



# What Contractors Need to Know About Changes to State False Claims Acts

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# Agenda

A Brief Introduction to State FCAs

Recent Legislative Developments

Recent Court Decisions

# Federal False Claims Act: Basis of State FCAs

- Liability for any person who knowingly presents or causes to be presented false or fraudulent claims to the U.S. Government
- Qui tam: allows private citizens to sue violators on behalf of the government & keep up to 30% of recoveries
- Dates to the Civil War, but little used until 1986 Amendments

# 1986 Amendments: The Modern FCA Era

- Higher civil penalties
- Triple damages
- Lower burden of proof than for common law civil fraud
- Whistleblower protections
- Federal FCA nets ~\$3 billion annually

# FCA Potential in Technology Procurements and Grants

- Common issues
  - Inferior parts & improper substitutions
  - Buy American Act/Trade Agreements Act violations
  - Bid rigging & kickbacks
  - Export control law violations
  - Labor mischarging
  - Nonpayment of subcontractors & suppliers
  - DBE miscertifications

# The FCA and Health Care Fraud

- ~75% of FCA recoveries
- Nationwide FCA cases
  - Pharmaceuticals and medical devices
- Local/Regional FCA cases
  - Unbundling & upcoding
  - Double billings & fraudulent billings
  - Unreturned overpayments

# State False Claims Acts

- 1987: California enacts first state FCA
  - Patterned on federal FCA; California courts look to precedent applying federal FCA
- Over 30 states now have FCAs, most of which have qui tam provisions
- 2 types of State FCAs
  - General applicability
  - Medicaid only



# Federal Incentives Prompt State FCAs





# Deficit Reduction Act of 2005

- Amended Social Security Act to increase a state's share of recouped Medicaid payments, if the state has an FCA that meets 4 criteria
  - FCA liability for Medicaid spending
  - Reward and facilitate whistleblower claims
  - Filing under seal
  - Civil penalties not less than federal FCA penalties
- HHS OIG determines state qualification for recoupment incentive

# HHS Qualifies States Under DRA Standards

- HHS qualified 14 states for Medicaid recoupment incentive under the DRA
  - Generally Applicable FCAs
    - Include California, Florida, Illinois, Massachusetts, New York and Virginia
  - Medicaid-only FCAs
    - Include Maryland, Michigan, New Mexico and Texas

# Post-DRA Changes to Federal FCA

- 2009: Fraud Enforcement and Recovery Act
  - Overturned *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008) (re presentment)
  - Broadened definition of “claim”
  - Anti-retaliation protection for non-employees
- 2010: Patient Protection & Affordable Care Act
  - Revised public disclosure bar
  - Tightened Medicare/Medicaid overpayments
- 2010: Dodd-Frank Wall Street Reform Act

# HHS Updates Reviews of State FCAs

- March 2011: HHS OIG begins to compare state FCAs to federal FCA, as strengthened by FERA, PPACA and Dodd-Frank
  - 14 previously qualified states no longer qualified
  - OIG letters catalog ways in which state FCAs fall short of federal FCA amendments
  - States given two year grace period to amend FCAs and continue to qualify for enhanced recoupment

# States Respond to HHS Notifications

- HHS OIG review letters of state FCAs:  
<http://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp>
- Numerous state bills introduced in response
- Where state FCA is of general applicability, toughened state laws will impact all industries
- Medicaid incentive payments in California were approximately \$90 million in 2009-2011

## Example: California Amending its FCA

- HHS OIG identifies 12 areas in which the California FCA has not kept pace with federal FCA amendments
- February 2012: Assembly Bill No. 2492 introduced
  - Answers every element identified by HHS OIG; with one exception applies to all industries
- August 2012: Passed by legislature and presented to Governor

# Recent Court Decisions

“I've sentenced boys younger than you to the gas chamber. Didn't want to do it. I felt I owed it to them.”

Judge Elihu Smails





# Hot State FCA Topics in the Courts

- Implied certifications
- Pleading particularity
- Federal preemption
- False bid estimates
- Insurance coverage for FCA liability

# Implied Certifications

- What is an implied certification?
- May a contractor be liable under state FCAs based on an implied certification
  - Courts are split with regard to the federal FCA
  - Under the California FCA, answer is “yes”
    - *San Francisco Unified School District ex rel. Contreras v. Laidlaw Transit, Inc.*, 182 Cal. App. 4th 438 (2010)
  - Unclear in other states
    - *State ex rel. Beeler, Schad & Diamond PC v. Ritz Camera Centers Inc.*, 377 Ill. App. 3d 990 (2007)

# Pleading with Particularity

- Requirement that fraud be pled with particularity
  - Courts have consistently held rule applies to state FCAs, but difference in elements that must be pled
  - False claims allegations must be detailed re who, what, when, where and how
    - *State of California ex rel. McCann v. Bank of America, N.A.*, 191 Cal. App. 4th 897 (2011)
    - *State ex rel. Higgins v. SourceGas, LLC*, 2012 Del. Super. LEXIS 216 (May 15, 2012)

# Federal Preemption

- What is federal preemption?
- What is the market participant exception?
- When a state FCA violation is premised on a federal legal requirement, whether the FCA claim will be preempted depends on the language in the fed. law
  - *DHL Express (USA), Inc. v. State of Florida ex rel. Grupp*, 60 So. 3d 426 (2011)
  - *State ex rel. Grupp v. DHL Express (USA), Inc.*, 19 N.Y.3d 278 (2012)
  - *People v. DHL Express USA, Inc.*, Cal. Superior Court, Los Angeles County, Case No. BC406388 (Aug. 9, 2012)

# False bid estimates

- What is a false claim?
- A false bid is not, in and of itself, a false claim
  - *United States v. Farina*, 153 F. Supp. 819, 821 (D.N.J. 1957)
  - *Fassberg Construction Co. v. Housing Authority of City of the City of Los Angeles*, 152 Cal. App. 4th 720, 741 (2007)
  - *But see Stacy & Witbeck, Inc. v. City and County of San Francisco*, 47 Cal. App. 4th 1 (1996); *City of Pomona v. Superior Court*, 89 Cal. App. 4th 793, 802 (2001)

## False bid estimates (cont'd)

- A false bid can render subsequent requests for payment false claims (“fraud in the inducement”)
  - *Fassberg Construction Co. v. Housing Authority of City of the City of Los Angeles*
  - *City of Pomona v. Superior Court*
- What if a bid contains a false estimate?
  - *Hooper v. Lockheed Martin Corp.*, 2012 U.S. App. LEXIS 16003 (9th Cir., Aug. 2, 2012) (fed. FCA)

# Insurance Coverage

- Will a contractor's CGL and/or professional liability insurance cover state FCA liability?
  - What does the policy say?
  - Is a false claim an “occurrence” or “accident”?
  - Is “knowingly” under the state FCA the same as “intended” under the policy?



# Insurance Coverage (cont'd)

- Most decisions find no coverage or duty to defend fed. FCA allegations
  - *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. J-M Mfg Co., Inc.*, Cal. Superior Court, Los Angeles County, Case No. BC444309 (July 23, 2012)
  - *Health Care Indus. Liab. Ins. Pgm v. Momence Meadows Nursing Ctr.*, 566 F.3d 689 (7<sup>th</sup> Cir. 2009)
  - *Zurich Am. Ins. V. O'Hara Reg'l Ctr. for Rehab.*, 529 F.3d 916, 921-22 (10<sup>th</sup> Cir. 2008)

# Insurance Coverage (cont'd)

- But under some circumstances, coverage and a duty to defend may be found
  - *Watts Indus., Inc. v. Zurich Amer. Ins. Co.*, 121 Cal. App. 4th 1029 (2004)

# Closing Thoughts

- Legislatures are expanding existing state FCAs
- Many other states are likely to join the party
- Courts have hesitated to expand state FCAs...
  - Implied certification, pleading with particularity requirement, federal preemption
- ... but may do so soon
  - Implied certification? False bid estimates?
- Don't count on insurance coverage in most cases

# Closing Thoughts – cont'd

- So what's a contractor to do?
  - Consider increased potential state FCA exposure in deciding whether to bid and how to price proposals for state and local projects
  - Make sure compliance systems, both in bid preparation and contract performance, are sufficient, given the increased risk of state FCA liability
  - Review insurance policies for potential coverage

# Any Questions?

- Submit them now
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