

# Roundup

An Update on Government Contracts Issues for Clients & Friends

February 2008 Vol. IV, No. 2

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## **Jumping the Jurisdictional Hurdles of the False Claims Act: First Circuit Says Voluntary Disclosure To Government Does Not Invoke Public Disclosure Bar for *Qui Tam* Suits**

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The False Claims Act ("FCA") encourages contractors to disclose wrongdoing by providing for lesser penalties when they voluntarily report their wrongful acts. Many contractors also expect such voluntary disclosures to prevent future *qui tam* actions by triggering the public disclosure bar of the FCA. The public disclosure bar states that "[n]o court shall have jurisdiction over an [FCA *qui tam*] action. . . based upon the public disclosure of allegations." 31 U.S.C. § 3730(e)(4)(A). The First Circuit's decision in United States ex rel. Rost v. Pfizer, Inc., 507 F.3d 720 (1st Cir. 2007), however, follows a number of other circuits in holding that a company's confidential disclosures to the government are not "public disclosures" and thus do not trigger the FCA jurisdictional bar on *qui tam* suits. While the logic of the decision is questionable, contractors must take note of the possible impact of this line of cases in dealing with fraud issues.

The facts of the Rost case squarely frame the issue of whether a voluntary disclosure to the government invokes the public disclosure bar. Dr. Peter Rost, the *qui tam* relator, was the Vice President of Marketing for the Endocrine Care unit of Pharmacia Corp. ("Pharmacia"), a subsidiary of Pfizer, Inc. ("Pfizer"). In his position,

Rost oversaw global marketing for the human growth hormone Genotropin. Rost soon became concerned with some of Pharmacia's Genotropin marketing practices. Specifically, he believed that certain practices ran afoul of the Food, Drug & Cosmetic Act, which prohibits pharmaceutical companies from marketing drugs for "off-label" (non-FDA-approved) purposes. Rost brought his concerns to the attention of Pharmacia's management. Later, when Pfizer was in the process of acquiring Pharmacia, he also brought these issues to Pfizer's attention. Once Pfizer completed its acquisition, it initiated an internal investigation and voluntarily disclosed the potential problems to the government. Shortly thereafter, Rost filed his *qui tam* complaint.

In his *qui tam* action, Rost alleged that Pharmacia "knowingly caused the submission of fraudulent claims by others . . . in the form of claims for reimbursement for off-label prescriptions of Genotropin." 507 F.3d at 726. Pfizer moved to dismiss the case based on the public disclosure bar of Section 3730 of the FCA. In ruling on Pfizer's motion to dismiss, the district court refused to classify confidential disclosures to the government as "public disclosures" which would bar the action under the FCA. On appeal, the First Circuit affirmed.

The First Circuit held that Pfizer's disclosures to the government were not "public" because they were not disclosed to the general public. According to the court, "public" disclosure did not occur until almost one year after Rost filed his *qui tam* complaint, when Pfizer disclosed information about the government investigation in an attachment to its annual 10-K filing with the Securities and Exchange Commission. In support of its decision, the court relied on the legislative intent of the 1986 FCA amendments which "shifted the examination away from the information in the government's possession and instead looked to whether there was public disclosure," a shift intended to discourage "parasitic" or "free-loading" *qui tam* suits. 507 F.3d at 729. It also relied on similar holdings by the D.C., Ninth, Tenth, and Eleventh Circuits, and it pointed out that only one Circuit (the Seventh) has determined that disclosures to government investigators trigger the public disclosure bar.

The Rost decision may represent the emerging majority view on the scope of the public disclosure bar. If the Rost decision does become the prevailing law, then contractors will not be able to foreclose *qui tam* actions simply by making voluntary disclosures. They will have to show the *qui tam* relator learned about the fraud through information available to the general public. While Rost and other cases the court relied upon may diminish the possible benefits of voluntary disclosure, businesses should still view a voluntary disclosure of wrongdoing to the government as a proper approach for a responsible contractor where the facts and circumstances warrant. The disclosures may help prevent a government lawsuit and can be viewed favorably by Suspension and Debarment Officials in determining the contractor's ongoing responsibility.

## **FOIA: The Latest on Line-Item Prices and FOIA Exemption 4**

*By Brian P. Waagner (brian.waagner@akerman.com)*

On January 29, 2008, the D.C. Circuit published its decision in Canadian Commercial Corp. v. Air Force, No. 06-5310 (D.C. Cir. Jan. 29, 2008). The case addresses the controversial question of whether line-item prices in government contracts are exempt from public disclosure under the Freedom of Information Act (FOIA). The court's opinion concludes that "line-item pricing information in a Government contract falls within Exemption 4 of the FOIA if its disclosure would 'impair the government's ability to obtain necessary information in the future' or 'cause substantial harm to the competitive position of the person from whom the information was obtained.'" Applying this rule, the Court held that line-item prices for three one-year renewal options in Canadian Commercial's contract for aircraft maintenance services may not be released to the public under FOIA.

The case is noteworthy not only because it addresses line-item prices, but because of its approach to the proof of competitive harm that is required in applying FOIA Exemption 4. There is nothing in the opinion that would suggest releasing Canadian Commercial's option-year prices would reveal its proprietary business methods, its costs, or its profits. Rather, the Court found that releasing the option-year prices would allow Canadian Commercial's competitors to make better decisions about whether to attempt to compete for that work and to be more effective in persuading the government to consider unsolicited proposals. In light of such competition, the Air Force might be less likely to exercise the options and the value of Canadian Commercial's status as the incumbent contractor might be marginally reduced. Although the course of events leading to submission of unsolicited proposals could be seen as enhancing competition, the opinion suggests that the Air Force did not even make such an argument.

## **New Specialty Metals Rules: Will Life Be Easier For Suppliers?**

*By J. Michael Littlejohn (michael.littlejohn@akerman.com)*

For the last several years, DOD has stepped up enforcement of the "specialty metals" provisions of the Berry Amendment. In general, the restrictions prevent the DOD from buying products for certain systems that contained "specialty metals" (i.e., steel with certain elements, certain metal alloys, titanium, and zirconium) that were not melted or produced in the United States. Congress passed changes to the law in 2006 (Section 842 of the National Defense Authorization Act of 2007 (NDAA) (Pub. L. No. 109-364)) which were codified at 10 U.S.C. § 2533b. Those changes were intended to ensure the use of domestic specialty metals, but they also created supply and enforcement issues for DOD. Late last year, in Section 804 of the 2008 National Defense Authorization Act (Pub. L. No. 110-181), Congress passed a "clarification" to the Specialty Metals restrictions passed in 2006. According to Senator Carl Levin's statements in presenting the Conference Report to the Senate, the "clarification" was

intended to "build new flexibility into specialty metals requirements to ensure that the DOD can acquire the weapon systems needed by our men and women in uniform." 192 Cong. Rec. at S15601 (Dec. 14, 2007).

Under the changes passed in 2006 (Sec. 842 of Pub. L. No. 109-264) and subsequent DOD guidance, the application of the specialty metals restrictions depended in large part on which tier (prime, subcontractor, second-tier subcontractors, etc.) the supplier was on as it pertained to the DOD. Now, the application of the restrictions is more dependent on the type of item, the form of material, and the type and purpose of the sale. For instance, in the 2008 NDAA, Congress "clarified" that the restrictions do not apply to commercial off-the-shelf items, i.e., commercial items that are sold "without modification" to DOD. It redefined the *de minimus* exception to mean "2% of the total weight of the specialty metals in the item," and it waived the application of the restrictions to any electronic components. Congress also added a national security waiver. DOD reads the new law as eliminating the distinction between components, parts, and assemblies. Thus, if the restriction applies to the item, it applies at all levels of the item's components, parts, and assemblies unless another exception applies. Section 804 also eliminated language from the statute which made non-compliance with the specialty metals provision a violation of the Anti-Deficiency Act. Instead, it now provides that DOD is "prohibited" from purchasing specialty metals unless certain exceptions apply. In addition, Congress imposed public notice requirements on DOD when it decides to issue a Domestic Non-Availability Determination ("DNAD"). DOD now has to publish on FedBizOpps.gov its intent to buy non-compliant items if it is doing so based on determinations that it cannot obtain domestic specialty metals needed in the required form. Specialty metals suppliers and others can contest the determination. Congress made sure to define "required form" to prevent DOD from issuing DNADs for high level components. The test now is whether specialty metal material in "mill products . . . in the grade appropriate for the production" of the end item or component is available.

DOD issued a new Class Deviation on January 29, 2008, to implement the Specialty Metals Restrictions as amended by the Sections 804 and 884 of the 2008 National Defense Authorization Act. The January 2008 Deviation (2008-O0002) replaces Class Deviation 2007-O011 (issued on October 26, 2007) and Class Deviation 2006-O0004 (issued December 6, 2006), at least for new contracts.

While the new legislation appears more straightforward than the 2006 changes, there may still be confusion. DCMA thinks that the Congressional "clarification" "fundamentally changes" the law passed in 2006. In fact, DCMA notes that up to "five different sets of rules could apply to identical specialty metals items" depending on the date of award of the contract. DCMA Information Memorandum No. 08-143 (Jan. 31, 2008). If you are interested in a detailed analysis of the changes to the Specialty Metals restrictions or obtaining copies of the various statutes, regulations, or guidance relating to this issue, please email michael.littlejohn@akerman.com.

## **Former Corps of Engineers Chief Counsel Robert Andersen Joins Akerman Senterfitt**



The Government Contracts Group welcomes new shareholder Robert Andersen to Akerman Senterfitt. Robert joins us from Dewey & LeBoeuf, LLP where he was Senior Counsel in the Environmental, Health & Safety and Legislative & Public Policy groups. Robert also formerly was Chief Counsel of the United States Army Corps of Engineers (USACE) from 1998 to 2004, where he was responsible for all legal aspects of the agency's operations. Those responsibilities included the agency's many environmental restoration projects and the management of the USACE's litigation and contract practice generated by \$9 billion in procured services annually for navigation and infrastructure development of the nation's waterways.

Robert has advised corporate and public sector clients on a wide range of environmental, regulatory, and permitting issues, particularly those related to the siting of major energy projects in compliance with the requirements of the National Environmental Policy Act (NEPA), the Clean Water Act, and the Endangered Species Act. He has also represented clients in nuclear licensing, regulatory matters and environmental litigation before the Nuclear Regulatory Commission and the Department of Energy. Robert previously served as the first General Counsel of the Defense Nuclear Facilities Safety Board, Deputy General Counsel of the National Science Foundation, and Deputy Regional Counsel of EPA Region V.

Robert is an adjunct professor of environmental management at George Washington University. His numerous honors and awards include the Senior Executive Service Rank Award of Distinguished Executive from President Bill Clinton, and the Senior Executive Service Rank Award of Meritorious Executive from President George H. W. Bush. Robert earned his law degree, *magna cum laude*, from the University of Iowa College of Law where he was Articles Editor of the *Iowa Law Review*. He received a Master in Public Administration Degree from the John F. Kennedy School of Government at Harvard University, and earned his Bachelor's degree in General Science from the University of Iowa. He is admitted to the District of Columbia, Iowa and Ohio bars.

We are glad to have Robert as part of the Akerman team.

## About Our Government Contracts Group

The Government Contracts Group at Akerman Senterfitt Wickwire Gavin assists large and small businesses with all types of federal government contracts issues. To do business with the federal government, contractors must deal with a unique and complicated series of statutes, regulations and procedures. We help clients work with this system to maximize contracting opportunities with federal government agencies. We provide counseling and representation to clients in the areas of contract compliance issues, bid protests, Small and Disadvantaged Business matters, contractor and subcontractor claims administration, construction contracts, information technology contracts, and international contracts. In addition, we are uniquely qualified to advise and assist contractors who provide goods or services to the U.S. Postal Service.

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