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Understanding False Claims Act Liability in the Context of Construction Projects

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Most contractors are aware of the typical scenarios that can lead to liability under the federal False Claims Act ("FCA"). These include bribes, kickbacks and inflated claims for extra payments. What may not be as obvious, however, are the more subtle grounds for liability, such as cozy relationships with subcontractors, not appreciating the importance of prevailing wage statutes and failing to properly engage minority business enterprise firms. The following is a discussion of select cases that have established FCA liability in areas of construction projects that may not immediately come to the minds of contractors when they consider the FCA.

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The Bidding Process

FCA liability can arise in various scenarios related to the bidding process for public contracts. The most obvious of these is a "bid-rigging" scenario in which bidders collude to drive up the eventual contract price and the winning firm pays the losing firms a fee in return for their participation in the scheme. See, e.g., *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.,* 608 F.3d 871 (D.C. Cir. 2010), vacated in part on other grounds (involving a scheme by which bidders agreed that "all but one would either bid high or refrain from bidding, and the winning bidder would pay these cooperators a 'loser's fee'").

Courts have also found FCA liability due to other types of false claims that arose during the bidding process. The case of *United States ex rel. Harrison v. Westinghouse Savannah River Co.,* 352 F.3d 908 (4th Cir. 2003), illustrates two such scenarios. Here, the plaintiff originally set forth a slew of alleged false claims. After a complete dismissal by the trial court, the Court of Appeals reinstated two of the claims. The first was that the contractor knowingly understated the cost of subcontracting out a training program when it sought approval from the Department of Energy. While this "low-ball" claim was eventually dismissed on remand, it remained in litigation for years. In its second review of this case, the Court of Appeals affirmed a finding of liability based on the certification by the contractor that there were no organizational conflicts of interest between it and the subcontractor when, in fact, an employee of the subcontractor gained a competitive advantage in the subcontract bidding process by having access to the contractor's procurement documents. This insider status may have benefitted the subcontractor, but it cost the general contractor penalties on 26 different false claims.

Minority-Owned Business Enterprises

Properly engaging a minority-owned business enterprise ("MBE") or a women business enterprise ("WBE") is another area that should be taken very seriously by contractors. Requirements in public contracts for a certain percentage of work to be done by MBEs or WBEs, which often pass through to subcontractors, must be genuinely and strictly complied with.

Contractors, who represent that work was done by MBE/WBEs, when in fact it was done by other firms, can face FCA liability. For example, in *United States ex rel. Reava King v. F.E. Moran, Inc.,* Case No. 00 C 3877 (N.D. Ill 2002)**,** a first-tier subcontractor was required to have a certain level of MBE participation. The qui tam relator alleged that the subcontractor violated the FCA by certifying MBE participation, when in fact it only used MBE subcontractors as a "pass through" by issuing subcontracts to non-MBEs "to perform certain work, then canceled those subcontracts and reissued them to MBE firms which, in turn, subcontracted the work back to the original nonminority companies on essentially the same terms. In exchange, the MBEs received a certain percentage fee." These allegations were enough to get the plaintiff past summary judgment.

MBEs themselves must ensure that they comply with what is expected of them by not assigning or delegating too much authority to non-MBE firms. For example, in the case of *Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429 (Fed. Cl. 1994), Ab-Tech, a MBE, was awarded a contract by the Small Business Administration ("SBA") to construct a facility for the U.S. Army Corp of Engineers. When asked by the SBA about its relationship with Pyramid Construction Company ("Pyramid"), which was one of its non-MBE subcontractors, Ab-Tech denied that there was a joint-venture type of relationship between the two firms that would have made Ab-Tech ineligible for the contract under SBA rules. In fact, there was such an agreement between the firms which provided that Pyramid had the right to approve subcontractor invoices and to take over full performance of the contract in the event of an Ab-Tech default. Moreover, the agreement required that the funds from the Corps of Engineers had to go into a separate bank account which allowed for withdrawal only with the joint signature of Ab-Tech and Pyramid. In holding that payment vouchers submitted by Ab-Tech constituted false claims, the Court noted that Ab-Tech's actions infringed on the very integrity of the SBA program:

> The payment vouchers represented an implied certification by Ab-Tech of its continuing adherence to the requirements for participation in the 8(a) program. Therefore, by deliberately withholding from SBA knowledge of the prohibited contract arrangement with Pyramid, Ab-Tech not only dishonored the terms of its agreement with that agency but, more importantly, caused the Government to pay out funds in the mistaken belief that it was furthering the aims of the 8(a) program. In short, the Government was duped by Ab-Tech's active concealment of a fact vital to the integrity of that program.

Invoicing for Work Not Done by Subcontractors

Contractors must be careful with any representation they make to a public owner concerning the status of its payments to subcontractors. This is an area in which contractors may have their guard down, due to flexible arrangements with prior owners which allowed them to invoice for work not yet fully completed or the use of leverage over subcontractors by withholding funds. Practices such as these may be commonplace but, as demonstrated by the following case, contractors engaged in public projects should avoid careless invoicing as it could come back to haunt them.

In the case of *Lamb Engineering & Construction Co., v. United States*, 58 Fed. Cl. 106 (Fed. Cl. 2003), the general contractor, Lamb Engineering & Construction Company ("Lamb"), entered into a contract with the Department of Energy, Western Area Power Administration ("WAPA") to build an electrical substation. During construction, WAPA terminated the contract for cause and Lamb sued in attempt to have the termination converted into one for convenience. The government counterclaimed alleging that Lamb knowingly made false statements in connection with its certifications for payment. Prior to termination, Lamb submitted five invoices to WAPA. The fifth invoice, which WAPA did not pay, contained a representation that the subcontractors were paid on all of the prior invoices. The Court found that when Lamb submitted the fifth invoice, it still owed money subcontractors and vendors. The Court also found that Lamb satisfied the "knowing" requirement of the FCA by inserting clauses in its subcontracts which allowed Lamb to pay its subs later than 7 days in violation of the Federal Prompt Payment Act, 31 U.S.C. § 3903(b)(1).

Certifying That Prevailing Wages Are Being Paid

In order to qualify for federally funded projects which are subject to the Davis-Bacon Act and other related federal laws, contractors must certify that each laborer has not been paid less than applicable prevailing wage rates. Contractors which submit such certifications, but fail to comply with the standards mandated by these statutes, can run afoul of the FCA. This type of exposure is illustrated by the case of *United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co.*, 183 F.3d 1088 (9th Cir. 1999). The defendant contractor was awarded a contract to make improvements to a federally funded wastewater treatment project. A qui tam relator alleged that the contractor violated the FCA by falsely certifying that the contractor paid the applicable prevailing wage as required by the Davis-Bacon Act. The trial court dismissed the claim because the uncertainty over the prevailing wage rate prevented the plaintiffs from establishing the requisite scienter element of a "knowing" presentation of a false claim. The Court of Appeals reversed and remanded, noting that the contractor did not seek clarification from the Department of Labor regarding rates and the classifications of laborers, but instead certified that the rate at issue was the prevailing wage and that the contractor paid that wage. Because this certification was not accurate, the Court found that it "may well have risen at least to the level of 'deliberate ignorance' or 'reckless disregard,'" which is sufficient to establish the scienter requirement of the FCA.

Courts have made it clear that FCA exposure exists in scenarios such as these. Such liability can lead to exurbanite damages that vastly exceed the value of the contract for the project in question. Accordingly, contractors should spend the time and resources needed to create and maintain compliance programs that prevent the complacent and careless practices that lead to such liability. ■