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False Claims Act Defendants May Be Able to Recover Attorneys' Fees Under Their Fixed-Price Contracts, At Least For Now

By Evan R. Sherwood, Peter B. Hutt II and Robert K. Huffman*

The authors of this article discuss a recent decision on the issue of whether a contractor working on a fixed-price contract can charge the government for attorneys' fees to defend a False Claim Act case related to the contract.

If a contractor is working on a fixed-price contract, can it charge the government for attorney's fees to defend a False Claim Act ("FCA") case related to the contract? In *The Tolliver Group, Inc. v. United States*,[1] the Court of Federal Claims ("COFC") said the answer was "yes," if the government was liable for an equitable adjustment under the circumstances. The decision was welcomed by contractors facing meritless FCA suits, which are often costly to defend even when the relator plainly does not have a case.

But the U.S. Court of Appeals for the Federal Circuit has thrown cold water on *Tolliver*—at least for now. In a recent decision, the Federal Circuit vacated *Tolliver* on jurisdictional grounds, concluding that the legal theory of the COFC's decision was never presented to the contracting officer for a final decision under the Contract Disputes Act of 1978 ("CDA"), and that the COFC therefore lacked jurisdiction over the contractor's claim.[2]

The Federal Circuit's holding leaves open the question of whether the COFC's legal theory had merit. Because the Federal Circuit vacated the case on jurisdictional grounds, it never reached that question.

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[1] Fed. Cl. Jan. 22, 2020, https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2017cv1763-49-0.

[2] *The Tolliver Group, Inc. v. United States* (Fed. Cir. Dec. 13, 2021), https://cafc.uscourts.gov/opinions-orders/20-2341.OPINION.12-13-2021_1878135.pdf.

WHAT DOES THIS MEAN FOR CONTRACTORS?

So, what does that mean for contractors who would like to claim FCA defense costs on fixed-price contracts? At this point, the *Tolliver* legal theory survives to see another day, but it remains to be seen whether a future tribunal will find it persuasive.

On this point, the COFC's theory was based on a novel application of *United States v. Spearin*,[3] and FAR 52.243-1 (Changes-Fixed-Price). Under these authorities, the government may be liable for an equitable adjustment (i.e., payment of costs and reasonable profit) if it provides a defective specification that causes a contractor to incur unexpected, increased costs during performance. The COFC found that the government had constructively changed Tolliver's contract for production of technical manuals by failing to provide technical data that the contractor needed to perform.

But the COFC took that theory a step further. According to the COFC, the failure to provide technical data caused the contractor to submit seemingly inaccurate certifications of compliance with the contract. A relator cited those facts as the basis for an FCA action, and although the action was ultimately dismissed with support from the government, the contractor incurred almost $200,000 in legal fees to defend the case. The COFC held that the government was liable for an equitable adjustment for those costs under *Spearin*.

Again, the Federal Circuit declined to analyze these issues. But it did offer a hint of its thinking in a footnote, which said that "the United States has raised significant questions about whether the *Spearin* doctrine applies here."

The Federal Circuit's comment is not surprising. The biggest question regarding applicability of the *Spearin* doctrine is one of causation. *Spearin* entitles a contractor to damages that are caused by a defective specification—if the causal chain is too attenuated, the claim can fail. The facts of *Tolliver* appear to present a complicated causal chain under the circumstances. Among other things, the costs would not have been incurred if the relator had not filed an FCA action on the basis of the contractor's particular certifications and performance. Moreover, the facts of the case indicate that the contractor did not notify the government of its intent to claim legal costs until after the case was settled.

Notably, the Federal Circuit remanded the matter to the COFC for additional proceedings. If the contractor's claim is within the CDA's six-year statute of limitations, it may be able to cure the jurisdictional defect by filing a new claim with the contracting officer. If the contractor does re-file, it will

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[3] 248 U.S. 132 (1918).

likely need to address causation in detail. We expect that the government will continue to fight the contractor's claim.

TAKEAWAYS

- The COFC has strongly endorsed the view that FCA defense costs can be recoverable under *Spearin*. However, its decision has now been vacated, and the Federal Circuit expressed some interest regarding *Spearin*'s applicability (at least as initially presented by the plaintiff).
- If the facts show that an FCA case was caused by the government's changes to a fixed-price contract, then a contractor may want to consider exploring an equitable adjustment. But contractors pursuing relief should be prepared for the government to take a stand against recovery and be ready to litigate the claim.
- A contractor should carefully draft its CDA claim to articulate the legal and factual theories that support its right to relief. If a contractor does not assert its claim to the contracting officer, it may be unable to recover on that claim in litigation.