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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	15 Civ. ____
v.	:	
	:	<u>COMPLAINT</u>
YONKERS CONTRACTING, INC.	:	
	:	JURY TRIAL DEMANDED
Defendant.	:	
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Plaintiff United States of America (the “United States” or the “Government”), by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, alleges as follows:

INTRODUCTION

1. The United States files this civil complaint to recover damages and penalties from Defendant Yonkers Contracting, Inc. (“Yonkers Contracting” or “Defendant”) under the False Claims Act and common law arising from Defendant’s false representations that work on a federally-funded construction project had been performed by a disadvantaged business enterprise (“DBE”). Rather than hire a disadvantaged business to perform actual work on the project as required by United States Department of Transportation (“DOT”) regulations designed to ensure the participation of DBEs in DOT-assisted contracts, Defendant fraudulently used a

disadvantaged business enterprise that performed no commercially useful function in order to obtain payment on a project to reconstruct part of the Cross-Westchester Expressway (the “I-287 Project”).

JURISDICTION AND VENUE

2. This Court has jurisdiction over the claims brought under the False Claims Act pursuant to 31 U.S.C. § 3730(a) and 28 U.S.C. §§ 1331 and 1345, over the remaining claims pursuant to 28 U.S.C. § 1345, and over all claims pursuant to the Court’s general equitable jurisdiction.

3. Venue lies in this District pursuant to 31 U.S.C. § 3732(a) and 28 U.S.C. §§ 1391(b) and 1391(c), because Defendant conducts business within this District.

PARTIES

4. Plaintiff is the United States of America.

5. Defendant Yonkers Contracting is one of the largest construction contractors in the New York area and has an office in this District located at 969 Midland Avenue, Yonkers, NY 10704.

BACKGROUND

The Regulatory Framework

6. The DOT regulations entitled “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs” are intended to provide opportunities for businesses owned by socially and economically disadvantaged individuals, such as minorities and/or women, possessing the required skills to perform work on construction projects funded, at least in part, by the federal government. The regulations are codified at 49 C.F.R., Part 26 (the “DBE Regulations”). They are designed to “ensure

nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs.”

7. The DBE Regulations require that every contract that a DOT funding recipient signs with a contractor include an assurance by the contractor that “[t]he contractor . . . shall carry out applicable requirements of [the DBE Regulations] in the award and administration of DOT-assisted contracts.” The DBE Regulations further state that “[f]ailure to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.” 49 C.F.R. § 26.13(b).

8. The DBE Regulations provide that payments made to a DBE contractor may be counted toward DBE goals “only if the DBE is performing a commercially useful function on that contract.” 49 C.F.R. § 26.55(c). A “commercially useful function” is performed when a DBE is “responsible for the execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.” 49 C.F.R. 26.55(c)(1).

9. The DBE Regulations specifically prohibit “pass-through” arrangements. Thus, a DBE does not perform a commercially useful function “if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.” *Id.* If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, it is presumed that the DBE is not performing a commercially useful function. *Id.*

10. The DBE Regulations apply equally to projects funded through the Federal Highway Administration, which is an agency of the DOT. *See* 49 C.F.R. § 26.3(a). The DBE Regulations require, *inter alia*, DOT funding recipients (a) to establish DBE programs; (b) to set,

and make good faith efforts to reach, DBE goals; and (c) to take responsibility for the certification of businesses as DBEs. *See* 49 C.F.R., Part 26, Subparts B-E. Among other things, every contract that a recipient signs with a contractor must include an assurance, by the contractor, that “[t]he contractor . . . shall carry out applicable requirements of [the DBE Regulations] in the award and administration of DOT-assisted contracts.”

DBE Compliance Requirements for the I-287 Project

11. The New York State Department of Transportation (“NYS DOT”) oversees the reconstruction of the Cross-Westchester Expressway, which is also known as I-287. On June 26, 2006, NYS DOT awarded the contract for the I-287 Project to a joint venture comprised of defendant and another construction company (the “Joint Venture”). The project, which has been completed, included highway rehabilitation and the installation of noise barriers along I-287, and the replacement or refurbishment of several bridges. The initial value of the contract was estimated as approximately \$141 million. The project was substantially federally funded: 90 percent of the funds for its construction costs came from the Federal Highway Administration, which is part of DOT.

12. The contract between the Joint Venture and NYS DOT required adherence to the DBE regulations. In submitting its bid for the I-287 Project, the Joint Venture submitted a “DBE Utilization Packet” to NYS DOT. This included a “DBE Schedule of Utilization” (“DBE Schedule”) listing the DBEs with whom the Joint Venture subcontracted to perform work on the project, the dollar values of those subcontracts, and the percentages of those values the Joint Venture claimed as DBE credit. The Joint Venture also submitted separate “DBE Utilization Worksheets” (“DBE Worksheets”) for each DBE involved in the project. Each DBE Worksheet provided a breakdown of the work to be performed by the DBE, and certified that the

subcontract between the DBE and the Joint Venture “was in writing and contained all pertinent provisions of the prime contract in regard to Federal and State Laws and Regulations.” These DBE Utilization forms were used by NYS DOT to assess whether the Joint Venture could meet the DBE utilization target set for the I-287 Project, and whether they had put forth a good faith effort to do so.

13. Although NYS DOT initially set a goal of 10% DBE participation for the contract, in July 2006, it accepted a proposal from the Joint Venture for a DBE participation commitment of 8.03%. Correspondence between the Joint Venture and NYS DOT’s DBE Compliance Officers indicates that the Joint Venture submitted at least three proposals before NYS DOT was satisfied that it had exhibited a good-faith effort. The schedule ultimately accepted by NYS DOT listed 15 DBEs, including a DBE called Global Marine Supply Co. (“Global Marine”). It showed that the DBE credit claimed for Global Marine’s work as a supplier would amount to 2.55% of the I-287 Project’s total value. As such, that one subcontract represented over 31% of the Joint Venture’s 8.03% DBE participation commitment.

14. The Joint Venture’s contract with NYS DOT required the Joint Venture to track DBE participation during the project by making regular entries into NYS DOT’s “Equitable Business Opportunities Civil Rights Reporting Software” (known as “EBO”). The Joint Venture made entries in EBO for each payment it submitted to all subcontractors, including the DBEs. The DBEs then confirmed through the software that they had received those payments. Before accessing EBO, all users must certify that the information they enter into the system is true and accurate.

THE FRAUDULENT SCHEME

Global Marine

15. Following its successful bid on the I-287 Project, the Joint Venture submitted a DBE Utilization Schedule wherein it claimed to have entered into a multi-million dollar subcontract with Global Marine. That form, and the accompanying DBE Worksheet for Global Marine, stated that Global Marine would act as a “Supplier”¹ of steel, entitling the Joint Venture to claim DBE credit for 60% of the value of its subcontract.

16. At the time that Yonkers Contracting submitted the utilization schedule, it knew that Global Marine would perform no useful function on the project and accordingly should not be classified as a supplier. Yonkers Contracting had already negotiated directly with a third-party steel supplier, which was not a DBE, to supply steel for the project. Only when Yonkers Contracting realized that it needed to increase DBE participation on the project did it insert Global Marine as a pass-through between the true steel supplier and Yonkers Contracting.

17. Yonkers Contracting paid Global Marine a kickback of 1% to use Global Marine’s name as a DBE supplier.

18. Global Marine received invoices from the third-party steel supplier, recopied these invoices using its own software, added the 1% markup, and submitted them to the Joint Venture.

19. At no time while the project was underway did Global Marine store or ship any

¹ “Supplier,” as used in the project contract and Standard Specifications, has the same meaning as “Regular Dealer” under 49 C.F.R. § 26. A regular dealer is a “firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.” 49 C.F.R. § 26.55(e)(2)(ii).

steel. Even though, as Yonkers Contracting well knew, Global Marine played no commercially useful function on the project, the Joint Venture made regular entries into EBO reflecting steel purchases purportedly made through Global Marine. These records were used by NYS DOT to determine the value of Global Marine's contribution to the project, and whether the Joint Venture was meeting its DBE goal. Through the EBO entries, Yonkers Contracting caused the Joint Venture to represent that Global Marine had been paid in an amount equivalent to the value of the steel being supplied for the project. The Joint Venture also regularly submitted requests for partial payment based on Global Marine's invoices.

20. Yonkers Contracting was required to submit EBO entries as part of its applications for payment, and in fact Yonkers Contracting did receive federal funds as a result of making or causing to be made false statements in the EBO entries.

21. As a result of the false reports submitted by Yonkers Contracting, it obtained federally-funded project money to which it was not entitled.

FIRST CLAIM

Violations of the False Claims Act: Presentation of False Claims (31 U.S.C. § 3729(a)(1) (2006))

22. The United States incorporates by reference paragraphs 1-21 as if fully set forth in this paragraph.

23. The United States seeks relief against Defendant under Section 3729(a)(1) (2006) of the False Claims Act.

24. As set forth above, in connection with the foregoing scheme, Defendant knowingly, or with reckless disregard for the truth, presented and/or caused to be presented false or fraudulent claims for payment to NYS DOT, a recipient of federal funds, and such funds were

spent or used by NYS DOT on the Government's behalf and to advance a Government interest. Specifically, Yonkers Contracting's personnel submitted reports on behalf of the Joint Venture, as part of applications for payment on the I-287 Project, a federally-funded project, reflecting falsely that Global Marine supplied steel on the project when in fact Defendant had procured the steel directly from a different source.

25. By reason of these false claims, the United States has sustained damages in a substantial amount to be determined at trial, and is entitled to a civil penalty as required by law for each violation.

SECOND CLAIM

Violations of the False Claims Act: Making or Using a False Record or Statement (31 U.S.C. § 3729(a)(2) (2006))

26. The United States incorporates by reference paragraphs 1-21 as if fully set forth in this paragraph.

27. The United States seeks relief against Defendant under Section 3729(a)(2) (2006) of the False Claims Act.

28. As set forth above, in connection with the foregoing scheme, Defendant knowingly, or in reckless disregard for the truth, made, used, and caused to be made and used, false records and statements material to a false and fraudulent claim made to NYS DOT, a recipient of federal funds, and such funds were spent or used by NYS DOT on the Government's behalf and to advance a Government interest. Specifically, Yonkers Contracting made and used false reports as part of its bid and its requests for payments on the federally-funded I-287 Project.

29. By reason of these false claims, the United States has sustained damages in a substantial amount to be determined at trial, and is entitled to a civil penalty as required by law

for each violation.

THIRD CLAIM

Unjust Enrichment

30. The United States incorporates by reference paragraphs 1-21 as if fully set forth in this paragraph.

31. By reason of the payments to Defendant, Defendant was unjustly enriched. The circumstances of Defendant's receipt of these payments are such that, in equity and good conscience, Defendant should not retain these payments, the amount of which is to be determined at trial.

FOURTH CLAIM

Common Law Fraud

32. The United States incorporates by reference paragraphs 1-21 as if fully set forth in this paragraph.

33. Defendant made material misrepresentations of fact, with knowledge of, or in reckless disregard of, their truth, in connection with the claims for payment submitted by, or on behalf of, Defendant to the United States. Specifically, although Yonkers Contracting represented in its bid to the prime contractor on the I-287 Project that it would subcontract 8.03% of its work to a DBE, Yonkers Contracting knew at the time of the bid that it would not meet such requirement, and further, throughout the performance of the contract, it submitted false reports reflecting that it had subcontracted work to a DBE whereas in fact it was performing the work itself.

34. Defendant intended that the United States rely upon the accuracy of the false representations referenced above.

35. The United States made substantial payments of money in justifiable reliance upon Defendant's false representations.

36. Defendant's actions caused the United States to be damaged in a substantial amount to be determined at trial.

FIFTH CLAIM

Payment Under Mistake of Fact

37. The United States incorporates by reference paragraphs 1-21 as if fully set forth in this paragraph.

38. The United States seeks relief against Defendant to recover monies paid under mistake of fact.

39. The Government disbursed funds based on statements submitted by Defendant to NYS DOT under the erroneous belief that Defendant's statements that it was complying with DBE requirements were true.

40. Because of these payments and/or guarantees by mistake, Defendant has received monies to which it is not entitled.

41. By reason of the foregoing, the United States was damaged in a substantial amount to be determined at trial.

WHEREFORE, plaintiff, the United States, requests that judgment be entered in its favor and against Defendant as follows:

(a) On the First and Second Claims for Relief (Violations of the False Claims Act), for treble the United States' damages, in an amount to be determined at trial, plus civil penalties for each false claim presented and an award of costs pursuant to 31 U.S.C. § 3729(a);

(b) On the Third, Fourth, and Fifth Claims for Relief, in an amount to be

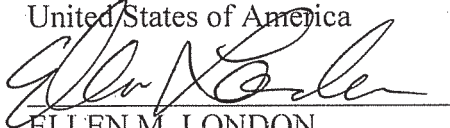
determined at trial, together with costs and interest; and

(c) awarding such further relief as is proper.

Dated: New York, New York
November 3, 2015

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