One of our favorite things here is when several strands of issues/concerns/challenges come together and align. For example, in **this article** we discussed the confluence of DCAA's push for access to contractors' internal audit reports with the push for access to attorney-client privileged documents—both topics that we had discussed previously in multiple individual articles. Similarly, in **this pithy article** we linked DCAA"s push for access to attorney-client documents with Sikorsky's ongoing CAS 418 litigation, as well as to the various Contract Disputes Act Statute of Limitations articles we've published here.

Now we get another opportunity to link disparate strands into a cohesive whole! Today's article links our **recent article** on the False Claim Act risks posed by disgruntled employees with our long-time (and multiple article) **concerns** about the importance of effective subcontractor management. Today is truly a special day!

So, to the point:

First, let us note the recent Department of Justice **press release** announcing that El Paso-based ReadyOne Industries (formerly known as the National Center for the Employment of the Disabled, or NCED)—a not-for-profit **AbilityOne®** entity—had settled allegations that it had violated the FCA, for the reasonable sum of $5 million. (Well, it seems reasonable to us. But let's all remember that's $5 million that is now not going to be available for ReadyOne's programs.)

According to the DOJ, a former NCED employee, Michael Ahumada, had filed a *qui tam* suit as a relator under the FCA. (If any of those terms or acronyms seems unfamiliar, you may want to review our article on the risks posed by disgruntled employees, link above.) Mr. Ahumada alleged that NCED/ReadyOne failed to accurately report its ratio of disabled labor hours to appropriate AbilityOne® authorities.

The press release stated—

The [AbilityOne®] program uses the purchasing power of the federal government to buy approved products and services from participating, community-based nonprofit agencies nationwide. These community-based nonprofit agencies, like NCED, must ensure that 75 percent of all annual direct labor hours on certain government contracts are performed by employees who are blind or severely disabled. The program is managed by the Committee for Purchase From People Who Are Blind or Severely Disabled, which is a federal agency. The United States alleges that, between 2000 and 2006, NCED employed a large number of non-disabled employees to work on contracts for the manufacture of archival boxes, apparel and other items, and did not appropriately account for their hours as part of the overall ratios it certified and submitted to the committee.

We have worked with AbilityOne® entities before, and this is not the first time we've heard of troubles in calculating the NISH ratios. But this is a nice example of the point we made in our earlier article, which is that companies are much better off listening to their employees' concerns, investigating them, and reporting back to the employee the results of those investigations, when compared to the legal and settlement costs associated with settlements under the FCA.

The next strand concerns another *qui tam* action under the FCA, this time brought by an employee of a subcontractor against both the subcontractor *and the prime contractor*. We were tipped to a nice summary of the court decision, penned by two wily government contracts attorneys at **Wiley Rein**. Their summary focused on FCA liability associated with the Davis-Bacon Act, but what caught our eye was the following—

After finding that it had primary jurisdiction to decide the plaintiffs' FCA claim, the court concluded that the contractor *acted with reckless disregard* concerning the falsity of the payroll certifications, and thus violated the FCA. The prime contractor conceded that it understood

the Davis-Bacon requirements, and yet
did not supervise the subcontractor's payment of its employees, and did not verify the payroll certifications for accuracy and completeness
. This lack of supervision and verification resulted in payroll certifications that did not account for the subcontractor's electrical workers and falsely certified that they received Davis-Bacon wages.

[Emphasis added.]

We followed the article's link to the full Sixth Circuit Appellate **decision** . We were interested in the following bits—

Circle C's contract explicitly incorporated the Davis-Bacon requirements and included an hourly wage determination for electrical workers…. Circle C, as a frequent contractor with the government, admitted its familiarity with these requirements…. Circle C conceded that it should submit payroll certifications for all employees on the project, but did not include Phase Tech employees on the original certifications, although it did submit separate payroll certifications for the other subcontractors. Circle C acknowledged that it never paid or supervised the payment of any Phase Tech employees and had no first-hand knowledge regarding Phase Tech's payments to its employees. It was only in 2006 that Circle C finally informed Phase Tech of the need to submit payroll certifications to Fort Campbell. Once the records were provided by Phase Tech, Circle C never verified their accuracy. In fact … there were 62 inaccurate submissions, 53 of which pertained to 2004 and 2005 and failed to list any Phase Tech workers. The 62 certifications also were false because they wrongly certified that the prevailing wages were paid. …

For the reasons stated by the district court, the totality of the circumstances show that Circle C, an experienced contractor, made false statements, acted in reckless disregard of the truth or falsity of the information, and that the false statements were "material" to the government's decision to make the payment sought in Circle C's claim. Thus, we affirm the district court's grant of summary judgment in favor of plaintiffs on their FCA claim.

Circle C did not effectively manage the administrative details of its subcontract with Phase Tech. The Court didn't dwell on it, but it appeared that Circle C was not aware for some months—perhaps as long as two years—that Phase Tech was actually its subcontractor, performing work in the field. Certainly, the normal administrative procedures and controls that a government construction contractor would impose, as a matter of routine, seemed to be largely lacking. Consequently, the Circle C's failure to properly manage its subcontractor led to a finding of liability under the FCA, a liability that will likely cost Circle C millions to settle.

The Circle C litigation started out as a *qui tam* suit, filed by relator Brian Wall, a Phase Tech employee who worked at the construction site. We didn't see how Mr. Wall learned that Circle C and Phase Tech were failing in their Davis-Bacon Act-imposed duties, or how Mr. Wall came to the realization that there might be some FCA liability associated with those lapses. We like to imagine that Mr. Wall became disgruntled and decided to get even for some slight, but the truth is, we have no idea.

The fact of the matter is that Mr. Wall's emotional state is irrelevant. For whatever reason, Circle C failed to properly manage its subcontractor, Phase Tech, as required by its contract with the U.S. Army, and that failure created liability under the FCA. Just like ReadyOne failed in its own labor-related administrative requirements.

Clearly, the False Claims Act is not only about accurate invoices and properly claiming allowable costs. It encompasses such back-office administrivia as payroll certifications and direct labor hour ratio reporting. So perhaps the moral here is not to stint on systems, policies and procedures, because sometimes that stuff is as important as project execution and delivery.