

# Construction & Infrastructure Law Blog

Posted at 9:18 AM on January 26, 2011 by Sheppard Mullin

## [Congress Increases False Claims Liability for Public Works Contractors](#)

By **Bram Hanono**

The Fraud Enforcement and Recovery Act (FERA)<sup>1</sup> was signed into law in May 2009. Among other significant changes, FERA expanded the grounds for liability under the False Claims Act (FCA).<sup>2</sup> Public works contractors who work on projects funded with federal funds now stand an increased risk for potential liability under the FCA. The FCA now covers, for example, state and local agency projects where the public agency has received a grant of federal funds to build the project. And it includes projects only partially funded by federal money. Accordingly, federal, state, and local contractors should ensure that they have appropriate compliance systems and controls in place to deal with the enhanced FCA.

### FERA's "Clarifications" to the FCA

One purpose of FERA was to provide clarifications to the FCA, which Congress felt had been made uncertain and watered down by recent court decisions. It does so by

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<sup>1</sup> 123 Stat. 1617.

<sup>2</sup> 31 U.S.C. §§ 3729-3733.

clarifying that the FCA covers claims for government money or property: (1) whether or not the claim was presented to a government employee or official; (2) whether or not the government has custody of the money or property; and (3) whether or not the contracting entity specifically intended to defraud the government. FERA accomplishes these expansions by amending the grounds for liability and altering (and adding) key definitions to the FCA.

As revised by FERA, the FCA may be enforced against any person or entity that "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval."<sup>3</sup> This language amends the FCA<sup>4</sup> by eliminating the requirement that a claim must be presented to an officer or employee of the government or a member of the U.S. military to impose liability. Similarly, FERA revises the definition of "claim" to include:

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 made 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 . . . where the United States Government provides or has provided any portion of the money or property [or] will reimburse such contractor, grantee, or other recipient for any portion of the money or property[.]<sup>5</sup>

The effect of this revision was to repudiate the decision in *United States ex rel Totten v. Bombardier Corp.*<sup>6</sup> In *Totten*, the D.C. Circuit held that the government had to prove a claim was "presented" to an officer or employee of the government for liability to attach. Now, a "claim" includes requests or demands to a grantee, such as a local public agency which is building a project.

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<sup>3</sup> 31 U.S.C. § 3729(a)(1)(A).

<sup>4</sup> Former 31 U.S.C § 3729(a)(1).

<sup>5</sup> 31 U.S.C § 3729(b)(2).

<sup>6</sup> 380 F.3d 488 (DC. Cir. 2004).

Similarly, FERA's revised definition of "claim" clarifies the Fourth Circuit's holding in *United States ex rel. DRC, Inc. v. Custer Battles, LLC*<sup>7</sup>, in which the Fourth Circuit held that liability under the FCA did not reach claims for payment of funds over which the U.S. had neither title or control. Now, the FCA reaches claims for payment of funds over which the U.S. has neither title or control, as long as the funds are "to be spent or used on the Government's behalf or to advance a Government program or interest." Notably, FERA provides no definition of what it means to "to advance a Government program or interest."

Finally, FERA's clarifications to the FCA effectively overturn the Supreme Court's decision in *Allison Engine v. United States ex rel. Sanders*.<sup>8</sup> In *Allison Engine*, the Supreme Court explained that a subcontractor violates the FCA if it submits a false statement to the prime contractor, *intending* for the statement to be used by the prime contractor to get the government to pay its claim. Now, FERA prescribes FCA liability where a person "knowingly makes, uses, or causes to be made or used, a fake record or statement material to a false or fraudulent claim."<sup>9</sup> This language amends the FCA<sup>10</sup> by eliminating the "to get" and "by the Government" language previously cited in *Allison Engine* as connoting an intent requirement.

FERA also added a materiality requirement to that section. "Material" is defined as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."<sup>11</sup> Therefore, under the new provisions, liability exists if the subcontractor's statement has a natural tendency to influence, or is capable of influencing,

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<sup>7</sup> 562 F.3d 295 (4th Cir. 2009).

<sup>8</sup> 128 S. Ct. 2123 (2008).

<sup>9</sup> 31 U.S.C. § 3729(a)(1)(B).

<sup>10</sup> Former 31 U.S.C. § 3729(a)(2)

<sup>11</sup> 31 U.S.C § 3729(b)(4).

payment or receipt of money. FERA makes it irrelevant whether the contractor intended that the government rely on the statement in payment of its claim. The FCA now has a much lower standard for bringing a lawsuit.

#### FERA Expands Liability for "Reverse False Claims"

Another important change to the FCA under FERA expands liability for "reverse false claims." A reverse false claim was previously characterized by the situation where a company used a false statement or record to avoid or decrease an obligation to pay money to the government in order to keep the funds. Now, liability for a reverse false claim exists whenever one "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government."<sup>12</sup> A false statement or record is no longer required for liability to attach.

Further, FERA expanded the definition of "obligation" to include "an established duty . . . arising from . . . the retention of any overpayment."<sup>13</sup> Under this definition, contractors have a duty to determine if any payment by the government or its agents includes an overpayment. If so, the contractor must refund the overpayment. Failure to identify and refund an overpayment may now result in a FCA violation. Contractors and other recipients of government funds must be alert to these obligations. It appears that fraudulent intent is no longer required to establish liability.

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<sup>12</sup> 31 U.S.C. § 3729(a)(1)(G).

<sup>13</sup> 31 U.S.C. § 3729(b)(3).

## Conclusion

Overall, FERA increased the potential for liability under the FCA for government contractors or others who receive federal funds. Contractors that perform public works projects should train key personnel regarding the FCA and put a compliance system and controls in place to deal with the potential liability under the recently enhanced FCA.

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