UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel., USN4U, LLC,	)	**CASE NO. 1:17-CV-558**
Relator,	)	**JUDGE DAN AARON POLSTER**
vs.	)	
	)	**OPINION AND ORDER**
WOLF CREEK FEDERAL SERVICES, INC, et al	)	
Defendants.	)	

USN4U, LLC on behalf of the government ("Relator")[1], through this *qui tam* action, seeks to recover alleged damages and civil penalties arising from false and/or fraudulent statements, records, and claims made by Wolf Creek Federal Services ("Wolf Creek"), Timothy Tesch, Christopher Logan, and Anthony Santillo (collectively, "Defendants")[2]. The United States declined to join the action. Relator alleges such conduct violates the False Claims Act, 31 U.S.C. § 3729 et seq. ("FCA"). Defendants moved to dismiss Relator's claim pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6). For the reasons below, the Court **GRANTS** Defendants' motion to dismiss.

I. BACKGROUND

A. The Contract

Defendant Wolf Creek contracted with the National Aeronautics and Space Administration ("NASA" or "the Government") to repair and maintain its Glenn Research Center facility ("GRC") under contract No. NNC14BA11B (the "Contract"). *See* Am. Compl. ¶2. The Contract divides

[1] Relator is a Limited Liability Company based in Akron, Ohio. Relator alleges that it has knowledge of the facts and events underlying this qui tam suit through its members. The members of USN4U, LLC say they created the company to protect their identity from retaliation from Wolf Creek's management or union employees.
[2] The three individual defendants are: Timothy Tesch, who was Wolf Creek's project manager for the Contract from 2014-2017; Christopher Logan, who was Wolf Creek's quality assurance manager for the Contract from October 2014-2017; and Anthony Santillo, who is a Wolf Creek's union employee and Work Group Lead for the carpentry.

Wolf Creek's tasks into two components: Base Work and indefinite-delivery-indefinite-quantity ("IDIQ") Work. *Id*. ¶26. The IDIQ work in the Contract is where the dispute lies. IDIQ work is firm-fixed priced by task. *Id*. The IDIQ work fluctuated depending on unforeseen repairs, unknown service request work, and changes to GRC funding for operations and maintenance. *Id*. ¶29.

The extensive IDIQ order and documentation process for the Contract begins with the Government receiving a work request from a Government employee in GRC. *Id*. ¶30. The Government then assigns the work request to the appropriate contract, and logs the work request in its system, which creates a work order. *Id*. A work order is a formal document that directs Wolf Creek to perform work. *Id*. Within ten days of receiving a work order, Wolf Creek must prepare a detailed work order proposal to accomplish the task including a scope of work, schedule, and total cost. *Id*. ¶31. Wolf Creek's estimated labor hours and cost are contained in their work order proposals. *Id*. The work order proposals go through cost estimating and processing, is reviewed by a lower Wolf Creek management team, and then presented to the Government. *Id*. ¶¶ 31, 33. The Government then reviews the proposed work order and negotiate a final firm-fixed price and work schedule with Wolf Creek. *Id*. ¶33.

Once a firm-fixed price contract is issued, Wolf Creek is required to ensure that all invoices for completed IDIQ tasks equal the quoted prices unless an unforeseen field condition occurs, there is a design error, or the scope of work changes. *Id*. ¶34. If such a change occurs, Wolf Creek must stop the work, notify the Government, and issue a revised work order proposal to complete the work. *Id*. If Wolf Creek fails to follow the above-stated procedure, then Wolf Creek will be paid only the amount in the agreed-upon original work order proposal. *Id*.

While performing the work order, Wolf Creek's employees self-report their labor hours through a software program. Am. Compl. ¶¶35. Wolf Creek's software program allows Wolf

Creek's employees to submit their labor hours remotely to Wolf Creek's management and has no mechanism to confirm whether an employee performed the work. *Id*. Once a work order is completed, Wolf Creek issues the Government an invoice equal to the agreed-upon firm-fixed price. Am. Compl. ¶36. The total maximum value for IDIQ work under the Contract was $30 million. Am. Compl. ¶29. According to publicly available data, Wolf Creek was awarded and paid at least $9 million in firm-fixed price contracts for IDIQ work orders from 2014 to June 2020. *See* Am. Compl. ¶36.

B. Relator's *Qui Tam* Action

In March 2017, Relator filed under seal this *qui tam* action under the False Claims Act, 31 U.S.C. 3729 et seq. Relator alleges that Defendants made false claims to the Government when securing the Contract by using inflated labor hour estimates in a proposals to receive increased compensation from the Government. The Government then allegedly agreed to the firm-fixed price for the work replying on the inflated estimated labor hours. Santillo or other individuals under Santillo's control would instruct employees to report false labor hours to justify the inflated labor estimate. Upon completion of the work order, the Government paid Wolf Creek the firm-fixed price. *See* Doc #: 30 at 10; *see also* Ex. 5-6.

In December 2019, the Government declined to intervene, and the Court unsealed the Complaint. In June 2020, Defendants filed a motion to dismiss the Complaint. In late June, Relator amended its Complaint as a matter of course ("Amended Complaint"). In July 2020, Defendants filed a motion to dismiss the Amended Complaint pursuant to Rules 9(b) and 12(b)(6). In August 2020, Relator filed an opposition to Defendants' motion to dismiss, and Defendants filed a reply. In September 2020, Relator filed a motion for leave to file its Second Amended Complaint to

attach some of the invoices that were allegedly sent to the Government during the relevant period. Defendants opposed Relator's request for leave to file its Second Amended Complaint.

II. DISCUSSION

A. Standard

"On a motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, (2007). To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim for which relief can be granted, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Although a complaint must contain "a short and plain statement" of the claim, Fed. R. Civ. P. 9(b) demands that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *See* Fed. R. Civ. P. 8 and 9(b). Rule 9(b) requires that a complaint set forth allegations of fraud with particularity, including: "the time, place, and content of the alleged misrepresentation . . . the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud" *United States ex rel. Snapp, Inc. v. Ford Motor Co*., 532 F.3d 496, 504 (6th Cir. 2008). Rule 9(b)'s particularity requirement and Rule 8's general principles must be read in harmony. *Id. at* 503. "Rule 9(b)'s particularity requirement protects a qui tam defendant from unwarranted damage to its reputation caused by 'spurious charges of immoral and fraudulent behavior.'" *Id*.

B. The False Claims Act

Under the FCA's *qui tam* provisions, a private individual may bring a civil action on behalf of the United States. *See Walburn v. Lockheed Martin Corp*., 431 F.3d 966, 970 (6th Cir. 2005).

If the government does not intervene in the action, as is the case here, the Relator may proceed with the case on his own, though still on behalf of the government. *See* 31 U.S.C. § 3730(c)(3). If the action is successful, the Relator is eligible to receive a percentage of the recovery. 31 U.S.C. § 3730(d)(1)-(2).

The FCA creates liability for any person who "(1) knowingly presents, or causes to be presented, to [the Government]…a false or fraudulent claim for payment or approval; (2) knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; or (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(1)(A)-(C) (2006). In the context of the FCA, the falsity of a claim is determined at the time of submission. *See United States ex rel. Bledsoe v. Cmty. Health Sys*., 342 F.3d 634 (6th Cir. 2003) ("The FCA, 31 U.S.C. § 3729 et seq., is an anti-fraud statute that prohibits the knowing submission of false or fraudulent claims to the federal government."). For Defendants to be liable under § 3729(a)(1), Relator must demonstrate that: (1) the Defendants made a claim against the Government; (2) the claim was false or fraudulent; and (3) the Defendants knew the claim was false or fraudulent.

i. Relator failed to adequately identify a "claim" that was presented to the Government.

Relator contends that Defendants submitted falsified labor estimates in their work order proposals to the Government in violation of the FCA. *See* Am. Compl. ¶74. Furthermore, Relator alleges that Santillo purposely inflated the estimated labor hours so he and other union employees could falsely report increased labor hours. *See* Am. Compl. ¶37. In doing so, the Amended Complaint treats Wolf Creek's work order proposals as "claims" pursuant to the FCA.

In response, Defendants asserts that the Relator has failed to allege that any false "claim" has been presented to the Government, as required to trigger liability under the FCA. *See* Doc #: 36 at 7-9. Specifically, Defendants contend that Relator failed to identify any false invoice submitted to the Government or any other false "request or demand… for money or property." *Id*. Defendants note that a "proposal" is not a claim; rather, it was an offer that the Government reviewed and was free to accept, counter, reject, or negotiate prior to agreeing on a final firm-fixed price. *Id*. The Court finds Defendants' argument to be persuasive.

Under the False Claims Act, a "claim" is defined as

> any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

§ 3729(c). Claims under the False Claims Act must comply with Fed. R. Civ. P. 9(b). *See United States ex rel. Branhan v. Mercy Health Sys*., 1999 U.S. App. LEXIS 18509, at *7 (6th Cir. 1999).

Relator's Amendment Complaint pleads proposals as "claims." However, the work order proposals were not "claims" because they were not "request[s] or demand[s] for money." As the Amended Complaint details, once the Government sends Wolf Creek a work order, Wolf Creek must prepare a detailed work order proposal to accomplish the task including a scope of work, schedule, and total cost (including labor hours, material costs, equipment costs, and markups). *See* Am. Compl. ¶31. The work order proposal is prepared by a union member lead, who supervises work, develops work plans, and estimates cost for IDIQ tasks. *Id*. Once both parties agree on the estimated costs and scheduling, the Government awards a firm-fixed price contract to Wolf Creek

to complete the work order.[3] Am. Compl. ¶33. Wolf Creek is then required to "ensure that all invoices for completed IDIQ tasks equal the quoted prices unless…" an unforeseen field condition occurs, there is a design error, or the scope of work changes. Am. Compl. ¶34.

Based on the language in the Contract and Relator's description, it is clear that Wolf Creek's proposals were not claims. Instead, they were estimates sent to the Government to review, and the Government was free to reject, accept, or negotiate a final firm-fixed price. *See* Am. Compl. ¶33. The ordinary meaning of the word "proposal" confirms this interpretation. By its nature, the phrase "proposal" suggests that it is an offer that can be countered, rejected, or negotiated. This is especially true, whereas here, the proposal is for future work and has a pricing expiration date of 30 days. No reasonable person that was asked to submit a work order proposal would believe that the proposals itself were a "request or demand… for money or property." Nor would the receiver of that proposal consider it something other than an offer. Put simply, Wolf Creek's response to the Government's request for a work order proposal cannot be deemed a "request or demand… for money."

Furthermore, Relator's contention that Wolf Creek's work order proposals were a "request or demand…for money or property" is inconsistent with the language in the Contract. Under the Contract, it is apparent that Wolf Creek can request payment only through an invoice – not a proposal. *See* Am. Compl. ¶36. Likewise, nothing in the Contract requires the Government to make a payment after being sent a proposal. Thus, the Court finds that only an invoice can be a claim under the FCA in this case. Accordingly, as Relator plead work order proposals as claims, Relator

[3] A firm-fixed contract provides for a price that is not subject to any adjustment based on the contractor's actual cost in performing the contract. 48 C.F.R. § 16.202-1. This is unlike a cost-plus contract where the cost is determined after the contractors complete their work.

fails to adequately identify a false "claim" that was presented to the Government pursuant to the FCA.

ii. Rule 9(b) Compliance and Falsity.

"In order to comply with Rule 9(b) in FCA cases, the Sixth Circuit requires the Relator to identify a specific false claim in the complaint, or, where the complaint describes a complex and far-reaching fraudulent scheme, a representative example of a fraudulent claim." *United States ex rel. Holloway v. Heartland Hospice, Inc*., 386 F. Supp. 3d 884, 900 (N.D. Ohio 2019).

The Court notes that Relator's first representative example undercuts Relator's contention that proposals containing labor estimates constitute false claims and that Wolf Creek knew the labor estimates were false at the time it submitted its proposals to the Government. In Relator's first example, Relator listed the tasks and estimated costs outlined in a proposal, and then concluded that the estimates were knowingly false because the actual work did not take as long as Wolf Creek stated in its proposal. *See* Am. Compl. ¶¶57-59. Relator asserts that Wolf Creek only took one day for this job that was estimated in a proposal to take 116 hours. *See* Am. Compl. ¶58; Rel.'s Opp'n. 2. As Defendants note, upon review of Relator's Ex. 4, it appears that the start date was on July 31, 2018 with an end date of September 15, 2018. Thus, it took Wolf Creek more than six weeks to complete the job – not one day as Relator stated. *See Williams v. CitiMortgage, Inc*., 498 F. App'x 532, 536 (6th Cir. 2012) ("[W]hen a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations.").

In Relator's second, third, and fourth examples, Relator relies solely on industry standards to conclude that Wolf Creek's labor estimates were false. *See* Am. Compl. ¶¶60-71. However, Wolf Creek has offered no evidence to establish an objective industry-wide standard. Furthermore, industry standards generally provide the minimum or average time it takes to complete, not the

maximum. *See United States ex rel. Snapp, Inc. v. Ford Motor Co.*, No. 06-11848, 2006 U.S. Dist. LEXIS 63850, at *18 (E.D. Mich. Sep. 7, 2006), aff'd 532 F.3d 496 (6th Cir. 2008) ("[a Relator] must do more than recite conclusory allegations of [defendant's] fraudulent billing practices leading to 'payments' by the government which it would not otherwise have made."); *see also United States ex rel. Bledsoe v. Cmty. Health Sys.*, 501 F.3d 493, 504 n.12 (6th Cir. 2007) (Although courts have permitted allegations of fraud based upon 'information and belief,' the complaint must set forth a factual basis for such belief, and the allowance of this exception must not be mistaken for [a] license to base claims of fraud on speculation and conclusory allegations.).

iii. Wolf Creek failed to properly plead fraud in the inducement.

While this theory of liability is not readily apparent from Relator's Amended Complaint, Relator argues in its opposition brief that Wolf Creek's invoices under the firm-fixed price contract were based upon Wolf Creek's falsified inflated labor estimates. Accordingly, Relator alleges that Wolf Creek fraudulently induced the Government to pay more than it should have paid, and this scheme falls within the ambit of the FCA. *See* Doc #: 37 at 4-7. The Court does not find this argument availing.

FCA liability exists under a fraudulent inducement theory when a government contract is obtained "through false statements or fraudulent conduct." *See United States v. BAE Sys. Tactical Vehicle Sys., LP*, No. 15-12225, 2016 U.S. Dist. LEXIS 29785, at *8 (E.D. Mich. Mar. 9, 2016) (other citations omitted); *see also United States v. United Techs. Corp.*, 626 F.3d 313, 320 (6th Cir. 2010) (amended Jan. 24, 2011). To plead FCA under fraudulent inducement, a Relator generally must allege (1) that there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit money due. *See United States*, 2016 U.S. Dist. LEXIS 29785, at *9.

As applied to this case, this theory of liability would require Relator to plead with particularity that the alleged false labor estimates in Wolf Creek's work order proposals were material and caused the Government to pay more money to Wolf Creek than it would have paid had it known the true labor costs. However, Relator failed to properly plead such facts. The Amended Complaint's only apparent reference to materiality is as follows:

> "Santillo's falsified work order proposals were material to the Government's decision to award Wolf Creek a firm-fixed-price contract for each work order. If the Government approved a work order for funding, it accepted Santillo's labor estimates as true and did not negotiate the firm-fixed-price. If the Government knew Santillo's labor hour estimations were purposefully falsified, then the Government would have rejected his work order proposals or negotiated the firm-fixed price." Am. Compl. ¶72.

Relator alleges that Wolf Creek's alleged false labor estimates were material to the Government simply because the Government awarded a firm-fixed price contract to Wolf Creek. Relator's conclusory and speculative allegations are not enough to sufficiently plead the element of the FCA fraudulent inducement, especially where these allegations are contradicted by what actually happened in this case. Indeed, the evidence in the record establishes that the Government independently evaluates proposals with its subject matter experts based on experience, the work requested, and prior jobs completed[4]. S*ee HMS Prop. Mgmt. Grp. v. Miller*, 1995 U.S. App. LEXIS 35116, *7 (6th Cir. Oct. 31, 1995) ("When reviewing a motion to dismiss…a court [] need not accept conclusory allegations or indulge in unreasonable inferences."). It is mere speculation to assume that because the Government possibly did not exercise their right to negotiate Relator's proposals, then the work order proposals were material to the Government. *Id*.

Further, it is highly relevant to the issue of materiality that prior to bringing this action, Relator informed the Government that Wolf Creek's proposals allegedly contained inflated labor estimates. *See* Am. Compl. ¶17. Despite the Government's knowledge, the Government did not

[4] *See* Am. Compl. ¶17.

terminate the contract and continued to pay the firm-fixed price stated in the contracts. *See* Am. Compl. ¶¶17, 36. Also, during the course of this litigation, the Government awarded Wolf Creek additional contracts and paid the agreed-upon firm-fixed price for additional contracts[5] – doing exactly what Relator claimed it would not have done had the Government been aware of the scheme. "If the government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material." *Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003-04 (2016). This is a logical explanation for why the Government declined to intervene in this case. Accordingly, the Court concludes that Relator have failed to adequately plead a fraud in the inducement scheme.

C. LEAVE TO AMEND

Leave to amend pleadings under Federal Civil Procedure Rule 15(a) should be freely given in the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or the futility of the amendment. When a motion seeking leave to amend is filed while a motion to dismiss is pending, a district court is to consider the motion to dismiss in light of the proposed amendments to the complaint and determine whether the proposed amendments would cure the identified deficiencies. *See Begala v. PNC Bank, Ohio, N.A.*, 214 F.3d 776, 784 (6th Cir. 2000).

Relator's motion for leave to file its Second Amended Complaint pleads and attaches invoices Wolf Creek sent to the Government. For the reasons stated in this Opinion, Relator fails to state a claim for the FCA's fraudulent inducement theory of liability, and its Second Amended

[5] *See Id.*

Complaint does not remedy this defect. Relator's Second Amended Complaint, in large part, is essentially a restatement of its Amended Complaint and would not survive Defendants' motion to dismiss. Accordingly, Relator's motion for leave is denied. *See Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000) ("A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss.").

III. CONCLUSION

For the reasons discussed, Defendants' motion to dismiss is **GRANTED**. The claims against Defendants are **DISMISSED** with prejudice. Relator's motion for leave to file a second amended complaint is **DENIED**.

IT IS SO ORDERED.

/s/ Dan Aaron Polster November 3, 2020