Bloomberg Government

Federal Contracts Report™

Contracting in the World of Whistleblowers: Practical Tips for Turning Possible *Qui Tam* Plaintiffs into Internal Reporters

Government Contracts

Last year, the Department of Justice (DOJ) recovered more than $3.7 billion from contractors and businesses that do business with the government. More than 90 percent of those recoveries were the result of whistleblower-initiated lawsuits. Given the perils of whistleblowers turning into government informants, the stakes have never been higher for companies to proactively address allegations of internal wrong-doing. In this article, two former DOJ prosecutors outline practical suggestions for doing business in the world of whistleblowers.

BY A. LEE BENTLEY, III, AND JASON MEHTA

As many defense contractors have painfully learned over the years, the world of federal procurement regulations is complicated, evolving, and perilous. Even technical violations of procurement regulations can bring stiff consequences. Nowhere are the stakes higher than in the world of the False Claims Act, where the government can recover up to treble damages when government contractors are found to have engaged in fraud.

A. Lee Bentley, III, *is the former U.S. Attorney and* **Jason Mehta** *is a former Assistant U.S. Attorney, both for the Middle District of Florida. While in government, both focused on sophisticated white-collar fraud prosecutions, particularly in the defense and procurement arenas. Under Mr. Bentley's leadership, the office's False Claims Act recoveries grew from $10 million annually to $800 million in the final year of his leadership. Mr. Mehta personally recovered nearly a quarter of a billion dollars in False Claims Act recoveries. Both now are partners in the Government Enforcement and Investigations Practice Group at Bradley Arant Boult Cummings LLP in Tampa, Fla., advising government contractors on procurement regulation risks and opportunities. Mr. Bentley can be reached at lbentley@bradley.com. Mr. Mehta can be reached at jmehta@bradley.com.*

And, the stakes are indeed high. According to the most recent statistics, the Department of Justice (DOJ) is maintaining a fast clip with respect to False Claims Act prosecutions. In fiscal year 2017, the federal government recovered more than $3.7 billion in fraud recoveries from federal contractors. While the vast majority of those recoveries came in the healthcare arena, federal defense contractors made up the second highest category of False Claims Act defendants.

Of particular note is that more than 90 percent of the recoveries reached by DOJ—$3.4 billion out of $3.7 billion—were the result of *qui tam* lawsuits. *Qui tam* lawsuits, otherwise known as whistleblower lawsuits, are one of the fastest-growing segments of litigation in federal courts, with entire cottage industries of lawyers devoted to these cases.

Given this new regulatory and legal environment, it is incumbent on defense contractors to understand both the risks—and, equally importantly—the opportunities of whistleblowing employees. This article outlines the history of *qui tam* lawsuits for defense contractors, then details some practical suggestions for turning potential government whistleblowers into internal employee

 ISSN 0014-9063

watchdogs. The article concludes with some words of advice for corporate executives and compliance officers alike.

History of *Qui Tam* Litigation The history of *qui tam* litigation in America finds its roots in the Civil War. During the latter part of the war, the government found itself facing a variety of claims submitted by contractors that were false, inflated, or otherwise fraudulent. In response, Congress passed legislation—affectionately known as ''Lincoln's Law''—to help the government combat fraud by federal contractors.

The law remained on the books for over a century until it was significantly revamped in the mid-1980s. At that point, Congress significantly sweetened the pot for potential whistleblowers. Congress authorized large awards for whistleblowers who disclose fraud—promising upwards of one-third of the government's recoveries in certain instances. Further, Congress added a variety of protections for whistleblowers to prevent unwarranted targeting and harassment.

The law has been strengthened and enhanced over the years, most recently during the debate over the Affordable Care Act in 2009. Through a variety of procedural tweaks, Congress has ensured that the law has remained vibrant and allows whistleblowers to file lawsuits against their former employers, competitors, and the like. Today, there are literally hundreds of law firms around the country that purport to specialize in *qui tam* litigation.

In the procurement arena, activity has been particularly notable in the recent years. In 2017, for example, DOJ announced a $95 million settlement with Agility Public Warehousing Co. KSC to resolve allegations that Agility knowingly overcharged the Department of Defense for locally available fresh fruits and vegetables supplied to U.S. soldiers in Kuwait and Iraq by failing to disclose and pass through discounts and rebates it obtained from suppliers, as required by its contracts.

Also last year, DOJ resolved two cases involving the alleged failure to follow applicable nuclear quality standards. Bechtel National Inc., Bechtel Corp., URS Corp. (the predecessor in interest to AECOM Global II LLC) and URS Energy and Construction Inc. (now known as AECOM Energy and Construction Inc.) agreed to pay $125 million to resolve allegations that they charged the Department of Energy for deficient nuclear quality materials, services, and testing, and improperly used federal contract funds to pay for a comprehensive, multiyear campaign to lobby Congress and other federal officials.

Notably, in both the Agility and AECOM cases, the government's involvement began with the filing of a whistleblower lawsuit. Only by having a whistleblower come forward was the government able to begin its investigation in earnest. Given the risks involved—both financially and reputationally—defense contractors and procurement companies alike would be well-served by spending time cultivating a culture where potential whistleblowers are trained to report concerns internally, rather than to the government.

Practical Suggestions for Dealing with Potential Whistleblowers In any large organization, it is seemingly inevitable that some employee or disgruntled former employee will opt to file a *qui tam* lawsuit perhaps hoping for a large payday. So, while no solution is perfect, a few practical suggestions likely will go a long way in creating a culture where employees report concerns inwards, rather than to the government, in the first instance. These suggestions include:

- Most importantly, consider creating—or otherwise bolstering—**an internal whistleblower hotline program**. A whistleblower hotline is often a key component of an effective corporate compliance and ethics program. According to some research studies, in companies with an internal hotline, tips account for over half of all fraud detection versus only one-third of detections in companies with no internal hotline.
- It is not enough to just simply have a hotline, however. Employees need to not only be aware of its existence, but also trust the process. To that end, seriously consider **adopting rigorous anonymity provisions**. In 2013, for example, a study across organizations was conducted that suggested upwards of 60 percent of tips were reported anonymously. Employees often feel more comfortable when they can report anonymously. To that end, consider having the hotline managed by a third-party provider as employees generally tend to trust outside vendors as being better equipped at addressing anonymity concerns.
- Employees generally tend to only report concerns when they feel a **sense of agency**—or, otherwise feel that their reported concerns are being addressed. To that end, show employees that they make a difference when they report. Develop summary reports describing the types of reports received by management and the actions that were taken.
- A best practice is to **benchmark, or otherwise measure, the effectiveness of internal compliance systems** such as employee hotlines. Companies should benchmark their compliance programs to internal (e.g., location, business units and departments) and external (e.g., peers and industry) data sources. Hotline data benchmarking provides companies with comparative information to determine reporting patterns that are higher than, lower than or in line with peers and their industry, which information may suggest mistrust or misuse of the whistleblower hotline or be indicative of more serious company-wide compliance and ethics issues.
- Make sure employees understand that there will be **no retaliation for reporting suspected abuse, fraud, or waste**. This is easier said than done as employees are often skeptical of no-retaliation pledges. Nonetheless, some practical ways to instill trust are to (a) recognize those employees who have reported suspected problems, (b) include compliance and self-reporting as part of the employee evaluation process, and (c) punish those who actually retaliate against potential whistleblowers.
- One way to undercut the allure of the False Claims Act's ''big payday'' for whistleblowers is to **offer your own financial incentives to employees to report within**. As appropriate, consider offering financial as well as non-financial reporting incentives, such as cash rewards or extra vacation days, for whistleblower reports that lead the company to identify suspected unethical or unlawful activity.
- When suspected unethical or unlawful activity is reported, no matter whether corroborated or otherwise, **follow up with the whistleblower**. Many government whistleblowers first report the concerns internally and then only turn to the government after they feel that their concerns were not addressed. So, develop a sys-

  FCR ISSN 0014-9063

tem to close the feedback loop and keep the whistleblowers informed about their concerns.

■ Lastly, consider doing **exit interviews with all departing employees**. While departing employees might be reticent to fully disclose negative feelings, the mere act of conducting exit interviews—perhaps by third parties—will at least ferret out some concerns and feedback.

Concluding Thoughts Again, in the world of splashy headlines where whistleblowers take home millions of dollars for reporting fraud, it might seem virtually impossible to direct employees to reporting internally. However, remember that the vast majority of employees want to help their organizations, not harm them. And, most whistleblowers go to the government only after feeling stymied internally.

A best practice for procurement and defense contractors alike is to view the world of whistleblowing as an opportunity, not a risk. It is an opportunity to learn more about what employees ''really'' think—and an opportunity for unfiltered and honest feedback. The more receptive a company is to critical feedback, the more it can grow. Ultimately, by empowering employees to be watchdogs, rather than turning them into external whistleblowers, contractors can minimize legal risk and maximize possible growth.