



## The Guards Who Couldn't Shoot Straight: Fourth Circuit Endorses "Implied Certification" Theory Under False Claims Act

01.13.2015

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Does the federal False Claims Act ("FCA") require the submission of an "objectively false statement" to the government? When does a company's knowing failure to comply with contractual terms amount not just to a breach of contract, but potentially to actionable fraud? In *United States v. Triple Canopy, Inc.* (decided Jan. 8, 2015), the Fourth Circuit concluded that objective falsity in a claim to the government is *not* required, and endorsed the so-called "implied certification" theory of liability under the FCA. The result expands the risks that companies may face when doing business with the federal government.

In 2009, Triple Canopy contracted with the government to provide security services at an airbase in Iraq. Under a firm fixed price contract and the applicable task order, Triple Canopy was obligated to ensure that its employees had received initial training on their weapons and that they had qualified on a U.S. Army marksmanship test. Qualifying scorecards were required to be maintained in the employees' personnel files for one year. However, nothing in the task order required submission of the scorecards to the government or expressly conditioned payment on compliance with these responsibilities.

Triple Canopy hired more than 300 Ugandan guards to serve at the airbase. When the guards arrived, Triple Canopy learned that they were unable to meet the necessary qualifying score. Nonetheless, the company submitted monthly invoices for the guards, and also created false scorecard sheets (some of which were post-dated) that they kept in the guards' personnel files.

During the year in which the task order was in effect, Triple Canopy presented twelve monthly invoices for guard services, totaling more than \$4.4 million. Each invoice accurately listed the number of guards in service for that month. Under the task order, a government-appointed contracting office representative (COR) was "responsible for acceptance" of the services Triple Canopy performed. The COR confirmed acceptance of the guard services by filing a DD-250 form, which stated that the services "conformed to contract" and were "received in apparent good condition." None of the DD-250 forms included any certification or endorsement from Triple Canopy. Although the task order contemplated that the COR would review the scorecards, no such review occurred.

After a whistleblower sued Triple Canopy under the FCA in the Eastern District of Virginia, the Justice Department intervened in the lawsuit, alleging among other things that the company had knowingly

presented false claims and had created material false records. The government's FCA theory was that Triple Canopy had billed the full contract price for each of the errant-shooting Ugandans, and had falsified documents in its files to show that the guards were contractually qualified.

The district court in Alexandria dismissed the FCA claims, concluding that (1) there was no allegation that Triple Canopy submitted a demand for payment that contained an "objectively false statement," and (2) as to the fabricated scorecards, there was no false claim and no allegation that the COR ever reviewed the documents. The district court expressly declined to recognize an "implied certification" theory of liability under the FCA.

On appeal, the Fourth Circuit reversed in part. Although the appeals court reiterated the traditional line in FCA cases between breach of contract and fraud, the court recognized that a claim for payment can be false when it rests on a false representation – even if only implied and based upon silence – of compliance with an applicable contractual term. Accordingly, the court held, **the government pleads a false claim under the FCA when it alleges that the contractor, with the requisite intent, made a request for payment and withheld information about its noncompliance with material contractual requirements.** "The 'pertinent inquiry,'" said the court, "is 'whether, through the act of submitting a claim, a payee knowingly and falsely implied that it was entitled to payment.'" And, recognizing that the materiality requirement in these types of cases exists to protect contractors from onerous and unforeseen FCA liability as a result of noncompliance with the many requirements in contracts that are merely ancillary to the parties' bargain, the court emphasized that the false statement must have a "natural tendency to influence, or be capable of influencing," the Government's decision to pay." Applying these rules, the court had no trouble concluding that the government had alleged material false claims, and refused to countenance the lower court's view that Triple Canopy could avoid liability because nothing on the "face" of its invoices was objectively false.

The Fourth Circuit also reinstated the government's false records claim even though the COR did not review the fabricated scorecards. The court emphasized that "the FCA reaches government contractors who employ false records that are capable of influencing a decision, not simply those who create records that actually do influence the decision." Because the bogus scorecards "complete[d] the fraud" and would have offered "the most direct evidence" that the guards satisfied the marksmanship requirement, they met the FCA's materiality standard. The court further explained that neither actual reliance nor presentment is required by the FCA under these circumstances.

The appeals court recognized that the implied certification theory may be "prone to abuse" by parties seeking to turn a violation of "minor contractual provisions" into an FCA action. The court commented that the best protection against such abuse is "strict enforcement" of the FCA's materiality and intent requirements. Specifically, to prove knowledge the government must show that both the contractor and the government understood that violation of a particular contractual provision would foreclose payment. Likewise, not every part of a contract can be assumed to provide a material "condition of payment."

*Triple Canopy* makes government contracting in the Fourth Circuit a riskier business. After this case, even when a contractor's claims for payment are literally accurate, the contractor may still be liable under the FCA if it withholds information about its failure to comply with a contractual requirement. As creative *qui tam* relators build on the case, contractors may be required to respond to fraud allegations regarding less significant clauses in a contract, where documents in the file, although not deliberately fabricated to misrepresent the facts, are inaccurate nonetheless.

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