



Thomas M. Keranen, Committee Co-Chair
Keranen & Associates, PC, Bloomfield Hills

Stephen Hilger, Committee Co-Chair
Rhoades, McKee, P.C., Grand Rapids

Gabriela Ban, Walbridge, Detroit
Thomas Bischoff, Dykema Gossett, Detroit
Stan Buell, Grand River Construction, Hudsonville

Marty Burnstein, Law Office of Marty Burnstein, Franklin

Peter Cavanaugh, Keranen & Associates, PC, Bloomfield Hills

Joe DeLave, Dickinson Wright, PLLC, Bloomfield Hills

Tom Dyze, Walbridge, Detroit

Pat Facca, Facca, Richter & Pregler, Troy
Steve Frederickson, The Christman Company, Lansing

Martin Frenkel, Maddin, Hauser, Wartell, Roth & Heller, Southfield

Scott Graham, Howard & Howard, Kalamazoo

Kevin Hendrick, Clark Hill, P L C, Detroit

Richard T. Hewlett, Butzel Long, PC, Ann Arbor

David Houston, Dickinson Wright, PLLC, Lansing

Bruce A. Inosencio, Jr., Bruce A. Inosencio, Jr., PLLC, Jackson

Aileen Leipprandt, Smith, Haughey, Rice & Roegge, Grand Rapids

David M. Lick, Foster Swift Collins & Smith, Lansing

Frank Mamat, Foster Swift Collins & Smith, Farmington Hills

Mark McAlpine, McAlpine & McAlpine, PC, Auburn Hills

Brian Moore, Moore Trosper Construction, Holt

Raymond O'Dea, Keranen & Associates, Bloomfield Hills

Brian Page, Dykema Gossett, PLLC, Grand Rapids

Chris Parfitt, Deneweth, Dugan & Parfitt, PC, Troy

Ted Peters, Sullivan Ward Asher & Patton, Southfield

Tom Porter, Barton Malow Co., Southfield

Bob Rabeler, Soil & Materials Engineers, Grand Rapids

Gary Reeves, Bodman LLP, Troy

Dennis Schultz, Butzel Long, Bloomfield Hills

John Sier, Kitch, Drutchas, Wagner, Denardis & Valitutti, Detroit

Neil Steinkamp, Stout Risius Ross, Inc., Southfield

Jeff Theuer, Loomis Ewert Parsley, et al, Lansing

Ron Torbert, Barton Malow Company, Southfield

State of Michigan is Proposing a False Claims Act

On February 19, 2008 the Michigan House of Representatives voted and passed a False Claims Act of its own known as House Bill 4773. The AGC has taken a stance opposing the passage of the state FCA. What has been proposed by the state is very similar to the federal FCA. The pertinent portions of the HB 4773 are as follows:

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act shall be known and may be cited as the "false claims act".

Sec. 2. As used in this act:

(a) "Claim" means a request or demand for money, property, or services made to an employee, officer, or agent of this state or a political subdivision in this state, or to a contractor, grantee, or other recipient, whether under contract or not, if any portion of the money, property, or services requested or demanded issued from or was provided by this state or a political subdivision in this state.

(b) "Knowingly" means any of the following:

- (i) With actual knowledge of the relevant information.
- (ii) In deliberate ignorance of the truth or falsity of the relevant information.
- (iii) In reckless disregard of the truth or falsity of the relevant information.

(c) "Person" means an individual, partnership, corporation, association, governmental entity, limited liability company, trust, or other legal entity.

d) "Political subdivision" means a county, township, city, village, district, metropolitan government or authority, political body with the legal power or authority to levy taxes, or other legally authorized local governmental body, or a legally authorized combination of political subdivisions.

Based upon the definition of "Claim" and "Political Subdivision" every project except private developments will be subject to the false claims act. However, private developments with funding provided by the state would still be subject to the False Claims Act. With the various aspects of financing on "private" projects, just about all projects would be subject to the FCA. In fact, contractors should probably assume there is some aspect of public finance on all projects. Further, although the statute, if enacted, is new, the state courts will look to the federal statute and court decisions for guidance on application and interpretation.

WHAT TO DO?

A contractor could decide to avoid government contracts. However, given the fact that the State of Michigan may enact its own FCA, the volume of government projects, and that federal financing is involved in numerous projects, avoiding government contracts is not a realistic answer. Prudent contractors will have to educate themselves on government requirements and develop compliance programs for their employees.

This article is intended to highlight a specific area of the law. This communication is not legal advice. The reader should consult an attorney to determine how the information applies to any specific situation.

Published by the AGC of Michigan

Lansing Office
2323 N. Larch Street
LANSING, MI 48906
Phone: (517) 371-1550
info@agcmichigan.org

Detroit Office
26001 Five Mile Road
REDFORD, MI 48239
Phone: (313) 533-3509
www.agcmichigan.org



INSIDE THIS ISSUE:

*False Claims Act –
Additional Risk for Contractors*

What is the Federal False Claims Act? (FCA)

What are False Claims?

Does FCA Only Apply to Federal Projects?

State of Michigan is Proposing a Small Claims Act

What to Do?

These articles were prepared by Pat Facca, Facca, Richter & Pregler 70 W. Long Lake Rd. Suite 120 Troy, MI 48098 Phone: (248) 813-9900 Fax: (248) 813-9901 pfacca@frplaw.com

They are intended to highlight a specific area of the law. This communication is not legal advice. The reader should consult an attorney to determine how the information applies to any specific situation.



AGC Legal Brief

Published by the AGC of Michigan

Volume IV, Issue 3 - 2008

False Claims Act — Additional Risk for Contractors

by Patrick A. Facca pfacca@frplaw.com

The Federal False Claims Act (FCA) has been in existence since 1863. However, the application and use of the FCA against contractors and subcontractors has been rapidly increasing on federal projects and federally funded projects. A multitude of routine events such as progress payment requests for change orders and additional compensation on a construction project can result in the risks of liability under the FCA. FCA litigation can result, not only, in a contractor's request for equitable adjustment being forfeited, but can subject a contractor to substantial fines and penalties. The FCA and related statutes is the subject of entire books. This article is presented as an overview of the FCA to provide a basic understanding of some of the risk associated with the FCA. See page four for the proposed Michigan False Claims Act.

WHAT IS THE FEDERAL FALSE CLAIMS ACT? (FCA)

The FCA is found at 31 USC§ 3729-373 and contains the following:

(a) *Liability for certain acts. -- 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 receives a certificate or receipt;
- (5) authorized to make or deliver 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 or pledge the 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, is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

False Claims Act — Additional Risk for Contractors (Continued)

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation; the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) *Knowing and knowingly defined.*--For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) *Claim defined.*--For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient 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.

(d) *Exemption from disclosure.*--Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) *Exclusion.*--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

In addition, the Forfeiture of Claims Act, 28 USC §2514, provides the following:

A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof. In such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture.

These statutes plus the Anti Kickback Act; Truth in Negotiation Act ("TINA") and Cost Principles found in the Federal Acquisition Regulations ("FAR") are part of litigation involving the FCA.

Section 3729(a)(1) and (a)(2) of the FCA are the most pertinent provisions (most likely to be violated) for Contractors.

3729 (a)(1) – Imposes liability for knowingly presenting or causing to be presented a fraudulent or false claim for payment or approval.

3729(a)(2) Imposes liability for knowingly using false records or statements to get a false claim paid or approved for payment.

Typically a violation of Section 3729 (a)(1) will also result in a violation of Section 3729(a)(2) and vice versa. What seemingly is a single violation will result in two violations with fines and penalties assessed for each violation. The penalties for each violation are a civil penalty of not less than \$5,000.00 and not more than \$10,000 plus 3 times the amount of damages which the government sustains because of the act of that person. In addition to the penalties imposed by the FCA, a contractor may be required to forfeit its claim that it asserted, pursuant to the Forfeiture of Claim Act, 28 USC§ 2514. Thus, a contractor and/or subcontractor may be required to forfeit its claim, and end up paying fines and penalties to the government.

False Claims Act — Additional Risk for Contractors (Continued)

WHAT ARE FALSE CLAIMS?

A claim under the FCA can arise from a variety of sources, such as progress payments, final payment, a request for equitable adjustment, and any corresponding certifications required by the contract. If a request for payment includes a representation that a subcontractor has been paid, and the subcontractor has not been paid, it can be considered a false statement under the FCA. If a request for additional compensation includes a cost request which has not been requested by a subcontractor, this too can be the basis of a false statement.

For contractors and subcontractors the determination of what conduct will result in a false claim can be difficult to ascertain since the statute does not define false or false claim, but is defined by court. Recent court decisions should make contractors take notice of their own conduct and implement compliance programs for the company. The case of Morse Diesel Inc d/b/a AMEC Construction Management v United States, involved an arrangement between the contractor and its surety bond broker in which the broker rebated part of its commission received for procuring performance and payment bonds back to the contractor. The case involved several contracts. Morse Diesel submitted an application for payment as allowed by its contract with the United States Armed Services. The application included the cost of a bond provided by Morse Diesel and its surety. Morse Diesel had not paid the bond premium, in addition Morse Diesel had an agreement to receive a rebate/sharing of commission with the broker, which was not accounted for by Morse Diesel in the application for payment.

Subsequently, Morse Diesel submitted a request for an equitable adjustment in excess of 53 million dollars. The government asserted a variety of claims involving FCA. The court determined that the surety bond brokers' sharing of commissions with Morse Diesel were illegal kickbacks, and that Morse Diesel had submitted false claims, to the government. Based upon the determination of kickbacks and false claims, Morse Diesels' request for equitable adjustment was then forfeited under the forfeiture of claims act. Subsequently, the court awarded the United States damages and imposed penalties based upon the violations by Morse Diesel which exceeded 7.0 Million Dollars. In the end, Morse Diesel forfeited its claim for 53 Million Dollars, and was assessed fines and penalties of 7.0 Million Dollars because the Court found that the bond rebate arrangement was a kickback and false claim under the FCA.

DOES FCA ONLY APPLY TO FEDERAL PROJECTS?

While a Contractor may feel insulated from the FCA if the Contractor does not work on Federal Projects, in reality this is a false sense of security. The FCA applies to Federal Projects and Federally Funded Projects including State or Local Projects which receive federal funding. Projects such as airports typically have some federal funding therefore the FCA can apply to the Project. Thus, a Contractor can be subject to the FCA even though the Contractor does not have a contract directly with a Federal Agency. For example, in U.S.V. Sequel Contractor, 402 F. Supp 2d 1142 (2005) the Contractor was awarded a contract by the County on an Airport construction project. The Project was partially funded with Federal Funds. The Contractor submitted its invoices to the County and received payment from the County. The County paid the invoices and received reimbursement from the FAA for 80 percent of the Project cost. An FCA claim was brought against the Contractor based upon allegation of fraudulent billings. The Contractor moved to dismiss on the basis that it did not present the invoices to the Federal Government. The Court denied the motion and held that the FCA encompassed the situation in which the Contractor caused the presentation of the false claim for payment to the federal government.

Therefore, contractors are at risk for FCA claims on federal projects and projects which involve federal funds.