



April 2009

Spectrum Auction Bidders In Qui Tam Scam Jam

Harry F. Cole
cole@fhhlaw.com
703-812-0483

With the public issuance of letters to certain winners in Auctions 58 (PCS licenses), 66 (AWS licenses) and 73 (700 MHz licenses), the Commission has lifted the curtain ever so slightly on a melodrama that has been playing out in the Federal District Court since 2007. While we still don't know the entire cast of players, much less how the melodrama will be resolved, we can say one thing for sure: it is **NOT** a good idea to try to play cute with the FCC's bidding rules in an effort to secure undeserved bidding credits. Even if the FCC doesn't catch you, a little-known provision of Federal law provides private parties both a major league financial incentive to blow the whistle on such misconduct **and** a non-FCC forum in which to blow that whistle.

The source of the somewhat obscure process is the False Claims Act. Usually invoked by "whistleblowers" eager to call attention to waste in the government procurement process (think hammers bought by Uncle Sam for \$5,000 a pop), the FCA permits anyone to file a complaint "on behalf of the U.S. Government" to recover ill-gotten gains. (The *cognoscenti* refer to such actions as "*qui tam*" suits – don't ask why.) To sweeten the deal, another provision of the law also permits the person making the claim to skim off up to 30% of any settlement or damages award that might result. And since the Act *also* provides for *treble damages*, the whistleblower's potential payday can easily reach into the eight digits.

The FCA first snuck into the FCC's back yard several years ago, when allegations of misconduct were directed against a number of bidders in FCC auctions. The claim was that all of the targeted bidders – who had claimed entitlement to bidding credits – were in fact fronts for other real parties in interest who would not have been entitled to such credits. As a result, according to the allegations, the government was underpaid for the spectrum to the tune of tens of millions of dollars. The case was litigated over several years. It was finally resolved in a settlement in which the accused party did *not* admit any guilt, but still coughed up about \$130 million to put the whole thing behind him. Mr. Whistleblower, *i.e.*, the guy who initially invoked the False Claims Act, took home more than \$30 million.

Very shortly after that settlement was reached in 2006, two more cases were brought. They targeted completely different parties and deals, but the litigation approach was strikingly similar: the plaintiffs alleged that successful bidders in certain FCC auctions had improperly claimed to be entitled to bidding credits and had, thus, cheated the Feds out of a bunch of money.

These most recent cases were placed “under seal” by the courts, meaning that the proceedings have been withheld from the public eye. But a couple of months ago, the presiding judges agreed to lift the seal just enough to permit the FCC, on behalf of the government, to publicly disclose the complaints and to request the targeted applicants to respond to the allegations. In the letters recently released by the Commission, it did just that.

At this point it is impossible to say what will come of these cases. It is entirely possible that the bidders are being wrongly accused, and that they will ultimately be vindicated. It is also possible that they are guilty as charged. And, as was the case in the earlier *qui tam* case, it is possible that the case will be settled without any admission of guilt, but with a sizable payment to make it all go away.

But however these cases shake out, one thing is clear: the availability and potential profitability of *qui tam* actions are no longer hidden secrets. Word has obviously started to get around, doubtless in large measure because of the impressive pay-outs that await successful plaintiffs.

Because of this development, anyone claiming bidding credits in a spectrum auction should take special care to avoid any circumstances which could trigger suspicions and accusations of impropriety. Even if your deal is squeaky clean, the filing of a *qui tam* suit can drag you into long, stressful and expensive litigation. Remember, in the 2006 settlement, the alleged wrong-doer admitted no guilt, but still had to suffer through several years of litigation and still ended up paying more than \$100 million in settlement.

Remember, too, that *qui tam* suits can be brought by pretty much anybody, including former spouses, disgruntled former employees, disappointed former business associates, etc., etc. You get the point. Anybody with a big grudge and a little knowledge can cause major problems even if the grudge is unjustified and the “knowledge” turns out to be completely inaccurate.

So if you plan to claim bidding credits in a spectrum auction, proceed with caution.