STATE AND FEDERAL FALSE CLAIMS ACTS

County Counsels' Association of California
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State and Federal False Claims Acts

- What are they?
- Allow government or whistleblower actions to bring action for recovery of triple damages, penalties and attorneys' fees against persons who submit, or who are paid on, false "claims" to a governmental entity.
- Provide remedies for retaliation against Whistleblowers.
- Many situations where material breach of contract is discovered after a payment has been made for that work.

Federal, State and Local False Claims Laws

Gov. Code § 12650 et seq.

31 U.S.C. § 3729 et seq.

San Francisco Administrative Code § 6.83. (attached)

Criminal Laws

Penal Code § 72.

18 U.S.C. §§ 286, 287, 1000.

Liability

(1) Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval.

(2) Knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim.

(3) Conspires to commit a violation of this subdivision.

(4) Has possession, custody, or control of public property or money used or to be used by the state or by any political subdivision and knowingly delivers or causes to be delivered less than all of that property.

(5) Is authorized to make or deliver a document certifying receipt of property used or to be used by the state or by any political subdivision and knowingly makes or delivers a receipt that falsely represents the property used or to be used.

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property.

(7) Knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state or to any political subdivision, or knowingly conceals or knowingly and improperly avoids, or decreases an obligation to pay or transmit money or property to the state or to any political subdivision.

(8) *Is a beneficiary of an inadvertent submission of a false claim, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim.*

Gov. Code § 12651(a).

- May have several grounds for liability in one case.

(a) Liability for certain acts.

(1) In general. Subject to paragraph (2), any person who–

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property; . . .

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government . . . .

31 U.S.C. § 3729(a).

"Claim"

(1) "Claim" means any request or demand, whether under a contract or otherwise, for money, property, or *services*, and whether or not the state or a political subdivision has title to the money, property, or services that meets either of the following conditions:

(A) Is presented to an officer, employee, or agent of the state or of a political subdivision.

(B) Is made to a contractor, grantee, or other recipient, if the money, property, or service is to be spent or used on a state or any political subdivision's behalf or to advance a state or political subdivision's program or interest, and if the state or political subdivision meets either of the following conditions:
(i) Provides or has provided any portion of the money, property, or service requested or demanded.
(ii) Reimburses the contractor, grantee, or other recipient for any portion of the money, property, or service that is requested or demanded.

Gov. Code § 12650(b)(1).

(2) the term "claim"--

(A) means 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–
(i) is presented to an officer, employee, or agent of the United States;
or
(ii) 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, and if the United States Government–
(I) provides or has provided any portion of the money or property requested or demanded; or
(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and . . . ."

31 U.S.C. § 3729(b)(2).

Intent

(3) "Knowing" and "knowingly" mean that a person, with respect to information, does any of the following:

(A) Has actual knowledge of the information.

(B) Acts in deliberate ignorance of the truth or falsity of the information.

(C) Acts in reckless disregard of the truth or falsity of the information.

Proof of specific intent to defraud is not required.

Gov. Code § 12650(b)(3).

(1) the terms "knowing" and "knowingly"--

(A) mean that a person, with respect to information--

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud; . . . .

31 U.S.C. § 3729(b).

"Congress attempted 'to reach what has become known as the "ostrich" type situation where an individual has "buried his head in the sand" and failed to make simple inquiries which would alert him that false claims are being submitted.' [Citation.] Congress adopted 'the concept that individuals and contractors receiving public funds have some duty to make a limited inquiry so as to be reasonably certain they are entitled to the money they seek.' [Citations.]" (U.S. v. Bourseau (9th Cir. 2008) 531 F.3d 1159, 1168; see Gulf Group General Enterprises Co. W.L.L. v. U.S. (Ct.Cl. 2013) 114 Fed.Cl. 258, 314 ["The standard was designed to address 'the problem of the "ostrich-like" refusal to learn of information which an individual, in the exercise of prudent judgment, had reason to know.' [Citation.] Thus, the [federal FCA] covers not just those who set out to defraud the government, but also those who ignore obvious deficiencies in a claim."]; U.S. ex rel. Ervin & Associates, Inc. v. Hamilton Securities Group, Inc. (D.D.C. 2005) 370 F.Supp.2d 18, 42 ["[t]he standard of reckless disregard ... was designed to address the refusal to learn of information which an individual, in the exercise of prudent judgment, should have discovered"]; but see U.S. ex rel. Hefner v. Hackensack University Medical Center (3d Cir. 2007) 495 F.3d 103, 109 ["Congress specifically expressed '"its intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence."'"].) Among other things, "A failure to make a minimal examination of records can constitute deliberate ignorance or reckless disregard, and a contractor that deliberately ignores false information submitted as part of a claim can be found liable under the" federal FCA. (Gulf Group, at p. 315.) The plain language of the CFCA reflects similar legislative intent. (See Thompson Pacific Construction, Inc. v City of Sunnyvale (2007) 155 Cal.App.4th 525, 548 [66 Cal. Rptr. 3d 175] (Thompson) [reckless disregard standard in federal FCA and CFCA "indistinguishable"]."

San Francisco Unified School Dist. ex rel. Contreras v. First Student, Inc. (1st Dist. 2014) 224 Cal. App. 4th 627, 646.

Reverse False Claims

Failure to Provide Money or Property Owned to Government
Failure to Disclose Making of False Claims

> (4) Has possession, custody, or control of public property or money used or to be used by the state or by any political subdivision and knowingly delivers or causes to be delivered less than all of that property.
>
> (7) Knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state or to any political subdivision, or knowingly conceals or knowingly and improperly avoids, or decreases an obligation to pay or transmit money or property to the state or to any political subdivision.
>
> (8) Is a beneficiary of an inadvertent submission of a false claim, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim.

Cal Gov Code § 12651(a).

> Under the FCA, liability for reverse false claims attaches when any person knowingly files a false record to conceal an obligation to pay money. The statute prohibits "[k]nowingly mak[ing], us[ing], or caus[ing] to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state or to any political subdivision." (Gov. Code, § 12651, subd. (a)(7), italics added.) The same prohibition exists under the federal False Claims Act (31 U.S.C. § 3729(a)(7)).

State of California ex rel. Bowen v. Bank of America Corp. (2005) 126 Cal. App. 4th 225, 240.

False Claims Made Indirectly by Subcontractors and Suppliers

(b) For purposes of this article:

(1) "Claim" means any request or demand, whether under a contract or otherwise, for money, property, or services, and whether or not the state or a political subdivision has title to the money, property, or services that meets either of the following conditions:
(A) Is presented to an officer, employee, or agent of the state or of a political subdivision.
(B) Is made to a contractor, grantee, or other recipient, if the money, property, or service is to be spent or used on a state or any political subdivision's behalf or to advance a state or political subdivision's program or interest, and if the state or political subdivision meets either of the following conditions:

(i) Provides or has provided any portion of the money, property, or service requested or demanded.

(ii) Reimburses the contractor, grantee, or other recipient for any portion of the money, property, or service that is requested or demanded.

Gov. Code § 12650(b); 31 U.S.C. § 3729(c)(A)(ii).

(1) Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval.

(2) Knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim.

Gov. Code § 12651(a).

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government.

31 U.S.C. § 3729(a)(1).

United States v. Bornstein (1976) 423 U.S. 303, 309-313, 96 S.Ct. 523.

United States ex rel. Hutcheson v. Blackstone Med., Inc. (1st Cir. 2011) 647 F.3d 377, 388 - 392.

City of Pomona v. Superior Court (2001) 89 Cal. App. 4th 793, 803.

Who can bring an Action?

- The Attorney General or the "prosecuting authority of a political subdivision" to which a claim is submitted.

Gov. Code § 12652(a) & (b).

- (8) "Prosecuting authority" refers to the county counsel . . . .

Gov Code § 12650(b).

> (b)
> (1) The prosecuting authority of a political subdivision shall diligently investigate violations under Section 12651 involving political subdivision funds. If the prosecuting authority finds that a person has violated or is violating Section 12651, the prosecuting authority may bring a civil action under this section against that person.

Gov, Code § 12652.

- Political Subdivision has right to intervene in Attorney General Action involving its own funds.

Gov. Code § 12652(a)(3).

- Whistleblowers, or *Qui Tam* relators, on behalf of the governmental entity.

Gov. Code § 12652(c)(1).

> We therefore conclude that public entities, such as City, are not "persons" who may bring qui tam actions on behalf of other agencies of government under the CFCA.

State ex rel. Harris v. PricewaterhouseCoopers, LLP (2006) 39 Cal. 4th 1220, 1238.

Qui Tam Cases filed by Whistleblowers

- Filed under Seal for 60 days.

- Mandatory Disclosure Statement.

  Gov. Code § 12652(c)(3).

- Political Subdivision's right to intervene.

  (7)(A) Within 15 days after receiving a complaint alleging violations that exclusively involve political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure of material evidence and information to the appropriate prosecuting authority for disposition, and shall notify the qui tam plaintiff of the transfer.

  (B) Within 45 days after the Attorney General forwards the complaint and written disclosure pursuant to subparagraph (A), the prosecuting authority may elect to intervene and proceed with the action.

  (C) The prosecuting authority may, for good cause shown, move for extensions of the time during which the complaint remains under seal. The motion may be supported by affidavits or other submissions in camera.

  (D) Before the expiration of the 45-day period or any extensions obtained under subparagraph (C), the prosecuting authority shall do either of the following:
  (i) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the prosecuting authority and the seal shall be lifted.
  (ii) Notify the court that it declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

Gov. Code. § 12652(c)(7) & (8).

(e) (1) If the state or political subdivision proceeds with the action, it shall have the primary responsibility for prosecuting the action. The qui tam plaintiff shall have the right to continue as a full party to the action.

(2)
(A) The state or political subdivision may seek to dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified by the state or political subdivision of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity to oppose the motion and present evidence at a hearing.
(B) The state or political subdivision may settle the action with the defendant notwithstanding the objections of the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances.

(f)
(1) If the state or political subdivision elects not to proceed, the qui tam plaintiff shall have the same right to conduct the action as the Attorney General or prosecuting authority would have had if it had chosen to proceed under subdivision (c). If the state or political subdivision so requests, and at its expense, the state or political subdivision shall be served with copies of all pleadings filed in the action and supplied with copies of all deposition transcripts.

(2)
(A) Upon timely application, the court shall permit the state or political subdivision to intervene in an action with which it had initially declined to proceed if the interest of the state or political subdivision in recovery of the property or funds involved is not being adequately represented by the qui tam plaintiff.
(B) If the state or political subdivision is allowed to intervene under paragraph (A), the qui tam plaintiff shall retain principal responsibility for the action and the recovery of the parties shall be determined as if the state or political subdivision had elected not to proceed.

Gov. Code § 12652(e) & (f).

- Difference in recovery by Whistleblower , depending on whether Government Initially Intervenes in *Qui Tam* case.

  15% - 33% vs. 25% - 50%.

Gov. Code. § 12652(g)(1)-(3).

> (4) In all actions brought under subdivision (c), . . . a court shall not have jurisdiction over an action based upon information discovered by a present or former employee of the state or a political subdivision during the course of his or her employment unless that employee first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and unless the state or political subdivision failed to act on the information provided within a reasonable period of time.

Cal Gov Code § 12652(d).

Protections for Whistleblowers/Damages and Remedies for Retaliation

(a) Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of his or her employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action under this section or other efforts to stop one or more violations of this article.

(b) Relief under this section shall include reinstatement with the same seniority status that the employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, and where appropriate, punitive damages. The defendant shall also be required to pay litigation costs and reasonable attorneys' fees. An action under this section may be brought in the appropriate superior court of the state.

(c) A civil action under this section shall not be brought more than three years after the date when the retaliation occurred.

Gov Code § 12653.

31 U.S.C. § 3730(h).

Where can Combined Actions be Filed?

- State Court under both Statutes.
- Federal Court under both Statutes.

31 U.S.C. § 3732(b); *United States v. Sequel Contrs., Inc.* (C.D. Cal. 2005) 402 F. Supp. 2d 1142, 1149.

Defenses

Statutes of Limitations

- State

> (a) A civil action under Section 12652 shall not be filed more than six years after the date on which the violation of Section 12651 is committed, or more than three years after the date when facts material to the right of action are known or reasonably should have been known by the Attorney General or prosecuting authority with jurisdiction to act under this article, but in no event more than 10 years after the date on which the violation is committed, whichever of the aforementioned occurs last.

Gov. Code § 12654.

- Federal

31 U.S.C. § 3731(b).

Government Knowledge

> The Allied Mold case provides further explication in noting that there cannot be a knowing presentation of a false claim for payment where the government is fully aware of the facts surrounding the claim and approves it. The court approvingly cited the Seventh Circuit's decision in U.S. ex rel. Durcholz v. FKW, Inc., 189 F.3d 542, 544-45 (7th Cir. 1999) as follows:
>
> "The government's prior knowledge of an allegedly false claim can vitiate a FCA action. If the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim. In such a case, the government's knowledge effectively negates the fraud or falsity required by the FCA."

United States v. Shasta Servs. Inc.(E.D. Cal. 2006) 440 F. Supp. 2d 1108, 1113-1114.

> We further conclude that the submission of a claim for payment on a contract allegedly entered into in violation of state contracting laws, where the state was fully aware of and instigated the alleged violations, does not contravene the Act.

Am. Contract Servs. v. Allied Mold & Die (2001) 94 Cal. App. 4th 854, 856.

Types of "False" Claims - Where Was the False Statement?

- **A. Express Representations or Certifications Which are False.**

City of Pomona v. Superior Court (2001) 89 Cal. App. 4th 793, 803-804.(False Statement in Material Supplier's product catalog as to performance of pipes.)

> [A] false certification that workers have been paid at the legally required wage rate may give rise to liability under the FCA.

United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C. W. Roen Constr. Co. (9th Cir. Cal. 1999) 183 F.3d 1088, 1092.; *Wall v. Cinelac Construction* (6th Cir. 2012) 2014 WL 4477.

> Yet when a contractor adopts a contract interpretation that is implausible in light of the unambiguous terms of the contract and other evidence (such as repeated warnings from a subcontractor or the fact that the interpretation is contrary to well-established industry practice), the contractor may be liable under the FCA or the CDA even in the absence of any deliberate concealment or misstatement of facts. Under such circumstances, when the contractor's purported interpretation of the contract borders on the frivolous, the contractor must either raise the interpretation issue with the government contracting officials or risk liability under the FCA or the CDA.

Commercial Contrs. v. United States (Fed. Cir. 1998) 154 F.3d 1357, 1366. (CCI excavated less than the contract drawings required, but submitted cross-sections and quantity surveys indicating that it had excavated up to the contract lines.)

- Effect of contract provisions requiring express certifications.

- **B. "Implied Certifications" or Representations.**

- Implied Certification of Compliance with Contract.
"Implied Certification Under the False Claims Act" (2010)
41 Pub. Cont. L.J. 1.

San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc. (2010)182 Cal.App.4th 438, 448-453.

- Liability without express false statement.

- Federal law is before U.S.S.Ct.
Universal Health Services, Inc. v. United States ex rel. Escobar (No.15-7) (Argued April 19, 2016).

- Justices appear to seek limiting principle in FCA case, Daily Journal (April 22, 2016) p.6.

Laidlaw initially argues its claims for payment were not false, because there was no literally false information on the face of the invoices, which identify the routes driven and the charges arising from each route. However, Laidlaw ultimately concedes that a section 12651, subdivision (a)(1) false claim need not contain an expressly false statement to be actionable. This is evident from a distinction between the language of section 12651, subdivision (a)(1), and that of section 12651, subdivision (a)(2). Under former section 12651, subdivision (a)(2), liability is premised on the presentation of "a false record or statement to get a false claim paid or approved by the state or by any political subdivision." Section 12651, subdivision (a)(1), however, requires only the presentation of a "false claim for payment or approval" without the additional element of a "false record or statement." (See Shaw, supra, 213 F.3d at pp. 531–532 [noting same distinction in federal act].) Thus, liability under section 12651, subdivision (a)(1), may arise absent an express false statement by the government contractor. (See Shaw, at p. 532 [reaching same conclusion regarding federal FCA]; Pomona, supra, 89 Cal.App.4th at p. 802 ["[T]he claim itself need not be false but only need be underpinned by fraud."].)

The first critical issue in this case is whether a request for payment under a contract includes an implied certification of compliance with contractual requirements that, if false and fraudulent, can form the basis for a CFCA action. The Shaw court considered this question directly in the federal context. There, one of the defendants was a government photography contractor that, among other things, failed to comply with a provision of its contract requiring it to recover silver from used laboratory chemicals. (Shaw, supra, 213 F.3d at p. 523.) Like Laidlaw in the present case, the defendant in Shaw argued that "an invoice, submitted after the violation of a contractual provision, cannot constitute the knowing presentation of" a false claim. (Id. at p. 531.) The Shaw court rejected that argument and accepted an argument made by the United States, appearing as amicus curiae, that "when [the defendant] submitted its monthly invoices, it impliedly certified that it had complied with the silver recovery provisions in the contract; because [the defendant] was being paid not only for photography services but also for environmental compliance, its false implied certification of compliance with the contract's silver recovery requirement gives rise to liability under the [federal] FCA." (Ibid.) In accepting that argument, Shaw relied on the distinction discussed above between the provision in the federal FCA prohibiting false claims and another prohibiting false statements used to support false claims. (Id. at pp. 531–532.) The court also discussed other federal case law (id. at pp. 532–533) and pointed to language in a United States Senate committee report stating that a false claim " 'may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation.' [Citation.]" (Id. at p. 531.)

Similar language appears in an analysis of the CFCA before its enactment, prepared by the Center for Law in the Public Interest (Center), which was the "source" of the bill in the California Assembly and also the drafter of the federal enactment. (See Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1441 (1987–1988 Reg. Sess.) as amended Sept. 8, 1987, pp. 1, 5; see also State ex rel. Harris v. PricewaterhouseCoopers, LLP (2006) 39 Cal.4th 1220, 1230 [48 Cal.Rptr.3d 144, 141 P.3d 256] (Harris) [stating that the Center "participated in drafting both the current federal and California false claims statutes"]; Altus, supra, 36 Cal.4th at p. 1296 [describing the Center as the "principal drafter of the statute"].) The analysis, which was provided to the author of the bill and was before the Senate and Assembly

Judiciary Committees, states "a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of a contract term, statute or regulation." (Center, Cal. False Claims Act Section-by-Section Analysis (1987) p. 4, italics added; see also Armenta ex rel. City of Burbank v. Mueller Co. (2006) 142 Cal.App.4th 636, 648 [47 Cal.Rptr.3d 832] [relying on the Center's analysis in interpreting the CFCA]; Laraway v. Sutro & Co. (2002) 96 Cal.App.4th 266, 275 [116 Cal.Rptr.2d 823] [same].)

Other federal decisions also provide support for an implied certification theory of CFCA liability. In Ab-Tech Constr., Inc. v. U.S. (1994) 31 Fed.Cl. 429, 434 (Ab-Tech), the court concluded payment vouchers submitted by a government contractor constituted "an implied certification" of the contractor's continuing adherence to the requirements for participation in a minority-owned business program. The court stated that the federal act "extends 'to all fraudulent attempts to cause the [g]overnment to pay out sums of money.' [Citation.]" (Id. at p. 433; see also U.S. ex rel. Hendow v. University of Phoenix (9th Cir. 2006) 461 F.3d 1166, 1170 (Hendow) [noting that the federal FCA is not limited to "facially false or fraudulent claims for payment"; rather, the federal FCA is " 'intended to reach all types of fraud, without qualification, that might result in financial loss to the [g]overnment' "]; Pomona, supra, 89 Cal.App.4th at p. 802.) Similarly, in Hendow, at pages 1168, 1176–1177, the court concluded the plaintiffs had stated a claim under the federal FCA where a university submitted requests for funds from the federal government despite being in violation of a provision of a program agreement banning payment of school recruiters on a per-student-enrolled basis. In Daff v. U.S. (1994) 31 Fed.Cl. 682, 689, the court concluded that a government military contractor's requests for payment were false because they misled "the government into a belief that the contractor had fully complied with terms of the contract, when in fact it had not." There, the contractor concealed testing failures and "non-conforming soldering." (Ibid.) In U.S. v. TDC Management Corp., Inc. (D.C. Cir. 1994) 306 U.S. App.D.C. 286 [24 F.3d 292, 294, 296, 298], the court concluded a contractor could be liable under the federal FCA where it knowingly omitted from progress reports information concerning its noncompliance with the program it had contracted to implement.

In U.S. ex rel. Fallon v. Accudyne Corp. (W.D.Wis. 1995) 921 F.Supp. 611, 615, 620 (Fallon), it was alleged that a government contractor inadequately tested military hardware. The district court denied the defendant's motion for summary judgment, concluding "[i]f a contractor knowingly fails to perform testing as required by a contract, and tenders the untested goods, making a claim for full payment, it has surely submitted a false claim. Under such circumstances a false claim may arise from not advising of a failure to perform a material part of the contract." (Id. at p. 621; see also U.S. ex rel. Holder v. Special Devices, Inc. (C.D.Cal. 2003) 296 F.Supp.2d 1167, 1175–1177 (Holder) [violation of federal FCA may be based on false implied certification where contract required compliance with federal laws and specific regulations were incorporated into the contract]; cf. U.S. ex rel. Willard v. Humana Health Plan of Texas Inc. (5th Cir. 2003) 336 F.3d 375, 383 [no violation of federal FCA where regulations allegedly violated were not referenced in contract].)

The decision in Pomona also supports plaintiffs' position in this case. There, the defendant manufactured supply pipes and other water distribution parts that were sold to the City of Pomona (Pomona) for use in its municipal water system. (Pomona, supra, 89 Cal.App.4th at pp. 797–799.) The defendant represented in its catalogs and sales literature that its parts complied with specified national standards. (Id. at p. 797.) One of those standards required that all material coming into contact with potable water contain a specified combination of metals, in order to minimize corrosion. (Ibid.) Separate notations in the defendant's catalogs asserted compliance with that particular standard. (Id. at pp. 797–798.) Nevertheless, some of the parts purchased by Pomona were in fact made of an inferior metal combination. (Id. at p. 799.) The Court of Appeal concluded the plaintiffs had stated a claim under the CFCA. The representations in the catalog were intended to induce purchases and Pomona was deemed to have incorporated the catalog specifications into its order. (Pomona, at pp. 803–804.) When the defendant delivered nonconforming parts and sought payment, it constituted a false claim, both because the contract with Pomona was induced by a falsity and because the bill sought payment for a good which had not been provided. (Id. at pp. 804–805; see also Rothschild, supra, 83 Cal.App.4th at pp. 492, 500 [involving the same false claim].) . . . .

Laidlaw argues a request for payment constitutes an implied certification of contract compliance giving rise to potential liability only where the contract

requires such a certification as a prerequisite to payment. Laidlaw cites U.S. ex rel. Hopper v. Anton (9th Cir. 1996) 91 F.3d 1261 (Hopper), where it was alleged that the Los Angeles Unified School District accepted federal funding for special education programs but did not observe regulatory guidelines related to the program. (Id. at pp. 1264–1265.) The Ninth Circuit held the plaintiff could not show the school district had made a false claim for payment because the federal government did not require certification of compliance with the regulations as a prerequisite for obtaining the funding. (Id. at pp. 1266–1267.) However, Hopper did not consider whether a false implied certification relating to compliance with express contractual requirements could state a violation of the federal FCA. In this case, the District's obligation to pay Laidlaw was conditioned on Laidlaw's "satisfactory" performance of services under the Contract, which included compliance with the maintenance requirements and specified environmental and safety regulations. (See Civ. Code, § 1439 ["Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself ...."].) The Shaw and Holder courts distinguished Hopper on the same grounds. (Shaw, supra, 213 F.3d at p. 533; Holder, supra, 296 F.Supp.2d at pp. 1173–1177.) As explained by the Holder court, "compliance with federal regulations was the sine qua non of payment because the contract specifically requires compliance." (Holder, at p. 1175.) And Hopper itself noted that actions have "been sustained under theories of supplying substandard products or services," which is essentially the claim in this case. (Hopper, at p. 1266.)

San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc. (1st Dist. 2010) 182 Cal. App. 4th 438, 448-452.; *San Francisco Unified School Dist. ex rel. Contreras v. First Student, Inc.* (1st Dist. 2014) 224 Cal. App. 4th 627, 639-641.

C. "Fraud in the Inducement" False Claims.

"The FCA makes liable anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). Under fraudulent inducement, FCA liability attaches to "each claim submitted to the government under a contract so long as the original contract was obtained through false statements or fraudulent conduct." In re Baycol Prods. Litig., 732 F.3d 869, 876 (8th Cir. 2013), citing

> United States ex rel. Marcus v. Hess, 317 U.S. 537, 543-44, 552, 63 S. Ct. 379, 87 L. Ed. 443 (1943) (finding contractors liable under FCA for all claims submitted under government contract obtained by collusive bidding). Accord, United States v. United Techs. Corp., 626 F.3d 313, 320 (6th Cir. 2011) ("False statements underlying multi-year contracts generate a stream of related invoices and cause the government to pay all of the invoices related to the contract."); United States ex rel. Longhi v. United States, 575 F.3d 458, 468 (5th Cir. 2009) ("[A]lthough the Defendants' subsequent claims for payment made under the contract were not literally false, [because] they derived from the original fraudulent misrepresentation, they, too, became actionable false claims." (second alteration in original) (internal quotation marks omitted)); United States ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1173 (9th Cir. 2006) ("[L]iability will attach to each claim submitted to the government under a contract, when the contract . . . was originally obtained through false statements or fraudulent conduct."); United States ex rel. Main v. Oakland City Univ., 426 F.3d 914, 916 (7th Cir. 2005) ("If a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork."); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999) (stating "any time a false statement is made in a transaction involving a call on the U.S. fisc, False Claims Act liability may attach" even if "the claims that were submitted were not in and of themselves false"). See also United States v. Neifert-White Co., 390 U.S. 228, 232, 88 S. Ct. 959, 19 L. Ed. 2d [1204] 1061 (1968) (noting FCA "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government").

United States ex rel. Miller v. Weston Educ., Inc. (8th Cir. Mo. 2015) 784 F.3d 1198, 1203-1204.

United States ex rel. Marcus v. Hess (1943) 317 U.S. 537, 539, 63 S. Ct. 379. (Bid rigging)

> [W]e conclude that both false estimates and fraudulent underbidding can be a source of liability under the FCA, assuming that the other elements of an FCA claim are met.

Hooper v. Lockheed Martin Corp. (9th Cir. 2012) 688 F.3d 1037, 1047.

Materially Requirement

(4) "Material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money, property, or services.

Gov. Code § 12650(b). (Stats 2009 ch 277 § 1 (AB 1196), effective January 1, 2010).

The CFCA does not expressly require a showing of materiality to support the imposition of a statutory penalty for the submission of a false claim. Under section 12651, subdivision (a)(1), a person who '[k]nowingly presents or causes to be presented a false or fraudulent claim for payment or approval' is 'liable to the state or political subdivision for a civil penalty of not less than five thousand dollars ($5,000) and not more than ten thousand dollars ($10,000) for each violation.' (Stats. 2009, ch. 277, § 2.) Nevertheless, a number of courts have concluded that the federal FCA contains an implicit materiality requirement, because it would not effectuate the intent of the statute to impose a penalty based on a falsity which would not have influenced the public entity's payment decision. [Citations.]" (Contreras I, supra, 182 Cal.App.4th at p. 454.) "[A]n alleged falsity satisfies the materiality requirement where it has the '"'natural tendency to influence agency action or is capable of influencing agency action.'" [Citation.]' [Citation.]" (Ibid.)

In Contreras I, we concluded plaintiffs' allegations were sufficient to satisfy the materiality requirement because defendant's "implied certification that it had satisfactorily performed its material obligations under the Contract, [640] including provisions designed to protect the health and safety of the student population, had a '"'natural tendency'"' [citation] to cause the District to make payments it would not have made had it been aware of [defendant's] noncompliance." (Contreras I, supra, 182 Cal.App.4th at p. 455.) Essentially, we concluded that defendant's alleged falsities were material as a matter of common sense. (U.S. v. Dolphin Mortgage Corp. (N.D.Ill., Jan. 22, 2009, No. 06-CV-499) 2009 WL 153190, p. *11 [relying on "common sense" in materiality analysis]; U.S. ex rel. Durcholz v. FKW Inc. (S.D.Ind. 1998) 997 F.Supp. 1159, 1170 [same].)

San Francisco Unified School Dist. ex rel. Contreras v. First Student, Inc. (1st Dist. 2014) 224 Cal. App. 4th 627, 639-640.

Damages /Harm

Reduced Damages for Reporting Violations.

(a) Any person who commits any of the following enumerated acts in this subdivision shall have violated this article and shall be liable to the state or to the political subdivision for three times the amount of damages that the state or political subdivision sustains because of the act of that person. A person who commits any of the following enumerated acts shall also be liable to the state or to the political subdivision for the costs of a civil action brought to recover any of those penalties or damages, and shall be liable to the state or political subdivision for a civil penalty of not less than five thousand five hundred dollars ($5,500) and not more than eleven thousand dollars ($11,000) for each violation: . . . .

(b) Notwithstanding subdivision (a), the court may assess not less than two times and not more than three times the amount of damages which the state or the political subdivision sustains because of the act of the person described in that subdivision, and no civil penalty, if the court finds all of the following:

(1) The person committing the violation furnished officials of the state or of the political subdivision responsible for investigating false claims violations with all information known to that person about the violation within 30 days after the date on which the person first obtained the information.

(2) The person fully cooperated with any investigation by the state or a political subdivision of the violation.

(3) At the time the person furnished the state or the political subdivision with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

Gov Code § 12651(a) & (b).

31 U.S.C. § 3729(a)(2).

What are Government's "Damages"?

- Usually "benefit of the bargain" damages, difference between value of consideration paid and consideration received in return.

- But, under the "Fraud in the Inducement" theory of False Claims, where a party received a contract or benefit that it was not entitled to, damages may equal the entire contract sum paid!

  - *U.S. ex rel Longhi v. Littman Power Technologies, Inc.* (5th Cir. 2009) 575 F.3d 458, 473. (False representation in response to RFP for small business research grant).

Settlement of *Qui Tam* Cases.

- **Settlement or Dismissal of *Qui Tam* Action by Relator.**

(c)
(1) . . . Once filed, the [*Qui Tam*] action may be dismissed only with the written consent of the court and the Attorney General or prosecuting authority of a political subdivision, or both, as appropriate under the allegations of the civil action, taking into account the best interests of the parties involved and the public purposes behind this act. No claim for any violation of Section 12651 may be waived or released by any private person, except if the action is part of a court approved settlement of a false claim civil action brought under this section. Nothing in this paragraph shall be construed to limit the ability of the state or political subdivision to decline to pursue any claim brought under this section.

Gov. Code § 12652**(c).**

- **Government Settlement or Dismissal of *Qui Tam* Action.**

(e)
(1) If the state or political subdivision proceeds with the action, it shall have the primary responsibility for prosecuting the action. The qui tam plaintiff shall have the right to continue as a full party to the action.
(2)
(A) The state or political subdivision may seek to dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified by the state or political subdivision of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity to oppose the motion and present evidence at a hearing.
(B) The state or political subdivision may settle the action with the defendant notwithstanding the objections of the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances.

Gov Code § 12652(e).

Attorney Fees / Costs

- **For Plaintiff:**

  " If the state, political subdivision, or the qui tam plaintiff prevails in or settles any action under subdivision (c), the qui tam plaintiff shall receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable costs and attorney's fees. All expenses, costs, and fees shall be awarded against the defendant and under no circumstances shall they be the responsibility of the state or political subdivision."

Gov. Code § 12652(g)(8).

- **For Defendant:**

  "if the defendant prevails in the action and the court finds that the claim was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment".

Gov. Code § 12652(g)(9)(A) & (B).

Disbarment

- *Stacy & Witbeck v. City and County of San Francisco* (1995) 36 Cal. App. 4th 1074, 1083-1084. (per provision of City Administrative Code)

- Due Process Requirement:

  Niles Freeman Equipment v. Joseph (2008) 161 Cal. App. 4th 765, 787-791

  Southern Cal. Underground Contractors, Inc. v. City of San Diego (2003) 108 Cal. App. 4th 533, 544-546

  Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County (1972) 7 Cal. 3d 861, 871.

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San Francisco Administrative Code

ARTICLE V: VIOLATIONS OF ADMINISTRATIVE CODE CHAPTER 6; FALSE CLAIMS; PROCEDURES FOR DEBARMENT; MONETARY PENALTIES

SEC. 6.80. VIOLATIONS AND FALSE CLAIMS; DEBARMENT AND MONETARY PENALTIES.

Any Contractor, subcontractor, supplier, consultant or subconsultant who fails to comply with the terms of its contract with the City; or who violates any provision of this Chapter 6; or who fails to abide by any rules and/or regulations adopted pursuant to this Chapter 6; or who submits false claims; or who has violated against any government entity a civil or criminal law relevant to its ability to perform under or comply with the terms and conditions of a contract with the City, may be declared an irresponsible Bidder or an unqualified consultant and debarred according to the procedures set forth in Chapter 28 of this Administrative Code. Additionally, any Contractor, subcontractor, supplier, consultant or subconsultant who submits a false claim to the City may also be subject to monetary penalties, investigation and prosecution as described below.

In the event that such a violation of this Chapter 6, including the submission of one or more false claims, comes to the attention of a responsible Department Head or board or commission, the Department Head must investigate the matter. The Department Head must report the findings of any such investigation by letter to the Board of Supervisors within 30 days of the completion of the investigation. The investigation letter to the Board of Supervisors must state the name of the Contractor, subcontractor, supplier, consultant or subconsultant; the nature of the violation; the results of the investigation; and the Department Head's plan for addressing the violation, if any. A hearing shall also be called in the Audit Committee of the Board of Supervisors to report on this investigation.

(Added by Ord. 286-99, File No. 991645, App. 11/5/99; amended by Ord. 324-00, File No. 001919, App. 12/28/2000; Ord. 7-02, File No. 011675, App. 1/25/2002; Ord. 8-04, File No. 031503, App. 1/16/2004; Ord. 108-15, File No. 150175, App. 7/2/2015, Eff. 8/1/2015)

SEC. 6.81. COLLUSION IN CONTRACTING.

If, at the determination of the Mayor, the Department Head who executed the Contract or the board or commission who awarded such Contract, and pursuant to the debarment procedures set forth below, any party or parties to whom a Contract has been awarded has been found to have engaged in collusion with any officer or representative of the City, or any other party or parties, in the submission of any Bid or in preventing of any other being made, or in knowingly receiving preferential treatment by any officer or an employee of the City, then any Contract so awarded, if not completed, may be declared null and void by the Board of Supervisors on the recommendation of the Mayor, Department Head or the board or commission concerned, and no recovery shall be had thereon. The Department Head concerned may then readvertise for Bids for the uncompleted portion of the work. The matter may also be referred to the City Attorney for such action as may be necessary. Any party or parties found to have engaged in such collusion shall not be permitted to participate in or to bid on any future Public Work, Improvement, or purchase to be made by the City.

(Added by Ord. 286-99, File No. 991645, App. 11/5/99; amended by Ord. 108-15, File No. 150175, App. 7/2/2015, Eff. 8/1/2015)

SEC. 6.82. PROCEDURES FOR ADMINISTRATIVE DEBARMENT.

Notwithstanding and not exclusive or preclusive of any pending or contemplated legal action, any Contractor, subcontractor, supplier, consultant or subconsultant directly or indirectly subject to the provisions of this Chapter 6 may be determined irresponsible and disqualified from contracting with the City in accordance with the provisions of Chapter 28 of this Administrative Code.

(Added by Ord. 286-99, File No. 991645, App. 11/5/99; amended by Ord. 7-02, File No. 011675, App. 1/25/2002; Ord. 8-04, File No. 031503, App. 1/16/2004; Ord. 108-15, File No. 150175, App. 7/2/2015, Eff. 8/1/2015)

SEC. 6.83. ASSESSMENT OF MONETARY PENALTIES FOR FALSE CLAIMS: INVESTIGATION AND PROSECUTION.

(a) Notwithstanding and not exclusive or preclusive of any other administrative or legal action taken by the City, a Contractor may be assessed monetary penalties for submitting false claims. The Department Head responsible for the Public Work or Improvement may withhold such penalties from amounts due or retained under the Contract. Notwithstanding and not exclusive or preclusive of any administrative or other legal action, the City Attorney may investigate and prosecute in a civil action any submission of a false claim.

(b) The submission of a false claim occurs when a Contractor, subcontractor, supplier, consultant or subconsultant commits any of the following acts enumerated below:

(1) Knowingly presents or causes to be presented to an officer or employee of the City a false claim or request for payment or approval;

(2) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the City;

(3) Conspires to defraud the City by getting a false claim allowed or paid by the City;

(4) Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the City;

(5) Is a beneficiary of an inadvertent submission of a false claim to the City, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the City within a reasonable time after discovery of the false claim.

(c) In such event, the Contractor, subcontractor, supplier consultant or subconsultant shall be liable to the City for: (1) three times the amount of damages which the City sustains because of the act(s) of that Contractor, subcontractor, supplier, consultant or subconsultant; and (2) the costs, including attorney's fees of a civil action brought to recover any of those penalties or damages. Such Contractor, subcontractor, supplier, consultant or subconsultant may also be liable to the City for a civil penalty of up to $10,000 for each false claim. Liability under this Section 6.83 shall be joint and several for any act committed by two or more persons.

(d) For purposes of this Section, "claim" includes any request or demand for money, property or services made to any employee, officer, or agent of the City, or to any Contractor, subcontractor, grantee or other recipient, whether under contract or not, if any portion of the money, property, or services requested or demanded issued from, or was provided by, the City.

(e) For purposes of this Section, "knowingly" means that a Contractor, subcontractor, supplier, consultant or subconsultant with respect to information does any of the following: (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information. Proof of specific intent is not required and reliance on the claim by the City is also not required.

(Added by Ord. 286-99, File No. 991645, App. 11/5/99; amended by Ord. 108-15, File No. 150175, App. 7/2/2015, Eff. 8/1/2015)