

A Design-Builder's Guide to Government Lawsuits (and How to Avoid Them)

Wednesday, August 20, 2014

Federal Project Symposium

3:15 – 4:45 pm



FEDERAL PROJECT
DELIVERY SYMPOSIUM



Omni Shoreham Hotel / Washington, DC



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Introducing Our Panel

- **Reggie Jones**

- Fox Rothschild, LLP
- Chair, Federal Government Contracts & Procurement Practice Group



- **Andrew Steinberg**

- Trial Attorney, United States Department of Justice
- Civil Division



- **Tanya Matthews**

- President, TMG Construction Corporation
- Former DBIA National Board Chair



- **Nick Solosky**

- Fox Rothschild, LLP
- Attorney, Federal Government Contracts & Procurement Practice Group

Why We Are Here



- **Lusk Mechanical - \$6.25M Settlement**
 - Alleged False Statements by Mechanical Contractors to the SBA concerning HUBZone Program Participation and False Claims to the U.S. Army
- **Okland Construction – \$1M Settlement**
 - Alleged False Statements and False Claims by a Large Construction Company to the SBA concerning 8(a) Mentor-Protégé Program Participation
- **Granite Construction - \$367,500 Settlement**
 - Alleged Fraud relating to Inflated Invoices Submitted by an Infrastructure Contractor to the DOT and USACE

Why We Are Here

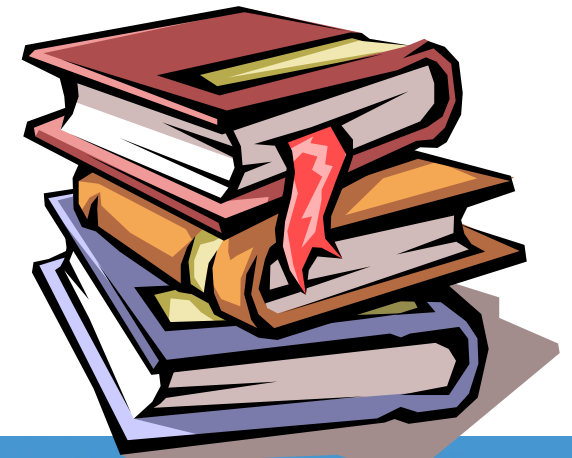
- The **Civil False Claims Act** (31 USC 3729-3733) and liability to the U.S. Government
- Primary and most effective tool used by the Government to combat **fraud** on Federal contracts
- In the last **4 years**, the U.S. has recovered **more money from private contractors** based on alleged fraud against the Government than it had in the previous **150**

The Importance for Design-Builders

- Updates to the **Federal Acquisition Regulation (FAR)** to provide express design-build provisions are leading to **increased opportunities** for Design-Builders with Federal agencies.
- Designers may be less experienced with the Construction-Related FAR Certifications.

The Importance for Design-Builders

- **FAR Part 36 and Required Contractor Certifications**
- **Mandatory Treble Damages and Mandatory Civil penalties;**
- **FAR Subpart 3.10—Contractor Code of Business Ethics and Conduct**



Today's FCA Reality

- The Construction Industry is an Easy Target for Civil False Claims Act Allegations.
- There is Bi-Partisan Political Support for Enforcement
- Risk of Unintentional False Claims is High
- Regular Ethics & Compliance Training is the Best Protection



False Claims Act Liability

Direct False Claim

Knowingly presenting, or causing to be presented, a false claim

False Statement

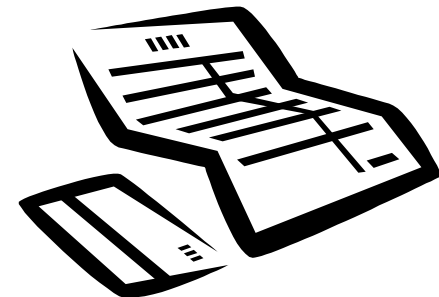
Knowingly making, using or causing to be made or used a false record/statement material to a false or fraudulent claim

Reverse False Claim

Knowingly concealing or decreasing an obligation to pay money to government

Conspiracy to Commit a False Claim

Frequently used in multi-defendant actions



The Elements of a False Claim

Claim – Means any request for money or property

Multiple requests = multiple false claims



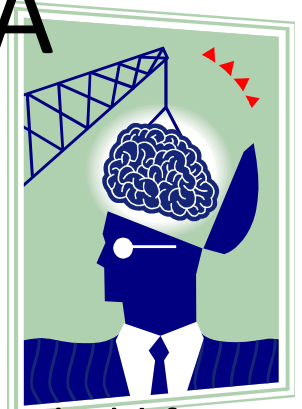
Knowingly – Means a Contractor:

1. Has **actual knowledge** of falsity;
2. Acts in **deliberate ignorance** of truth/falsity; **or**
3. Acts in **reckless disregard** of truth/falsity.

**** A specific intent to defraud is not required ****

Recent Amendments to the FCA

Broad Knowledge Standard



- **Actual Intent to Defraud is Irrelevant**

- Fraud Enforcement & Recovery Act of 2009 (“FERA”) lowered the threshold for the government to prove intent (*scienter*)
- Knowingly submitting a false claim is enough, and now “knowingly” does not mean actual knowledge
- Reversal of *Allison Engine Co. v. United States*, 553 U.S. 662 (2008)

- **Presentment Directly to Government is Irrelevant**

- It is enough that a claim that should not be submitted reaches the government

- **Just \$1 of federal money is enough to subject the *entire claim* amount to False Claims Act litigation**

- *United States v. Custer Battles*, 562 F.3d 295 (4th Cir. 2009)

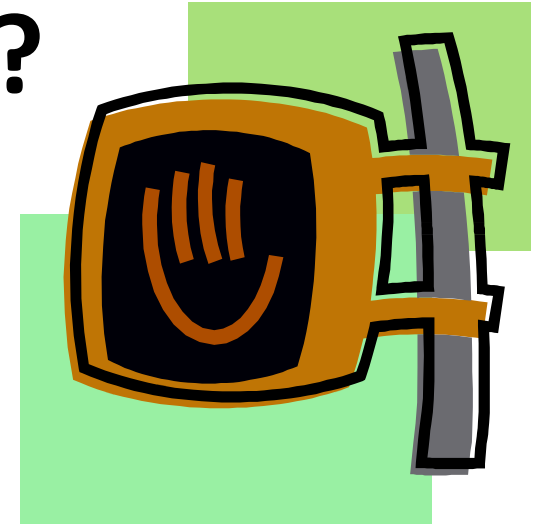
Who Can Bring a False Claims Action?

- **Contracting Officer**
 - What must CO do if false contract claim is suspected?
 - FAR 33.209 – If contractor is unable to support any part of a claim, assumed to be false and must be reported to agency's fraud unit
- **Qui Tam Relator (Private Citizen Plaintiff)**
 - Whistleblower Action
 - Competitor
 - Employee
 - Incentive = up to 30% of the government's damages



False Claims Act: What Can't You Do?

- Submit false invoices
- Submit false contract claims
- Conceal rebate or credit
- Illegitimately front load invoices
- Submit inflated material/personnel/equipment costs
- Substitute non-conforming materials
- Conceal defective/non-conforming work
- Submit false certifications – SBA certifications
- Collude on bid/proposal prices
- Submit a false federal Small Business Subcontracting Plan
- **Implied Certifications**





False Claims Act: What Can't You Do?

- *Daewoo Eng'g & Const. Co. v. United States*, 73 Fed. Cl. 547 (2006)
 - Bid low and planned to submit REAs to make up the difference
 - Submitted \$13 million claim disguised as \$64 million claim
 - Court of Federal Claims held Daewoo liable under fraud provision of the CDA for \$50 M; required Daewoo to forfeit \$14 M claim; and held Daewoo liable for \$10 K under the FCA

What Happens if You Do?

- Up to **\$11,000 civil penalty** for each false claim
- **Automatic Treble damages** – Three times the amount of damages sustained by the government (*e.g.*, 3 times the amount of the false invoices)
- **Forfeit** legitimate claims
- **“Benefit of the Bargain”** damages
 - *Morse Diesel Int’l v. U.S.*, 79 Fed. Cl. 116 (2007)
 - \$467,000 claim led to **\$7 million** in penalties
- Small Business Job Act presumed damages (full value of the contract)



Unsealed Civil False Claims Act Case Studies

Andrew Steinberg

- Trial attorney
- Civil Division of the U.S. Department of Justice



Case Studies

- ***United States ex rel. Howard v. Harper Construction Co., et al. Case No. 7:12-CV-215-D (E.D. N.C.)***



Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Wednesday, April 9, 2014

California-Based Masonry Companies Pay Nearly \$1.9 Million to Settle Claims of Misrepresenting Disadvantaged Small Business Status in Connection with Military Contracts

- ***Caddell Construction Settlement***



Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Monday, March 25, 2013

Caddell Construction Agrees to Pay \$1,150,000 to Resolve False Claims Allegations

United States Alleges that Company Falsely Claimed Payment For Native American-Owned Business Participation

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Ethics & Compliance Requirements

FAR 52.203-13 (effective 12/31/08) requires contractors to:

- 1. Implement Contractor Code of Business Ethics and Conduct**
- 2. Establish Business Ethics Awareness and Compliance Program**
- 3. Establish Internal Control System**



Inform Office of Inspector General (“OIG”) of “credible evidence” of any violation

Code of Business Ethics and Conduct

- **Must be drafted within 30 days after award**
- **Applies to contracts in excess of:**
 - **\$5 million in value and**
 - **120 days in contract duration**
- **Should address false claims, conflicts of interests, bribes, kickbacks, anticompetitive actions, hiring government employees**



Application of the Code

- **To whom does the Code of Business Ethics and Conduct apply?**
 - Any **officer, director, or employee**
 - **All employees** have a duty to report all suspected violations of the Code or other potentially unethical behavior by anyone, including officers, directors, employees, agents, customers, subcontractors, suppliers, and prime contractors to the Corporate Compliance Officer



Internal Control System

- **Establish procedures to:**
 - **Monitor and detect improper conduct**
 - **Conduct periodic reviews of business practices**
 - **Establish internal reporting mechanisms – Hotline, Compliance Officer – to allow anonymous reporting**
 - **Display Agency Fraud Hotline**
 - **Ensure corrective measures carried out – Disclose and discipline**
 - **No retaliation against Whistleblowers**



Business Ethics Awareness and Compliance Program

- Take “Reasonable Steps” to educate principals and employees
 - Communicate “Periodically” and in a “Practical Manner” about ethics program
 - Conduct effective training programs
 - Disseminate information regarding roles and responsibilities
 - Include agents and subcontractors



Disclosure of Credible Evidence

- **Timely disclose** “credible evidence” of improper conduct, in writing, to the agency Office of the Inspector General, with a copy to the contracting officer involving:
 - Criminal Acts:
 - Fraud
 - Bribery
 - Gratuities
 - Violations of the civil False Claims Act



How to Implement a Contractor Code of Business Ethics and Conduct

Tanya Matthews

- President, TMG Construction Corporation
- Expert in the Field of Design-Build Construction
- DBIA's First Female National Board Chair



**The Matthews Group, Inc. t/a
TMG Construction Corporation (TMG)**

**Code of Business Ethics and Conduct
(Section 2.06 of Employee Manual)**

With Updates as of [REDACTED]



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2.06.1 Statement of Policy

It is the policy of The Matthews Group, Inc. t/a TMG Construction Corporation (“TMG”) to maintain high ethical standards and comply with all applicable laws, rules, and regulations. We believe that adherence to this policy will ensure our continued success as well as earn and maintain the confidence of our customers and the community in which we live. In order to ensure TMG operates pursuant to this policy, we have established this Code of Business Ethics and Conduct (“Code”). The following general rules apply to the implementation of this Code:

1. All employees must comply with this Code. Any officer, director, or employee violating this Code is subject to discipline, which may include demotion or dismissal.
2. All employees have a duty to report all suspected violations of the Code or other potentially unethical behavior by anyone, including officers, directors, employees, agents, customers, subcontractors, suppliers, and prime contractors, to the Corporate Compliance Officer. The Corporate Compliance Officer is [REDACTED]. She can be reached using the TMG Ethics Hotline at [REDACTED] or by E-mail at [REDACTED]. All communications concerning related matters are strictly confidential.

2.06.12 Training of Employees and Subcontractors

TMG shall conduct training of its employees in business ethics and conduct at least once a year and a record shall be kept of the annual training of each employee and written acknowledgement of the TMG Code. TMG shall annually review the training programs to ensure that the content is appropriate to the employees in attendance and that the program reflects the newest developments in ethics and conduct.

To the extent that it is appropriate, TMG shall offer training in business ethics and conduct to subcontractors or subconsultants. The appropriateness of or necessity for any such training shall be determined by the Compliance Officer. Any questions concerning subcontractors or subconsultants and their efforts to comply with these ethical requirements, and any role played by TMG in assisting them in achieving compliance, should be directed to the Compliance Officer, [REDACTED]

2.06.8 Investigation and Disclosure Policy

In order to maintain the highest level of integrity and ethics throughout the Company, TMG internally investigates any allegation that a violation of Federal, State or Local criminal law involving fraud, conflict of interest, bribery or gratuity violations, or a violation of the civil False Claims Act in connection with any Government contract to which TMG is a party. Unless circumstances require a different individual to investigate, the investigation shall be headed by the Corporate Compliance Officer. Using sufficient time to conduct its investigation but without taking unnecessary delays, TMG shall investigate these allegations, TMG employees involved and any other individuals involved in the situation. In the event that the TMG investigation discovers credible evidence of a violation of this Code or applicable Federal law, TMG will make a timely disclosure in writing to the Office of the Inspector General for the contracting agency and will provide a copy of its findings to the contracting officer for the affected contract.

For the purposes of TMG's internal investigations, credible evidence is evidence that based upon the circumstances of the allegation makes it reasonably believable that a violation of applicable law occurred.

QUESTIONS?



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