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# DC Circuit Finds Government Failure to Seek Repayment is "Very Strong Evidence" of Non-Materiality In False Claims Act Case

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The DC Circuit recently issued a decision in *U.S. ex rel. McBride v. Halliburton* — F.3d —-, 2017 WL 655439 (D.C. Cir. Feb. 17, 2017), in which it applied *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016) to a government contracts False Claims Act matter. It found that the government's failure to seek repayment after investigating a relator's claim was "very strong evidence" that the false statement or claim was not material.

The relator generally alleged that the defendants were required to maintain and report "headcount data" under a contract relating to the maintenance and operation of recreation centers Iraq for United State troops and that defendants overstated its headcount. *McBride*, 2007 WL 655439, *2. After the realtor filed her complaint under seal in 2005, the Defense Contract Audit Agency (DCAA) investigated issued "written questions to" defendants, visited the recreation centers "to review records and interview [defendants'] personnel. The DCAA did not issue any formal findings, but neither DCAA nor any other Government agency disallowed or challenged any of the amounts" defendants had billed. *Id.* The district court granted summary judgment to defendants and the DC Circuit upheld that decision.

Of key importance to defendants is the DC Circuit analysis of materiality, or the lack thereof, given government failure to seek repayments following investigation. It stated:

> Absent any connection between headcounts and cost determinations, it is difficult to imagine how the maintenance of false headcounts would be relevant, much less material, to the Government's decision to pay KBR. Nevertheless, McBride persists, claiming as "dispositive" an Administrative Contracting Officer's (ACO) statement in a declaration that he "might" have investigated further had he known false headcounts were being maintained, and that such an investigation "might" have resulted in some charged costs being disallowed. The ACO's speculative statement could be true of the maintenance of any kind of false data; it tells us nothing special about headcounts. At most, the statement amounts to the far-too-attenuated supposition that the Government might have had the "option to decline to pay." *See Universal Health*, 136 S. Ct. at 2003 ("Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance."). Given the speculative and generic nature of the ACO's statement, and the "rigorous" and "demanding" materiality standard that must be met, *id.* at 2002-03, McBride's evidence will not suffice to defeat summary judgment.
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> Moreover, we have the benefit of hindsight and should not ignore what actually occurred: the DCAA investigated McBride's allegations and did not disallow any charged costs. In fact, KBR continued to receive an award fee for exceptional performance under Task Order 59 even after the Government learned of the allegations. This is "very strong evidence" that the requirements allegedly violated by the maintenance of inflated headcounts are not material. *See id.* at 2003 ("[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.").

For government contractors and suppliers, this decision underscores the importance of agency investigations and successful resolution of such investigations as part of a comprehensive False Claims Act defense.

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