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# The Most Dangerous Claim

## Recent Cases Highlight the Importance of Avoiding False Claims Act Liability

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Need a reminder about the risk of making false claims in connection with public contracting?

I'll give you three.



First, consider the general contractor who submitted allegedly inflated change orders on various projects financed by the U.S. Department of Justice and Army Corps of Engineers. The government alleged that the change order requests included CGL and workers' comp insurance rates that had additional "cushions" above and beyond what the GC had actually incurred. Although the contractor denied liability, [it agreed in February 2013 to settle the government's fraud allegations by paying the United States \\$367,500.](#)

Next, consider the general contractor whose subcontractor failed to pay prevailing wages under the Davis Bacon Act on a U.S. Department of the Army contract. The GC's certified payroll records inaccurately represented that prevailing wages were paid to all subcontractor employees. In October 2012, [the U.S. Court of Appeals for the Sixth Circuit upheld a U.S. District Court's \\$1.66 million judgment against the GC](#), but remanded the case for a recalculation of damages that could end up saving the GC at least a little bit of money.

Finally, consider the general contractor who overstated the costs it incurred participating in the U.S. Department of Defense's Mentor-Protégé Program, designed to provide developmental assistance to disadvantaged small businesses. The government alleged that the contractor



submitted more than 20 requests for payment in connection with the program that significantly overstated the amount of developmental assistance actually provided. In December 2012, [the contractor agreed to pay a \\$2 million penalty](#) to avoid prosecution by the government.

Three cases. Millions of dollars. One conclusion: submitting false claims in connection with federal contracting can be extremely expensive.

And with a three year-old North Carolina False Claims Act law on the books, the risk of submitting false claims on state construction projects must be managed as well.

### **The Federal False Claims Act.**

[Codified at 31 U.S.C. §§ 3729-3733](#), the Federal False Claims Act (“FCA”) is intended to deter persons from knowingly presenting or causing to be presented a false or fraudulent claim for payment from the U.S. Government. The term “knowingly” does not require actual knowledge that the claim is false; a person who acts in reckless disregard or in deliberate ignorance of the truth or falsity of the information can also be found liable under the Act. When a defendant is found liable for a violation under the FCA, the government can recover up to three times its actual damages.

Further, the FCA allows private persons to file suits for violations of the statute on behalf of the U.S. Government, and if the government successfully intervenes in the case, the whistleblower or “relator” is entitled to receive between 15-25 percent of the amount recovered. If the relator prosecutes the claim without the assistance of the government, its share is increased to 25-30%. The FCA also provides relief from retaliatory actions that may be taken against the whistleblower by his or her employer.

A helpful overview of the FCA can be found [here](#).

### **North Carolina’s False Claims Act.**

False claims exposure is not limited to federal contracting. On the books since January 1, 2010, North Carolina’s own False Claims Act, [codified at N.C. Gen. Stat. § 1-605 et seq.](#), is intended to deter persons from knowingly presenting or causing to be presented a false or fraudulent claim for payment from the State. Like the federal statute, North Carolina’s False Claims Act permits judges to order defendants to pay up to three times the actual harm incurred by the State, rewards whistleblowers who assist with claims with a share of any recovery obtained and protects whistleblowers from retaliation by their employers.



## **Guarding Against False Claims Act Liability.**

Now, more than ever, contractors must establish and employ consistent oversight procedures to avoid false claims act exposure on federal and state construction projects. Although the following list is certainly not exhaustive, below are a few trouble areas contractors should bear in mind:

- **Bid Preparation.** When bidding work subject to MBE/WBE/DBE requirements, prime contractors must be sure their proposals accurately reflect the extent of such participation. Otherwise, the government could argue the entire contract was obtained through fraud and that every subsequent pay application represents a false claim.
- **Periodic Payments.** Front-loading early applications for payment [is a risky proposition](#), with the amount of the overstatement arguably representing a false claim. The safest course is to invoice only for actual costs incurred and/or percentage of work accomplished during any given pay period.
- **Regulatory Compliance.** For projects requiring payment of prevailing wages under the Davis Bacon Act, general contractors must ensure not only that their own forces are getting paid the appropriate rates, but also that their subcontractors are abiding by the law as well. Otherwise, the government could argue that every payment made in reliance on inaccurate prevailing wage certifications represents a false claim.
- **Claim Submission.** Before passing subcontractor claims through to public owners, general contractors should satisfy themselves not only that the subcontractor's claim is meritorious, but also that the subcontractor has accurately calculated its damages. Otherwise, all or part of the subcontractor's claim could constitute a false claim for which the GC might be liable.

*Three cases. Millions of dollars. One conclusion: submitting false claims in connection with public contracting can be extremely expensive.*

False claims act exposure creates a minefield for contractors in the world of public contracting. When in doubt, contact an experienced [construction attorney](#) with any questions you may have about avoiding or defending against false claims act liability.



*This article is adapted from a post originally published on Matt Bouchard's blog, "N.C. Construction Law, Policy & News," which can be found at [www.nc-construction-law.com](http://www.nc-construction-law.com).*

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