

The Court Trusts, But You Should Verify—D.C. Circuit Affirms Dismissal of Qui Tam Alleging Reseller Violated the TAA

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In a decision with significant implications for government contractors in a variety of industries, the D.C. Circuit recently affirmed the dismissal of a relator's suit alleging that a contractor violated the Civil False Claims Act (FCA) by delivering IT products from "non-designated countries," in violation of the Trade Agreements Act (TAA). In affirming the district court's dismissal, the court held that the contractor reasonably relied on the country of origin certifications provided by the product distributor and manufacturer, and therefore did not act with "reckless disregard" when it allegedly delivered non-compliant products to the Government.

The D.C. Circuit's decision in *United States ex rel. Folliard v. Government Acquisitions, Inc.*, No. 13-7049, 2014 WL 4251150 (D.C. Cir. Aug. 29, 2014), is the latest and perhaps final chapter in a long-running series of *qui tam* suits brought by an employee of a government reseller against a number of competing resellers, alleging violations of the TAA under various contract vehicles. This most recent decision involved sales of IT products by a reseller through the GSA Schedule, which requires delivery of products only from "designated countries." To satisfy this requirement, the reseller relied on country of origin (COO) information furnished by its distributor, which "expressly certifies to resellers . . . that COO information is accurate, and more generally that the products it distributes comply with the TAA."

The district court dismissed the case on summary judgment, holding that the reseller's reliance on the distributor's COO representations precluded a finding that the reseller knowingly sold products that did

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not comply with the TAA. The district court found that the relator could not establish that the reseller acted with “reckless disregard,” for purposes of establishing liability under the FCA, reasoning that “absent some reason to question [the distributor's COO] representations, it was not gross negligence-plus for [the reseller] not to separately certify that the products were TAA-compliant.”

On appeal, the D.C. Circuit affirmed the dismissal of the relator's complaint, reasoning that “a contractor . . . is ordinarily entitled to rely on a supplier's certification that the product meets TAA requirements.” The Court concluded that the relator failed to show that the reseller “knowingly sold to the federal government products that did not comply with TAA requirements, a prerequisite to FCA liability,” and therefore affirmed the dismissal of the relator's complaint.

While the court's decision in *GovPlace* is a welcome development for government contractors, there are potential limits on the scope of the court's decision that should be recognized. First, before concluding that the reseller reasonably relied on the distributor's certifications, the court was required to dispose of the relator's argument that the reseller “unreasonably relied” on the COO certifications, because the reseller had allegedly received information which contradicted the COO certifications furnished by the distributor. Thus, the court's decision suggests that contractors may not blindly rely on COO certifications (or other representations furnished by their suppliers), particularly where the contractor receives information which calls into question the accuracy of those certifications. Thus, contractors should continue to exercise proper due diligence in reviewing supplier certifications and compliance, and should be particularly mindful of information which calls into question the accuracy of their supplier certifications.

Second, in reaching its decision, the court in *GovPlace* emphasized the fact that the reseller had informed GSA personnel during Contractor Assistance Visits that it was relying on its distributor's COO certifications to comply with the TAA, and GSA had issued Administrative Report Cards stating that the reseller demonstrated compliance with the TAA on that basis. The court interpreted this to mean that GSA had “implicitly approved” the reseller's reliance on the distributor's COO certifications to comply with the TAA. Although perhaps not necessary, the court's emphasis on the Government's “implicit approval” suggests that in some cases contractors may be able to mitigate their risk by disclosing the basis for their certifications to appropriate Government personnel.