

# Recent False Claims Act Decision Offers Important Lessons on Risks and Perils of GSA Schedule Contracting, Calculation of Damages Under the FCA

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After more than 10 years of litigation and a four-week bench trial, a District Court in D.C. recently found a contractor liable under the False Claims Act (FCA) in connection with the U.S. General Services Administration's Multiple Award Schedules program (GSA Schedules). While the court only awarded a fraction of the damages sought by the government, the case nevertheless serves as a cautionary tale for contractors about the unique risks and liabilities of doing business under the GSA Schedules.

## **Background**

The recently decided case, *United States ex rel. Morsell v. NortonLifeLock, Inc.*, was originally filed under the *qui tam* provisions of the FCA by a former employee who alleged that the Schedule holder had violated the FCA by, among other things, (i) submitting false Commercial Sales Practices (CSP) pricing disclosures in connection with the award and modification of the Schedule contract; and (ii) failing to disclose deeper discounts granted to the agreed-upon "basis of award" customer, as required under the Price Reductions Clause (PRC). In a decision spanning over 180 pages, the court ruled for the government on liability with regard to both issues.

## **Liability**

With regard to the CSP disclosures—which were prepared in part by an outside consultant who had no specific expertise in GSA Schedules—the court found that the contractor's submission was false

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because it failed to disclose the existence of certain commercial rebate programs. The court also found that the CSPs were false because they misrepresented the frequency of non-standard discounts awarded to commercial customers. The court therefore found for the government on the issue of liability, holding that the Schedule holder violated the FCA by “fraudulently inducing” the Government to enter the Schedule contract by submitting “knowingly, materially false CSP disclosures” in connection with the initial award. The court also held that the Schedule holder violated the FCA by “impliedly certifying compliance” with the CSP disclosure obligations throughout the life of the contract, and by expressly reaffirming the false CSPs in connection with various contract modifications.

With regard to the PRC, the court likewise found that the Schedule holder violated the FCA by failing to monitor for CSP compliance or to notify GSA when it granted more favorable discounts to the agreed-upon basis of award customer—which was broadly defined in the Final Proposal Revision (FPR) as “Commercial Class of Customers.” Of particular note, the court found that the PRC was not triggered for commercial sales involving “non-standard discounts with different terms and conditions” that were approved in an internal system referred to as “eSPA.” The court found that these non-standard discounts approved in the eSPA system had been “carved out” as an “exception to the PRC,” based on language included in the FPR. While this carve-out significantly narrowed the universe of potential PRC triggers, the court nevertheless found that the Schedule holder violated the FCA by failing to “make even the most cursory effort to even learn about its obligations” under the PRC. Supporting this conclusion, the court found that personnel involved in approving commercial discounts “did not take PRC or GSA compliance into account when approving sales” and “did not receive even basic training on the PRC or GSA contract.”

## **Damages**

Although the court ruled for the government on liability, the court ultimately awarded only a fraction of the damages the government sought. With regard to the government’s FCA claims tied to the submission of false CSPs, the court held that the government failed to establish a “proximate connection” between the false CSPs and the government’s claimed damages. In particular, the court found that was “more likely than not that GSA would have insisted on a more advantageous discount” if the Schedule holder had not submitted the false CSPs, the court found that the government failed to offer any evidence of “*how much* more advantageous the GSA discounts would have been.”

The court’s decision not to award damages for the false CSP was driven in part by the fact that the Schedule holder had made clear during negotiations that it was not offering GSA “its best price in all circumstances.” However, the bigger driver behind the court’s decision was the government’s “strategic decision” to tie its calculation of damages for submitting false CSPs to the calculation of damages for violating the PRC. The court found that the government’s calculation of damages resulting from violations of the PRC included a significant number of transactions that had been “carved out” as an exception to the PRC, as discussed above. Because of this and other errors, the court concluded that it could not “untangle whatever actual damages GSA sustained” as a result of either the PRC violations or the false CSPs.

The court acknowledged “the tension in its determination that the United States has met its burden on liability but not on damages.” However, the court noted that “the treble damages imposed under the FCA ‘are essentially punitive in nature.’” As a result, the court reasoned that “it is especially important to hold the United States to its burden of proving those damages rather than attempting to estimate them through numerical guesswork.” Ultimately, the court awarded the government approximately \$1 million in damages, which the court calculated using certain rebates that the Schedule holder failed to disclose. In addition, the court awarded the government approximately \$200,000 in civil penalties for each false statement (not false claim or invoice), including the false CSP and subsequent modifications certifying the accuracy of the CSP.

### **Key Takeaways**

The court’s decision in *United States ex rel. Morsell v. NortonLifeLock, Inc.* offers several key lessons regarding both the FCA and GSA Schedule compliance. With regard to the FCA, the case shows that calculating and proving damages can be a complicated task—particularly in cases involving GSA Schedule pricing, which involves complex rules and often significant amounts of data.

The court’s decision also highlights the unique risks of doing business under the GSA Schedules program—including the risk of agreeing to a broadly defined basis of award customer like “All Commercial Customers.” The often scathing decision also highlights the need for Schedule holders to implement effective controls to comply with those unique compliance obligations—including the wisdom of engaging qualified experts to assist in preparing pricing disclosures; the requirement to train relevant business personnel on the obligations imposed under the Schedule; and the need to devote resources and leadership attention to these important issues.