

Federal Grants and the False Claims Act: Eighth Circuit Decision Shows Communication with Your Granting Agency Can Help Avoid Liability

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Consistent with a trend we reported on earlier this year, a recent case decided by the U.S. Court of Appeals for the Eighth Circuit emphasizes the risks to federal grant recipients of False Claims Act (FCA) actions, and proves that frequent communication with the Government can save grantees a lot of trouble in the long run. In an Eighth Circuit decision issued on May 29, 2015, the court affirmed the district court's decision dismissing a *qui tam* suit brought against a federal grantee by a former employee, who alleged that the grantee made false statements to the agency in its grant application. In dismissing the case, both courts relied heavily on the grantee's ongoing communication with the agency during performance regarding how it was using the funds, reasoning that the grantee did not make "false" statements if the agency knew what the grantee was doing. Although the grantee ultimately prevailed, the case demonstrates that just as with government contractors, federal grantees' use of federal funds is subject to intense scrutiny by the Government and potential whistleblowers.

By way of background, the *qui tam* suit was based on the grantee's application for a three-year grant from the National Telecommunications and Information Administration (NTIA), an agency of the U.S. Department of Commerce. The grant's purpose was to increase broadband accessibility in northern Missouri. The relator claimed the grantee knowingly made false statements in its grant application to NTIA which were material to the agency's decision to award the grant to the grantee. The relator further

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alleged that the grantee implemented the grant in a manner substantially different from what the grantee told NTIA it would do in its grant application.

Specifically, the relator's allegations were based on the application requirement that the grantee provide matching funds for more than \$19 million in project-related costs, either through cash or in-kind contributions. The grantee provided a projected budget naming potential sources of matching funds and in-kind contributors in its application. The relator alleged, among other things, that the grantee: asserted that one contributor could provide certain matching funds, even though the grantee knew the contributor did not intend to provide the funding; falsely classified an exchange with the state of Missouri as an "in-kind contribution" when the grantee knew the exchange was not in-kind; promised that certain individuals would not manage the grantee's participation in the grant, when in fact they did manage the participation; and knowingly redirected the purpose of the grant network away from providing service to specified community anchor institutions.

The grantee ultimately beat the *qui tam* suit because of its continued communication with NTIA regarding its use of the funds throughout its performance of the grant, proving once again that maintaining open lines of dialogue with the granting agency is always the best course of action. For example, the *qui tam* suit alleged that the grantee knowingly redirected the purpose of the grant away from serving community anchor institutes. In dismissing the case, the court cited the grantee's communication with NTIA—which led to NTIA approving the specific institutions the grantee would serve—as an important factor in finding the grantee's application statements were not false. As for the allegation that the grantee misrepresented its funding options in its grant application, the court recognized that NTIA approved the financing the grantee eventually secured, even if that funding was different from that initially proposed. The court also noted that the grantee informed NTIA of its intent to join with another entity to perform the grant, and that NTIA had approved the joint venture while continuing to administer the grant. The court thus determined that the grantee had at all times been open with the government regarding its execution of the grant, which led the court to affirm the lower court's finding that the grantee had not submitted a false statement to the agency—and thus had not violated the FCA.

This case is an important lesson for federal (as well as state and local) grant recipients. Even though the grantee ultimately defeated the FCA allegations, it took over three years and a trip to the Eighth Circuit to prevail. Given the significant penalties associated with FCA liability, and the substantial cost of litigation even when the *qui tam* allegations are baseless, federal grantees must remain proactive in ensuring compliance with all conditions in grant applications and awards, and communicate early and often with the government during the course of grant performance. As this case proves, sometimes an ounce of prevention is worth a pound of cure.