SUPREME COURT ADOPTS "IMPLIED CERTIFICATION" WITH MATERIALITY REQUIREMENT

In mid-June, the U.S. Supreme Court adopted the "implied false certification" theory of liability, which treats a contractor's invoice or other payment request as an implied certification of compliance with relevant statutes, regulations or contract requirements that are material conditions of payments. This theory also treats the failure to disclose a violation as a misrepresentation that renders the claim "false or fraudulent," and therefore actionable under the Civil False Claims Act, 31 U.S.C. §3729. (the "FCA"). (The FCA permits suits against government contractors if they knowingly present a materially false or fraudulent claim for payment.) The court held that the implied certification theory can be a basis for FCA liability, and can be actionable if the contractor knowing violated a requirement that the contractor knows is material to the government's payment decision. However, the court said that even statutory, regulatory and contractual requirements are not material just because the government labels them as conditions of payment. *Universal Health Services, Inc. v. United States ex rel Escobar et al.* 136 S.Ct. 1989 (2016).

The case involves a payment made under the Medicaid program (a joint federal-state program) to which Universal Health Services ("Universal") submitted reimbursement claims using payment codes corresponding to different services provided to a patient. However, Universal's employees lacked licenses to provide the services and to prescribe drugs, something that was never disclosed to the Federal government. The Court noted that "by submitting claims for payments using payment codes that corresponded to" specific services, Universal represented that it had provided such services. And Universal used codes that implied that it met the staff and licensing requirements, which it did not meet, thereby the making the fund requests misrepresentations. The court found these claims to be half-truths, i.e. representations that state the truth only so far as it goes, while omitting critical qualifying information.

The first holding was that the implied certification theory can be a basis for FCA liability, if two conditions are met: (1) the claim does not merely request payment but makes specific representations about the goods or services provided; and (2) the contractor fails to disclose noncompliance with material statutory, regulatory or contractual requirements. The court further stated that it does not matter if the government designates a provision as a condition of payment. Rather, a provision must be material to the government's payment decision in order to be actionable under the FCA. Not every statutory, regulatory or contractual violation is material, as the Government had asserted in this case. Materiality depends on the likely or actual behavior of the recipient of the misrepresentation—if it would induce a reasonable person to agree to the transaction. Furthermore, materiality cannot be found where noncompliance is minor or insubstantial.

The following statement in the opinion is important to contractors:

> In sum, when evaluating materiality under the False claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not

> automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the [contractor] knows that the Government consistently refuses to pay claims …based on noncompliance with the particular statutory, regulatory or contractual requirement. Conversely, if the Government pays a particular sum in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.

Since the Supreme Court disagreed with the Government's and First Circuit's view of materiality (that any statutory, regulatory or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment if it knew of the violation), the court vacated the judgment and remanded to the lower court to determine if the FCA had been violated.

AFTERNOTE: On June 30, 2016, the Department of Justice issued an interim rule at 81 Fed. Reg. 42491 that nearly doubled the penalties under the FCA. FCA violations went from a minimum of $5,500 for each claim or violation and maximum of $11,000 to a new minimum of $10,781 and a new maximum of $21,563.