False Claims Laws: What Every Public Contract Manager Needs to Know

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When Do False Claims Laws Apply?

The federal False Claims Act (FCA) applies to any requests for payment from the United States, except tax refunds. It applies to all contracts with the federal government or with any federal funding.

There are also false claims laws in an increasing number of states and local jurisdictions. Currently, there are false claims statutes applicable to public contracts in the following jurisdictions:

- California
- Delaware
- Florida
- Hawaii
- Illinois
- Massachusetts
- Montana
- Nevada
- Oklahoma
- Tennessee
- Virginia
- Washington, D.C.

Seven other states have false claims laws limited to health care contracts:

- Arkansas
- Louisiana
- Michigan
- North Carolina
- Texas
- Utah
- Washington

False claims legislation has also been introduced in Alabama, Alaska, Colorado, Connecticut, Kansas, Maryland, Mississippi, Missouri, Montana (adding whistleblower provisions), New Jersey, New York, Oklahoma, Pennsylvania, Texas (expanding beyond health care), and Washington.

When Will a Contractor Be Liable for False Claims?

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A contractor will be liable under the federal Act if it knowingly submits or causes another to submit a false claim for payment ("direct false claims"); makes false records or statements to support a false claim; engages in a conspiracy to get the Government to pay a false claim; or makes false records or statements to reduce or avoid an obligation to the Government ("reverse false claims"). In addition, false claims laws in several jurisdictions also provide that a beneficiary of a false claim who discovers its falsity and fails to disclose it within a reasonable time is liable.

Of greatest significance to subcontractors is the FCA provision stating that a company may be liable even if it did not submit its claim directly to the Government. For example, a subcontractor may be liable under the FCA for submitting a false claim to the prime contractor, where the prime subsequently submits that claim to the Government.

The Contractor Need Not Have Intentionally Deceived the Government to Be Liable.

Although the FCA is an anti-fraud statute, liability under the Act is much broader than liability for common law fraud. There is no requirement that one have an intent to deceive or defraud to be liable under the FCA. Instead, the FCA imposes liability for "knowing" submissions of false claims to the Government. A contractor meets this requirement (called "scienter") where it submits its claims knowing they are false, in deliberate ignorance of whether they are true or false, or in reckless disregard of whether they are true or false.

A corporation may be liable under the FCA for its employees' acts so long as they are within the scope of their authority, even if no management personnel know about the false claims.

A frequently litigated issue is the effect of Government knowledge on whether a contractor "knowingly" submitted a false claim. Contractors have argued, with mixed success, that they could not have knowingly submitted a false claim because the Government knew the facts which allegedly made the claims false or because the contractor told the Government those facts. The majority rule is that these facts are relevant to scienter but do not provide contractors with an absolute defense.

Where the alleged false claim involves a violation of contract or regulatory requirements, the reasonableness of the contractor's interpretation of those requirements is relevant to scienter.

When Is a Claim "False"?

For a contractor to be liable for a claim it submits to the Government, that claim must be false. Falsity is obvious where the contractor seeks payment for a product it never delivered or work it never performed. A request for payment is false if the work for

which the contractor seeks payment does not comply with contract specifications, even if the noncompliance resulted in a product "with the same basic performance characteristics as those specified in the contract." A contractor or supplier can be liable under the FCA for requesting payment for a product the Government both inspected and accepted.

Falsity is not so clear for questions of scientific or engineering judgment. A claim is not false simply because different scientists or engineers disagree. For example, if a contract calls for the use of concrete with certain properties and the contractor believes correctly that a certain mixture will have those properties, it has not violated the FCA, even if the Government believes that a different mixture would have provided superior results.

Falsity is also unclear for questions of interpretation of specifications, drawings, or other technical contract requirements. Again, differences of opinion should not qualify as falsity. At least one court, however, has ruled that a claim was false under the FCA where it was based on the contractor's reasonable, but incorrect, interpretation of government accounting rules.

An increasing number of FCA cases have been filed recently alleging that claims submitted by a contractor were false because the contractor violated laws or regulations allegedly applicable to its contract performance. A regulatory violation will only subject a contractor to liability under the FCA if the Government's payment of the contractor's claim was conditioned upon the contractor's compliance with the regulation at issue.

As with scienter, a frequently litigated issue has been the effect of Government knowledge on whether a claim is "false." The majority rule is that government knowledge does not preclude falsity, though it may be relevant.

Another litigated issue is whether a falsity must be "material", *i.e.*, likely to have impacted the Government's decision to pay, in order for there to be FCA liability. Most courts to consider the issue have found that an alleged false claim must be material for a contractor to be liable under the FCA.

What Is a "Claim" Under the FCA?

The FCA defines claims broadly to include any request for payment of money or property, whether the Government actually pays or not. The false claims laws in some jurisdictions (California, Nevada, and Washington, D.C.) also explicitly include claims for services. Unlike other laws, the FCA does not limit claims to signed certifications. Bid documents may constitute claims but only if they result in a contract award (even if no payments are made under the contract). Finally, a request for payment need not be submitted directly to the Government to qualify as a claim under the Act. For example, a request for payment submitted by a subcontractor to a contractor may be a "claim" under the FCA.

A Contractor May Be Liable Even If the Government Was Not Damaged.

The majority view is that the Government need not have been damaged for a contractor to be liable under the FCA. This is supported by the penalties provision of the FCA which provides that such penalties may be assessed against an FCA defendant, even in the absence of proof of actual damages. On the other hand, other language in the Act describes damages as an "essential element of the cause of action."

What Are the Consequences If a Contractor Is Found Liable Under the FCA?

The FCA provides that the Government is entitled to three times its actual damages. The Government will only recover twice its actual damages, however, if the contractor provides all of the information it has about a false claim within 30 days of its discovery of that information and fully cooperates with the Government's investigation of the false claim before any FCA lawsuit is initiated.

How damages are measured will vary depending upon the nature of the false claim. A frequently used measure of damages is the difference in value between what the contractor represented the Government was paying for and what the Government received. In one case, for example, after a contractor was found to have rigged its bid, the court measured the Government's damages by determining the difference between the contract price and what it would have been in a fair and open competition.

The federal Act also provides for monetary penalties in the amount of $5,000-10,000 per false claim. State laws provide for varying penalties. These may be awarded even if the Government has suffered no damages. There is a split among courts as to whether the Government is entitled to recover both penalties and trebled damages.

Another potential result from a finding of FCA liability is debarment.

How Are FCA Lawsuits Initiated?

A contractor can be sued under the FCA in two ways: (1) the Government can sue directly or (2) a whistleblower can sue on the Government's behalf. Under false claims laws in some states (California, Illinois and Nevada, for example), both the local state and public entities can sue. In whistleblower actions, the Government may "intervene" and prosecute the case, or it may decline and let the whistleblower prosecute on its behalf.

Almost Anyone Can Sue a Contractor as a Whistleblower.

The *qui tam* provisions of the FCA allow private citizens to sue under the FCA on behalf of the Government. Plaintiffs filing *qui tam* lawsuits are also called relators.

In general, anyone can sue under the FCA. Some common examples are employees, ex-employees, Government employees, competitors, lawyers, and public interest groups. Subcontractors to sue prime contractors under the FCA, and, although not common, prime contractors can also sue their subcontractors. Both individuals and corporations may sue under the FCA.

While the federal Act itself contains no limits on when a Government employee may be a relator, the courts have nevertheless found ways to dismiss cases brought by some such relators. As a general rule, a Government employee may maintain a *qui tam* action if her job duties did not require her to report to the Government the false claims alleged in her complaint. Certain states' false claims laws contain additional limitations on government employees' ability to sue as relators.

Relators have a tremendous incentive to sue. Under the federal Act, the relator gets 15-25% of any recovery if the Government intervenes and 25-30% if it does not. Some states' false claims laws allow even greater recoveries. Where within these ranges the relator's recovery will fall depends upon the extent the relator "substantially contributed" to the prosecution of the action. The relator gets this recovery whether the case settles or is resolved by a court.

Whistleblower Actions Are Filed Under Seal and May Not Be Disclosed to the Contractor While the Government Decides Whether to Intervene.

A relator files its complaint on behalf of the United States. The complaint is filed under seal, meaning the public does not have access to it or any other court-filed document while the seal is in effect. Unlike a normal complaint, the relator is prohibited from serving the complaint on any defendant. The relator is, however, required to serve the complaint on the Government through the Department of Justice. It is also required to provide the Government with a disclosure of all material evidence and information in the relator's possession.

The Government has 60 days in which to decide whether to intervene (*i.e.* take over) the case. The Government routinely requests and courts routinely grant extensions of this deadline. Even if the Government declines to intervene, the relator can continue prosecuting the case on the Government's behalf. In such cases, the Government may still intervene at a later date on good cause.

In the process of making its intervention decision, the Government will often request a partial lifting of the seal and give the defendant contractor an opportunity to present evidence regarding the alleged false claim or claims. Contractors should take full advantage of this opportunity if presented with it. The likelihood of successfully defending a *qui tam* lawsuit increases dramatically if the Government declines to intervene.

Only after the Government has made its intervention decision is the seal lifted

and the complaint served on the defendant contractor. The case then proceeds much like any other, except the Government is entitled to receive all pleadings and discovery, may later request to intervene for good cause, and must agree to any settlement or voluntary dismissal.

A Contractor Can Get a Whistleblower Action Dismissed If It is Based on Public Information.

The FCA requires that courts dismiss *qui tam* actions based on the public disclosure of the allegations or transactions alleged to be false claims. For a public disclosure to be sufficient to bar an FCA action, it must be sufficient to allow an inference of fraud, either by disclosing allegations of the fraud itself or of all of the elements of that fraud. In addition, only disclosures in the following forums will bar an action: (1) criminal, civil, or administrative hearings; (2) Congressional, administrative or GAO reports, hearings, audits, or investigations; or (3) the news media.

There is an important exception to the public disclosure bar: an action based on a public disclosure may still be brought by a relator who qualifies as an "original source" of the disclosed information. An original source is an individual who has direct and independent knowledge on the information on which false claims allegations are based and who voluntarily provides that information to the Government before filing any *qui tam* action.

A Contractor Will Also Be Liable If It Retaliates Against a Whistleblower Employee.

The FCA prohibits retaliation against anyone acting in furtherance of the Act. This is especially a concern where an employee sues under the Act or threatens to do so. Violation of this provision will subject the violator to liability for compensatory damages, including twice the relator's lost back pay.

Courts engage in a two-step inquiry to determine whether a defendant is liable for retaliation in violation of the FCA. First, the relator must prove that his employer knew he had engaged in "protected activity" and that it retaliated against him at least in part because of that activity. Second, the burden then shifts to the employer to prove that the alleged retaliation would have occurred due to non-retaliatory reasons, even if the employee had not engaged in protected activity.

How Have or Could FCA Actions Arise in Public Projects?

Bidding

False bid documents can subject a bidder to liability under the FCA if (1) its bid is accepted and (2) payment by the Government on the resulting contract is conditioned on the truth of the bid documents. The Government need not actually pay the contractor or be damaged for the contractor to be liable. Such actions may be brought by disappointed

bidders or subcontractors and may be used in conjunction with bid protests to persuade the Government to cancel and reissue its solicitations.

Billing or Claims

These are probably the most common sources of false claims. A claim is false if it expressly or impliedly misrepresents the type or amount of work done or the amount due for that work, that the contractor's work meets contract requirements, or that the contractor performed additional work due to differing site conditions where, in fact, the work was performed for some other reason.

Defective Product

A contractor also submits a false claim if it requests payment for work it knows does not meet contract requirements.

Subcontractor Payment

Most federal contracts require that the prime contractor certify that it has paid its subcontractors as a condition to payment by the Government. Prime contractors often flow this provision down into their subcontracts. If a contractor or subcontractor falsely certifies that it paid its subcontractors, it may be liable under the FCA.

Wage Disputes

On construction projects, a contractor violates the FCA if it knowingly submits a false certification that it is paying applicable prevailing wages. Such actions are often brought by unions and concern certifications by contractors that they comply with the Davis-Bacon Act.

Small, Minority-Owned and Other Disadvantaged Business Certifications

Many public contracts require prime contractors to certify in their bids that certain types of disadvantaged businesses will perform portions of the work or provide for additional compensation based on participation by such businesses. Prime contractors will often flow these requirements down to their subcontractors. Failing to adhere to these certifications may subject a contractor to FCA liability.