

# Construction Briefings

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## Federal and State False Claims Laws and the Construction Contractor

by Aaron P. Silberman

Fraud ☞ 8, 9, 13(2), 31, 68.10

United States ☞ 120-123

The federal civil False Claims Act was enacted in 1863 to prevent fraud against the Government by contractors during the Civil War. In 1986, the civil FCA was significantly amended, giving the statute new life and, in particular, invigorating its whistleblower, or "qui tam," provisions. Since 1986, litigation under the civil FCA has increased in general and in the construction industry in particular.

The 1986 amendments to the federal civil FCA have also influenced state legislatures into taking notice of this powerful tool against fraud. California was the first to adopt its own false claims statute modeled after the federal civil Act, enacting its FCA in 1987. Other states have followed. Currently, eight states and the District of Columbia have statutes of general application closely tracking the federal civil FCA. Many other states have more limited statutes or have legislation pending. Like their federal counterparts, state and local enforcement and whistleblowers have increasingly utilized these laws in the context of public construction.

False claims laws subject construction contractors on public projects to substantial potential liability that may include damages, penalties, and even debarment from public contracting. In addition, on federal projects and on public projects in some states, contractors should be concerned about criminal false claims laws.

The laws governing false claims continue to evolve, expand and multiply in complexity. This CONSTRUCTION BRIEFING offers a survey of these laws with a focus on their application to construction projects. It begins with an examination of the elements the (1) federal civil and (2) federal criminal False Claims

Acts. It then looks at the (3) various state false claims acts, and concludes with a look at (4) how false claims arise in the course of a public construction project.

## Federal False Claims Statutes

The United States has both a civil False Claims Act<sup>1</sup> and a criminal False Claims Act.<sup>2</sup> Both have potential applications when construction projects are funded in whole or in part with federal funds.

## The Civil False Claims Act

### ♦ How May Contractors Be Liable?

The civil False Claims Act lists seven acts for which a contractor will be liable.<sup>3</sup> The most commonly invoked provisions impose liability for knowingly submitting or causing another person to submit a false claim for payment (“direct false claims”);<sup>4</sup> making false records or statements to support a false claim;<sup>5</sup> engaging in a conspiracy to get the Government to pay a false claim;<sup>6</sup> and making false records or statements to reduce or avoid an obligation to the Government (“reverse false claims”).<sup>7</sup>

Of greatest significance to subcontractors and suppliers is the provision in the Act stating that a defendant may be liable under the FCA even if it did not submit its claim directly to the Government.<sup>8</sup> For example, a subcontractor or supplier 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.<sup>9</sup>

Also significant to both prime contractors and subcontractors is the provision in the Act stating that a defendant may be liable under the FCA if it engages in a conspiracy to get the Government to pay a false claim.<sup>10</sup> The elements of an FCA conspiracy claim are

- (1) the defendant conspired with one or more persons to get a false or fraudulent claim allowed or paid by the United States; and
- (2) one or more conspirators performed any act to effect the object of the conspiracy.<sup>11</sup>

Where a prime contractor sponsors a subcontractor’s claim and that claim is false, both the prime and the subcontractor may be liable under the Act.<sup>12</sup>

### ♦ What Is a “Claim”?

A person will be liable under the civil FCA if he (1) submits a “claim” (2) that is false, and (3) does so “knowingly.” The civil FCA defines claims broadly to include any demand or request for payment of money or property:

**CLAIM DEFINED.** — For purposes of this section, “claim” includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.<sup>13</sup>

A demand or request may qualify as a claim under the FCA regardless of whether or not the government actually pays it.<sup>14</sup> The civil FCA does not limit claims to signed certifications. Bid

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documents are not claims.<sup>15</sup> 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 or supplier to a contractor may be a "claim" under the FCA.<sup>16</sup>

#### ♦ *What is "False"?*

A contractor will only be liable under the FCA if a claim it submits to the Government is false. The definition of "false" has been contested in many lawsuits. In some circumstances, falsity is obvious, most notably where a contractor seeks payment for a product it never delivered or work it never performed.<sup>17</sup> But a request for payment is also deemed false if the work for which the contractor seeks payment does not comply with contract specifications. For example, in 2001, the United States recovered \$15.7 million from Contech Construction for alleged false claims based on Contech's use of pipe that did not comply with contract specifications.<sup>18</sup> Similarly, in 1995, contractors building a facility for the Treasury Department in Ft. Worth, Texas, paid \$230,000 to settle false claims allegations that contractors failed to test electrical cables in accordance with contract requirements.<sup>19</sup> Somewhat surprisingly, a contractor can be liable under the civil FCA even if the noncompliance results in a product with the same basic performance characteristics as those specified in the contract<sup>20</sup> and even if the Government both inspected and accepted the contractor's work.<sup>21</sup>

In many cases, falsity is not as clear. For example, questions of scientific or engineering judgment are neither true nor false.<sup>22</sup> Nor are questions of interpretation of specifications, drawings, or other technical contract requirements (although at least one court disagrees).<sup>23</sup> One not so obvious source of liability stems from a variety of laws and regulations that can apply to a contractor's contract performance, e.g., environmental laws, wage and hour regulations, and OSHA regulations. A contractor may be liable for submitting a false claim if it violated such applicable laws or regulations, but only if

the Government's payment of the claim was conditioned upon the contractor's compliance with the law or regulation at issue.<sup>24</sup>

#### ♦ *What Is "Knowingly"?*

Although the civil FCA is an anti-fraud statute, liability under the Act is very different from that required for common law fraud. Most notably, there is no requirement that one have an intent to deceive or defraud to be liable under the civil FCA.<sup>25</sup> Instead, the civil FCA imposes liability for "knowing" submissions of false claims to the Government.<sup>26</sup> This requirement is called "scienter" (although the standard for scienter for civil liability is much easier to meet than it is for common law fraud or the criminal FCA). The Act states that a contractor acts knowingly when, with respect to information, it:

- (1) has actual knowledge of the information;
- (2) acts in deliberate ignorance of the truth or falsity of the information; or
- (3) acts in reckless disregard of the truth or falsity of the information.<sup>27</sup>

Gross negligence and innocent mistakes are not sufficient to establish FCA liability.<sup>28</sup>

A corporation may be liable under the civil FCA for the acts of its employees as long as they acted within the scope of their authority, even if no management personnel knew about the false claims.<sup>29</sup>

Where the alleged false claim involves a violation of a contract or regulatory requirements, courts have also determined that the reasonableness of the defendant's interpretation of those requirements is relevant to scienter.<sup>30</sup>

#### ♦ *The Falsity Must Have Been "Material"*

Although not discussed in the civil FCA itself, most courts have found that an alleged false claim must be material for a defendant to be liable. That is, the claim's falsity must have been likely to have affected the Government's decision to pay.<sup>31</sup> This

requirement should eliminate contractor liability for the most trivial of violations.

♦ **What If the Government Knew What the Contractor Was Doing?**

A frequently litigated issue has been the effect of Government knowledge on the determination of the falsity of a claim. In a 1988 decision, a district court held that Government knowledge precluded a finding of falsity because there was no difference between what the Government expected and what it got.<sup>32</sup> Most cases, however, indicate that Government knowledge does not preclude falsity, though it may be relevant to whether a claim was “false” under the Act.<sup>33</sup>

Another frequently litigated issue is the effect of Government knowledge on whether a defendant “knowingly” submitted a false claim. Defendants have frequently argued, with mixed success, that they could not knowingly have submitted a false claim because the Government knew the facts which allegedly made the claims false and/or because the defendant told the Government those facts. While some courts have held that Government knowledge can negate scienter,<sup>34</sup> the majority rule is that these facts are relevant to scienter but do not provide defendants with an absolute defense.<sup>35</sup>

Finally, Government knowledge is relevant to materiality.<sup>36</sup> The fact that the Government knew of the falsity of a claim but nevertheless paid that claim is strong evidence that the falsity was not material (i.e., was not likely to have affected the Government’s decision to pay).<sup>37</sup>

♦ **The Government Need Not Have Been Damaged**

Although a few disagree, most courts have held that a person may be liable under the civil FCA even if the Government has suffered no damage.<sup>38</sup> The majority view 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.<sup>39</sup> On the other hand, language elsewhere in the Act describes damages as one of the “essential elements of the cause of action.”<sup>40</sup>

♦ **Important Defenses**

Even if the Government or a whistleblower (in legal terms, a “relator”) can establish that a contractor knowingly submitted a false claim, the contractor may avoid liability under the FCA if it can prove an affirmative defense. The most commonly employed of these defenses are the statute of limitations,<sup>41</sup> which applies to all FCA actions, and the public disclosure and prior action bars,<sup>42</sup> which apply only to *qui tam* actions.

The statute of limitations provision of the FCA bars actions unless they are brought by the later of either (1) six years after the violation or (2) three years after the Government official responsible for taking action on false claims knew or should have known the facts material to an FCA action but no later than ten years after the violation.<sup>43</sup> The courts are split regarding whether the FCA’s three-year tolling rule applies to cases brought by *qui tam* relators.<sup>44</sup>

The public disclosure bar deprives courts of jurisdiction to hear *qui tam* actions “based upon the public disclosure of allegations or transactions” in (1) court or administrative hearings; (2) Government reports, audits, or investigations; or (3) the news media.<sup>45</sup> This bar does not apply to FCA actions brought by the Government directly.<sup>46</sup> A whistleblower can overcome this bar if he or she is an “original source,” which the Act defines as “an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action ... which is based on the information.”<sup>47</sup> Courts are divided on whether a whistleblower must have been the catalyst for the public disclosure in order to qualify as an original source.<sup>48</sup>

Finally, the prior action bar prevents *qui tam* relators from bringing actions “based upon alle-

gations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party<sup>49</sup> or actions based on the facts underlying another pending *qui tam* action.<sup>50</sup> The courts have interpreted this defense narrowly, only applying it where the challenged action is essentially identical to the prior, pending action.<sup>51</sup>

#### ◆ **How Can Contractors Be Sued?**

The United States Attorney General may assert FCA claims against a contractor by initiating a civil action or, where a contractor has sued the United States in court, by filing an FCA counterclaim.<sup>52</sup> Whether the Government will be able to file an FCA counterclaim against the contractor will depend upon whether the contractor chose to pursue its contract claims in the Board of Contract Appeals for the contracting agency or in the Court of Federal Claims.<sup>53</sup>

In a BCA action, the Government cannot maintain an FCA counterclaim because the Board is not authorized (i.e., it lacks jurisdiction) to hear such a claim.<sup>54</sup> For the contracting agency to assert FCA claims under that circumstance, it would have to persuade the Department of Justice's Civil Division to file a separate FCA action in district court. Because contracting agencies use their own lawyers in BCA actions rather than U.S. Attorneys, they are often less inclined to initiate FCA actions and generally only do so in egregious cases.

In contrast, when a contractor files a contract claim in the Court of Federal Claims, the contracting agency is represented by lawyers from the Department of Justice, and the court has the power to hear FCA counterclaims. As a result, such counterclaims in those cases are far more common than separate FCA actions in response to BCA actions.<sup>55</sup>

A whistleblower may also sue a contractor under the FCA.<sup>56</sup> In a whistleblower action, the Government has the option to "intervene," i.e., to take over the primary role in prosecuting the action.<sup>57</sup> If the Government does not inter-

vene, the relator may continue to prosecute the action, but a contractor's likelihood of successfully defending itself in a non-intervened *qui tam* FCA lawsuit increases dramatically.<sup>58</sup>

Relators have a tremendous incentive to sue, as they are entitled to 15–25% of any recovery if the Government intervenes in the lawsuit and 25–30% if it does not.<sup>59</sup> Where within these ranges the relator's recovery will fall depends upon the extent to which the relator "substantially contributed" to the prosecution of the action.<sup>60</sup> The relator gets this recovery whether the case settles or is resolved by a court.

In general, almost anyone can sue as a relator under the civil FCA, including employees, ex-employees, government employees, competitors, subcontractors, suppliers, public interest groups (such as Taxpayers Against Fraud), public entities, and lawyers. Both individuals and corporations may sue under the civil FCA. Even a person who participated in the submission of a false claim can sue under the FCA, but the court may reduce such a person's share of any recovery based on his or her level of participation in the violation.<sup>61</sup>

While the FCA 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.<sup>62</sup> If, however, the relator's job required him to report the alleged false claims, the court is likely to dismiss his complaint.<sup>63</sup> Some states' false claims laws further restrict public employees' ability to sue as *qui tam* relators.<sup>64</sup>

When a current employee of a contractor sues, or threatens to sue, as a relator, the contractor must be especially careful not to violate the FCA's anti-retaliation provision.<sup>65</sup> The FCA provides that "[a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in

the terms and conditions of employment by his or her employer" because of lawful acts taken in furtherance of an FCA action will be "entitled to all relief necessary to make the employee whole."<sup>66</sup> This provision applies whether the employee already has sued under the Act or merely has prepared to sue. A contractor that violates this provision may be ordered to reinstate the employee and will be liable for two times backpay, plus interest, special damages, litigation costs, and attorneys' fees.<sup>67</sup>

#### ♦ **What Are the Consequences if a Contractor Is Held Liable?**

The consequences of liability under the civil FCA can be severe. A party found liable will have to pay three times the Government's actual damages (treble damages).<sup>68</sup> The multiplier is applied before any offset may be applied to reduce these damages.<sup>69</sup> A court may reduce the Government's recovery to twice its actual damages, however, if the defendant 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.<sup>70</sup> Consequential damages (such as lost profits) are not recoverable under the Act,<sup>71</sup> and, in most jurisdictions, prejudgment interest is not recoverable either.<sup>72</sup>

How damages are measured will vary depending upon the nature of the false claim. A frequently used measure of damages has been the difference in value between what the contractor represented the Government was paying for and what the Government received.<sup>73</sup> In one 1981 circuit court decision, for example, where the defendant overstated its construction costs on a low income housing project, the measure of damages was the difference between the contract amount and what it would have been but for the defendant's false cost and pricing data.<sup>74</sup> Similarly, in a 1975 decision by the United States Court of Claims, after the defendant 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.<sup>75</sup>

The FCA also provides for monetary penalties in the amount of \$5,000–\$11,000 per false claim.<sup>76</sup> These may be awarded even if the Government has suffered no damages. However, an award of penalties under the FCA that is disproportionate to the Government's damages may violate the Excessive Fines Clause in the Eighth Amendment of the United States Constitution.<sup>77</sup>

In addition, if the relator prevails in a *qui tam* action against a contractor, the contractor will be liable not only for the relator's reasonable litigation costs but also for the relator's attorneys' fees, which can be substantial.<sup>78</sup> If, on the other hand, the contractor prevails, it will only be able to recover its attorneys' fees if it can show that the *qui tam* action was clearly frivolous or vexatious or was brought solely for purposes of harassment.<sup>79</sup>

Perhaps the most severe potential result to a contractor from a finding of liability is debarment. The civil FCA states that, in addition to the remedies provided in the Act, the Government may pursue "any alternate remedy available."<sup>80</sup> Such alternative remedies may include debarment.<sup>81</sup> Under federal regulations, the Government may preclude a contractor from contracting with it for a fixed period, usually three years, based on a judgment for fraud on a Government contract.<sup>82</sup> Liability under the civil FCA qualifies as a ground for debarment under these regulations.<sup>83</sup>

## **The Criminal False Claims Act**

The federal criminal False Claims Act provides that a person who presents a false claim to the Government knowing it to be false shall be imprisoned and subject to fines.<sup>84</sup> Like the civil FCA, a person can be liable under the criminal FCA by causing an intermediary to submit a false claim.<sup>85</sup>

Violations of the criminal FCA are much harder to prove than civil FCA violations for two reasons. First, the standard of proof for criminal liability is proof beyond a reasonable doubt, as opposed to the preponderance of the evidence standard (i.e., more likely than not) applicable to proving civil FCA violations. Second, unlike the civil FCA, under which a person may be liable if he submits a false claim in “deliberate ignorance” or “reckless disregard” of its truth or falsity, the criminal FCA requires the person actually to know that the claim is false in order for there to be liability.<sup>86</sup> Though knowledge is required, intent to defraud is not.<sup>87</sup>

Otherwise, the elements of criminal false claims are similar to those for civil false claims, although courts disagree on whether a false claim must be material for the claimant to be criminally liable.<sup>88</sup>

Another important difference between the two federal acts is that only the Department of Justice can bring an action under the criminal FCA, as opposed to the civil FCA, which allows for *qui tam* actions to be brought by private parties.

If found liable for criminal false claims, a contractor may be imprisoned for up to five years and fined up to \$10,000 per false claim.<sup>89</sup> Liability is also grounds for debarment from entering into future Government contracts.<sup>90</sup>

## State False Claims Laws

Many states have adopted false claims statutes modeled after the federal civil FCA. Since there are generally few court decisions concerning the false claims laws in these states, the courts often rely on federal case law interpreting the federal FCA.<sup>91</sup> Some states have criminal false claims laws as well.<sup>92</sup>

California,<sup>93</sup> Delaware,<sup>94</sup> the District of Columbia,<sup>95</sup> Florida,<sup>96</sup> Hawaii,<sup>97</sup> Illinois,<sup>98</sup> Massachusetts,<sup>99</sup> Nevada,<sup>100</sup> Tennessee,<sup>101</sup> and Virginia<sup>102</sup> have all adopted civil false claims statutes modeled after the federal Act. These stat-

utes are all similar to the federal civil FCA, but some differences exist. Most notably, the California statute allows local authorities to prosecute.<sup>103</sup> This is significant because local agencies have a much greater incentive to use the threat of a false claims prosecution to get contractors to reduce or even withdraw valid construction claims. In addition, some states’ false claims laws make a contractor liable if it discovers that it benefited from a false claim and fails to disclose the false claim within a reasonable time.<sup>104</sup> Some state laws also make explicit that “claims” include requests for services (in addition to those for money or property).<sup>105</sup>

Most states have anti-fraud statutes that would apply to false claims against public entities but that do not contain *qui tam* provisions. Arkansas,<sup>106</sup> Louisiana,<sup>107</sup> Michigan,<sup>108</sup> New Mexico,<sup>109</sup> North Carolina,<sup>110</sup> Texas,<sup>111</sup> Utah,<sup>112</sup> and Washington<sup>113</sup> have false claims statutes limited to health care fraud, but only those in Louisiana, New Mexico, and Texas contain *qui tam* provisions; Texas<sup>114</sup> and Washington<sup>115</sup> are considering proposed legislation to expand their statutes to other areas. Many other states, including Alabama,<sup>116</sup> Alaska,<sup>117</sup> Colorado,<sup>118</sup> Connecticut,<sup>119</sup> Kansas,<sup>120</sup> Maryland,<sup>121</sup> Mississippi,<sup>122</sup> Missouri,<sup>123</sup> Montana,<sup>124</sup> New Jersey,<sup>125</sup> New York,<sup>126</sup> Oklahoma,<sup>127</sup> and Pennsylvania,<sup>128</sup> have recently introduced bills in their legislatures for adoption of false claims statutes similar to the federal civil FCA (although the bills introduced in Alaska, Connecticut and Kansas lack whistleblower provisions).

## How False Claims Actions Arise in Construction Projects

False claims actions can arise in construction projects when those projects are funded with federal monies. They can also arise when projects are funded with state or local monies when the projects are in jurisdictions with their own false claims laws. As noted above, such actions may be brought by the Government—the Department of Justice in federal cases and

state or local authorities in cases brought under state or local laws. Governments often use these actions to provide leverage in other disputes with the contractor. This practice is especially prevalent in California, where local public agencies can bring their own false claims actions.

When private individuals—relators—bring such suits, they do so on behalf of the government. Relators in construction false claims cases may be current or former employees of the contractor, labor unions, or even government employees. Disappointed bidders and their subcontractors have also filed such lawsuits, and false claims actions may be used in conjunction with bid protests to persuade the Government to cancel and reissue its solicitations. While this is less common, prime contractors have filed *qui tam* actions against their own subcontractors and suppliers.

False claims liability can arise in construction projects in many ways. For example, a contractor may be liable under the federal or state false claims laws for any of the following:

♦ **Submitting False Bid Documents**

It is unclear whether a bid is a claim under the FCA. While the only federal court decision on point says that a bid is not a claim,<sup>129</sup> a bid is arguably a request for the Government to provide property (a contract) to the bidder. What is clear, however, is that a contractor that submits false bid documents may be liable under false claims laws if its bid is accepted and the Government's payment on the resulting contract is conditioned on the truth of the bid documents.<sup>130</sup> In a 1995 decision, for example, a contractor was held liable under the FCA for submitting pricing information in its bid that falsely represented that the contractor's cost to complete the contract included all costs associated with environmental compliance.<sup>131</sup>

In 2003, the City of San Francisco sued Tutor-Saliba Corporation and other contractors that bid on and were awarded construction contracts for the San Francisco International

Airport for alleged violations of the California False Claims Act and the City's own False Claims Ordinance.<sup>132</sup> The City's complaint alleges that the defendants overstated their intended use of minority-owned subcontractors and submitted unrealistically low bids on the Airport projects while planning to use minority fronts who were paid to lend their names to the project while non-minority subcontractors did the work. In addition, the City contends that the contractors artificially inflated the amounts claimed for project work through fraudulent change orders, fraudulent applications for payment, and manipulated project schedules.<sup>133</sup> Whether the City will succeed in this case remains to be seen. The Los Angeles Metropolitan Transportation District prevailed at trial on a similar theory in 2001.<sup>134</sup> On the other hand, a federal district court dismissed a similar claim under the federal civil FCA in 2004.<sup>135</sup>

♦ **Misrepresentation of the Work Done or Amount Due**

A contractor may be liable under false claims laws if it submits an invoice or claim that misrepresents the type or amount of work done or the amount due for that work.<sup>136</sup> This is the most obvious, and probably most common, type of false claim. For example, in a 1998 decision, the Court of Appeals for the Federal Circuit upheld findings by the Court of Federal Claims that a contractor was liable under the FCA where it had requested payments for volumes of earth it had not excavated.<sup>137</sup>

♦ **Misrepresenting That Work Meets Contract Requirements**

A contractor that submits an invoice or claim falsely stating that the contractor's work meets contract requirements may be liable under false claims laws.<sup>138</sup> In a 2001 decision, for example, a district court found a bathroom remodeling contractor liable for submitting reports certifying that its work met contract requirements, even though one of its employees had discovered, concealed, and disturbed asbestos in vio-

lation of contract provisions and the contractor's management had no knowledge of what the employee had done.<sup>139</sup> Similarly, also in 2001, a California Court of Appeal held that a pipe supplier was liable under the California FCA where its pipes did not comply with an industry standard, despite a representation to the contrary in the supplier's catalog.<sup>140</sup> In contrast, in a 2000 case, the district court ruled against the relator at trial on his claims that the contractor violated the FCA when it certified compliance with its Government contract despite the contractor's alleged violation of environmental requirements.<sup>141</sup>

#### ♦ **Misrepresenting That Work Is Subject to Reimbursement**

A contractor may be liable under false claims laws for submitting an invoice or claim that falsely represents that certain work is subject to reimbursement.<sup>142</sup> The most common scenario is where a contractor falsely represents that it performed additional work due to differing site conditions when, in fact, it performed the work for some other reason or the contractor assumed the risk of differing conditions.<sup>143</sup> In a 2000 decision, for example, a district court found that the Government adequately stated an FCA claim against a contractor and its subcontractors where the Government alleged that the contractor had falsely certified in its Request for Equitable Adjustment (REA) that the Government was liable for costs related to differing site conditions.<sup>144</sup>

#### ♦ **Misrepresenting That All Subcontractors Have Been Paid**

On most federal construction jobs, and public jobs in many states as well, the prime contractor is required to certify in its requests for payment from the Government that the contractor has promptly paid all subcontractors out of prior payments received and that the contractor will promptly pay those subcontractors out of the requested payment after receipt.<sup>145</sup> These certification requirements flow down to subcontractors as well.<sup>146</sup>

If a contractor or subcontractor submits an invoice with such a certification when it has not paid its subcontractors, or knowing that it will not use the requested payment to pay its subcontractors, the contractor or subcontractor may be liable under false claims laws.<sup>147</sup>

#### ♦ **Misrepresenting That the Contractor Is Paying Applicable Prevailing Wages**

A contractor may be liable under false claims laws if it falsely certifies that it is paying applicable prevailing wages in accordance with the federal Davis-Bacon Act<sup>148</sup> or applicable state law.<sup>149</sup> For example, in a 1999 decision, the Ninth Circuit Court of Appeals held that a contractor could be liable under the FCA for its allegedly false certification that it had paid its workers the prevailing wage rates required by the DBA, even where the United States Department of Labor had not performed an area practice survey.<sup>150</sup> By contrast, the Ninth Circuit Court of Appeals held in a 2003 decision that the *qui tam* relator labor unions failed to prove false claims based on a contractor's alleged failure to pay prevailing wages where the DOL had not issued an official prevailing wage determination.<sup>151</sup>

#### ♦ **Misrepresenting Role of Disadvantaged Businesses in Project**

A contractor that fails to adhere to certifications that certain types of disadvantaged businesses will perform portions of the work may be liable under false claims laws.<sup>152</sup> In a 1994 decision, for example, the United States Court of Federal Claims held that progress payment vouchers were false claims under the FCA where they impliedly certified that the contractor was continuing to adhere to the requirements for participation in the Small Business Administration (SBA) program for minority-owned businesses when, in fact, it was not.<sup>153</sup>

## Conclusion

Construction contractors on federal projects and public projects in a growing number of states

need to be aware of the false claims laws that apply to these projects. Government and whistleblower plaintiffs can establish contractor liability for false claims more easily than liability for fraud because, unlike fraud, false claims need not have been submitted with an intent to deceive or defraud the Government. To make matters worse, almost anyone can sue as a whistleblower under these laws, and there are tremendous financial incentives for doing so.

If a contractor is found liable under false claims laws, the consequences can be severe. If the Government was damaged, the contractor will have to pay triple those damages in most cases. And even if the Government was not damaged, the contractor may have to pay as much as \$11,000 per false claim in penalties; on a project with lots of invoices or other requests for payment, these amounts can add up quickly. Finally, in particularly egregious cases, a contractor may face criminal liability, which carries the possibility of additional penalties and imprisonment, and debarment from contracting with a public owner for a number of years.

With their combination of easier standards for liability and the harsh consequences of that liability, the false claims laws are a potent threat to contractors. As a result, when contractors are sued under these laws, they have a tremendous incentive to settle with the plaintiff, even when the case has little merit. In the situation where the Government has asserted a false claims counterclaim in response to a contractor's contract claim, the contractor will often be forced to reduce or even withdraw an otherwise legitimate claim to settle the case and eliminate the substantial risks that even marginal false claims allegations can pose to the contractor.

Even though it is difficult for public works contractors to avoid being sued under the FCA, it is still easier for a contractor to prevent an FCA lawsuit than to get out of one, once it has been sued, without paying a lot of money or possibly suffering even worse consequences. As a result, contractors should be especially diligent on public projects in ensuring the truth of their submissions to the Government, from their initial bid proposals to their final invoices.

## Guidelines

1. Contractors who work on any projects, whether as a prime or subcontractor, for the Federal Government or a state or local government in a jurisdiction with false claims laws, should alert their key personnel to false claims issues. Contractors that repeatedly work on such projects should implement a documented compliance program to ensure that the company systematically takes all reasonable steps necessary to prevent the knowing submission of false claims.

2. If a contractor learns that it may have submitted a false claim, it should immediately investigate, preferably under a lawyer's guidance (so the results of the investigation are privileged and may be kept confidential).

3. If a contractor determines that it likely did submit a false claim, it should at least consider voluntarily disclosing the information it has about the claim to the Government. Some advantages to making such a disclosure are that it may help persuade the Government that the contractor did not submit the false claim knowingly; it may reduce the Government's potential damages recovery to double, rather than triple, the Government's actual damages; and, at the very least, it will send a message to the Government that the contractor wishes to cooperate in any subsequent Government investigation.

4. If a contractor knows, or even suspects, that one of its employees is a whistleblower, or is about

to become one, it should thoroughly investigate any complaints the employee has made while, at the same time, making sure that the company does not take any adverse employment actions (firing, demotion, harassment, etc.) against that employee for any reason relating to those complaints. To the extent practicable, contractors should insulate those of its personnel that make employment decisions from those who respond to or investigate any employee complaints about contract compliance and false claims.

5. If the Government informs a contractor that it is investigating potential false claims by the contractor, the contractor should perform its own internal investigation to understand what has occurred as fully and quickly as possible. The contractor should also cooperate as fully as possible with the Government's investigation, especially when the Government is investigating a *qui tam* relator's complaint to decide whether it will intervene in the relator's

lawsuit. A contractor is much more likely to be found liable in a false claims lawsuit in which the Government intervenes than in one in which the relator is prosecuting the case alone.

6. When a contractor is sued for alleged false claims, it should evaluate its potential affirmative defenses to liability. Important defenses provided in the false claims statutes themselves include the statute of limitations defense for all FCA actions and the public disclosure and prior action bars for *qui tam* actions.

7. Due to the severe consequences for liability, most false claims lawsuits are resolved either by summary judgment or, if that fails, by settlement. Issues that frequently arise in FCA lawsuits and which are often amenable to summary judgment include (1) falsity, where it concerns compliance with technical contract requirements or regulations and/or scientific or engineering judgment, (2) materiality, and (3) public disclosure issues (in *qui tam* actions only).

## References

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2. 18 U.S.C. § 287.
3. 31 U.S.C. § 3729(a)(1)–(7).
4. 31 U.S.C. § 3729(a)(1).
5. 31 U.S.C. § 3729(a)(2).
6. 31 U.S.C. § 3729(a)(3).
7. 31 U.S.C. § 3729(a)(7).
8. 31 U.S.C. 3729(a)(1).
9. *United States v. Bornstein*, 423 U.S. 303, 308–9 (1976); see also *United States ex rel. Varljen v. Cleveland Gear Co.*, 250 F.3d 426 (6th Cir. 2001); but see *United States ex rel. Waris v. Staff Builders, Inc.*, 1999 WL 1797 45 (E.D. Pa. 1999).
10. 31 U.S.C. § 3729(a)(3).
11. *United States ex rel. Wilkins v. North American Const. Corp.*, 101 F. Supp. 2d 500, 525 (S.D. Tex. 2000), modified, 173 F. Supp. 2d 601 (S.D. Tex. 2001).
12. 31 U.S.C. § 3729(a)(3); *Wilkins*, supra n.11 at 525–526.
13. 31 U.S.C. § 3729(c).
14. *United States v. Killough*, 848 F.2d 1523, 1533–4 (11th Cir. 1988).
15. *United States v. Farina*, 153 F. Supp. 819, 821 (D.N.J. 1957).
16. *Bornstein*, supra n.9 at 308–9; *City of Pomona v. Superior Court*, 89 Cal. App. 4th 793, 803–4, 107 Cal. Rptr. 2d 710 (2001).
17. See, e.g., *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376 (3rd Cir. 1999), cert. denied, 529 U.S. 1018 (2000); *United States ex rel. Eberhardt v. Integrated Design & Const., Inc.*, 167 F.3d 861 (4th Cir. 1999); *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1364 (Fed. Cir. 1998); *Stacy & Witbeck, Inc. v. City & County of San Francisco*, 47 Cal. App. 4th 1 (1996) (California FCA).
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19. "False Claims Act Resource Center, Other Qui Tam Cases," available at <http://www.falseclaimsact.com/other.html>.
20. *Varljen*, supra n.9 at 430.
21. *Id.*; *Commercial Contractors*, supra n.17 at 1364.
22. See, e.g., *United States ex rel. Milam v. Regents of the Univ. of California*, 912 F. Supp. 868, 886 (D. Md. 1995).
23. *United States ex rel. Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1476–7 (9th Cir. 1996), cert. denied, 519 U.S. 865 (1996); *United States v. Bald Eagle Realty*, 1 F. Supp. 2d 1311 (D. Utah 1998); but see *United States ex rel. Oliver v. Parsons Co.*, 184 F.3d 1101, 1105 (9th Cir. 1999).

24. United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Const. Co., 183 F.3d 1088, 1092 (9th Cir. 1999), cert. denied, 530 U.S. 1203 (2000); United States ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1019 (7th Cir. 1999); United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902–3 (5th Cir. 1997).
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26. 31 U.S.C. § 3729(b)(1)–(3). See generally “Specific Intent to Defraud Government As Necessary to Impose Liability Under Provisions of False Claims Act (31 U.S.C.A. § 231) Pertaining to ‘False’ or ‘Fictitious’ Claims or Statements,” 26 A.L.R. Fed. 307.
27. *Id.*; *Plumbers & Steamfitters*, supra n.24 at 1092.
28. See, e.g., United States ex rel. Rakow v. Pro Builders Corp., 37 Fed. Appx. 930, 931 (9th Cir. 2002).
29. United States ex rel. Bryant v. Williams Bldg. Corp., 158 F. Supp. 2d 1001, 1006–8 (S.D.2001); Abdelkhalik v. United States, No. C-5809, 1996 WL 41234 at \* 7 (N.D. Ill. 1996).
30. See, e.g., *Plumbers and Steamfitters*, supra n.24 at 1095; *Commercial Contractors*, supra n.17 at 1366–7.
31. United States v. Data Translation, Inc., 984 F.2d 1256, 1267 (1st Cir. 1992); United States ex rel. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999); United States ex rel. Luckey v. Baxter Healthcare Corp., 183 F.3d 730, 732–733 (7th Cir. 1999), cert. denied, 528 U.S. 1038 (1999); but see United States ex rel. Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 415 (3rd Cir. 1999), cert. denied, 531 U.S. 880 (2000) (*dicta*).
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33. See, e.g., United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991); Tyger Const. Co. v. United States, 28 Fed. Cl. 35, 59–60 (1993); United States ex rel. Varljen v. Cleveland Gear Co., 250 F.3d 426, 430 (6th Cir. 2001).
34. United States ex rel. Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 288–9 (4th Cir. 2002), cert. denied, 538 U.S. 1012 (2003).
35. *Hagood*, supra n.33 at 1421 (“The requisite intent is the knowing presentation of what is known to be false. That the relevant government officials know of the falsity is not in itself a defense.”); United States ex rel. Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 327–329 (9th Cir. 1995); United States ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148, 1157 (2d Cir. 1993).
36. See, e.g., United States ex rel. Costner v. United States, 317 F.3d 883, 887 (8th Cir. 2003); cert. denied, 124 S. Ct. 225 (2003); *Lamers*, supra n.24 at 1013.
37. *Id.*
38. *Varljen*, supra n.33 at 429; *Bly-Magee v. California*, 236 F.3d 1014, 1017 (9th Cir. 2001); *Harrison*, supra n.31 at 785 n. 7; *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1371 (Fed. Cir. 1998); but see *Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1043 (Fed. Cir. 1994); United States ex rel. Stinson v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247, 1258–1259 (S.D. Fla. 1989); see also *Hammond v. Northland Counseling Ctr., Inc.*, 218 F.3d 886 (8th Cir. 2000) (assuming, without agreeing with, district court’s conclusion that proof of damage is required).
39. 31 U.S.C. § 3729(a).
40. 31 U.S.C. § 3731(c).
41. 31 U.S.C. § 3731(b). See generally Zesch, “When Does Statute of Limitations Begin to Run In Action Under False Claims Act,” 139 A.L.R. Fed. 645.
42. 31 U.S.C. §§ 3730(e)(3), (4).
43. 31 U.S.C. § 3731(b).
44. United States ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211, 1214–1216 (9th Cir. 1996) (3-year limit starts when relator knew or should have known of violation); U.S. ex rel. Colunga v. Hercules, Inc., 1998 WL 310481 (D. Utah 1998) (3-year limit starts when Government knew or should have known). Cf. U.S. ex rel. Amin v. George Washington Univ., 26 F. Supp. 2d 162, 172–3 (D.D.C. 1998) (3-year limit does not apply).
45. 31 U.S.C. § 3730(e)(4)(A).
46. *Id.*
47. 31 U.S.C. § 3730(e)(4)(A), (B).
48. Compare United States ex rel. Wang v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992) (required) with United States v. Bank of Farmington, 166 F.3d 853, 865 (7th Cir. 1999) (not required).
49. 31 U.S.C. § 3730(e)(3).
50. 31 U.S.C. § 3730(b)(5).
51. United States ex rel. S. Praver & Co. v. Fleet Bank, 24 F.3d 320, 328 (1st Cir. 1994); United States ex rel. LaCorte v. SmithKline Beecham Clinical Lab., 149 F.3d 227, 232 (3rd Cir. 1998).
52. 31 U.S.C. § 3730(a).
53. 41 U.S.C. §§ 606, 609 (Contract Disputes Act); 28 U.S.C. § 1491 (Tucker Act).
54. Appeal of Beaves, DOTCAB 1324, 83-1 BCA ¶ 16232.
55. See, e.g., *Commercial Contractors*, supra n.38 at 1364; *BMY–Combat Systems Div. of Harsco Corp. v. United States*, 44 Fed. Cl. 141 (1999); *Ab-Tech Const., Inc. v. United States*, 31 Fed. Cl. 429 (1994), *aff’d without op.*, 57 F.3d 1084 (Fed. Cir. 1995).
56. 31 U.S.C. § 3730(b).
57. 31 U.S.C. § 3730(b)(1).
58. See <http://www.taf.org/statistics.html>.
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60. 31 U.S.C. § 3730(d)(1).
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62. United States ex rel. Givler v. Smith, 760 F. Supp. 72, 74 (E.D. Pa. 1991).
63. See, e.g., United States ex. rel LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990), cert. denied, 499 U.S. 921 (1991); United States ex rel. Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 744–5 (9th Cir. 1995) (*en banc*), cert. denied, 517 U.S. 1233 (1996); but see United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991).
64. See, e.g., Cal. Gov’t Code § 12652(d)(4); D.C. Code Ann. § 2-308.15(c)(4); Fla. Stat. Ann. § 68.087(4)–(5); N.R.S.A. § 357.090; Tenn. Code Ann. § 4-18-104(d)(4); Va. Code Ann. § 8.01-216.8.
65. 31 U.S.C. § 3730(h).
66. *Id.*
67. *Id.*
68. 31 U.S.C. § 3729(a). See generally DiSabatino, “Measure and Elements of Damages Under False Claims Act,” 35 A.L.R. Fed. 805.

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70. 31 U.S.C. § 3729(a).
71. United States v. Aerodex, Inc., 469 F.2d 1003, 1011 (5th Cir. 1972); *BMV-Combat Systems*, supra n.55 at 147-148.
72. See, e.g., United States v. Foster Wheeler Corp., 447 F.2d 100, 102 (2d Cir. 1971). But see United States v. Cooperative Grain & Supply Co., 476 F.2d 47, 62 (8th Cir. 1973).
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76. 31 U.S.C. § 3729(a).
77. United States v. Advance Tool Co., 902 F. Supp. 1011, 1018-9 (W.D. Mo. 1995), aff'd without op., 86 F.3d 1159 (8th Cir. 1996); United States v. Mackby, 243 F.3d 1159, 1168 (9th Cir. 2001); see also State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513 (2003) (holding punitive damages must be proportionate to actual damages).
78. 31 U.S.C. § 3730(d)(1), (2).
79. 31 U.S.C. §§ 3730 (d)(4), 3730(g); 28 U.S.C. § 2412(d).
80. 31 U.S.C. § 3730(c)(5).
81. United States ex rel. Barajas v. United States, 258 F.3d 1004, 1006 (9th Cir. 2001).
82. FAR 9.406-2(a)(1) (48 C.F.R. Pt. 9).
83. See, e.g., *Barajas*, supra n.81 at 1014.
84. 18 U.S.C. § 287.
85. United States v. Gumbs, 283 F.3d 128, 131 (3rd Cir. 2002).
86. Id. at 131; United States v. Catton, 89 F.3d 387, 392 (7th Cir. 1996); United States v. Barker, 967 F.2d 1275, 1278-79 (9th Cir. 1991).
87. *Catton*, supra n.86 at 392; United States v. Milton, 602 F.2d 231, 234 (9th Cir. 1979). But see United States v. Miller, 545 F.2d 1204, 1212-13 (9th Cir. 1976), cert. denied, 430 U.S. 930 (1977).
88. Compare United States v. Pruitt, 702 F.2d 152, 155 (8th Cir. 1983) with United States v. Snider, 502 F.2d 645, 652 n. 12 (4th Cir. 1974) (materiality required), with United States v. Parsons, 967 F.2d 452, 455 (10th Cir. 1992) and United States v. Elkin, 731 F.2d 1005, 1009 (2nd Cir. 1984), cert. denied, 469 U.S. 822 (1984) (not required).
89. 18 U.S.C. § 287.
90. FAR 9.406-2(a)(1) (48 C.F.R. Pt. 9); Re Debarment of Gassman, GSBICA No. D-3, 79-1 BCA ¶ 13771.
91. See, e.g., *City of Pomona v. Superior Court*, 107 Cal. Rptr. 710 (App. 2001) (California FCA); United States ex rel. Humphrey v. Franklin-Williamson Human Services, Inc., 189 F. Supp. 2d 862 (S.D. Ill. 2002) (Illinois FCA).
92. See, e.g., Cal. Penal Code § 72; N.J.S.A. 2C: 21-34.
93. Cal. Gov't. Code § 12650 et seq.
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95. D.C. Code Ann. § 2-308.14 et seq.
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102. Va. Code, Ch. 3, tit. 8.01.
103. Cal. Gov't. Code § 12652(b)(1)-(2), (c)(5).
104. See, e.g., Cal. Gov't. Code § 12651(a)(8); D.C. Code Ann. § 2-308.14(a)(8); N.R.S.A. § 357.040(1)(h); Tenn. Code Ann. § 4-18-103(a)(8).
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128. H.B. 1285, 185th Gen. Assem., 2001-02 Reg. Sess., 2001.
129. United States v. Farina, 153 F. Supp. 819, 821 (D.N.J. 1957).
130. See, e.g., United States v. General Dynamics Corp., 19 F.3d 770, 772, 775 (2d Cir. 1994); United States v. Ehrlich, 643 F.2d 634 (9th Cir. 1981), cert. denied, 454 U.S. 940 (1981); United States ex rel. Durholz v. FKW, Inc., 997 F. Supp. 1143 (S.D. Ind. 1998); United States ex rel. Fallon v. Accudyne Corp., 880 F. Supp. 636, 638-40 (W.D. Wis. 1995).
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133. See the City of San Francisco's press release at [http://www.ci.sf.ca.us/site/cityattorney\\_page.asp?id=16167](http://www.ci.sf.ca.us/site/cityattorney_page.asp?id=16167).
134. See <http://www.construction.com/NewsCenter/Headlines/ENR/20010716a.asp> and <http://www.construction.com/NewsCenter/Headlines/ENR/20010803a.asp>.

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140. *City of Pomona*, supra n.138.
141. *Pickens*, supra n.138.
142. See, e.g., United States ex rel. Wilkins v. North American Const. Corp., 101 F. Supp. 2d 500, 504 (S.D. Tex. 2000), modified, 173 F. Supp. 2d 601 (S.D. Tex. 2001); Larry D. Barnes, Inc. v. United States, 45 Fed. Appx. 907, 914–15 (Fed. Cir. 2002); United States ex rel. Bhatnagar v. Kiewit Pacific Co., 2000 WL 1456940 (N.D. Cal. 2000), rev'd, 24 Fed. Appx. 837 (9th Cir. 2002); *City of Pomona*, supra n.138 (California FCA).
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149. See, e.g., United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Const. Co., 183 F.3d 1088 (9th Cir. 1999), cert. denied, 530 U.S. 1203 (2000); United States v. Schimmels, 127 F.3d 875, 877–78 (9th Cir. 1997); United States ex rel. Burns v. A.D. Roe Co., 186 F.3d 717 (6th Cir. 1999). But see United States ex rel. Local 342 Plumbers & Steamfitters v. Caputo Co., 321 F.3d 926 (9th Cir. 2003).
150. *Plumbers & Steamfitters Local Union No. 38*, supra n.149 at 1091–92.
151. *Local 342 Plumbers & Steamfitters*, supra n.149.
152. See, e.g., *Ab-Tech Const., Inc. v. United States*, 31 Fed. Cl. 429 (1994); *Southern Cal. Rapid Transit Dist. v. Superior Court*, 36 Cal. Rptr. 2d 665 (App. 1994) (California FCA).
153. *Ab-Tech*, supra n.152 at 433–34.

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