the purpose of the contract, which was to provide electricity to Kandahar and the surrounding area. The Court then concluded that, because the government paid BVSPC for its work, and had in fact given the defendant even more work after learning of the forged documents, it was clear that the submission of the forged documents was not material to the government’s decision to make payment, and therefore the relators had failed to establish a violation of the FCA. *Id.* at 1175.

Implications of the Court’s Decision

This case holds that a violation of a contract that does not undermine the contract’s purpose and does not impact the government’s decision to pay will not provide a sufficient basis to support an implied false certification-based FCA claim. Given the Supreme Court’s recent decision in *Escobar* to use a rigorous materiality requirement to impose meaningful limits to the scope of implied false certification-based liability, it will be important to watch how the Circuit Courts, including the Tenth Circuit, evaluate materiality under the FCA going forward.

If you have any questions or would like to discuss the foregoing or any related matter, please contact the Ropes & Gray attorney with whom you regularly work, or an attorney in our [False Claims Act](#) practice.