U.S. District Court Issues False Claims Act Judgment for Defendants in Case Challenging Competitive Bidding for DME Contract

After a fourteen-day bench trial, a Mississippi federal court in *United States ex rel. Jamison v. McKesson Corp., et al.*, Civ. A. No. 2:08-cv-214-SA-JMV (N.D. Miss. Sept. 28, 2012), rendered a complete verdict for the defense, holding that in this federal False Claims Act case based on the Anti-Kickback Statute ("AKS") , the United States had failed to carry its burden to prove that illegal remuneration had been offered or accepted, or that any defendant had acted with the scienter required by the AKS. While much of the Court's verdict in this intervened case turned on facts and circumstances particular to the case, the Court's assessment of what is required to prove remuneration and scienter has important implications for companies that may face similar allegations.

What is – and what is *not* – "remuneration" under the AKS?

The focus of the trial was on two DME supply contracts between subsidiaries of McKesson Corporation and entities representing Beverly Enterprises, an operator of skilled nursing facilities. For each contract, the government's theory was that the prospect of another contract or other business with Beverly was successfully "dangled" in front of the McKesson subsidiaries in order to induce below fair market value, below cost, or discounted bids from the McKesson defendants. While the theory that a business opportunity can constitute "remuneration" under the AKS is not new, *see, e.g.*, *United States v. Bay State Ambulance and Hosp. Rental Serv.*, 874 F.2d 20, 29 (1st Cir. 1989), pursuing the theory in this case was aggressive, and the Court rejected it for good reason.

Prospect of Additional Business. At the outset of the bidding process for the 2003 contract, there was evidence that the prospect of another valuable contract was on the table; the government's theory was that this opportunity was "dangled" in front of the bidding defendants to induce lower bids. However, before final bids were submitted on the contract at issue, the other business opportunity was awarded to someone else, and the evidence presented at trial was that the McKesson defendants knew this. The court held that under these circumstances it was "illogical" to conclude either that the bidding defendants' final bid was improperly induced (the opportunity was known to be gone *before* the bid was submitted) or that the offering defendants intended to use the opportunity to induce lower bids (if the opportunity was intended to induce lower bids, the offering defendants wouldn't have taken the opportunity off the table before the final bids were submitted). While logic drove the court's decision here, it is noteworthy that DOJ pressed – through trial – a theory that defies common sense, and that the Court required trial to resolve this issue in favor of defendants.[1]

Fair Market Value. The government also argued at trial that the McKesson defendants had offered "remuneration" to secure the contracts through below fair market value or below cost bids. At trial, defendants' bids were not out of line with competing bids, and internal accounting analyses consistently projected that the contracts would be profitable at the bid amounts. Relying on a mix of common sense, court decisions and expert testimony, the Court concluded that competitive bidding can establish fair market

[1] In the summary judgment opinion, the Court explained that further fact development was necessary before a decision could be rendered. The Court, however, appears to have been aware that the McKesson defendants were informed about the other business opportunity being awarded to someone else in January 2003 before the execution of the first contract in February 2003. The opinion does not explain why this fact would not support summary judgment, but the Court may have believed it needed additional facts to determine if the fact that the notification came late in the bidding process was significant. *U.S. ex rel. Jamison v. McKesson Corp., et al.*, Civ. A. No. 2:08-cv-214-SA-JMV, 2012 WL 487998, *2, 5 (Feb. 14, 2012).

value. Because the Court had already rejected the government's contention that the bid process was tainted by the dangling/carving out of contracts, the theory that the defendants' bids were below FMV was rejected as well. With respect to the below cost bid theory, the Court focused on the government's burden, and the government's inability to carry it. The government certainly had an uphill battle – there was testimony that the accounting method that defendants had employed was a well-accepted method of analyzing profitability, and that defendants had in fact performed several analyses of the pricing and potential profitability of the contracts. Given this record, the surprise is not that the Court concluded that the Government failed to prove that the bids (and contracts) were below cost, but rather that the United States pursued this theory through trial.

What is – and what is *not* – "knowing and willful" misconduct under the AKS?

At trial, the government showed that in preparing cost projections for the contracts at issue, employees of the McKesson defendants on "several occasions" used arbitrary (but thought to be conservative) numbers in their cost analyses, "misplaced" numbers from one type of analysis to another, and extrapolated costs and other data based on subsets that may not have been representative. The government argued that this sufficiently proved intentional or deliberate mishandling of the numbers, and thus satisfied the scienter required for an AKS-based FCA claim. Highlighting the "number and differing backgrounds" of the persons putting together the projections, the Court concluded instead that the evidence was more likely that the employees were negligent or careless, and – critically – that "such carelessness did not evidence a willful wrong intentionally committed against the Government" as the AKS requires. This analysis by the Court should provide some relief to companies in the industry because mere carelessness or administrative errors were not viewed by the Court as sufficient to sustain liability.

Conclusion

There are at least two principal takeaways from the *Jamison* trial. First, DOJ continues to be interested in pursuing potential AKS violations and has shown a willingness to push an aggressive view of the statute that may not distinguish imperfect choices, flawed decisions, or run-of-the-mill carelessness from knowing and willful fraud. While these aggressive theories may survive summary judgment, when put to the test of trial, here at least they came up short. This point leads to the second takeaway: courts can be reluctant to reject theories of liability – especially complex ones – without the kind of full record that a trial provides. Yet, the court here ultimately took a strong position in favor of the defendants, suggesting that corporate defendants should be prepared to vindicate their rights at trial and have some confidence that a court will provide recourse.