

Three Lessons for Federal Grant Recipients from Recent False Claims Act Investigations

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Government Contracts Issue Update

The U.S. Department of Justice and agency Offices of Inspector General continue to use the False Claims Act as a hammer against federal grant recipients that fall short of compliance with the terms and conditions of their awards. The good news is that every time the Government announces one of these settlements, it provides a lesson for other grant recipients in where the potential exposure lies. In this article, we take a look at several recent settlements and draw three lessons from them:

1. Good causes are not immune to liability.

It is natural to assume the Government will go easy on nonprofit organizations that use grants to further good causes, or that employees of charitable organizations will forgive each other for compliance miscues. But, as recent cases show, those assumptions are mistaken. A few weeks ago, a children's charitable organization was forced to pay \$1.6 million to settle a False Claims Act investigation after an audit by the Inspector General revealed the organization had commingled grant funds with its general operating funds.

Last summer, a children's hospital had to pay \$12.9 million to settle allegations that it misreported its available bed count on an application for a grant from the U.S. Department of Health and Human Services to fund pediatric residents training at the hospital. The misstatement was brought to the Government's attention by a hospital employee whose responsibilities included regulatory analysis and compliance. The employee received almost \$2 million from the

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settlement.

2. The Government will follow the money trail especially when you don't.

One consistent target of law enforcement is grant recipients who fail to closely track funds received from the Government or misrepresent how they have spent those funds. Often these cases arise when the grant recipients have insufficient accounting and financial controls. For example, an Ivy League university paid \$9 million to resolve concerns that it had not verified whether salary and wage charges were based on an employee's actual effort for that grant. To manage the multiple federal, state, and private grants funding the work it was doing, the university allegedly developed a system where its finance department created reports that allocated its employees' time across the many grants. The principal investigators on the grant then allegedly certified large batches of the reports as correct without inquiring with the employees who performed the work whether the time reports were accurate. The batch timekeeping system led to mischarging among federal, state, and private grants.

In November 2015, another university paid almost \$20 million to settle allegations that it violated the False Claims Act. The Government alleged that the university did not have documentation to back up the level of effort claimed by hundreds of employees on the grants and that the university charged some of the grants for administrative costs for equipment and supplies that should not have been direct charges.

3. Don't cross funding streams.

Many research institutions receive grants from a number of sources at the same time. While multiple revenue streams can boost productivity, they can also create risks, especially when the different grants are similar in nature or the same employees work on multiple grants at the same time. As discussed above, one university struggled to track and allocate timekeeping among its multitude of federal, state, and private grants. A California university, meanwhile, had to pay \$500,000 to resolve allegations that, in applying for a new grant from the U.S. Department of Energy, the university failed to disclose its overlapping research funded by a grant from the National Science Foundation. The university allegedly later submitted progress reports and renewal applications to the National Science Foundation listing accomplishments achieved under the Department of Energy grant.

Early this month, an astrophysicist paid \$180,000 and entered into a deferred criminal prosecution for failing to disclose on a grant application that, in addition to working at his private company, he was full-time employed at a university. The scientist also understated how many other grants and competing time commitments he had with other federal agencies.

In each of these cases, the Government pursued damages and penalties under the False Claims Act because the grant recipient's representations and certifications did not accurately reflect its practices. Most likely, none of these targets ever considered itself to be "defrauding" the Government and came into the grant with the best of intentions. But unlike with traditional concepts of fraud, a grant recipient does not need to specifically intend to defraud the Government in order to be liable under the False Claims Act. Rather, in a False Claims Act case, the Government merely has to show that the grant recipient "knowingly" submitted a false claim or

false document. That means an organization can violate the False Claims Act by recklessly disregarding or deliberately ignoring the truth or falsity of the information provided to the Government.

In the absence of sufficient internal controls, this can be surprisingly easy to do. To manage these risk areas and minimize exposure to False Claims Act liability, grant holders should consider conducting more employee training, hiring an internal compliance manager, performing regular audits, developing procedures to verify representations and certifications before they are made to the Government, establishing an employee code of conduct and disciplinary policies, and creating a hotline or website for employees to report fraud, waste, and abuse.