

# The False Claims Act:

## What Every Contractor Needs to Know

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The False Claims Act applies to federal projects and state/local projects receiving federal funds. Under the civil portion<sup>1</sup> of the False Claims Act, at 31 U.S.C. §§ 3729-3733, those who knowingly submit, or cause another person or entity to submit, false claims for payment of government funds are liable for three times the government's damages plus civil penalties of \$5,500 to \$11,000 per false claim. This is in addition to the related threat of suspension and debarment that oftentimes accompany such claims.

In fiscal year 2010, the United States Department of Justice ("DOJ") recovered over \$2.3 billion from lawsuits under the False Claims Act.<sup>2</sup> As stated by the DOJ in a November 2010 press release, in 2009-2010, the DOJ's "aggressive pursuit of fraud under the False Claims Act has resulted in the largest two-year recovery of taxpayer dollars in the history of the Justice Department."<sup>3</sup> Given the government's aggressive stance on pursuing claims under the False Claims Act, construction contractors doing government work or work on projects funded with government funds<sup>4</sup> need to be aware of the potential exposure presented by the False Claims Act, as well as actions that can be taken to reduce the risk of such exposure.

### Overview of the False Claims Act

Under the False Claims Act, actions against contractors may be instituted by the government or by a private whistleblower, referred to as a qui tam relator, who would bring the action on behalf of the government. Because a private individual relator must have independent knowledge of non-public allegations, the relator is very often an insider at a private company who brings an action against his own employer. Under section 31 U.S.C. § 3730(d), the relator is entitled to share in the recovery from a False Claims Action. An innocent relator may receive at least 15 percent but no more than 25 percent if the government intervenes, or between 25 percent and 30 percent if the government does not intervene (culpability in the conduct alleged can reduce the relator's recovery). To put this in perspective, in fiscal year 2010, private individual relators were awarded \$385 million from lawsuits filed under the False Claims Act.<sup>5</sup> Obviously, the potential for a significant personal monetary recovery represents a motivational factor for any contractor employee, regardless of their employment level or years.

### Common Types of False Claims Act Violations

Although the False Claims Act is essentially a fraud statute aimed at combating false claims and false statements submitted to the government, its application takes many forms – not all of which are entirely obvious, yet which can trigger massive liability because of treble damages and penalties available to the government and whistleblowers under the False Claims

Act. Further, while the False Claims Act imposes liability only when the false claim is made "knowingly," it does not require that the person or entity submitting the claim have actual knowledge that the claim is false. Instead, a claim submitted in reckless disregard or in deliberate ignorance of the truth or falsity of the information, also can constitute an actionable false claim.<sup>6</sup>

The most common type of False Claims Act violations relate to overbilling, billing for work not performed, upcharging, etc. As an example, in the case of *Morse Diesel Int'l v. United States*, a construction contractor was found to have violated the False Claims Act by submitting certified payment applications that included the full amount of bond premiums even though a portion of the premiums were actually refunded to the contractor's parent company by the bond broker. The Court determined that these were false claims and awarded the government over \$7 million in treble damages and penalties against the contractor.<sup>7</sup>

In addition to pure false requests for payment, a growing number of actions have been based on a "false certification" theory by which it is alleged that the submission of a claim which expressly or impliedly certifies compliance with a federal statute, regulation, or contract term that has not in fact been complied with renders the claim false or fraudulent, even though the claim itself is not facially false. For example, in *Ab-Tech Construction, Inc. v. United States*,<sup>8</sup> a construction company participated in a federal SBA program that promoted minority-owned businesses. In order to participate, the contractor was required to submit an express certification attesting to its compliance with program requirements. Later, the government learned that the contractor had ceased to be in compliance without alerting the government, and so filed a False Claims Act lawsuit to recover payments made to the contractor after it ceased to be in compliance. The Court held that each invoice the contractor submitted included an implied certification that it was in continuing compliance with the express certification it had previously submitted, and held that the contractor's failure to comply with the terms of this implied certification made its claims for payment false under the False Claims Act.

More recently, the DOJ announced on November 19, 2010, that two Michigan contractors agreed to pay \$1.4 million to the government to settle alleged False Claims Act violations relating to a federally-funded construction project at the Detroit Wayne County Metropolitan Airport. The DOJ alleged that the two contractors had falsely claimed that they had used Disadvantaged Business Enterprises (DBEs) for part of the work on the project when they had not.<sup>9</sup>

There are numerous areas where False Claims Act violations can potentially arise in almost every phase of a construction project. For example, information or representations included within the contractor's bid or proposal may be considered false if not fully complete or accurate. Certifications

in the contractor's monthly pay applications as to the quantity of work performed, that all subcontractors have been paid, that all costs are allowable, etc., may also give rise to liability for false claims if not 100% accurate. Claims for additional time or money under the contract with inflated estimates or are that not supported by the contract's terms could also potentially lead to False Claims Act liability.

**Reducing the Risk of False Claims Act Liability**

While it may be impossible to completely eliminate any possibility of a False Claims Act violation, there are a number of steps that contractors can take to try to reduce the risk of False Claims Act liability. First, understand and work to ensure the accuracy of any certifications made to the government, either in formal, written proposals or claim submissions, or even in informal communications with the government. Often False Claims Act cases are brought based on a number of certifications, including annual or other periodic certifications as well as certifications submitted with each claim for payment. This may also include certifications in requests for change orders or extensions of time. Remember that the certifications need not actually accompany a claim to be actionable, because even if they are not submitted for payment, if the statements are false and cause a later claim to be false, False Claims Act liability can attach. Also, consult with legal counsel before retaining overpayments from the government, as doing so can create liability under the False Claims Act.

Additionally, both training of employees and having an effective compliance program help reduce the risk of False Claims Act claims. It is important that these compliance programs be more than just pieces of paper; they should be robust, active programs and a compliance-oriented tone should be implemented from management down. Instruct employees to monitor work to insure that any certifications of compliance with any statute, regulation, or contract term are accurate and truthful. Scrupulous monitoring of the accuracy of progress payment applications, unit price quantities, equipment rates, etc., is also important. Consider establishing protocols, such as anonymous reporting, to encourage employees to come forward with concerns. Audits may also assist in identifying fraud risk areas or non-compliance that risks False Claims Act liability.

Another potential step is to obtain information from exiting employees. A detailed exit interview can provide valuable information as to any concerns the employee has. If the employee indicates that they have no concerns, consider having the employee sign a statement to that effect. Although this would not insulate the contractor from a later False Claims Act case, it would call in to doubt the employee's credibility. Similarly, formal severance agreements can help limit potential exposure.

It should be also be noted that the False Claims Act has anti-retaliation provisions under which employers can be held liable for retaliating against

employees who complain about conduct violating the False Claims Act. Needless to say, contractors should consult legal counsel before demoting, firing, or taking any other adverse action against employees who have reported conduct that may violate the False Claims Act. Likewise, contractors that become aware of potential misconduct by employees that may violate the False Claims Act should consult legal counsel about performing an internal investigation and possibly self-reporting violations to the government. ▼

1. The False Claims Act also provides for criminal liability at 28 U.S.C. § 287, under which a person who presents a false claim to the government knowing it to be false shall be imprisoned up to five years and subject to fines.
2. Department of Justice, November 22, 2010, Press Release: "Department of Justice Recovers \$3 Billion in False Claims Cases in Fiscal Year 2010," at <http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html> (last accessed on July 22, 2011)
3. Id.
4. This article focuses on the Federal False Claims Act, but many states also have their own false claims act statutes with similar provisions related to state government contracts.
5. Department of Justice, November 22, 2010, Press Release: "Department of Justice Recovers \$3 Billion in False Claims Cases in Fiscal Year 2010," at <http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html> (last accessed on July 22, 2011).
6. 31 U.S.C. 3729(b).
7. 79 Fed. Cl. 116 (2007).
8. 31 Fed. Cl. 429 (1994), affirmed by *Ab-Tech Const. v. U.S.*, 57 F.3d 1084 (Fed. Cir. 1995).
9. Department of Justice, November 19, 2010, Press Release: "Two Michigan Construction Firms to Pay More Than \$1.4 Million to Resolve Alleged False Claims," at <http://www.justice.gov/opa/pr/2010/November/10-civ-1331.html> (last accessed July 22, 2011).



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