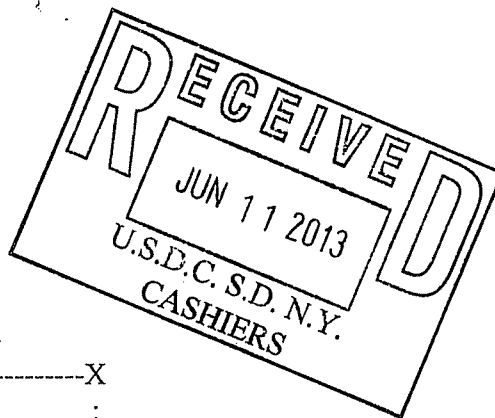


JUDGE CASTEL

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13 CIV 3979



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

Plaintiff,

v.

KLEINBERG ELECTRIC INC.,

Defendant.
-----X

13 Civ. ____

COMPLAINT

JURY TRIAL DEMANDED

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 Kleinberg Electric Inc. ("Kleinberg" 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, consistent with federal regulations, by a disadvantaged

business enterprise (“DBE”). Rather than hire a DBE 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 DBE as a pass-through to obtain a subcontract worth hundreds of thousands of dollars for electrical work on the Dey Street Concourse at the Fulton Street Transit Center.

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 Kleinberg is one of the largest electrical contractors in the New York metropolitan area with offices at 437 West 16th Street, New York, NY 10011.

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.” *Id.* To perform a “commercially useful function,” the regulations require that the DBE “be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material and installing (where applicable) and paying for the material itself.” *Id.*

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 Transit Administration (“FTA”), which is an agency of the DOT. *See* 49 C.F.R. § 26.3(a).

The Dey Street Project Contract

11. The Metropolitan Transportation Authority (“MTA”) oversees the construction of the Fulton Transit Center, which includes the Dey Street Concourse. The design and construction of the Dey Street Concourse (the “Dey Street Project”) is funded entirely with grant money awarded by the FTA.

12. As a condition of receiving DOT funding for the Dey Street Project, the MTA was required to establish DBE goals for the project and to require the general contractor to make good faith efforts to reach the DBE goals.

13. Before the bidding process for a federally-funded project commences, the MTA’s Department of Diversity and Civil Rights establishes the DBE goal for the project. After the goal is set, the contract is advertised, and the MTA selects a bidder. The bid package submitted by bidders must contain a schedule of DBE participation (“Form A”) identifying all of the DBE subcontractors the bidding prime contractors intend to use for the project. The Form A identifies the names of the DBEs, a description of the services they will perform, and the proposed start and end dates of their services. If selected, the prime contractors are required to submit monthly DBE progress reports (“Form Es”) identifying the amount of money paid to the DBEs. The Form Es must be submitted for the contractors to be paid for requisitions they submit to the MTA.

14. With respect to the Dey Street Project, the MTA set the DBE goal at 10 percent of the contract. The total value of the contract was estimated at approximately \$127 million. Thus, unless MTA granted a waiver, the winning bidder was required to hire DBEs to perform at least \$12.7 million worth of work.

15. In anticipation of its bid to be the prime contractor on the Dey Street Project, Slattery Skanska ("Skanska") subcontracted with Kleinberg to perform electrical work on the Dey Street Project. Kleinberg expressly represented to Skanska that it would utilize J&R Rey Electrical ("J&R Rey") as a second-tier DBE subcontractor in order to help Skanska reach its DBE goals.

16. Accordingly, in 2005, as part of its bid package for the Dey Street project, based on Kleinberg's representation of its intent to use J&R Rey as a subcontractor, Skanska submitted to the MTA a Form A listing, among others, J&R Rey as a second-tier DBE subcontractor. The Form A indicated that the contract amount for J&R Rey would be \$600,000.

17. In 2005, the MTA awarded contract A-36025 (the "Dey Street Project Contract") with the understanding, based on representations in the Form A, that the DBE obligations would be met.

THE FRAUDULENT SCHEME

18. Once work on the Dey Street Project Contract commenced, in order to be paid by the MTA, monthly requisitions detailing the expenses incurred were required. Skanska relied on its subcontractors, including Kleinberg, to provide information necessary to complete the monthly requisitions.

19. Between September 2005 and April 2007, at least 34 monthly requisitions were

submitted to the MTA for the Dey Street Project Contract.

20. Each monthly requisition contained a certification that “the payment requested, all as presented in this Application for payment, are correct and in full compliance with the terms of the Contract and all authorized modifications thereto.”

21. Pursuant to the Dey Street Project Contract, MTA also required monthly reports (“Form Es”) on progress towards meeting the project’s DBE Participation Goal. These reports had to be submitted to both the MTA Office of Civil Rights and to the MTA Procurement Officer for the Dey Street Project Contract. Skanska relied on its subcontractors, including Kleinberg, to provide information necessary to complete the Form Es.

22. Each monthly requisition submitted to the MTA for the Dey Street Project Contract was accompanied by a Form E. The Form Es included the following certification: “By signing this form, the person individually and on behalf of the Contractor represents to the Authority that the information contained herein is truthful, accurate, complete and not misleading.”

23. Each Form E contained the following 4 questions:

Did any of the DBE subcontractors rent/lease equipment from the prime contractor or an affiliate company during the report period?

Did any of the DBE subcontractors utilize employees or former employees of the prime contractor or an affiliate company during the reporting period?

Did any of the DBE subcontractors subcontract any portion of its work to a non-DBE during the report period?

Has the scope of work or the subcontract amount for any of the DBE subcontractors changed since the last report?

24. Relying on information provided by Kleinberg, on every Form E that Skanska

signed between September 2005 and April 2007 pertaining to work performed by J&R Rey, Skanska circled "no" for its response to each of the above questions.

25. The information was false because Kleinberg never intended for J&R Rey to perform the work listed therein. Instead, Kleinberg solicited other subcontractors and secured contracts for materials that were then processed for payment through dual-party checks, using J&R Rey as the conduit to earn DBE credit. J&R Rey's services were neither needed nor used and J&R Rey was involved in the transaction solely to allow Kleinberg to represent falsely to Skanska that Skanska could earn DBE credits.

Defendant's Knowledge of the Falsity of the Form Es

26. Defendant knew that the Form Es that it caused to be filed were false, as indicated in documents and statements from both Kleinberg and J&R Rey employees.

27. Specifically, the President of J&R Rey confirmed to the MTA's Office of Inspector General that it never performed a commercially useful function on the Dey Street Project. Moreover, during an interview regarding a separate contract with an investigator from the MTA's Office of Inspector General, one of the owners of Kleinberg admitted that J&R Rey generally did not perform a commercially useful function on Kleinberg's projects.

28. Kleinberg's purchasing records also evidence Kleinberg's practice of paying J&R Rey a commission for Kleinberg's purchases of materials "through" J&R Rey in order to earn DBE credit. For example, on July 10, 2006, Kleinberg paid \$70,256.21 to another supplier for materials for the Dey Street Project and then drafted a check to J&R Rey for \$1,405.12, representing a two percent commission for the fraudulent arrangement. Kleinberg's records regarding the transaction contain the following notation: "materials paid through J&R Rey."

29. Finally, Kleinberg's records show that Kleinberg knowingly paid workers on the Dey Street Project with dual-party checks to make it appear as though J&R Rey was getting paid for the work. For example, on June 9, 2006, Kleinberg paid Joseph Mascaro, an electrician on the Dey Street Project, gross wages of \$2,025.00 with a dual-party check made out to both the worker and to J&R Rey. That same day, Kleinberg drafted a check for \$40.50 to J&R Rey, representing the two percent commission on these wages.

30. Kleinberg's statements and documents reflect that Kleinberg knew of, and actively orchestrated, the fraudulent DBE pass-through scheme involving J&R Rey.

FIRST CLAIM

Violations of the False Claims Act: Presentation of False Claims

(31 U.S.C. § 3729(a)(1) (2006), and, as amended, 31 U.S.C. § 3729(a)(1)(A))

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

32. The United States seeks relief against Defendant under Section 3729(a)(1) (2006), and, as amended, 31 U.S.C. § 3729(a)(1)(A), of the False Claims Act.

33. 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 the MTA, a recipient of federal funds, and such funds were spent or used by the MTA on the Government's behalf and to advance a Government interest.

34. 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), and, as amended, 31 U.S.C. § 3729(a)(1)(B))

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

36. The United States seeks relief against Defendant under Section 3729(a)(2) (2006), and, as amended, 31 U.S.C. § 3729(a)(1)(B) of the False Claims Act.

37. 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 that was made to the MTA, a recipient of federal funds, and such funds were spent or used by the MTA on the Government's behalf and to advance a Government interest.

38. 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

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

40. 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

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

42. 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.

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

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

45. 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

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

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

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

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

50. 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);

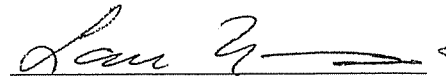
(b) On the Third, Fourth, and Fifth Claims for Relief, in an amount to be determined at trial, together with costs and interest; and

(c) awarding such further relief as is proper.

Dated: New York, New York
June 11, 2013

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