CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. 97-4837 HLH (CTx) Date November 15, 1999

Title U.S.A. ex rel. Bond v. Jacobs Engineering Group, Inc.

DOCKET ENTRY

ENTERED ON ICMS NOV 17 [redacted] CV

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PRESENT

The Honorable Harry L. Hupp, Judge

Jim Holmes
Deputy Clerk

LYNNE Smith
COURT REPORTER

ATTORNEYS PRESENT FOR PLAINTIFF:

DAVID K BARRETT
WAYNE GROSS
Michael Dawson ✓
CONSUELO WOODHEAD
SUSAN R. HERSHMAN

ATTORNEYS PRESENT FOR DEFENDANTS:

Brad Brian ✓
Marc Becker ✓
Douglas Axel ✓
Jonathan Altman ✓

PROCEEDINGS: DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

ORDER (also, if applicable, findings and memorandum opinion):

The defendant's motion to dismiss for lack of jurisdiction limited to the claims of the Relator is granted and the claims of Relator Edwin Bond are dismissed by separate order signed and filed this date.

The determination does not affect the claims asserted in the Complaint in Intervention by the United States.

The facts as stated below are not in dispute. Thus, the court does not have to determine whether to treat the motion as a jurisdictional one (where the court makes factual findings) or one on the merits when the jurisdictional facts are "intertwined" with the "merits" facts (where the summary judgment standard applies). Since the relevant facts are undisputed, the court may

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decide this matter on the papers on this motion.

Basically, the reason for the decision is that there was a "public disclosure" of the facts before Relator Bond filed his suit and he was not the original source of that public disclosure.

Relator was, for a period of time, employed by Jacobs Engineering Group, Inc.(Jacobs), but did not have responsibilities for submitting requests for payment on "cost plus" contracts. Starting about 1982, Jacobs did substantial business with the government under cost plus contracts. In determining costs, there had to be an allocation of "overhead" or non-direct costs, the determination of which is governed by numerous regulations. One of those regulations is 48 CFR Ch. 1 § 31.205-36(b) (hereafter referred to as Federal Acquisition Regulations (FAR) § 31.205-36(b) or simply FAR). It provides that if the contractor sells and leases back property, the maximum charge to the government is only what could be charged (primarily depreciation) had the contractor retained ownership of the property. In this case, there was a sale and leaseback of the Jacobs corporate headquarters building in Pasadena in 1982. The amount of rent payable to the leasing company was substantially in excess of the allowable depreciation on the building. In each subsequent year, Jacobs claimed reimbursement from the government on its cost plus contracts for an amount based on the total rent it was paying. In a summary judgment motion on Nov. 1, 1999, this court determined that such was a violation of FAR. Jacobs now challenges the participation of Relator Edwin Bond in this action.

Mr. Bond filed this qui tam suit on July 2, 1997. Eventually, the government took over management of the suit, exercising its option to do so under the False Claims Act (FCA) and filed a Complaint in Intervention. The facts relating to the sequence of events leading to the filing of the suit are undisputed except in irrelevant detail. Mr. Bond was an employee of Jacobs between 1994 and May, 1997. However, his responsibilities did not include preparations for reimbursement on cost-plus contracts. After he left Jacobs in May 1997, Mr. Bond had dinner with his former supervisor, Mr. Hedrick, who also

was no longer employed by Jacobs at that time. Mr. Hedrick did have knowledge of the FAR, and told Mr. Bond about the overcharges, that Hedrick had written a memo about them which his supervisor ordered him to destroy, and that he had been rebuffed by two subsequent supervisors when he tried to bring the matter to their attention. Hedrick in his deposition says he does not recall this conversation, but he does confirm the truth of most of the basic facts. For purposes of this motion, the court assumes that the facts are as stated by Mr. Bond. After the conversation, Mr. Bond sought out the services of a lawyer specializing in qui tam cases, and this lawsuit was filed by that attorney after further investigation.

The qui tam statute, more correctly known as the FCA, provides in 31 USC § 3730(e)(4)(A) that the district court has no jurisdiction over an FCA case when there has been "public disclosure of allegations or transactions in a ... congressional, administrative, or Government Accounting Office report, audit, or investigation ... unless the ... person bringing the action is an original source of the information." Mr. Bond does not claim that he is an original source (one who has personal knowledge), but says that there was no public disclosure.

There are many authorities on what is a "public disclosure", and those authorities are not always perfectly consistent. The undisputed facts are that here Mr. Sui, the government auditor with the Defense Contractors Audit Agency (DCAA) (the government auditing agency charged with reviewing payment claims on cost plus contracts) in reviewing in the spring of 1997 the Jacobs claims for 1994, uncovered the fact that the Jacobs headquarters building had been the subject of a sale and leaseback, thus bringing into issue the above quoted section of FAR. After confirming that the same building was involved, he communicated in writing with Jacobs executive Mr. Lutz his belief that claims in excess of what was allowable had been made and paid. Mr. Lutz turned the report over to Ms. Burns, his supervisor. This communication took place in April 1997, and was followed by discussion between Mr. Sui and various executives of Jacobs in May and June 1997. It is undisputed that many of the Jacobs executives with whom the matter was discussed by Mr. Sui had no knowledge of the leaseback and amount of the claims. The legal

question is whether the discussion between Mr. Sui and the Jacobs executives who had no knowledge of the fraud was a "public disclosure" sufficient to bring into play § 3430(e)(4)(A).

Relator Bond argues for the application of ex rel Schumer 9Cir'95 63 F3d 1512, vacated 520 US 939 ('97). If Schumer were the law, any disclosure to any employee of the government contractor (whether knowledgeable or not about the fraud) is not a "public disclosure", and therefore § 3430 does not apply. There is a major deficiency in this argument. The Supreme Court vacated the opinion in ex rel Schurmer which means that it is no precedent at all (Durning 9Cir'91 950 F2d 1419). It is noted that the Schumer case was not only reversed on other grounds, but the opinion was "vacated", meaning that it is not the law for any purpose. By contrast is the law in most of the other circuits which have opinions on the subject. In ex rel Doe 2Cir'960 F2d 318, the decision was that there is a public disclosure when the facts are revealed to contractor personnel who were not in on the alleged fraud. This is in contrast to the Schurmer view that revelation of any contractor employee does not trigger the public disclosure provision. While the facts of subsequent cases vary considerably, most of the cases have adopted the Doe formulation. (See ex rel Fine 10Cir'96 99 F3d 1000; ex rel Foust DDC'98 26 Fsupp 60.) The Seventh Circuit seems to have gone its own way in holding that the relevant disclosure is one made to the government (not by the government). (Bank of Farmington 7Cir'99 166 F3d 853.) If that rule is applied here, there was public disclosure. This court adopts the Doe rule as being the most accurate statement of the purposes behind the congressional command.

Relator also argues that the information possessed by DCAA in April 1997, was not enough to show a FCA violation. Relator says that while the government may have known that more rental was charged than allowed under the regulation, it did not know additional facts tending to show scienter. This position is rejected. What the public disclosure must be is of facts containing "enough information to enable the government to pursue and investigation against [the contractor]". (ex rel Harshman 9Cir'99 1999 WL 795970 pg. 4); see also Hagood II 9Cir'96 81 F3d 1465; and ex rel Springfield Terminal R. R. Co. DCCir'94 14 F3d

645).

Since Mr. Bond does not claim to be an "original source", the court has no jurisdiction over his claim and it is dismissed with prejudice. The United States, however, is not barred from pursuing the claims on its Complaint in Intervention, and defendant has filed a "clarification" indicating that it does not dispute this proposition. (See ex rel Burns 6Cir'99 186 F3d 717.)

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