PROCUREMENT FRAUD: *QUI TAM* SUITS IN FEDERAL COURT

WHAT IS A QUI TAM SUIT?

Recently, the Army has endeavored, whenever possible, to alter the nature of the relationship between the Government and our contractors, shifting from the traditional adversarial relationship to more cooperative relationships. We generally refer to these new relationships as "*Partnering.*" Under the Partnering concept, we have endeavored to create Government-contractor teams which attempt to resolve contract issues before they become disputes, and foster an atmosphere of trust between the partners. Under such a relationship, contract problems are identified early in the process, and resolutions are sought at the lowest possible level. Unfortunately, there are some areas of the Government-contractor relationship where such an approach to contract administration cannot be applied. One of these is the situation where a third party brings a suit against the contractor. These are called *Qui Tam* suits. In a *Qui Tam* suit, an individual brings an action in Federal District Court, *on behalf of the United States.* Since these suits are commonly brought alleging some sort of fraud, waste or abuse, they are commonly referred to as "whistleblower" suits.

Qui Tam suits are authorized by statute in certain cases, such as fraud against the United States. The *Qui Tam* action dates back to the Civil War era, when there was rampant fraud by businesses supplying war materials to the Federal Government. The existing Federal law enforcement and judicial structures were not equipped to address the magnitude of the fraud problem that the Government faced. In an attempt to deal with this problem, Congress authorized individuals to bring legal suits against people who had defrauded the Government.

WHO BRINGS A QUI TAM SUIT?

While an individual might be motivated to bring a *Qui Tam* suit by a sense of civic duty, or a sense of indignation that the Government is being cheated, there are other, more tangible motivations for such a suit. First, such suits are often brought by a disgruntled contractor employee or former employee, who sees a *Qui Tam* suit as an avenue for airing grievances against the former employer. Such suits usually also include a suit for wrongful termination, unrelated to the alleged fraud. (It is noted that the Federal statute that authorizes such suits also authorizes courts to award damages to relators who were discharged *because* they brought such a suit.) The biggest reason, however, for bringing a *Qui Tam* suit is the potential for monetary reward. Persons bringing such suits, called relators, are entitled to percentages (usually between 15 and 25 percent) of any damages recovered by the Government as a result of the suit, as well as their costs and attorney fees.

HOW IS A QUI TAM SUIT DIFFERENT FROM ANY OTHER SUIT?

Once a *Qui Tam* suit is filed, procedures for handling that suit differ from a typical suit in several ways. The United States, in the person of the Department of Justice attorney assigned to the case, must make a determination as to whether the suit is of sufficient merit that the United States should "intervene" in the suit. If the Government intervenes, then the Department of Justice takes the lead in pursuing the suit and the relator's role is limited to providing support to the Department of Justice (usually in the form of testimony and other evidence) as necessary. In order to allow the Department of Justice sufficient time to examine the case and to make a reasoned determination as to whether intervention is appropriate, the *Qui Tam* procedures provide for the complaint that originated the suit to be placed "under seal" by the court for a period of 60 days. That means that the existence of the suit is kept secret, with knowledge of it restricted to the relator and those members of the Government necessary to evaluate the merits of the suit. The contractor

being sued is not informed of the suit against it while the case is under seal. It is imperative that Government employees respect the court's seal, as violating it could potentially result in charges of contempt of court being brought against the violator.

If the Government decides not to intervene, however, that does not end the suit. Relators may still pursue the suit independently, paying the costs of the litigation up front, and taking the risk of absorbing those costs should they lose. Relators found to have brought suits for frivolous, harassment or retaliatory purposes may also be assessed the attorney fees of the parties being sued. The motivation to the relator for continuing alone is a higher share of the recovery, which ranges between 25 and 30 percent.

There are some limitations to bringing a *Qui Tam* action. Members of the Armed Forces are barred from bringing such suits based on facts or knowledge arising out of their official duties. Civilian Government employees, while not barred from bringing such suits, face a variety of procedural and circumstantial hurdles before they may be considered proper *Qui Tam* relators. *Qui Tam* suits may not be based on information publicly disclosed, *unless* the relator was the original source of the Government or public information. What constitutes "publicly disclosed" is a complex analysis, and generally includes most instances where the Government was already aware of the fraud. In cases where there is public disclosure, the relator's share of the recovery is usually limited to around 10 percent. In cases where the relator turns out to be the person who planned or initiated the fraud against the Government, courts have substantially limited, or even eliminated the relator's share of the recovery.

Since the relator is a party to a *Qui Tam* suit, such suits cannot generally be settled by the Government without the relator's concurrence. In cases where the Government cannot get a relator to approve a settlement, it may be able to settle over the relator's objection if it can get the court to find that the settlement is "fair, adequate and reasonable", under all the circumstances. In cases

where the Government does not intervene in the *Qui Tam* suit, the Government must generally still approve any settlement between the relator and the defendant.

HOW DOES A QUI TAM SUIT AFFECT ME?

What does all this mean to the average Team C4IEWS employee? First, if you, as an employee are informed of the existence of a *Qui Tam* suit against a contractor, that fact MUST be kept extremely close hold. If you are being told of the suit by someone from outside Team C4IEWS (such as a United States Attorney, other official of the Department of Justice, or an agent of a criminal investigative agency) you should inquire if the CECOM Legal Office is aware of the suit. If not, then ask the official if you can inform the Legal Office of the existence of the suit, or if they will be doing so. Under no circumstances should you inform anyone else of the suit unless given permission. You risk possible contempt of court charges if you violate the court's order sealing the suit. If you need to inform someone of the suit in order to obtain information necessary to support the investigation, get permission first.

Second, you need to realize that, perhaps more so than in other litigation, cooperation in the initial stages of a *Qui Tam* suit will need to be provided expeditiously. The Government has 60 days in which to assess the validity of the suit and determine if intervention is warranted. Because of the nature of Team C4IEWS' business, this often requires the assessment of a great deal of technical information by the Department of Justice, often involving evaluations by Government technical experts. While the Government can request an extension of the 60 day period for making its intervention determination, courts vary on how much time they are willing to allow.

WHO IS RESPONSIBLE FOR QUI TAM SUITS AT TEAM C4IEWS?

Coordination of *Qui Tam* suits with the Department of Justice, along with all other cases of contract fraud, is the responsibility of the CECOM Procurement Fraud Advisor (PFA), within the CECOM Legal Office. Currently, the PFA is John H. Eckhardt, who can be reached at x29833.

Kathryn T. H. Szymanski