INTRODUCTION

When one of the authors requested that I write an introduction to False Claims in Construction Contracts, I hesitated. The stack of material on my desk dealing with current writing projects made me wonder whether I could do justice to the book.

I glanced through the mail on my desk. One item caught my attention. It was Construction Law Update, a newsletter, and the headline was “Turnabout at Trial: Contractor Ordered to Pay $50 Million for Fraudulent Claims.”

The trial court was the United States Court of Federal Claims. The case was Daewoo Engineering and Construction Co. v. United States. I will not describe the case in detail (it is mentioned in a number of the chapters, particularly Chapter 5). It is enough to say that Daewoo, a Korean company, presented a multimillion dollar claim and ended up at the short end of a $50 million judgment based on its having violated a number of federal statutes, including the False Claims Act (FCA) and the Contract Disputes Act antifraud provisions.

What piqued my interest was a statement by a Daewoo employee that Daewoo filed the claim as a negotiating ploy to make the government “pay attention,” a tactic not uncommon in the hurly-burly of construction dispute negotiation.

I could not turn down the invitation. It was kismet. It was my fate to introduce a book that shed much needed light on a dry, dark, and dusty pocket of American construction law with which I had only the most limited contact.

Chapter 1, written by Lynn Patton Thompson, describes the background of the False Claims Act from its Civil War beginnings. From the outset, there was concern over the provisions that allowed what have become known as qui tam claims, ones that are brought by private parties under which winners can recover a portion of any damage award. (I learned from Chapter 1 that this phrase is short for qui tam pro domino rege quam pro se ipso in hac parte sequitor, translated loosely by the author as “he who brings an action for the king as well as for himself.”)

The ambivalence reflected in the Congress and in the courts toward qui tam claims is reflected in the way we describe the person who brings such a claim.

1. The author was J. Michael Littlejohn.
As children, we are taught by our peers not to “tell on other kids.” We do not think much of the Old West bounty hunters. We are suspicious of those members of a gang who become witnesses for the prosecution. We do not like those who inform on tax cheaters for personal gain. The terms we employ to describe such people include squealer, fink, tattletale, snitch, turncoat, or even traitor. We describe the process as “ratting on your friends.” We want to catch the crooks, especially the hard-to-find ones. That is for sure. But we are not always proud of those who “tell.”

Some of this contempt has been moderated by a new term, whistleblower. He or she is a “good guy.” He or she helps us get the crooks, who may be hard to catch without outside help. Nevertheless, the ambivalence is still there.

Chapter 2, written by Peter B. Hutt II, focuses on construction-related claims. It takes us through the Daewoo case, a case mentioned by other authors, and highlights the many issues raised in these claims.

Although 70 percent of such claims these days relate to the health care industry, a substantial number of FCA claims relate to construction projects. I was interested in the discussion of competitive bidding, a process used often in construction projects. The author educates us on bid rigging and collusive bids. Also, construction projects routinely involve a plethora of statements, such as requests for information, applications for progress and final payments, and certificates of completion—all central activities in construction.

Also, FCA claims can be based on false statements, such as supposed compliance with the many ancillary requirements in federal procurement (for example, the use of minority-owned enterprises or the Davis-Bacon Act’s prevailing wages). Finally, as in the Daewoo case, the claimant often seeks an equitable adjustment. Such a claim requires statements and certificates, similar to the frequently asserted claims for asserted changes, staples of construction disputes.

Chapter 3, written by Edmund V. Caplicki III, tackles claims against design professionals and construction managers, both fixtures in the construction process. What amazed me about this chapter was the pervasive presence of federal money in so many of our economic activities. Claims can be made not only where money is provided directly by a federal agency but also where federal funds are involved in projects of others. This material, along with much of Chapter 5, would be essential for any seminars on this topic given by construction claims specialists to those who must deal with construction administration and claims.

Chapter 4, also written by Hutt, presents a comprehensive treatment of the damages and penalties in an FCA claim. As a veteran teacher of civil remedies, I felt as though it was old home week when reading this chapter. Once again, I could plunge into that staple remedial issue, the standard measures of recovery for breach of contract. I was shocked to see diminution in value preferred over cost of correction, the reverse of remedies for breach of a construction contract. But false claims are different.
I enjoyed the excursion into the limiting rule of avoidable consequences. The author also treats with incisiveness the many issues that can arise when the court awards penalties. We even get a dose of constitutional law. Defendants often claim, usually without success, that the award violates the constitutional prohibition of excessive fines.

Chapter 5, written by Claire M. Sylvia, makes a masterful presentation of the problems with the *qui tam* claim, particularly control of the litigation when the government intervenes, and issues surrounding how the payoff is divided.

Chapter 6, written by Brian A. Hill, deals with retaliation claims. Employees who tell or, to use a more friendly term, who “blow the whistle,” are not beloved by their employer or fellow employees. To encourage them to give information, Congress enacted legislation giving them specific remedies if their employers seek to retaliate.

Creating a new cause of action raises many problems that Hill outlines well, such as the statute of limitations, protected activities, and remedies. Those who tell are not likely to be received into the bosom of their old employer. As a result, retaliation protection is needed if information is to be given that exposes the employer.

In Chapter 7, Patrick J. Greene Jr. and Frank A. Hess tell us about the practical considerations found in defending an FCA claim. They take a somewhat different tack than most of the other writers. They postulate a big, bad federal government browbeating the weak, defenseless contractor. The use of the *qui tam* system points in another direction.

In Chapter 8, Stephen D. Altman covers resolutions of FCA claims. He tells us that since the act was strengthened in 1986, federal recoveries have exceeded $18 billion and have averaged $1.5 billion in the past six years. All sectors have seen increases, but the bulk has come in the health care industry.

He gives many helpful construction contract illustrations. He also provides the policy considerations in settlement, such as ability to pay, taxation, and the need contractors have for a global settlement of the varying types of claims. Finally, he takes us on a helpful excursion into mediation and settlement practices.

Chapter 9, written by William W. Thompson Jr., treats with great precision corporate compliance and ethics programs. He covers such programs both from the perspective of preventing such often devastating claims and how to prepare when one is made. He differentiates what can be expected from large corporations with their complex infrastructures from what we can expect from smaller corporations. He provides a most valuable list, which all should read, that describes all the weapons the federal government has in its arsenal. Many are not seen in ordinary construction projects, such as debarment, forfeiture of valid claims, truth in negotiation, and kickbacks, as well as statutes covering bribery and gratuities. This lengthy chamber of horrors for a contractor demonstrates the reason for the existence of a specialized bar handling federal projects.
In this chapter, the author makes a strong, although for me unconvincing, defense for the often attacked Sarbanes-Oxley regulation of corporations. The author emphasizes memoranda issued by high officials in the Department of Justice, such as the Thompson and McNulty memos. Practitioners in this field must and do pay close attention to these memos, even though they are purely internal justice department communications. Again, I was impressed with the immense involvement of the federal government in our lives—in health, education, and science, to name only a few areas.

Chapter 10, written by Howard E. O’Leary and Krista L. Pages, covers criminal prosecution of FCA defendants. There is much practical advice to those under investigation. They tell us how to avoid making bad things worse by “panic, ignorance, arrogance, or recklessness.” They discuss the use of counsel and the difference between inside and outside counsel. Again, we see much attention to Justice Department memoranda and reasons for the importance of Effective Compliance and Ethics programs, both to prevent problems and to help when they do occur. The authors describe and analyze the controversial sentencing guidelines. This chapter is a most useful primer to those lawyers whose clients face criminal charges.

In Chapter 11, Deborah S. Ballati and Christopher D. Montez, with the assistance of a number of attorneys in the states covered, describe the increasing number of states with little FCAs. They list fourteen such states. Why this sudden interest? I suspect there is a copycat effect. Some states see the feds collecting all this money and have said, “Why not me?”—particularly with the increased state funding of varying activities.

The editors and the authors deserve our praise for taking something I described at the outset as dry, dark, and dusty, and creating an extraordinarily useful, engaging, and well-written text that shines needed light on an often ignored subject.

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