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False Claims Acts: Be Aware, Be Wary, Be Ready

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I. INTRODUCTION—

The False Claims Act\(^1\) is the Federal Government’s primary tool for redressing fraud against the government. Twenty-nine states, the District of Columbia, Puerto Rico, and some local governments have followed the Federal Government’s lead and enacted similar laws. These laws typically not only authorize governments to sue to recover damages and penalties for fraud, but also authorize persons with knowledge of fraud to pursue lawsuits in the name of the government and to receive a share of the proceeds recovered. By providing incentives to persons with knowledge of fraud to bring that information to the governments’ attention, the laws vastly increase the information and resources of the government to combat and deter fraud.

Federal and state contractors, subcontractors, and other persons working on government funded projects or services should be aware of the reach of these laws and the potential consequences of violating them. Efforts to ensure compliance, including timely responding to reports of concerns by employees, consultants, and others assume a renewed importance when failure to address problems can result in substantial financial consequences as well as damage to relations with government customers. This paper first describes the general prohibitions of these laws and their unique procedural mechanisms. It then describes a number of case studies that explore how the law has been applied to construction contracts involving federal, state and local projects. By learning more about these laws you can start to be aware, be wary, and be ready.
II. OVERVIEW

A. The Federal False Claims Act

The federal False Claims Act (“FCA”) was first enacted in 1863 in order to address frauds that were plaguing the Federal Government during the Civil War. A congressional committee investigating fraud found “an astounding amount of illegal and fraudulent activities” in government procurement: “For sugar [the government] often got sand; for coffee, rye, for leather, something no better than brown paper, for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors or the refuse of shops and foreign armories.” In order to address this rampant fraud, the government adopted a broad prohibition against submitting false or fraudulent requests for government funds, and deputized private individuals to bring such cases on its behalf.

The FCA has since been amended a number of times, but the core purpose remains the same. The FCA is broadly phrased to address the many ways in which false or fraudulent claims for payment to the Federal Government can manifest. The FCA has thus been applied to a wide range of conduct, including seeking payment for goods or services not provided, seeking payment under a program or grant for which the person is not eligible, or demanding payment for goods or services that do not conform to contractual or regulatory requirements.

1. Liability

The FCA contains four primary bases for liability. A person is liable under the FCA if they knowingly: (1) present or cause to be presented to the government false or fraudulent claims for payment; (2) make, use or cause to be made or used a false record or statement material to a false or fraudulent claim; (3) engage in a conspiracy to violate any of the Act’s provisions; or (4) conceal or improperly avoid or decrease an obligation to pay or transmit money or property to the government, or make, use, or cause to be made or used a false record or
statement material to an obligation to pay or transmit money or property to the government.\textsuperscript{13} Claims, records or statements under the Internal Revenue Code are excluded from the FCA.\textsuperscript{14}

The FCA prohibits both submitting false claims to the government, or using false statement or records, and \textit{causing} another to submit false claims or use false statements or records.\textsuperscript{15} Accordingly, even if a subcontractor does not have a direct relationship with the Federal Government, its conduct can violate the statute.\textsuperscript{16}

In 2009, Congress amended the False Claims Act to address a Supreme Court decision that had imposed an additional scienter requirement that required that the government or a relator prove that a subcontractor intended to defraud the government as opposed to the general contractor.\textsuperscript{17} This was based on language that provided that a record be presented to an officer of the United States and that the record be used “to get” a claim paid. The amendment removed the reference in the false claim liability provision that a claim be presented to an officer of the United States and added text to the definition of the term “claim” to make clear that it encompassed a claim to a subcontractor or recipients of federal funds under federal programs.\textsuperscript{18} The amendment also changed the false statement or record provision by eliminating the phrase “to get” a false claim paid and inserted language providing that the statement or record be “material” to a false or fraudulent claim.\textsuperscript{19}

\textit{Knowledge.} The FCA defines “knowingly” to mean actual knowledge, reckless disregard, or deliberate ignorance.\textsuperscript{20} The FCA expressly provides that no specific intent to defraud need be shown.\textsuperscript{21}

\textit{Materially False or Fraudulent.} The FCA does not define the terms “false” or “fraudulent,” but in a 2016 decision, the Supreme Court held that the statute incorporates common law meanings of those terms, including misrepresentations by omission.\textsuperscript{22} In response
to arguments that such an interpretation could lead to overly expansive application of the FCA, the Court explained that the statute’s reach is limited by the statute’s knowledge and materiality requirements. The Court described the materiality requirement as “demanding” and “rigorous.” The Court did not resolve whether the FCA’s definition of materiality applied or the common law definitions of materiality applied, as “[u]nder any understanding of the concept, materiality ‘look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.’”

2. Remedies

A violation of the FCA subjects a person to three times the damages which the government sustains because of the act of the person. Although the FCA does not specify a method of calculating damages, FCA damages “typically are liberally calculated to ensure that they ‘afford the government complete indemnity for the injuries done it.’” Certain voluntary disclosures of misconduct may result in reduced damages. To be eligible for reduced damages, the person must furnish responsible federal officials with all information known to such person within 30 days after the defendant first obtained the information, must fully cooperate with any government investigation and at the time of the report, no criminal prosecution, civil action, or administrative action had been commenced and the defendant must have had no actual knowledge of a pending investigation.

In addition to treble damages, a person who violates the statute is subject to a civil penalty. The statute provides that the penalty is not less than $5,000 and not more than $10,000, as adjusted for inflation pursuant to statute. The penalties have been adjusted for inflation several times.
The number of penalties to be assigned turns on the conduct of the defendant. Thus, for example, in *United States v. Bornstein*, the defendant argued that it should be subject to only one penalty because only one contract was involved. The government argued that the defendant should be subject to 35 penalties, which was the number of invoices the general contractor submitted to the government. The Supreme Court rejected both measures. It rejected the defendant’s measure because it would undermine the statute’s purpose and “convert ‘the Act’s forfeiture provision into little more than a $2,000 license for subcontractor fraud.” It rejected the government’s measure because the penalty should be focused on the specific conduct of the defendant, in that case, the subcontractor, who had submitted three invoiced shipments to the general contractor. Accordingly, the Court held that the subcontractor was liable for three penalties.

A defendant is also liable for the government’s costs. A defendant who prevails may seek attorney fees from the government under the Equal Access to Justice Act.

3. *Qui Tam Actions*

A case under the FCA may be brought by the United States Government or by a person acting on behalf of the government and known as a “relator.” An action initiated by a relator is known as a *qui tam* action. As further discussed below, the government may join such an action, in which case the government has primary responsibility for prosecuting the action. If the government elects not to join the case, the FCA authorizes the relator to pursue the case on his or her own.

The FCA incentivizes relators to bring cases by offering a reward based upon the government’s recovery. If the government intervenes in the case, the relator is entitled to between 15 and 25 percent of the proceeds of the action. If the government does not
intervene, the relator is entitled to between 25 and 30 percent of the proceeds of the action. In addition, the defendant is liable for the relator’s reasonable attorney fees, costs and expenses. Where a defendant establishes that a qui tam action was frivolous, vexatious, or brought for purposes of harassment the defendant is entitled to attorney fees.

B. State False Claims Statutes

Twenty-nine states, the District of Columbia and Puerto Rico have enacted versions of the federal False Claims Act to address fraud against their treasuries. Most state statutes follow the model of the federal statute, but there are often important differences. For example, California contains a provision that imposes liability on beneficiaries of inadvertent submissions of false claims who discover the false claims and fail to disclose it within a reasonable time. New York’s False Claims Act does not exclude violations of the state’s tax code from the statute’s reach. Some states’ statutes apply only to Medicaid claims. Not all state statutes that address false claims have qui tam provisions authorizing private individuals to sue. Some of the state statutes apply to claims against local governments and political subdivisions, and some cities have adopted their own false claims statutes.

The majority of the state statutes were enacted after the Deficit Reduction Act of 2005, which included incentives for states that adopted false claims acts, providing the states a greater share of any Medicaid recovery in an FCA. In order to be eligible for the benefit, the state act must meet several requirements, including establishing liability for fraud against the Medicaid program, and providing protections that are at least as effective at rewarding and facilitating qui tam actions as those in the FCA. The law authorizes the Health and Human Services Office of the Inspector General, in consultation with the Department of Justice, to determine whether a state law meets the requirements.
III. HOW QUI TAM CASES EVOLVE

A. *Initiation of Qui Tam Cases*

A federal *qui tam* action is initiated when a person files a complaint in the name of the government and the person. The complaint must be filed under seal and is not served on the defendant. The relator must serve the complaint and written disclosure of all material evidence and information the person possesses on the government. The statute provides that the complaint remains under seal for 60 days. The purpose of this period is to enable the government to investigate the allegations and determine whether to intervene. For good cause, the government may seek additional time from the Court, and the government almost always does, as 60 days is rarely sufficient time to investigate an FCA case.

B. *Government Election Whether to Proceed*

At the conclusion of its investigation, the government makes an election whether to intervene and assume primary responsibility for the case, or to permit the individual to proceed on his or her own. If the government proceeds with the action, it shall have the primary responsibility for prosecuting the action and shall not be bound by an act of the person bringing the action. The relator has the right to continue as a party to the action, subject to certain limitations. If the government elects not to intervene, the person who initiated the action has the right to conduct the action. The government, for good cause, may intervene at a later time without affecting the rights of the relator.

Once the government makes its initial election, the court will order that the complaint be unsealed and served upon the defendant. The defendant is not required to respond until 20 days after the complaint is unsealed and served upon the defendant pursuant to Federal Rule of Civil Procedure 4.
Most state false claims statutes with *qui tam* provisions follow a similar procedural pattern, requiring that the *qui tam* relator file the complaint under seal to provide the government time to investigate the allegations. However, state statues may incorporate state procedural rules that are different from the federal rules and may have different service requirements.

**IV. EXAMPLES OF FCA CASES INVOLVING CONSTRUCTION CONTRACTS**

The following examples illustrate the types of conduct and situations that may implicate liability under federal and state false claims acts.

**A. Federally-Reimbursed State/Local Projects**

As noted, the FCA definition of the term “claim” applies not only to direct requests for payment or approval but also requests for reimbursement made by recipients of federal funds under federal benefits programs, such as disaster relief public assistance. For example, *United States ex rel. Plumber and Steamfitters Local Union No. 38 v. C.W. Roen Construction Co.*, involved a contractor that had a project with the City of Santa Rosa, California. Because the project was federally funded, federal laws, including the Davis Bacon Act (“DBA”) and the federal False Claims Act, applied.

The contractor argued that it could not be held liable under the FCA for false certification of compliance with the DBA because the U.S. Department of Labor had issued no prevailing wage rate/area practice survey applicable to the Project. The court rejected that argument, pointing out that if a contractor is unclear about a requirement, it should seek clarification from the appropriate agency. Without such clarification, the contractor cannot establish what requirement it is certifying that it meets. Failure to clarify may therefore support a finding that the contractor acted with deliberate ignorance or in reckless disregard of the truth or falsity of the information certified when seeking payment under the contract.
B. Subcontractor Violations Can Lead to Prime Contractor FCA Liability

A subcontractor’s actions can result in a prime contractor’s exposure to liability under the FCA. For example, in *United States ex rel. Wall v. Circle C Constr., LLC*, Circle C, the prime contractor to the Department of the Army, contracted to build 42 warehouses at Fort Campbell. As a federal construction project, wages paid to all workers had to comply with the DBA. Circle C’s electrical subcontractor was Phase Tec, and Phase Tec underpaid DBA wages to its electricians by a total of $9,916. Circle C had certified DBA compliance, which included certifying compliance of its subcontractors.

Phase Tec, the subcontractor, settled with the Department of Labor regarding alleged violations of the DBA and paid back wages. A relator subsequently brought a FCA *qui tam* action against Circle C, alleging that the prime contractor had falsely certified compliance with the DBA when it submitted invoices for the project to the Federal Government.

The sum of the subcontractor’s underpayment of DBA wages was a total of $9,916 spanning a performance of seven (7) years. The underpayments involved two (2) of the subcontractor’s employees. The government argued its damages were much greater, portraying its “bargain” as ensuring compliance with the DBA. Therefore, the government sought damages equal to the entirety of what was paid for the electrical work. The total amount paid for Phase Tec’s electrical work was roughly $259,298. The government’s position was that it was entitled to recover all the money paid for the electric work because the DBA violation tainted it and rendered it all worthless. The district court agreed, awarding treble damages on $259,298, for a total of $777,894.

On appeal, the Sixth Circuit reversed, holding that the government’s damages were to be measured by the amount of the underpayment of Davis Bacon wages, which was $9,916. The
Davis Bacon regulations, which provided that the government could withhold from a contractor the estimated wage underpayments, reinforced that this was the amount of the government’s damage. Rejecting the argument that the entire value of the work was tainted by the wage rate violations, the Court distinguished the alleged violation before it as one for which there was a market remedy – the payment of additional wages—and a violation that could not be remedied by calculable money damages.67

Ultimately, the Sixth Circuit awarded prime contractor, Circle C, its attorney fees under the Equal Access to Justice Act.68 The district court had denied the fee request, but the Sixth Circuit held this was an abuse of discretion. Noting that litigation of the agency’s claims under the FCA had spanned approximately 10 years and cost the prime contractor nearly $500,000 in fees and costs, the Sixth Circuit held that the agency’s theory of damages, on the facts here, was “nearly frivolous”. The dollar value of the DBA violation involved was only $9,916. The government’s demand against the contractor for $1.66 million—compared to the damages awarded of only $14,478—was substantially in excess of the judgment finally obtained. The agency put on no proof that the prime contractor acted in “bad faith” when it certified its subcontractor’s compliance with the DBA, and there was no large-scale, systematic effort to defraud the government. The government contended that a fee award in this case would have a chilling effect on attempts to vigorously enforce the FCA, to which the Court’s answer was, “[o]ne should hope so.”69

C. Falsified invoices and forfeiture of right to payment due to fraud under 28 U.S.C. § 2514

Contractors who submit false or fraudulent invoices may be liable under the FCA, even if they provided goods or services for which they might otherwise have been paid. For example, Alcatec, LLC v. United States,70 involved a contractor that had been awarded a section 8(a) set-
aside contract in 2006 by FEMA to provide monthly preventative maintenance inspections ("PMI") and de-activation of mobile homes issued to those left homeless by Hurricane Katrina. The government refused to pay Alcatec when Alcatec did not provide the required substantiation for its work and began investigating whether the required work had been performed. Alcatec then filed a $3.8 million breach of contract claim against the government for payment on a single contract line item that it had completed for mobilizing and getting ready to perform. The government counterclaimed for violation of the FCA, alleging Alcatec submitted false or fraudulent invoices. Although the contractor showed that FEMA mismanaged the contract and was aware of some out-of-sequence billing for the PMIs, the evidence showed that the contractor had engaged in a systematic scheme to defraud the government. The government was awarded $275,050 for damages and $77,000 in penalties. Alcatec did not recover on its breach of contract claim.

Alcatec portrayed the overbilling as due to mistake and confusion and not an intent to defraud the government. However, the Court found that Alcatec “created a chaotic billing scheme that made it difficult for FEMA to detect inaccuracies in Alcatec’s billing.” 71 The Court noted that it was Alcatec’s owner who directed inspectors to conduct more than one inspection per month and how to bill for them. Although the Court acknowledged that FEMA was aware of Alcatec’s billing practices, the Court noted that “[t]he fact that FEMA itself failed to adhere to the contract and was on notice of out-of-month-inspections is unfortunate, but does not obviate the finding that plaintiff intentionally submitted fraudulent invoices.” 72

Even though the government did not have “direct and positive evidence” of fraud, the Court found that “the instant case exemplifies a situation in which ‘circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, be sufficient to
constitute conclusive proof [of fraud].” The Court found that due to the falsification of the underlying documents on which claims for payment had been submitted, such fraud voided each of the claims associated with the contract. The government’s counterclaim for alleged overpayment to Alcatec was denied because the Court found that even though the basis for showing certain invoices to be false was demonstrated, the total amount of overpayments alleged was not sufficiently coherent.

D. Disaster Relief Public Contracts Funded by FEMA

It seems disaster begets disaster. Public contracts funded through FEMA reimbursements provide fertile ground for allegations of FCA violations, as shown in the following cases.


This case involved an appeal of summary judgment granted in favor of the defendant construction management firm and against the relator. The relator was the former architect responsible for coordinating the reconstruction of buildings on the California State University Northridge (“CSUN”) campus after an earthquake. Soon after CSUN terminated the relator’s employment in favor of Daniel, Mann Johnson & Mendenhall (“DMJM”), the construction management firm, the relator filed a complaint which was later amended to include violations of the FCA against DMJM. The relator alleged that DMJM submitted fraudulent reports that CSUN intended to reoccupy apartment buildings that had been damaged by the earthquake. Specifically, two DMJM employees drafted communications to FEMA asserting that a feasibility study performed by CSUN prior to the earthquake clearly indicated CSUN’s intention to reoccupy the buildings in question. The DMJM employees who drafted this communication to FEMA did so without investigating the truth of that claim. In reality the CSUN Board had voted
prior to the earthquake against the proposals contained in the study, which essentially meant that
the Board voted against making repairs.

The relator claimed DMJM’s communication to FEMA constituted a violation of the
FCA, because the regulations applicable to CSUN’s FEMA claims stated that only buildings in
active use or planned to be reoccupied at the time of the earthquake were eligible for funding.
The relator claimed communications by DMJM falsely stated CSUN’s intent to reoccupy the
buildings in question and that by submitting these communications to FEMA, DMJM had
committed a violation of the FCA. The FEMA official who provided initial approval of the
funding and based his decision on these communications, was unaware that the Board had voted
against taking the reparative actions stated in the study. This official also stated that if he had
been aware of CSUN’s prior decision to forego repairs, he would not have approved funding for
the $21 million restoration project. The court concluded that summary judgment could not be
affirmed because a reasonable factfinder could conclude that the communications prepared by
DMJM fraudulently misrepresented CSUN’s intent to repair and reoccupy the buildings in
question prior to the earthquake and induced FEMA to approve funding for buildings which
would have otherwise been ineligible under the regulations. Thus, relator had raised a genuine
issue of material fact as to whether DMJM knowingly submitted false claims to FEMA.


Prior to this case, the defendants (contractor and its principal) had been indicted in a
criminal action for submitting fraudulent bids and contracts to FEMA for work to repair declared
disaster sites in Puerto Rico. The specifics of the defendants’ actions in submitting the
fraudulent claims were not discussed, but it was alleged that the false claims submitted to FEMA
totaled over $1 million. As part of the criminal case, the defendants entered into a guilty plea
arrangement whereby they admitted to submitting fraudulent bids to FEMA, paid a fine, and consented to the matter of restitution being the subject of a separate civil claim.

Thereafter, the government brought the current action seeking restitution from the defendants. In its prayer for relief, the government failed to state a specific amount of damages but sought treble damages plus a civil penalty of $10,000 for each violation of the FCA.

The defendants filed a motion for summary judgment. They argued the government’s restitution action under the FCA was barred by the Double Jeopardy Clause of the United States Constitution (“Double Jeopardy Clause”) because defendants were placed on probation and fined as part of the criminal case. Additionally, the defendants argued they were entitled to summary judgment because the government was unable to prove actual damages.

The court noted that a civil award against an already convicted defendant was not precluded by the Double Jeopardy Clause if the award was rationally related to the goal of making the government whole rather than punitive in nature. The court found that not only did the defendants consent to the separate civil restitution proceeding, but the government had not yet presented its accounting. Without the accounting, the court was unable to determine whether the civil penalty moved beyond the realm of restitution to punitive, which would potentially violate the Double Jeopardy Clause. As for the defendants’ allegation that the government was unable to prove actual damages, the court noted that the defendants admitted to participating in a conspiracy to submit or cause to be submitted false claims to FEMA for amounts over $1 million. The court viewed this as evidence of the government’s damages for which summary judgment was inappropriate.

In this case, FCA violations involved whether multiple defendant contractors falsely claimed reimbursement from FEMA for work performed in connection with Katrina relief. First, relators alleged that defendants falsely claimed reimbursement for temporary housing unit (“THU”) installations that were not in compliance with state liquefied petroleum (“LP”) laws. Relators attempted to assert a theory that defendants’ subcontracts were null because of their failure to comply with state law and therefore, any reimbursement claim to FEMA was false due to the underlying nullity of the contracts. Second, relators alleged the defendants had made false certifications, false statements and intentionally concealed facts from FEMA regarding subcontractor qualifications and permits. The reported decision noted above is the court’s order on motions to dismiss and for summary judgment by three of the defendants.

The common theme of relator’s first claim was that the defendant contractors’ alleged failure to require their subcontractors to obtain gas installation permits required under state law nullified the subcontracts. Relator argued that because the defendants’ subcontracts did not specifically mention the terms or provisions of the state law gas statute and regulations, each defendant failed to enforce state law concerning permitting, training or any other requirement of the state gas statutes or regulations.

Each defendant contractor submitted evidence that the language in its subcontracts obrigated the subcontractor to obtain and maintain *all* permits and to comply with all federal, state and local laws, rules, and regulations applicable to the work performed under the subcontract. The court focused on the broad language of the subcontracts to find that this language obligated the subcontractors to obtain state gas permits and comply with state gas
statutes and regulations. Failure to specifically mention the Louisiana statutes did not nullify the contracts. The court dismissed relator’s claim of subcontract nullity against each defendant.

Each defendant also faced an allegation that it knowingly concealed information and made intentional misrepresentations to FEMA regarding the qualifications, training, and permitting of its staff and subcontractors. The court refused to dismiss the false statement claims against Fluor and Shaw. However, CH2M Hill’s motion for summary judgment was granted on a finding that CH2M Hill did not knowingly conceal or intentionally withhold information from FEMA regarding subcontractor qualifications.

Fluor argued that it could not be found liable under the “government knowledge defense.” Fluor argued FEMA had been aware of Fluor’s failure to comply with state gas statutes regarding the permitting and training of its subcontractors, and therefore Fluor did not act “knowingly.” According to the court, it was not the initial failure to comply that prevented dismissal of the claims against Fluor. Rather, it refused to dismiss this claim due to relator’s allegation that Fluor misrepresented the corrective action it was taking to remedy its noncompliance to FEMA. Fluor represented to FEMA that it had caused 400 hundred employees to be adequately trained by the state gas commission and that it had taken measures to ensure proper permitting. Relator alleged that Fluor had done none of these actions. The court stated that if relator’s allegation were true, then this was a knowing misrepresentation to the government that would constitute a violation of the FCA. Because Fluor was unable to provide evidence that FEMA was aware of the full extent of Fluor’s noncompliance, the court refused to dismiss the claims.

CH2M Hill was faced with the same predicament but received a different outcome. First, CH2M informed FEMA of its noncompliance with the state gas statutes as soon as it became
aware and said that unless FEMA could secure a waiver of the permit requirement, it would require its staff to undergo training as soon as possible. After this notice, CH2M was in regular communication with FEMA about its attempts to become compliant, and FEMA gave instructions to continue with the work. The court found that CH2M did not act with the intent of defrauding FEMA due to its open lines of communication regarding attempts to comply with the state gas statutes. CH2M had been open with FEMA regarding their efforts, and FEMA had approved payments with this knowledge.

On March 10, 2017, the Fifth Circuit affirmed the District Court’s order.

E. **FCA Liability Based Upon Misrepresentation of Contractor Status**

Contractors can be held liable under the FCA for misrepresenting their status as a contractor to take advantage of contract set-aside programs. *LW Constr. of Charleston, LLC v. United States,* demonstrates this can be so even if the government has no proof it paid more than the value of the work performed by contracting with an entity that was not rightfully entitled to participate as a “special status” contractor. The contract at issue was awarded to LW in 2009, but only in 2018 was a decision issued by the Court of Federal Claims that could force LW to repay all payments made to it in on that contract, which exceeded $10 million, and face FCA penalties and damages.

In 2008, LW Construction of Charleston, LLC (“LW”) was formed by Louis White, a service-disabled veteran, and brothers Sidney and Gary Brantley, to participate in federal procurements set aside for Service-Disabled Veteran Owned Small Businesses (“SDVOSB”). Neither of the Brantley brothers was a service-disabled veteran, and both had long been in construction through Brantley Construction Company, LLC. Generally, to qualify as a SDVOSB, an entity must be a small business that is owned and controlled by a service-disabled
veteran. The veteran’s ownership must be at least 51%, and the veteran must have the immediate right to determine and manage the day to day and long-term affairs of the entity. While LW’s operating agreement stated that Mr. White owned 51% of the company, Sidney Brantley owned 25%, and Gary Brantley owned 24%, other terms of the LW Operating Agreement indicated that unanimous consent of the members was required for actions by LW to be effective. Résumés of the Brantley brothers stated each was a managing member of LW. In short, the record indicated there was much evidence showing that LW was not owned and controlled by a service-disabled veteran and, therefore, LW was not a legitimate SDVOSB.

In 2009, LW was awarded a contract by the Department of Veterans Affairs (“VA”) for construction work at the Fort Jackson National Cemetery. The project was set aside for SDVOSBs. At the time LW submitted its bid for the project in April 2009, the VA had yet to institute its requirement that it first verify that business concerns were compliant with the SDVOSB program to be eligible for SDVOSB set-asides. Rather, SDVOSBs were eligible for award of a procurement set aside for SDVOSBs provided they were listed in the VA’s Veterans Information Pages (“VIP”) database. The record in the case is not clear, but LW was able to get listed in the VA’s VIP before the Fort Jackson Project was awarded to it on June 2, 2009, and on the basis of very little information.

By the fall of 2011, LW’s contract had received several performance extensions. Also, in accordance with the VA’s implementation of its 2010 verification requirement for SDVOSBs, the VA requested that LW provide certain records (e.g., LW’s Operating Agreement, its members’ tax returns, and the tax returns of multiple companies in which the Brantley brothers held interests) to demonstrate compliance with the VA’s SDVOSB program. In October 2011, the VA determined LW was not owned and controlled by Louis White. LW was removed from
the VA’s VIP and de-certified as a SDVOSB. Nevertheless, LW’s Fort Jackson contract was not
terminated as a result of its de-certification as a SDVOSB. The VA’s position was that
SDVOSB status is determined at the time an offer is submitted to the government, and LW’s de-
certification years after the award did not mean LW was no longer entitled to continue
performance and receive payment.

By 2013, LW’s performance was in default, and LW was in dispute with at least one
subcontractor, Landmark Construction Company (“Landmark”). Landmark complained that LW
grossly mismanaged the project and interfered repeatedly with Landmark’s work. The VA
terminated LW for default on October 16, 2013, due to numerous performance deficiencies, but
not due to LW’s being de-certified as a SDVOSB.

In May 2014, Landmark sued LW in a qui tam action in the United States District Court
for South Carolina. Landmark alleged, among other things, that LW had falsely and fraudulently
represented that it was a SDVOSB. The Department of Justice (“DOJ”) declined to intervene in
the qui tam action.

In October 2014, LW filed a complaint in the Court of Federal Claims alleging that
termination of the Fort Jackson contract was wrongful. In its initial answer and its first
amended answer, the DOJ failed to assert counterclaims. In fact, the DOJ did not file its motion
seeking leave to assert counterclaims until October 2017. At that time, the DOJ sought leave to
file a counterclaim for FCA violations (alleging LW’s submission of invoices for payment were
false claims) and for unjust enrichment (alleging LW fraudulently procured a contract for which
it was not eligible and was unjustly enriched by payments made).
Even though the VA de-certified LW as a SDVOSB in 2011 and still permitted LW to perform until it was terminated for default in 2013, these allegations had traction with the court, which stated:

Based on the record currently before the court, the VA had restricted competition for the Fort Jackson contract only to eligible SDVOSBs. The solicitation for the Fort Jackson contract stated that the “procurement is a … SDVOSB set-aside,” and that “[o]ffers received from concerns that are not service-disabled veteran-owned small business concerns shall not be considered.” The Fort Jackson solicitation makes clear that, but for LW’s representation that it was a SDVOSB, the VA would not have considered LW’s proposal for the award of the Fort Jackson contract.\(^87\)

Each invoice submitted by LW for payment was held to be a separate claim for purposes of the FCA. The court noted that “‘[C]laims submitted pursuant to a fraudulently obtained contract are FCA violations even if the claims themselves do not contain false statements.’”\(^88\) Hence, LW could be found liable for damages under the FCA even if its invoices were for services actually provided and consistent with the contract terms.

LW argued the counterclaims were barred by applicable statutes of limitation. Although the DOJ’s FCA and unjust enrichment counterclaims both arise out of the same operative facts, the court determined that they were subject to different statutes of limitation. The court found that any invoice LW submitted to the government after October 13, 2011, was subject to a viable counterclaim under the FCA.\(^89\) Such invoices were submitted within the 6-years prior to the DOJ’s request for leave to amend its counterclaim filed October 13, 2017, and therefore were within the 6-year statute of limitations in 31 U.S.C. §3731(b)(1). Because the court held that the DOJ did not have sufficient evidence of fraud at earlier dates, the DOJ’s FCA counterclaims were not barred by the more restrictive 3-year period in 31 U.S.C. §3731(b)(2).

Those portions of its counterclaim that the DOJ was not allowed to pursue under its FCA theory were still viable under its theory of unjust enrichment. The court recognized that the
unjust enrichment counterclaim was a different, non-contractual theory of recovery, but noted the motion stage was not the appropriate stage to determine the merits of either theory of relief, even if the DOJ could not succeed on all of its theories.\textsuperscript{90} LW unsuccessfully argued that the unjust enrichment claim—which sought the total of all monies paid to LW since the award of the contract in 2009—was barred by the general 6-year statute of limitations applicable to government claims.\textsuperscript{91} The court agreed with DOJ’s position that the unjust enrichment counterclaim arose out of the same transaction or occurrence that gave rise to the complaint (the contract), and thus was a right of set-off to which no statute of limitations applied, as provided in 28 U.S.C. §2514(f).\textsuperscript{92}

V. CONCLUSION

The federal and state false claims acts provide powerful reasons for contractor, subcontractors and others working on federal and local projects to ensure compliance with contractual and regulatory requirements. Learning more about these laws, paying attention to red flags, and timely responding to issues when they are raised are important steps for anyone working on government funded projects.

\textsuperscript{1} 31 U.S.C. § 3729, \textit{et seq.}  
5 Escobar, 136 S.Ct. at 1996. See also United States v. Neifert-White Co., 390 U.S. 228, 232-33 (1968) (“This remedial statute reaches … to all fraudulent attempts to cause the government to pay out sums of money.”)
7 E.g., United States ex rel. Longhi v. Lithium Power Technologies, Inc., 575 F.3d 458 (5th Cir. 2009).
8 E.g., United States ex rel. Compton v. Midwest Specialties, 142 F.3d 296 (6th Cir. 1998).
13 31 U.S.C. §3729(a)(1)(G). This type of allegation is often referred to as a “reverse false claim.”
16 See, e.g., United States v. Bornstein, 423 U.S. 303 (1976) (upholding liability for subcontractor that caused prime contractor to submit to the Government invoices for a product containing substandard parts provided by the subcontractor).
18 Id. The term “claim” is defined to include claims for payment presented to contractors, grantees, or other recipients of federal funds if the money is to be used on the government’s behalf or to advance a government interest and the government has provided, or will reimburse, any portion of the money or property requested. 31 U.S.C. §3729(b)(2)(A). The term excludes payments to an individual as salary or income subsidy with no restrictions on the person’s use of the funds. 31 U.S.C. §3729(b)(2)(B).
23 Id. at 2002.
24 Id. (citing common law definitions of materiality). The FCA’s statutory definition of materiality is the same as the Supreme Court’s definition in Neder v. United States, 527 U.S. 1 (1999), see S. Rep. No. 111-10, at 12, n.6, which in turn drew on the common law.
28 Id.
Prior to the 1986 amendment, the penalty was $2,000, which it had been since 1863 when the law was first enacted. See S. Rep. No. 99-345, at 17 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5282.

For conduct after November 2, 2015, the penalties can range from a minimum of $10,781 to a maximum of $22,363 depending upon when the penalties are assessed. See 28 C.F.R. § 85.5.

“Qui tam” is short for a longer Latin phrase meaning he who brings the case for the King as well as for himself. Black’s Law Dictionary (6th ed.) p. 1251.

Rico enacted the False Claims to Government of Puerto Rico Programs, Contracts and Services Act, which takes effect 6 months from the date of enactment. 2018 Puerto Rico Act 154 (H.B. 1627).

44 Cal. Gov’t Code §12651(a)(8).
45 New York State Finance Law § 187, et seq.
48 See, e.g., California False Claims Act, Cal. Gov’t Code § 12650(b)(1).
51 See id.; see also http://www.oig.hhs.gov/fraud/docs/falseclaimsact.
53 Id.
54 Id.
57 31 U.S.C. §3730(c).
58 31 U.S.C. §3730(c)(1). The government may dismiss or settle the action over the objection of a relator, who is entitled to a hearing. Id., §3729(c)(2).
60 Id.
62 See, e.g., 79 Del. Code Ann. Tit. 6, §1203(b).
64 183 F.3d 1088 (9th Cir. 1999).
65 40 U.S.C. §§3141-3148, now referred to as Wage Rate Requirements.
66 813 F.3d 616 (6th Cir. 2016).
67 Id. at 618 (citing as an example an “unalterable moral taint” such as goods made by child laborers for which no award of money damages could remedy the breach).
69 Id. at 472.
71 Id. at 518.
On the issue, generally, of whether FCA monetary penalties could implicate the Double Jeopardy Clause, see *Hudson v. United States*, 522 U.S. 93, 99, 118 S.Ct. 488, 493 (1997) (holding that the “Clause protects only against the imposition of multiple *criminal* punishments for the same offense”).


*Id.* at 308-309.

*Id.* at 262-264.

*Id.* at 267. These requirements are virtually identical to the requirements for other “special status” concerns, including Woman-Owned Small Businesses and 8(a) concerns for socially and economically disadvantaged small businesses.

*Id.* at 263-267.

*Id.* at 264.

*Id.* at 267-268.

*Id.* at 269.

*Id.* at 269-272. Landmark eventually dismissed its action voluntarily but without prejudice to the DOJ.

*Id.* at 272.

*Id.* at 275. Apparently, there was a change in counsel for the DOJ, and discovery conducted in defense of LW’s wrongful termination claim led the new DOJ counsel to seek leave to file the counterclaims.

*Id.* at 291 (emphasis added).

*Id.* at 292, *quoting Veridyne Corp. v. United States*, 758 F.3d. 1371, 1379 (Fed. Cir.), *reh’g and reh’g en banc denied* (Fed. Cir. 2014).

*Id.* at 296-297.

*Id.* at 298-299.

28 U.S.C. §2415(a) applies to any government claim for money damages and requires that such claims “founded upon any contract express or implied in law or fact” be filed within 6 years.

139 Fed.Cl. 254, 301-302.