

Common Fraud Allegations Under SBIR Awards

The Small Business Innovation Research (SBIR) program can be a great opportunity to get government funding of cutting-edge research. But the Government takes fraud, waste, and abuse of that funding seriously. As a result, any misstatements in a SBIR proposal or project report can be the subject of an enforcement action by the United States under the False Claims Act (FCA). With treble damages and penalties, plus incentives for whistleblowers to bring claims of their own, the FCA is a heavy hammer for the federal government and creates significant exposure for any company that does not carefully vet the representations it makes to get and maintain SBIR funding.

The False Claims Act

The FCA is the federal government's primary tool for recovering money from companies or individuals who defraud it. The FCA imposes civil liability on any person who, among other things, knowingly presents to the Government a false or fraudulent claim for payment or knowingly makes a false statement or uses a false record material to a claim for payment.

In general, liability under the FCA requires four elements: (1) a claim for government payment or approval; (2) falsity; (3) materiality; and (4) knowledge. Unlike traditional notions of fraud, however, the FCA does not require a specific intent to defraud the Government. Rather, all the Government must show is that the person knew the information being submitted was false or recklessly disregarded or deliberately ignored the truth or falsity of the information provided.

The U.S. Department of Justice enforces the FCA. Additionally, a private whistleblower may bring a civil suit under the FCA "in the name of the Government." Known as a "*qui tam* relator," the whistleblower can receive a percentage of the Government's recovery plus his or her attorney's fees if the case results in a settlement or judgment against the defendant. In 2017, *qui tam* relators filed over 600 new cases alleging violations of the FCA, and the United States and *qui tam* relators combined to recover \$3.7 billion in damages. *Qui tam* relators are often former (or even current) employees of organizations that receive federal funding.

Common SBIR Pitfalls

The Department of Justice and *qui tam* relators have pursued a variety of cases against companies who have submitted false claims or made false statements in connection with SBIR awards. The most common ways SBIR awardees are alleged to have violated the FCA are:

- **Mischaracterizing information about key personnel.** SBIR programs have rules about the where the principal investigator is employed and which key personnel will be working on the project, as well as restrictions on the amount of work that can be done by subcontractors. In [one recent case that turned into a criminal prosecution](#), a University of California San Diego professor failed to disclose his full-time employment at the university and all of his other grants, giving the misimpression that he had time to perform all of the research funded under the SBIR grant. In another case, a federal court found a professor from the University of Florida liable for almost \$3 million for proposing a principal investigator and laboratory assistant who never worked on the project. See *United States v. Anghaie*, 633 Fed. Appx. 514, 516 (11th Cir. 2015).

- **Submitting duplicate proposals.** SBIR programs prohibit funding from multiple government agencies for the same work, and may require a certification that submissions are not duplicative. [One company settled with the United States](#) for almost \$1 million after the Department of Justice alleged that the company had sought funding from both NASA and the Air Force for essentially equivalent research.
- **Failing to maintain sufficient accounting and timekeeping systems and records.** SBIR grant proposals often include representations about a company's accounting and timekeeping systems, and progress reports often must include certifications of compliance with the terms of the grant. One company with two National Science Foundation (NSF) SBIR grants [settled with the United States](#) for failure to maintain timekeeping records and track expenditures by grant or according to categories of the approved grant budget. Similarly, another company with multiple NSF SBIR grants [settled with the United States](#) based on allegations that, among other things, it misrepresented its time and effort policies and procedures in the Financial Management Systems Questionnaire and misrepresented the existence of timesheets or other supporting documentation in project reports. A third investigation found that a company's principals directed employees to charge time to the SBIR awards regardless of whether it corresponded to their actual work and alter their timesheets to maximize charges to each grant or contract. [The company settled for over \\$2 million.](#)

Damages in False Claims Act Cases

The consequences for a violation of the FCA are severe. The Government can recover damages equal to three times its loss, as well as penalties up to almost \$22,000 per false claim submitted. In cases involving the SBIR program, where the false statements often appear in the proposal, the Government may seek three times the entire amount of money paid to the recipient of the SBIR grant or contract, plus penalties. See *U.S. ex rel. Longhi v. Lithium Power Technologies, Inc.*, 575 F.3d 458 (5th Cir. 2009) (awarding \$5 million in damages, which was three times the amount of the grants paid out, due to several misrepresentations in the SBIR proposal).

Contacts

John R. Prairie

202.719.7167

jprairie@wileyrein.com

Scott A. Felder

202.719.7029

sfelder@wileyrein.com

Mark B. Sweet

202.719.4649

msweet@wileyrein.com

George E. Petel

202.719.3759

gpetel@wileyrein.com

