

## HOW THE FALSE CLAIMS ACTS MAY IMPACT YOUR CONSTRUCTION PROJECT

By Katherine M. Knudsen, Esq.  
*Procopio, Cory, Hargreaves & Savitch LLP*



KATHERINE M. KNUDSEN

Federal and state governments spend billions of dollars annually on a wide variety of construction projects. These projects have long been a target for fraud and abuse. Some of the most common types of fraud that have been investigated include bid-rigging, falsification of minority contractor status, bribes, illegal kickbacks, overcharging for materials, overcharging for labor hours, sub-standard materials, sub-standard workmanship, failure to follow contract specifications, and falsification of progress reports and documents.

The United States Congress and the California Legislature each enacted a False Claims Act (“FCA”) to empower federal, state and local governments and public entities to investigate and impose liability on contractors for the foregoing types of fraud. Significantly, contractors may be held liable for substantial damages and penalties even if they committed the fraudulent acts inadvertently and without any intention to deceive. Consequently, it is very important to understand the broad reach of the FCA’s and to put safeguards in place to avoid unintentional violations of the statutes.

### **The Federal False Claims Act**

The central premise of the federal FCA has remained essentially unchanged since Congress first enacted the law in 1863. The FCA provides the federal government with a powerful means of attacking fraud through an action for multiple damages and penalties. The apparent legislative purposes of the FCA are to discourage the filing of fraudulent claims against government entities, to promote the discovery of

fraudulent claims, and to penalize persons who file fraudulent claims. The FCA establishes liability when any person or entity improperly receives or avoids payment to the federal government. The FCA prohibits:

- Knowingly presenting or causing to be presented a false claim for payment or approval;
- Knowingly making, using, causing to be made or used, a false record or statement material to a false or fraudulent claim;
- Conspiring to commit any violation of the FCA;
- Falsely certifying the type or amount of property to be used by the Government;
- Certifying receipt of property on a document without completely knowing that the information is true;
- Knowingly buying Government property from an unauthorized officer of the Government; and
- Knowingly making, using, or causing to be made or used a false record to avoid, or decrease an obligation to pay or transmit property to the Government.

The most commonly used provisions are the first and second, which prohibit presenting false claims to the federal government and making false records to get a false claim paid. By far the most frequent cases involve situations in which a defendant—usually a corporation but on occasion an individual—overcharges the federal government for goods or services. Other typical cases involve the failure to test a product as required by the rigorous government specifications or selling defective products.

The FCA also contains whistleblower, or “*qui tam*” provisions. *Qui tam* is a unique mechanism in the law that allows citizens with evidence of fraud against government contractors and programs to sue, on behalf of the government, in order to recover the stolen funds. As compensation for the risk and effort of filing a *qui tam* case, the citizen whistleblower or “relator” may be awarded a portion of the funds recovered, typically between 15 and 30 percent of what is recovered.

The penalties for violating the federal FCA can be up to three times the actual value of the false claim, plus from \$5,500 to \$11,000 in fines, per claim.

In 2009 the Fraud Enforcement and Recovery Act (“FERA”) was signed into law. Some of the significant amendments to the FCA enacted by the FERA include the following:

- Expanded the scope of potential FCA liability by eliminating the “presentment” requirement;
- Redefined “claim” under the FCA to mean “any request or demand, whether under a contract or otherwise for money or property and whether or not the United States has title to the money or

property” that is (1) presented directly to the United States, or (2) “to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest” and the government provides or reimburses any portion of the requested funds;

- Amended the FCA’s intent requirement, to now require only that a false statement be “material to” a false claim;
- Expanded conspiracy liability for any violation of the provisions of the FCA;
- Amended the “reverse false claims” provisions to expand liability to “knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government;” and
- Increased protection for *qui tam* plaintiffs/relators beyond employees, to include contractors and agents.

### **California False Claims Act**

California was the first state to enact its own false claims statute involving a *qui tam* component, which it modeled after the federal FCA in 1987. In October 2009, the California FCA was amended to strengthen an already potent anti-fraud statute, increase the scope of liability, and legislatively “overrule” a number of cases favorable to defendants.

The California FCA has become an important tool for state and local governments and public entities, such as school districts. The state alone reportedly recovered more than \$1 billion under the False Claims Act since 1999. Actions have been brought in a wide range of situations, including against contractors on public works projects, health care providers, and those who contract to supply public entities with goods and services.

Liability under the California FCA is

similar to liability under the federal FCA, except that the California statute contains several important differences. California’s FCA additionally imposes liability upon anyone who is a “beneficiary of an inadvertently submitted false claim” and who later discovers the false claim but fails to report it within a “reasonable time” after discovery.

Also, the California FCA refers only to acts “knowingly” done. Proof of specific intent to defraud is not required. It also provides for civil penalties “of not less than five thousand dollars (\$5,000) and not more than ten thousand dollars (\$10,000) for each violation.” The statute also provides that any person who violates the statute shall be liable for three times the amount of damages sustained by the state or political subdivision. The amendments to the California FCA change the language regarding the imposition of civil penalties from “may” to “shall,” making clear that penalties are not discretionary.

If certain mitigating circumstances are present, the penalties may be less severe. The court may assess not less than two times, and not more than three times, the amount of damages the state or political subdivision sustained because of the fraudulent conduct. Further, no civil penalty may be assessed if the court finds all of the following:

- The person committing the violation furnished officials of the state or of the political subdivision responsible for investigating false claim violations with all information known to that person about the violation within 30 days after the date on which the person first obtained the information;
- The person fully cooperated with any investigation by the state or political subdivision of the violation; and
- At the time the person furnished the state or the political subdivision with information about the violation, no criminal

prosecution, civil action, or administrative action had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

Recovery for *qui tam* relators is somewhat more generous under the California statute than under the federal FCA. Where the government does not join the case, the relator is eligible to receive between 25 and 50 percent of the recovery in addition to costs and attorneys’ fees. Where the government joins a *qui tam* case, the relator is eligible to receive from 15 to 33 percent of the recovery.

An additional difference between the federal FCA and the California statute is that more than one governmental prosecutor may be involved. Under the California statute, local governments may pursue claims involving local funds. The statute provides that either the Attorney General of the state or the local prosecuting authority, ordinarily the City Attorney or the County Counsel, may take over a case brought by a *qui tam* relator.

Both the California and federal amendments make the FCA’s powerful tools for the government. Like the federal government, California has strengthened its FCA and attempted to nullify judicially imposed limitations. As a result, more claims under the California FCA are likely to be filed and potential defendants may face greater exposure to liability.

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*Ms. Knudsen is a member of the firm’s Construction Litigation Group where she concentrates her practice on construction, real estate, business litigation and business matters. Reach her at [kathy.knudsen@procopio.com](mailto:kathy.knudsen@procopio.com) or 619.515.3206.*