Federal Contracting

AECOM Whistleblower to Argue War Needs Trumped Afghanistan Fraud

By Daniel Seiden

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- Fraud plausible despite Army payments, whistleblower says
- But if feds 'pleased,' suit rightly rejected, AECOM counters

A whistleblower will tell a Manhattan federal appeals court Friday that his lawsuit against defense contractor AECOM alleging fraudulent billing under a $2 billion support contract in Afghanistan should be reinstated, even though the U.S. Army extended the contract several times while aware of the misconduct.

A New York-based district court found that the asserted fraud from workers' inaccurate time sheets couldn't have been significant because the contract payments continued. If the Army didn't penalize the company, the alleged wrongdoing couldn't be "material" under the False Claims Act, the court reasoned.

But former AECOM finance supervisor Hassan Foreman will tell a U.S. Court of Appeals for the Second Circuit panel during oral argument that it should revive his suit, because the district court didn't conduct a holistic materiality analysis.

No one factor makes or breaks materiality, and just because the Army continued its "mission critical" wartime relationship with AECOM, that doesn't mean it excused the fraud as insignificant, Foreman says in his opening brief.

This appeal may be a long shot based on how courts have been interpreting materiality, but help for whistleblowers trying to get to trial could be on the horizon in the form a bill to amend the FCA by Sen. Chuck Grassley (R-Iowa).

Planned Legislation

Grassley's bill, as he has described it, would make it more difficult for defendant contractors to stop, early in the litigation process, FCA cases based on the argument that ongoing contract payments meant any alleged noncompliance wasn't material.

Grassley told fellow senators in March that the federal courts have become too accepting of the same-continued-payments strategy that AECOM pursued to get Foreman's fraud case dismissed.

"Materiality is important to protect against parasitic lawsuits," Grassley said. "But we can't allow defendants to get away with scalping the taxpayer because some government bureaucrats failed to do their jobs," he said.

AECOM, as other contractors have successfully argued in recent years, contends FCA whistleblower suits must fail because, when a federal agency pays like the Army did in this instance, it acknowledges that it wasn't significantly defrauded.

"How is it plausible that the Army was defrauded by defendants when it knew of their compliance issues, proposed only forward-looking remedies without withholding a cent, and offered every indication that it was pleased with defendants' overall performance on the contract?" the contractor asks in its brief. "Foreman has no answer for this critical question."

Protecting U.S. Forces

But Foreman, echoing sentiments Grassley has voiced in recent years, says the government can have good reasons—even with actual knowledge of wrongdoing—to continue to pay a contractor. They include, in this instance, protecting U.S. forces in Afghanistan and providing them with vital supplies.

The more essential the continued execution of a contract is to an important government interest, the less the continued payment should favor the government-knowledge defense, Foreman says in a reply brief.

Foreman also criticized the district court's reliance on a Defense Contract Audit Agency report about AECOM noncompliance with time-sheet rules to suggest the Army was aware of misconduct but didn't find it important.

That report didn't disclose the full scope of AECOM's fraud, including its policy of billing 154 hours each pay period regardless of the actual hours worked, its use of unqualified employees, and its submission of multiple time sheets for the same work by the same person, Foreman says.

The U.S. District Court for the Southern District of New York also should have given greater weight to the government's settlement with Northrop Grumman Systems Corp. in November 2018 to resolve allegations of time-sheet fraud under Air Force contracts, Foreman says.

It shows federal officials do care about ensuring time-sheet compliance as part of its bargain with contractors, he says.

An attorney for other whistleblowers says this case illustrates how courts are forcing whistleblowers, at the pleadings stage, to raise stronger facts than defendant contractors to survive motions to dismiss for lack of materiality.

Instead, the courts should simply say, when the factual issues are contested, that enough of a dispute has been raised for the case to go on, said attorney Mark A. Strauss of Mark A. Strauss Law PLLC in New York.

Courts in some cases are taking a "technically improper" view of the U.S. Supreme Court's standard in *Universal Health Services Inc. v. United States ex rel. Escobar* as allowing them to dismiss cases where allegations of materiality are simply outweighed by other evidence, he said.

The Supreme Court has turned away several review petitions seeking further input on FCA materiality since its June 2016 ruling in *Escobar*. That includes a May 17 denial of a petition challenging the revival of a suit alleging fraud in a veterans mortgage program.

'Immense Powers'

But attorneys who represent contractors said the mission-critical argument is unlikely to get much traction in the appeals court.

The Second Circuit "might well find relevant for its materiality analysis whether the Army felt compelled to accept substandard performance from AECOM, and thus opted not to withhold payments or terminate the contract as it ordinarily would, because of an overriding need to protect soldiers in combat," said Thomas S. D'Antonio.

"But based upon my understanding of the record, there are no plausible allegations suggesting the Army ever reached such a conclusion," he said. D'Antonio represents FCA defendants with Ward Greenberg Heller & Reidy LLP in Rochester, N.Y.

This case doesn't appear to present even a close call as to materiality, said Brian T. McLaughlin, who represents contractors with Crowell & Moring LLP in Washington.

The government has the right, among others, to terminate a contract for convenience or for default, to ensure compliance from a contractor, he said.

But when faced with the kind of contract violations alleged in this suit, "the government exercised none of its immense powers," McLaughlin said. "In fact, the complaint's acknowledgment that the government was aware of the violations here for years undermines the relator's speculation that the government had no other option."

AECOM's contract, known as MOSC-A, required providing vehicle and equipment maintenance, facilities management and maintenance, supply and inventory management, and transportation services to the 401st Army Field Support Brigade in Afghanistan.

Foreman, who worked for AECOM from 2013 to 2015, says he was terminated after raising various compliance problems with the contractor.

He filed suit in March 2016 under seal.

The district court dismissed the suit in April 2020 and rejected a motion to alter its ruling several months later.

Nelson Bumgardner Albritton PC and Bragalone Olejko Saad PC represent Foreman.

The case is United States ex rel. Foreman v. AECOM, 2d Cir., No. 20-2756, oral argument 5/21/21.

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Documents

Opinion
SDNY opinion

Docket
2d. Cir. docket