



The US False Claim Act as a Mean to Protect Administrative Contracts: A Comparative Study of the United States and Kuwait

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Abstract

Goal: A state is in danger to be over-charged in its administrative contracts. To prevent such a danger, the United States promulgated what is called the False Claim Act which seeks to protect the States against such danger. This Act enforces different penalties on whoever exploits the state through these contracts. In the course of comparison, this study reviews detailed research in this Act in comparison to different Kuwaiti laws which were issued to achieve similar objective.

Study Methodology: The Study adopts the descriptive method to explain the US Act and its historical development. It also used the comparative method to show the extent of Kuwait need to promulgate such Act.

Study Results: The study pointed out that despite the fact Kuwait adopted many laws to protect the state from being overcharged in its administrative contracts, it did not arrange full protection to the state public money.

Study: In its conclusion, the study urges the Kuwaiti legislature to adopt the U.S. way in enacting direct act that prevents overcharging the state in its administrative contracts.

Keywords: Kuwait - USA - Administration - Contracts - Government - False Claim Act - Public - State.

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1. Introduction

“The Department of Justice will hold accountable contractors that seek to profit unfairly at the expanse of U.S. troops and taxpayers...Those who expect to do business with the government must do so fairly and honestly”⁽¹⁾.

On May 26, 2017, the US Department of Justice issued a press release in which it stated that a Kuwaiti company had agreed to pay the US Department of Defense (DOD) \$93 million and renounced up to \$249 million that it should have received from its contracts with the DOD. According to these contracts, the company was to provide US troops with food from 2003 to 2010. The US Department of Justice and the company settled: the Department would abandon its civil, administrative, and criminal charges against the company. The company avoided having to pay \$27.9 million in fines for the indictments, and the Department of Justice was required to lift a proposed seven-year suspension against the company prohibiting the company from entering into contracts with the US government.

The company faced an indictment for civil fraud and a criminal misdemeanor for theft of government funds. Such charges are raised against any party to a US governmental contract in which the other party seeks unfair profit from the governmental party. The US government resorted to these charges to maintain fairness and honesty in signing such contracts and implementation of their clauses.

According to the Department of Justice, the investigation on those charges began when a whistleblower filed a civil lawsuit that was based on qui tam under the False Claims Act,⁽²⁾ which allows individuals to file lawsuits before the US courts on behalf of the federal government against whoever unfairly charges the US government in its contracts. The act allows US agencies to join lawsuits and

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- (1) Deputy assistant attorney, US Department of Justice Civil Division press release, May 26, 2017.
- (2) US ex rel. Kamal Mostafa Al-Sultan v. Agility Public Warehousing Co., K.S.C. et al., No. 1:05-cv-2968-GET (N.D. Ga.).

stand against those that committed such offenses. As for the individuals who file a civil lawsuit in accordance with the False Claims Act, he or she shall be rewarded with part of what would be returned to the US government from the courts' decisions⁽³⁾.

According to the civil lawsuit, the company allegedly overcharged the DOD in making it pay for fruits and vegetables at full price while the contract obliged the company to pay 10 percent. Moreover, the lawsuit stated that the company failed to execute its obligation: disclose any discount that it granted to any supplier based in the United States. The company was also charged with having the United States to pay for its contracts at an inflated price. The company transferred fees from one of the contracts to be paid by the US government. The Department of Justice revealed that the suspension would have been expanded to more than three hundred entities that were affiliated with the said company.

Compared to civil and commercial contracts, administrative contracts, in which governmental agencies are parties, are vulnerable to outrageous overcharging⁽⁴⁾. This is especially true with the different concept of relationships between those parties and public funds. In other words, while parties in civil and commercial contracts pay their obligations raised in such contracts with their own money and through their own possession, the governmental agencies and administrations, as parties to administrative contracts, make transactions to execute these contracts using government money and through taxpayer funds. Hence, in administrative contracts, the public budget is at stake.

In fact, this explains the different procedures required to set the two kinds of contracts. In general, governmental agencies that intend to

(3) According to the US Department of Justice's press release, the plaintiff who filed this civil lawsuit received \$38.85..<https://www.justice.gov/opa/pr/defense-contractor-resolves-criminal-civil-and-administrative-liability-related-food>.

(4) For further discussion on administrative contracts in comparison with civil and commercial contracts see Dr. Alreshidi, Abdallah, (2017), *Administrative Contracts*, Mo'asasat Dar Almirante, 1st edition, p. 17, and Dr. Sari, Jorji, (2004), *The General Principles of Administrative Law*, Dar Alnahdha, 4th edition, p. 877.

establish administrative contracts are obliged to follow long and complicated administrative procedures to sign those contracts. They have to go through strict scrutiny from different audit departments in the government to ensure fair and honest agreements with every contractor to maintain and prevent overcharging the governmental budget.

Because the government through its agencies and departments resorts to private sectors to meet public needs and accomplish many tasks (whether to build streets and buildings or provide military troops with food and other supplies), the government is involved in an endless number and variety of contracts. This makes supervision difficult. Lawmakers don't hesitate to promulgate different laws and regulations. Huge sums of money and many complications affect administrative contracts, so contractors see opportunities to gain excessive profits beyond what they could obtain from civil or commercial ones. Thus, laws and regulations are necessary to prevent overcharging⁽⁵⁾.

Outrageous overcharging in administrative contracts has several impacts on governments and the lives of their people. Overcharging increases the expenses of government planning and development project, jeopardizes the accomplishment of some projects at the expense of others, and risks quantity and quality of projects. In preventing outrageous overcharging, state agencies can spare significant amounts that can be earmarked for future improvements. Overcharging puts a strain on the state's budget and thus minimizes alternatives that should have been open beforehand to maintain a certain pace of development in public services and utilities. When overcharged, the government will be limited in providing sufficient services to individuals. It either postpones some needed projects for later completion or risks undertaking them while compromising quality or quantity.

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- (5) It is worthy mentioning that there is no expressed definition for the term “outrageously overcharging” in relation to administrative contracts. Yet, this can be comprehended as an excessive raise of the expenses of those contracts that governmental bodies, as one of their parties, are obliged to pay. In other words, it is the increase of the amount of those contracts on public budget that private parties would not accept to pay in ordinary contracts, known in private law such as civil or commercial laws.

Outrageous overcharging affects people as well as they do not enjoy a satisfying level of public services. They see that what they pay in taxes is not reflected in the quality of services. They eventually look with suspicion on their government and their handling of public funds. With this attitude held against the government and its agencies, people face the challenge of preventing corruption and fighting for equality and justice.

Whistleblowing laws protect the one who discloses any offense committed against the government and are effective to combat corruption. In 2015, the Parliamentary Assembly of the Council of Europe urged ministers to “promote further improvements for the protection of whistleblowers by launching the process of negotiating a binding legal instrument in the form of a framework convention that would be open to nonmember state and cover disclosure of wrongdoings by persons employed in the field of national security and intelligence.”⁽⁶⁾ Meanwhile, the Committee on Legal Affairs and Human Rights of the Council of Europe pushed the protection of whistleblowers; they are already seen as traitors rather than protectors of state money⁽⁷⁾. “Whistleblowers play an essential role in exposing corruption, fraud, mismanagement and other wrongdoing that threaten public health and safety, financial integrity, human rights, the environment and the rule of law, etc. The absence of effective protection can therefore pose a dilemma for whistleblowers. They are often expected to report corruption and other crimes, but so can expose them to retaliation.”⁽⁸⁾

This article deals with legislation promulgated to protect administrative contracts from outrageous overcharging. It studies the False Claims Act, adopted by the US Congress in 1863. It also analyzes this act’s different amendments. In doing so, this article points out the main elements of these amendments and their evolving consequences and applications. It focuses on their impact and aims to refrain contractors from outrageously overcharging the government for its contracts.

(6) Recommendation 2027 of (2015).

(7) Study conducted by the committee in (2009).

(8) Transparency International’s Secrétariat, (2013).

This article focuses in depth on the False Claims Act. Then it will analyze the Kuwaiti situation in preventing outrageous overcharging.

2. The Outrageous Overcharging in Administrative Contracts in The United States:

In the United States, the government is protected from outrageous overcharging by the False Claims Act of 1863,⁽⁹⁾ or the “Whistleblowing Act.”⁽¹⁰⁾ Although the act was well phrased at the time it was enacted and sufficiently stated, it went through alterations and changes beginning in 1943. These amendments have impacted whistleblower reward requirements-the amount to be paid. The act in its original sphere and its amendments are reviewed below.

2.1.The History of the False Claims Act and Its Amendments:

The False Claims Act dates back to the Civil War. It was promulgated on March 2, 1863⁽¹¹⁾. President Lincoln pushed its enactment⁽¹²⁾. It mainly aimed to allow individuals to undertake their duty in helping states’ agencies fight corruption and protect the public budget from illegal expenses due to outrageous overcharging imposed by contractors in administrative contracts. The False Claims Act’s

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- (9) Johnson, R. (2003), *Whistle-Blowing: When It Works-and Why* (Boulder, CO: Lynne Rienners), 116 (Whistleblowing laws were first adopted in the United States to prevent unnecessary expenses the government is obliged to pay).
 - (10) Whistleblowing requires the disclosure of information in a record of an organization and is not considered wrongdoing; a person who uncovers the information must be a member of this organization rather than a journalist or public officer (Johnson, 3). Another definition is “an act of an individual within an organization who discloses information in order to report and correct corruption” Schultz, D. & Harutyunyan, K. (2015), “Combating Corruption: The Development of Whistleblowing Law in the United States, Europe, and Armenia,” *International Comparative Jurisprudence* 1, 88.
 - (11) Despite the fact that the whistleblowing law was first adopted in the United States in 1863, others argued for its enactment in 1777 with a law that encouraged officers in the military to announce any abuse to war prisoners (see Kohn, S. (2011), “The Whistle-Blowers of 1777,” *New York Times*, 23.
 - (12) The False Claims Act was originally adopted in the United States, but other European states have similar laws. The US version is well defined in comparison with European counterparts (Schultz & Harutyunyan, 87-97).

adoption of the Latin term *qui tam*⁽¹³⁾ means that any individual has the right to resort to the court on behalf of himself as well as on behalf of the government to file a lawsuit to declare contractor fraud in administrative contracts. Without a *qui tam* action, individuals⁽¹⁴⁾ would have no legal standing to file such a lawsuit unless the government agreed to join the lawsuit.

The act had different amendments that affected its shape from various points of view. The 1943 amendment specified the knowledge of the government as a reason by which the relator's *qui tam* would be dismissed. It also reduced the amount that the relator could received from the *qui tam* lawsuit. This amendment sought to eliminate false cases that the US courts faced after the Second World War.

In order to avoid any kind of unnecessary payment to individuals who brought a *qui tam* lawsuit, the amendment made it clear that no reward would be paid to such individuals if the government had prior knowledge regarding the acts on which the lawsuit was based. Moreover, it reduced the reward that was to be received by the relator and provided no minimum amount whenever the government would not have any recovery from the contractor if it had not been the relator's lawsuit.

Because of the 1943 amendment's complications affecting the accessibility of rewards that would reach the relators from such lawsuits, the government lost *qui tam* initiations from individuals. The 1986 amendment⁽¹⁵⁾ brought back *qui tam* lawsuits to enable individuals to bring lawsuits under the False Claims Act⁽¹⁶⁾. The main changes included the abandonment of the prior government knowledge provision in terms of refusing rewards to the relator. The relator would be

(13) The short form of the Latin *qui tam pro domino rege quam pro se ipso in hac parte sequitur*.

(14) The word *whistleblower* is also used to refer to the individual who brings the *qui tam* action under the False Claims Act.

(15) Walkman, M. (1989), "The 1986 Amendments to the False Claim Act", *Public Contract Law Journal*, vol. 18, No. 3, p. 469.

(16) Depoorter, B. & De Mot, J., (2006), "Whistle Blowing: Economic Analysis of the False Claim Act", *Supreme Court Economic Review*, vol. 14, p. 140.

rewarded as long as the actions were not subject to public disclosure⁽¹⁷⁾. This amendment set a minimum for the relator's recovery.

In 1988, the “principle architect clause” was added to the False Claims Act. It refrained contractors subject to qui tam lawsuits from filing lawsuits against each other as long as they were considered the principle architect of the fraud⁽¹⁸⁾. Furthermore, another amendment was made in 2009. This amendment was enacted as part of the Federal Enforcement and Recovery Act (FERA). It came as a response to the courts' interpretations of the 1986 amendment. It presented clear meaning in some of the terms, used by this amendment⁽¹⁹⁾. It is

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- (17) Despite the amendment of 1986 not requiring proof of an intent to defraud, courts keep rejecting actions on the basis of collective knowledge where the government relied on a combination of the knowledge of more than one employee of the defendant to prove such intention. See, for example, *United States ex rel. Harrison v. Washington Savannah River Co.*, 353 F. 3d 908 (4th Cir. 2003), *United States v. President & Fellows of Harvard Coll.*, 323 F. Supp. 2d 151 (D. Mass. 2004), and *United States v. United Tech. Corp., Sikorsky Aircraft Div.*, 51 F. Supp. 2d 167 (D. Conn. 1999). Indeed, the DC Circuit plainly declared that the collective knowledge criteria “prove scienter by piecing together scraps of innocent knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing in connection with a claim seeking government funds” (*United States v. Science Applications Int'l Corp.*, 626 F. 3d. 1257 (DC Cir. 2010)).
- (18) Loretta Calvert, “The Qui Tam Provision of the False Claims Act: Congressional Missile or a Net Full of Holes?,” *Annual Survey of American Law*, 439.
- (19) In fact, the 2009 amendment came as a response to an Arkansas federal court's request: “The Court sympathizes with anyone litigating under the False Claims Act. Perhaps Congress will elect at some point to give legislative attention to the FCA to resolve some of the still unresolved questions about the Act's application.” *United States ex rel. Montgomery v. St. Edward Mercy Medical Center*, 2008 WL 110858 (E.D. Ark. Jun. 8, 2008). As stated in the preamble of said amendment, such an amendment was adopted to correct courts' misinterpretation when applying the act. “Court decisions have created a complex pathwork of procedural and jurisdictional hurdle that have often derailed meritorious actions and discouraged private citizens from qui tam action.” Thus, “This legislation is particularly relevant during this period of increase reliance on private contractors to perform what have traditionally been viewed as governmental functions. These amendments to the False Claims Act will strengthen the tools available to combat those who seek to pilfer Government funds, resulting in a recovery of losses from fraud, as well as deterring those who otherwise might consider defrauding the Government” (see, e.g., the Supreme Court decision issued under the 1986 amendment to the False Claims Act in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008)).

noteworthy to mentioned that 2009 amendment was to be implemented retroactively⁽²⁰⁾. Thus, it was applied to pending cases even though they were brought before the enactment of the amendment⁽²¹⁾.

The False Claims Act was partly amended in 2010 as part of the Patient Protection and Affordable Care Act (PPACA)⁽²²⁾. It aimed to alleviate the application of public disclosures as an obstacle the relator would face in receiving a reward⁽²³⁾. Yet this amendment was to be applied prospectively. Therefore, it was not applied to pending cases.

2.2. Provisions of the False Claims Act:

Section 3729 specifies the actions for which individuals will be held responsible based on the False Claims Act. It specifies five situations in which contractors may face such liability. The Act states,

Any person who-

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (B) knowingly makes, uses, or cause to be made or used, a false record or statement material to a false or fraudulent;
- (C) conspires to commit a violation of subparagraph (A), (B), (C), (D), (E), (F), or (G);
- (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;
- (E) is authorized to make or deliver a document certifying receipt of

(20) Salcido, R., (summer 2010), "The 2009 Amendments False Claim Act", Public Contract Law Journal, vol. 39, No. 4, p. 763.

(21) McCubbin, T. & Fitzgerald, T., (November 2006), "As Claim Penalties Mount, Defendants Scramble for Answers Qui Tam Liability", the Business Lawyer, vol. 62, No. 1, pp. 103-133. See also, Stewart, D., (spring 1991), "Recent Developments in the False Claim Act", Public Contract Law Journal, vol.20, No. 3, p. 386.

(22) Barnett, B. & Greis, J., (March 2015), "False Claim Act Litigation Under the Affordable Care Act", American Bar Association, vol. 32, No. 2, p. 22.

(23) The plaintiff alleged that she was discharged from her job because of her qui tam action against her coworkers. *US & Wilson v. Graham County Soil & Water Conservation District*, US Court of Appeal, No. 03-1122, April 29, 2004.

property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

- (F) Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property;
- (G) Knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

Paragraph (G) was formulated in the opposite act, where the prohibited action is to avoid the amount of money or property that was supposed to be received by the government, or at least minimized such amount. On the other hand, paragraphs (D), (E), and (F) are connected to individuals who misused power and jurisdiction over governmental money or properties and caused either to lose, or minimize, their amount.

In cases where the defendants failed to comply with applicable statutes and regulations or contractual clauses, courts relied on the certification criteria in order to make a ruling. In fact, the Second Circuit Court⁽²⁴⁾ defined express certification as “a claim that falsely certifies compliance with a particular statute, regulation, or contractual term, where compliance is a prerequisite to payment.” On the other hand, it referred to an implied false certification claim as “based on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment.” Nevertheless, and in the light of the amendment of 2009, the First Circuit Court refused to adopt the certification criteria⁽²⁵⁾. It expressly stated that “the text of the FCA does not refer to factually false or legally false claims, nor does it refer

(24) *Mikes v. Straus*, 274 F. 3d. 687, 698 (2d Cir. 2001).

(25) *United States ex rel. Hutcheson and Brown v. Blackstone*, 647 F. 3d 327 (1st Circ. 2011).

to express certification, or implied certification. Indeed, it does not refer to certification at all. In light of this, and our view that these categories may do more to obscure than clarify the issues before us, we do not employ them here.”

As a consequence of committing these deeds, whoever is held responsible for such actions “is liable to the United States Government for civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990...plus 3 times the amount of damage which the Government sustains because of the act of that person.”

On the other hand, the act opens the door for offenders to partially avoid severe consequences by declaring the violation within thirty days of obtaining the information and completely cooperating with the governmental agencies investigating such violations. In order to enjoy the use of such procedures, individuals must initiate such declarations before the commencement of any criminal prosecution or civil or administrative action⁽²⁶⁾. When such conditions are met, the individual committing such violations should pay no less than twice the amount of the damages caused to the government.

The terms knowing and knowingly used by the act refer to “actual knowledge,” “deliberate ignorance of the truth or falsity of the information,” or “reckless disregard of the truth or falsity of the information.” The act does not require the specific intent to defraud in the burden of proof. The word claim used in the act refers to any “request or demand” for governmental money or property brought by a governmental employee and agency or filed by a contractor or grantee when spending it on behalf of government. The act also defines the word material as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”

The US government has sixty days beginning from the day the complaint is first made known⁽²⁷⁾ to choose either to advocate the

(26) Section 3729, para. (A)(2), “Reduced Damages.”

(27) The sixty-day period can be extended by the court in response to a request from the government.

complaint and “proceed with the action” or refuse to do so by “notify[ing] the court that it decline[s] to take over the action.” And when the government chooses the latter option, the person who brought the complaint may proceed at his own expense.

While dealing with the complaint, the act allows the government to settle the action with the defendant through an alternative remedy against the person’s will who brought the complaint if the court finds such a remedy “fair, adequate and reasonable under all the circumstances.” The act explains how the rewards for the individual bringing the complaint shall be determined.

Under the title “(d) Award to QUI TAM Plaintiff,” the act states that if the government proceeds with the complaint, the plaintiff should receive an amount that is not less than 15 percent and no more than 25 percent of the amount recovered by the government, plus reasonable expenses⁽²⁸⁾. If the government decides not to proceed with the complaint yet the court finds there is an outrageous overcharge in the administrative contract, the plaintiff should be awarded an amount that is no less than 25 percent and no more than 30 percent of the amount recovered by the government, plus reasonable expenses.

The amount of the reward can be reduced to no more than 10 percent of the amount recovered by the government if the plaintiff relied on information that was publicly announced. Moreover, if the plaintiff was found guilty of violating Section 3729 because of his or her role in the matter of the complaint, he or she shall be exempted from the civil action while not receiving any reward. Finally, in case the government refuses to proceed and the plaintiff decides to continue with the complaint, and the court rules in favor of the defendant, the plaintiff still has the right to receive an amount that covers reasonable attorney’s fees and expenses. Whistleblowing laws aim to either encourage individuals to disclose reasonable expenses that contractors

(28) Interestingly, the False Claims Act originally awarded plaintiffs up to 50 percent of the amount recovered by the government. The 1943 amendment significantly reduced this amount, resulting in claims ceasing. In 1986, the act adopted the arrangement described above.

might commit using governmental funds or motivate them to do so while seeking compensation granted to them by such laws⁽²⁹⁾.

Finally, the act lays down situations in which governmental employees and agencies for certain reasons are exempted from being the subject of any claim based on the False Claims Act⁽³⁰⁾. The act denies courts jurisdiction on complaints raised by former or present members of the armed forces against other members of the armed forces as long as the plaintiffs had received the information during their service.

The act also keeps plaintiffs from raising complaints against members of Congress, members of the judiciary, and senior executive branch officials only if the information on which the complaints are based is known to the government. The act refers to the Ethics in Government Act of 1978 in its list of such officials:

- 1 - the president of the United States
- 2 - the vice president of the United States
- 3 - any officer or employee in the executive branch
- 4 - any employee who was appointed in accordance with Section 3105 of US Code title 5-Government Organization and Employees Act
- 5 - any employee who was appointed to the executive branch and who is of a confidential or policy-making character
- 6 - the postmaster general, the deputy postmaster general, the board of governors of the US Postal Service, and any officer or employee of the US Postal Service
- 7 - the director of the Office of Government Ethics and any designated agency
- 8 - any civilian employee not included in clause 3

The act prohibits complaints based on allegations or transactions that are already subject to lawsuits to which the government is a party.

(29) Schultz & Harutyunyan, (2015), 89.

(30) Section 3730(e), "Civil Action for False Claims."

Such complaints also are prohibited if they are based on something already subject to a public hearing or investigation, whether federal, criminal, civil, administrative, or congressional or published in the media-unless the plaintiffs were the original source of such information⁽³¹⁾.

In order to be accepted and hence reviewed, such complaints must be filed within six years of the date on which the violation was committed. The government must take action within three years after an official charged with the responsibility of dealing with such violations knew or should have known about the violation. No action can be taken more than ten years after the violation.

The False Claims Act is clearly effective as a mean to fight outrageous overcharging. The legislature did not hesitate in attacking this subject with expressly direct clauses that sought to protect public funds, punish offenders, and inspire individuals to report what they might discover relating to unreasonable government payments. A monetary reward is appropriate for those who bring such offenses to light, and they should be protected from any negative outcome that they might face as a *qui tam* relator.

3. Outrageous Overcharging in Administrative Contracts in Kuwait:

Even though the Kuwaiti legal system does not have specific legislation that expressly deals with outrageous overcharging in administrative contracts, it has adopted laws that should somehow protect public money and governmental funds from being subject to any misuse⁽³²⁾. By issuing such laws, the legislature has tried to use the state's money and properties wisely.

(31) The act specifies the term *original source* as one having the information before it was publicly announced and who voluntarily disclosed based on such information or added new and independent material.

(32) In Kuwait although the establishment of administrative contracts pass many stages and steps, those contracts can be easily fallen under the risk of being subject to be outrageously overcharged. This happens by the exaggeration of the price of the different elements of the contracts, or through reaching the point where the contractors became the sole supplier who could manipulate the price of the contracts.

Yet such laws still do not prohibit outrageous overcharging in administrative contracts. Therefore, two public authorities were established to supervise the signing of administrative contracts: the Kuwait Audit Authority and the Public Department of Legal Opinion and Legislation. The new Public Authority of Anti-Corruption also represents the scope of the legislature's intention to control the way government employees and officers handle public money. These laws that are the following:

3.1. The Law of the Disclosure of Commissions Relating to Contracts Signed by the State, No. 25/1996:

This law was adopted after a mass movement undertaken by the Kuwaiti MPs against what they suspected to be governmental officers accepting commissions from companies that submitted bids for administrative contracts. This law is not meant to ban such commissions but rather ensure transparency in governmental contracts. It lays out various punishments for failure to comply.

Article 1 lists the different government agencies subject to the law⁽³³⁾. They include workers and servants at any ministry, as well as other governmental administrations. It is applicable to employees at the Kuwaiti Municipal, governmental public authorities, and companies in which the Kuwaiti government owns no less than 50 percent of the capital. Yet Article 2 clearly states that all contracts relating to military weapons and dealing with other military affairs shall be ruled by this law whenever transactions reach 100,000 Kuwaiti dinar or

(33) This article reads as follows:

The provisions of this Law shall be applied to the following bodies:

- 1-The governmental bodies including the ministries and the public administrative bodies of which is formed the State administrative machinery.
- 2-Kuwait Municipality.
- 3-The public authorities and public institutions.
- 4-Companies that are fully owned by the State, or of which no less than 50% of the capital is held by the State or any other public legal persons.

more⁽³⁴⁾. The law enforces the disclosure of commissions in these contracts regardless of the procedures through which they were signed. This article obliged individuals to disclose commissions paid in relation to the above contracts. For instance, the Public Department of Legal Opinion and Legislation concluded, “Based on the above-mentioned, Kuwait Airways shall abide by the provisions of Law no. 25 of 1996 whether it has concluded a contract inside the country or abroad, with government or international bodies, or in coordination with GCC countries.”⁽³⁵⁾ Kuwait Airways is totally owned by the Kuwaiti government.

Meanwhile, Article 3 prevents any delay that might deliberately occur by drawing a deadline within which the disclosure of commissions must be presented. In fact, it establishes dual obligations on both parties of the commission. Both the providers of the commissions as well as the receivers must disclose it within thirty days of receiving it. This is true whether the commission is a sum of money that is clearly presented as a commission or is a gift or even a return of consultancy or any kind of benefit. Moreover, the law requires the commission to be fully disclosed in detail. In relation to the existence administrative contracts, the law provides a period of thirty days to submit the commission, beginning from the day when the law came in force.

(34) All contracts of import, export, purchase, commitment, and public works including the transactions of weapons and all types of military materials as well as any other type of contracts concluded by bodies referred in above Article, regardless of their type or method of their conclusion, and whose value is not less than KWD 1000, whether being concluded through an international or local tender, or through negotiation or direct order, shall include an express text on whether, or not, the party contracting with any of these bodies had paid or will pay, or has provide or will provide any cash or in-kind commission or any kind of benefit to underlying declared or undeclared intermediary in the contract. Should it be stipulated that such commission shall be paid the aforementioned contracting party shall have an authorized agent having an actual domicile or an elected domicile in Kuwait. As well, the full name, capacity, profession or job, domicile, and workplace of the intermediary or his representative shall be clearly stated in the contract as shall the commission's amount or its percentage be stated along with its type, the person to whom it was paid or will be paid, as well as the place of its payment.”

(35) Legal Opinion No. 2/242/97-2939, issued October 29, 1997.

As to whom the disclosures of commissions must be handed, the law specified that such disclosures must be received by the Kuwaiti Audit Bureau, the high governmental agency that supervises governmental administrative contracts. In case of failure to fulfill their obligations, Article 4 notes that the consequences are first to pay a fine equivalent to the amount of the commission as well as paying the government back another sum of money equal to the amount of such a commission. In other words, they must pay twice the amount of the undisclosed commission.

Finally, in order to prevent any misleading in relation to the obligation of disclosure of commissions, Article 5 declares that there shall be a maximum of three years in prison along with a fine that is equivalent to the amount of the commission to any individual or officer who brings a false statement relating to that commission. But despite these practice steps to impose transparency in administrative contracts, it prohibits the secrecy surrounding the receipt of commissions rather than the commission itself. Since the adoption of such legislation in 1996, there have been no criminal, administrative, or civil lawsuits filed in accordance with the said law. This may be true because of the circumstances in which the commissions were paid or received. In these circumstances, the secrecy is the main attribution. Moreover, the receiver of the commission might direct the provider to pay it through a third party. Yet a new law was promulgated that forces high-ranking governmental officers to disclose their financial statements.

3.2. The Law of the Protection of Public Money, No. 1/1993:

The Kuwaiti legislature enacted this law in an attempt to fight the misuse of public funds. Article 2 specifies the definition of public money as any asset owned by the government or one of its departments and agencies. Public money can also be owned by a company in which the government owns no less than 25 percent of the capital.

These entities must submit statements describing the state of the money to the State Audit Bureau of Kuwait. Such statements must be submitted within ten days of the date of each transaction. When these agencies invest more than 100,000 Kuwaiti dinar, they must present

statements regarding these investments after six months from the date of the investments.

The law requires the National Assembly-namely, the Kuwaiti Parliament-to establish a special parliamentary committee that supervises public funds. Article 11 prescribes a seven-year prison sentence for any public servant or officer dealing with public funds who intentionally uses administrative contracts to gain any kind of benefit. Article 12 increases this punishment to a life sentence for officers entrusted with the jurisdiction over administrative contracts who gain, or try to gain, for themselves or others any kind of illegitimate interest. Article 16 announces that those officers shall be fired from their public positions and must pay a fine that is double the amount of the sum of money they gained illegally.

Article 18 prescribes punishment for individuals who knew about the crime yet did not report it to the government. Such people could face three years in prison and/or pay a fine not exceeding 10,000 Kuwaiti dinar. Article 19 punishes those who present false documents or misleading information with up to six months in prison.

In 2004, an amendment to this law was adopted stating that criminal lawsuits based on the above-mentioned crimes shall not be subject to obsolescence. Offenders may be punished whenever they are brought before the courts regardless of the period of time that had passed since they committed the crimes relating to public funds.

3.3. The Law Establishing the Public Authority of Anti-Corruption, No. 2/2016:

In 2016, this law was promulgated by the Kuwaiti legislature. It came as a response to allegations surrounding high-ranking officers and other public servants who received an illegal benefit from their public work and administrative contracts. The law reflects the wide social movement against corruption as well as the implementation of the international convention against corruption.

While the law directly aims to fight corruption, it leads indirectly to protecting the government from being subject to unnecessary financial loss. Hence, it can be seen as a preventive provision that

protects the government and its departments and agencies from being outrageously overcharged through their administrative contracts. Article 1 defines illegitimate gain as any increase in wealth or decrease in obligations of public servants through public works or administrative contracts in a way that does not benefit governmental income.

Article 22 speaks to “corruption crimes” before diving into crimes against public funds (Law of Protection of Public Money, No. 25/1993); crimes of illegitimate gain are also considered. Article 34 discusses the Public Authority of Anti-Corruption established under this law and its possible causes of action due to suspicion of criminal activity. This Public Authority can secretly undertake an investigation and ask domestic and international individuals and governmental agencies to present documents related to its investigation.

Contrary to the False Claims Act, Kuwaiti law does not provide any reward to whoever discloses crimes of illegitimate gain. Article 41 settles for providing the discloser with legal protection from civil, criminal, and administrative lawsuits. It also protects them from any negative consequences at their places of employment. This article extends this protection to the discloser’s family and other individuals with whom the discloser has tight relationships. Article 43 states that the Kuwaiti government must compensate the discloser or his or her heirs for any damage resulting from the disclosure. To reinforce the protection of the discloser, the law punishes anyone who reveals the identity of the discloser with three years in prison and/or a fine of not less than 1,000 Kuwaiti dinar but not more than 5,000 Kuwaiti dinar. It also punishes anyone who imposes administrative charges on the discloser in a suit to protest such charges. Yet it punishes the discloser if he or she deliberately hides necessary information or provides false documents.

As for the punishment of whoever commits crimes of illegitimate gain, the law imposes five years in prison along with a fine that is equivalent to the amount that is subject to the said crimes. The law also requires confiscation of the amount gained illegally through the crimes, whether still in the offender’s hands or sent to any of his or her family member. It should be emphasized that the death of the offender must

not interrupt the confiscation. The offender's public work and position should also be terminated. As to other individuals concerns, the law punishes those others who intentionally gain illegitimately with half of the punishment imposed on the offender⁽³⁶⁾.

Finally, the Law Protecting Public Money refuses to accept the doctrine of obsolescence on dealing with the crimes stated by its provisions. This means that offenders will face charges regardless of how much time passes after commission of the crime.

3.4. The Law Establishing the State Audit Bureau of Kuwait⁽³⁷⁾, No. 30/1964:

The establishment of this bureau came as a response to the Kuwaiti Constitution-specifically, Article 151. The main purpose of the bureau, according to Article 6 of the law, is to monitor the state's income and expenses and ensure that both are in accordance with the Kuwait National Assembly's budget⁽³⁸⁾. The bureau's jurisdiction includes all state ministries, authorities, and agencies, and it enjoys jurisdiction over any state company in which the state owns more than 50 percent of the capital.

The jurisdiction covers all aspects of the state's activities. The bureau supervises all applications for credit orders by its agencies and reviews all decisions of agencies to appoint employees. Furthermore, the bureau ensures that any promotion or administrative decision that would grant extra payment for any employee conforms with laws and regulations. To fulfill its task, the bureau is equipped with all necessary authority and jurisdiction to view all documents and orders issued by any of the state's agencies.

As to contracts that are supposed to be signed by a state agency, the law provides the bureau with two different kinds of supervision.

(36) He or she will face up to two and a half years in prison and a fine that is equivalent to half of the amount gained as a result of committing the said crimes.

(37) See the Bureau's official web site: <https://www.sabq8.org>.

(38) That is, parliament.

The bureau must apply the first before signing a contract; the other is to be undertaken during the implementation of the contract and ends upon complete execution of the contract. This supervision contains extensive procedures, and Article 13 confines this supervision to contracts that reach one hundred Kuwaiti dinar or more. The bureau still monitors the signing and implementation of these types of contracts but with relatively soft procedures. Thus, agencies enjoy wide authority over their contracts if they do not reach one hundred Kuwaiti dinar. The law assumes that the bureau and the state agency might not agree upon certain clauses in the contract; in that case, the issue is brought before the Cabinet of Ministries. Its decision prevails.

With this power over state authorities, the law adopts a unique way of appointing the head of the bureau. The name of the nominee must be presented by the speaker of the national assembly and receives the acceptance of the majority of votes at the assembly. Then a decree is issued by the prime ministry appointing the head of the bureau. And once the said decree is issued, the head of the bureau cannot be fired unless the majority of the national assembly agree. The law thus guarantees the independence of the bureau so that it is not subject to any influence of the cabinet.

Finally, chapter 4 of the law confers on the bureau the ability to punish whoever causes the state to lose money or make unnecessary payments. For such financial violations, the state faces the same outcome and consequences as its employees. Article 52 defines financial violations to include, inter alia, any violation of the procedures relating to administrative contracts as well as signing a contract that reaches one hundred Kuwaiti dinar without reviewed by the bureau.

The punishment for committing such violations is either the deprivation of salary for up to three months or a fine that will not be less than ten Kuwaiti dinar but not to exceed one month's salary. Yet Article 70 specifies that no punishment should be imposed after five years if no lawsuit was filed.

3.5. *The Law of Public Tender*⁽³⁹⁾, No. 49/2016:

This law comprises the general provisions by which state agencies and companies are bound when setting their administrative contracts. Instead of allowing each state agency to handle its own administrative contracts,⁽⁴⁰⁾ the Central Agency for Public Tenders (CAPT) imposes general rules and procedures. CAPT ensures the secrecy of the tenders to ensure fair competition. It also aims to decrease the amount of money paid by such agencies. CAPT comprises seven members appointed to four-year terms. According to Article 5, they are to serve for only one term, and no extension is allowed. This is to protect the interests of its members in relation to agency tasks. Not all contracts signed by state agencies require CAPT supervision. Article 19 declares that only contracts for more than 75,000 Kuwaiti dinar are governed by CAPT.

The law defines collusion as a secret agreement between two or more parties to achieve illegal goals, such as illegal influence of tenders to go to certain contractors or to prevent other contractors from submitting their tenders. CAPT must be transparent in publishing the demand for administrative contracts to ask contractors to present their tenders in the state's official journal. The law also requires that contractors participating in such tenders establish their credibility by applying to join one of the group lists set by CAPT. In doing so, the law aims to ensure that contractors present their tenders to contracts that match their group lists. The contractors can apply to join the higher group lists after one year on their current lists.

As to the mechanism by which the CAPT shall decide upon the tenders, the law presents the price criteria. CAPT must present the tender to the contractor that presents the cheapest bid. 1964 version of

(39) See the Central Agency for Public Tenders' s official web site: <https://capt.gov.kw/en/>.

(40) In relation with the procedures that the Law requires to follow in public tenders, the Kuwaiti Court, yet, declared that failing to follow such procedures would not prevent the parties from signing the contracts. See the Court's decision No. 933/2005, dated 3/4/2007.

the law adopted this criteria with no exceptions; 2016 version opens the door to disregard the cheapest tender when CAPT proves that it is suspiciously cheap or misses some of the requirements stated by the contracts. To avoid entering administrative contracts with the cheapest contractors, two-thirds of the agency's members must agree.

On the other hand, Article 64 clearly states that the decision of CAPT in choosing suitable tenders does not give the contractor any right before the state unless the administrative contract itself is signed by the state's agency demanding it. The law also allows the agency to confiscate the first deposit handed in by the winning contractors if they refuse to sign the contracts. If the winner withdraws its tenders, CAPT can either cancel the tenders or accept the next-cheapest contractor.

Finally, contrary to the old version of the law, which allowed state agencies to issue alteration orders that resulted in expanding the cost of the contracts, the new law allows such alterations to be ordered if they do not exceed 5 percent of the original contract prices. It also requires that such alterations follow the same procedures as the original contracts.

If contractors fail to comply with the law, Article 85 notes that they could be transferred to lower group lists and allowed to participate only in minor contracts, or they could be banned from any participation until the dispute is resolved.

3.6. The Law Establishing the Public Department of Legal Opinion and Legislation⁽⁴¹⁾, No. 12/ 1960:

Along with CAPT, administrative contracts are to be reviewed by the Public Department of Legal Opinion and Legislation. This supervision is mandatory whenever the cost of these contracts reaches seventy-five Kuwaiti dinar. CAPT reviews said contracts from a financial and technical standpoint; the department looks at their legal basis⁽⁴²⁾.

(41) See the Department's official web site: <http://www.fatwa.gov.kw/Portal/Home/Index>.

The department was established before the promulgation of the Kuwaiti Constitution itself. It is directly annexed to the prime minister's cabinet, and the main purpose of its existence is to help government to create regulations and receive legal aid and consultation,⁽⁴³⁾ to represent governmental agencies before different courts and judicial entities, and to review administrative contracts. Yet by reviewing its tasks, one can point out that the department has no jurisdiction over the discovery of

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- (42) In its Legal Opinion No. 2/104/97-2045, issued on August 2, 1997, and after reviewing the agreement between the Ministry of Public Works and a consultant, the ministry leaned on the Public Department of Legal Opinion and Legislation to decide whether to pay the consultant for his supervisory staff's unused annual leave between January 7, 1995, and December 31, 1996. The department stated, "Based on the above, we are of the view that the consultant's claim for compensation is not consistent with the Law, as justified in the grounds." The department again asked for an opinion (No. 2/201/94-2360, issued October 20, 1994), and the Ministry of Communication was concerned whether the contractor might calculate Thursday's wage like that of other actual working days, taking into account that it was considered a weekly day of rest. The department concluded that the contractor should be paid for Thursday based on the number of workers who actually worked on that day.
- (43) The Ministry Of Electricity and Water asked the department to present its legal opinion on the fact that the contractor allowed another subcontractor to accomplish work needed for the execution of the administrative contract. After the completion this work, the contractor refused to pay for it. Thus, the subcontractor asked the ministry to pay for such work. The department concluded that "if the subcontractor proves that it has completed the works entrusted thereto, that is entitled to the amount it claims and that it has not received them in such a way as to leave no room for doubt and to satisfy the Ministry, he latter may settle the dues of the subcontractor by deducting them from the amount it owes to the main contractor" (Legal Opinion No. 2/247/93-917, issued on May 1, 1994). In another instance where the Ministry of Education signed an administrative contract for cleaning at schools and the contractor's inability to complete it due to school refusal, the contractor filed a lawsuit seeking compensation because of the interruption of the school. The department noted that the contractor "shall be entitled to compensation for the damages incurred thereby due to its prohibition from executing the contract it had concluded, as well as for the missing and destroyed items that were confiscated. The Ministry May settle this matter amicably provided that a draft settlement form is submitted to the Department before signing it" (Legal Opinion No. 96/35/2-0734, issued on March 24, 1996). With the San fair notion, the department, in another legal advice sent to Social Development Office, stated that "the contractor has the right to be fairly compensated for the damages it has suffered due to the termination of the contract. The Office shall not be blamed for disbursing the amount of KWD 6000 to this contractor =

outrageously overcharged administrative contracts because it contains no search criteria for such offenses.

4. Conclusion and Recommendations:

This article dealt with what the government faces in having its contracts overcharged by other contractors. The US Department of Justice press release mentioned in the introduction was one of many examples that show contractors who exaggerate the price of their

= as long as said Office estimated this amount to be the appropriate compensation for the reparation of the damages" (Legal Opinion No. 2/191/95-2941, issued December 24, 1995). On the other hand, the department referred to the administrative contract to make its legal opinion on a dispute between the Ministry of Interior and a contractor, stating that "whereas Article 10 of the contract concluded between the Ministry and the contractor stipulates that the Ministry shall enjoy the right to terminate the contract, and such right shall prevail over any relevant right stipulated in the contract, provided that any of the reason specified hereunder occur: should the other party breach any condition of the contract." It added that "whereas it is understood from the above that the termination of the contract gives the administrative entity an exclusive right to confiscate the performance bond with no need to take any legal proceedings" (Legal Opinion No. 2/138/98-1827, issued July 4, 1998). Furthermore, the department recognized that the failure to fulfill the contractor's obligations set by the administrative contract would not always result in imposing penalties against him. It stated that "whereas it is decided in administrative jurisprudence and judiciary that the delay penalties set forth in administrative contracts aim at guaranteeing that the party contracting with administrative entity fulfills its obligations within the deadline agreed upon so as to ensure the proper functioning of the utility. The administrative entity may impose the penalty set forth in the contract sua sponte upon the mere occurrence of the breach for which the penalty was decided. The imposition of the penalty shall not depend on providing that the administrative entity has incurred the damage as a result of the contractor's breach of its obligation. It goes without saying also that the imposition of the delay penalty shall be decided by the contracting administrative entity which is responsible for the proper functioning of public utilities according to contract and to the circumstances of the contractor; hence, it may exempt the latter from the penalties set forth in the contract, including the delay penalty, if it sees the relevance of such an action. The administrative jurisprudence has also decided in this regard that Delay penalties shall not be imposed in several cases, including if the cause of the delay is attributed to the administrative entity, if the delay is due to a case of force majeure, if the administrative entity extends the deadline at the contractor's request and without making any reservation or if the contractor's circumstances necessitate exemption" (Legal Opinion No. 2/47/2002-3095, issued October 1, 2002)

contracts with the governmental agencies. Because this article focuses on two legal systems-US and Kuwaiti-it began by highlighting the legal definition of the term administrative contracts in comparison with ordinary contracts signed by the government or its agencies. The article then turned to the US legal system and laid down the primary legislation by which the United States fights the problem of outrageous overcharging in administrative contracts. It studied this legal history to demonstrate how the different amendments reflect on the law.

Then the article focused on the Kuwaiti legal system and pointed out that this legal system lacks legislation equivalent to the US False Claims Act. Rather, the Kuwaiti legislature resorted to adopting laws to prevent unnecessary administrative contract costs. Kuwait also lacks any definition of outrageous overcharging in administrative contracts.

Therefore, the adoption of whistleblowing legislation is crucial to fight corruption. It could disclose unnecessary misused public monies by encouraging individuals to reveal information that offenders would keep classified. This transparency could force such contractors to submit to legislation and uncover bad behavior and illegal actions committed by contractors. A whistleblowing law could promote the rule of law and maintain justice and equality⁽⁴⁴⁾. Administrative contracts could be protected from outrageous overcharging. It would have been easier for the Kuwaiti legislature to adopt provisions similar to the False Claims Act rather than widening the net to include the protection of government agency-owned public funds using a wide range of laws and regulations.

(44) Schultz and Harutyunyan, (2015), 88.

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القانون الأمريكي للإدعاء الكاذب كوسيلة لحماية العقود الإدارية:

دراسة مقارنة بين الولايات المتحدة الأمريكية والكويت

د. خليفه ثامر الحميدة

ملخص

أهداف الدراسة: تتعرض الدولة في عقودها الإدارية إلى خطر المبالغة في تقدير الأموال التي ينبغي عليها دفعها فيها. ولقد كانت الولايات المتحدة سباقة في سن قانون الإدعاء الكاذب الذي يتمحور في حمايتها من هذا الخطر. بل إنه يرتب الجزاءات المختلفة على من يستغل الدولة في تلك العقود. وفي سبيل المقارنة تتعرض الدراسة إلى البحث المفصل في هذا القانون وبالمقارنة مع القوانين الكويتية المختلفة التي صدرت لتحقيق هذا الهدف.

منهجية الدراسة: تبنت الدراسة المنهج الوصفي لشرح القانون الأمريكي، فهو يبحث في مضمون هذا التشريع وتطوره التاريخي. كما أنها استعملت المنهج المقارن لبيان مدى حاجة الكويت إلى سن مثل هذا القانون.

نتائج الدراسة: توصلت الدراسة في نهايتها إلى أن الكويت وإن تبنت أكثر من قانون لحماية الدولة من المبالغة في عقودها الإدارية إلا أنها لم ترتب الحماية الكاملة لأموال الدولة العامة.

الخاتمة: تنتهي الدراسة في ختامها إلى حث المشرع الكويتي إلى تبني النهج الأمريكي في سن قانون مباشر يمنع المبالغة في الأموال التي تدفعها الدولة في عقودها الإدارية.

المصطلحات العلمية: الكويت، الولايات المتحدة، إدارة، عقود، حكومة، قانون عام، دولة، مناقصات.

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