

PUBLICATION

Unallowable costs under the False Claims Act: When to hold and when to fold

June 03, 2008

This article, published in the May 2008 issue of Compliance Today, appears here with permission from the Society of Corporate Compliance & Ethics. Please call 888/277-4977 with reprint and copy request.

The unallowable cost provisions have been a mainstay of fraud and false claims litigation judgments and settlement agreements. Medicare providers have long recognized the inevitable additional penalty of segregating and allocating out unallowable costs in *qui tam* litigation under the False Claims Act. The process of segregating and allocating the unallowable costs to a separate cost center in *qui tam* litigation is an arduous, time consuming, and costly task. It is a painstaking process to look back, review, and amend cost reports to identify and eliminate costs which are unallowable in *qui tam* litigation. It is a further administrative burden to track unallowable costs when a judgment and settlement agreement requires application of the unallowable cost provisions. However, the unallowable cost provisions are not applicable in every case.

The Federal Acquisition Regulations (FAR) were enacted over 20 years ago and apply to Medicare and Medicaid providers under Titles XVIII and XIX of the Social Security Act [42 U.S.C. §§ 1395-1395ggg and 1396 – 1396v]. FAR provides the roadmap for determining and accounting for unallowable costs in legal and other fraud proceedings, but that roadmap is hazy at best. Medicare providers have bright– line tests in determining unallowable costs for Medicare cost reporting purposes, but the task is not as clear cut in *qui tam* litigation.

In government contract matters, there is a Government Contract Guide which sets forth the principles and case law regarding cost allowability and the principles for determining and accounting for unallowable costs.¹ Comparable general guidance has not been forthcoming from the Department of Justice or Department of Health and Human Services, Office of Inspector General in Medicare fraud and False Claims Act litigation.