

CDR.01

False Claims on Public Projects: Don't Bet Your Business on It

Kayhan Fatemi, and Matthew J. Lankenau, CCE

The government's procurement policy pendulum swings from overprotection of the public purse to more business friendly procurement procedures depending on the business and political climate. Historically, businesses have relatively fearlessly submitted exaggerated requests for compensation from the government including attempts to recover monies lost due to bid busts, or just plain greed, despite existing laws making such attempts illegal. However, now, businesses must be on their "best behavior" as the trend is clearly towards increased enforcement of existing federal and state laws imposing punitive measures on those attempting to collect exaggerated fees for government work.

Businesses doing federal government work now risk dire consequences for historically tolerated acts, as federal and state penalties are being imposed with impunity and with such severity as to result in extreme "pain" for those brave enough to make blatant attempts to extract improper funds, even if historically within previously tolerable limits of behavior. The increased usage of the federal and state false claims acts as a litigation tool and negotiation strategy is evidence that the pendulum has swung towards increased governmental protectionism on domestic public construction projects.

The Federal False Claims Act ("FCA") was originally enacted in 1863 to combat fraud by government defense contractors and to recover the resultant losses of such fraud.^[i] Nevertheless, the FCA was seldom used until the mid 1980's. Since its amendment in 1986, more than \$6.3 billion has been recovered in civil fraud cases brought under the FCA's Whistleblower provision. ^[ii] Though nearly half of these fraud cases, and more than half of these recoveries, involve healthcare fraud,^[iii] there have been significant increases in false claims allegations and liability in the construction industry.^[iv] Fortunately, the standards defining FCA liability are relatively well defined and liability can be minimized, or conversely, identified by following a few common sense procedures.

CIVIL LIABILITY UNDER THE FCA

FCA liability is incurred by one of seven separate acts.^[v] Any person who (1) "knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent

claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; (4) has possession, custody or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person received the certificate or receipt; (5) authorizes or delivers a document certifying receipt of 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; (6) 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 the pledged property; or (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government."^[vi] Persons potentially liable under the FCA include: individuals; fictional entities, i.e., corporations; and local governments and municipalities.^[vii]

The statute broadly defines the term "claim" as including "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipients 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."^[viii]

Since liability does not demand proof of a "specific intent to defraud," the FCA requires a fairly minimal level of "awareness" to establish civil liability.^[ix] "Those who 'knowingly' present a 'false or fraudulent claim' to the government" are subject to false claims liability.^[x] "Knowingly is established when the Government shows the claimant either: "(1) had actual knowledge of the information; (2) acted in deliberate ignorance of the truth or falsity of the information; or (3) acted in reckless disregard of the truth or falsity of the information."^[xi]

Negligence and innocent mistakes do not create FCA liability.^[xii] For example, in *U.S. ex rel., Rakow v. Pro Builders Corp.*^[xiii], where the contractor only learned of the "isolated