



Common Scenarios Triggering False Claims Act Violations, Part 2: Construction and Workforce Issues

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Matt is an accomplished litigator with over 15 years of experience handling federal and state cases, including civil and appellate litigation, along with arbitration proceedings. As Practice Group Chair of PilieroMazza's Litigation & Dispute Resolution Group and Chair of the False Claims Act (FCA) and Audits & Investigations teams, Matt has a unique perspective on successful litigation strategies to achieve the best possible outcomes for government contractors and commercial businesses. He is particularly adept at identifying weak spots in an opponent's case, often leading to successful dismissals or early resolution of disputes, ultimately avoiding an expensive trial.

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Sarah serves as Chair of PilieroMazza's Labor & Employment Group, one of the few legal practices in the U.S. with a multi-jurisdictional labor and employment practice dedicated to advising government contractors on their compliance obligations. She advises government contractors and commercial businesses on a wide variety of labor and employment issues, including the Fair Labor Standards Act, the National Labor Relations Act, Office of Federal Contract Compliance Programs regulations, and anti-discrimination law. Sarah's practice also includes counseling employers on terminations, labor relations matters, employment agreements, wage and hour issues, and employment practices and policies. She regularly advises clients on compliance specific to government contracting, including offering counsel on prevailing wage laws, such as the Service Contract Act, codes of ethics, and equal employment opportunity requirements.

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Jessica leads the Firm's Construction Group as Practice Group Chair. Her practice focuses on the construction industry where she provides counsel to government contractors and commercial businesses of all sizes. Her practice includes advising companies on matters relating to operational issues, legal compliance requirements, and business litigation. Jessica's high level of experience, knowledge, and legal acumen in construction law helps clients advance their corporate interests and effectively resolve their complex disputes.

About PiliroMazza

PiliroMazza – a business law firm – serves as a strategic partner to government contractors and commercial businesses from across the United States.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PiliroMazza's efficient operational structure and lean approach to staffing matters translates into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PiliroMazza is privileged to represent clients in the following areas:

- Audits & Investigations
- Bid Protests
- Business & Transactions
- Business Succession Planning
- Construction
- Corporate and Organizational Governance
- Cybersecurity & Data Privacy
- Debt Financing
- Employee Incentive and Bonus Plans
- False Claims Act
- Fund Formation & Structuring
- Government Contracts
- Government Contract Claims & Appeals
- Intellectual Property & Technology Rights
- Labor & Employment
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Native American Law & Tribal Advocacy
- Nonprofits
- Private Equity & Venture Capital

Overview

- What is the False Claims Act?
- What are Common FCA Violations Affecting Construction Contractors?
- What are Common FCA Violations Arising out of Employment Practices?
- What are Some Examples of Recent Cases Highlighting Construction and Workplace Issues?

What Is the False Claims Act?

- Primary vehicle for the government to combat fraud and collect money obtained through misrepresentation or to retrieve money improperly withheld from the government
 - “Claim” is a request for money or property (such as an invoice)
 - “False” means the claim to entitlement was improper, incorrect, unlawful, or unjustified—or supported by a misrepresentation
 - Not all incorrect claims are violations of the False Claims Act
 - “Knowledge” or “recklessness” required

Relevant Types of FCA Violations

- False claim
- False record/false statement
 - Express certification
 - Implied certification
- Reverse false claim
- Conspiracy

Common FCA Issues in Construction

- Improper Billing
- Small Business/Set-Aside Fraud
- Workshare Non-Compliance
- Non-Compliant or Substandard Products/Services
- Contract Non-Compliance
- Inflated REA/Claims
- Surety Liability

Common FCA Issues in Employment Practices

- Timesheet Fraud
- Davis-Bacon Act/Certified Payrolls
- Service Contract Act
- Retaliation

Improper Billing

- Invoicing for Work Not Done or Materials Not Used
- Invoicing for Deficient Work
- Deviation from Project Specifications
- False Certification of Condition of Payment
- Falsifying Payment Applications

Improper Billing – False Certifications of Payment

– False Certifications of Payment

▪ Express Condition Precedent Not Met

- Misrepresentation that express condition of payment met

▪ Implied False Certification Theory

- Make specific representation about the goods/services;
- And failure to disclose noncompliance with material statute, regulation or contract requirement makes that representation misleading.
- Non-disclosure has to be material to the Government's payment decision. Focus will be on Government's Actions after notice of false representation.
- "Common sense" applied to materiality decision of payment

Improper Billing - Examples

- \$57.75M settlement to resolve allegations that group of contractors and subcontractors overcharged the USG by billing for idle time by electricians, millwrights, pipefitters, and other skilled tradesman after contractors failed to adequately schedule the construction of a waste treatment facility
- \$300K settlement to resolve claims that construction contractor billed the USG for materials that did not exist

Small Business/Set-Aside Fraud

- Prime contractor ineligible as a small business or under set-aside program
- “Fake” or “Figurehead” companies
- Failure to meet ownership/control or employee-based requirements
- Affiliation issues

Small Business/Set-Aside Fraud - Examples

- \$2.8M settlement to resolve allegations that construction contractor that claimed credit for and represented to the USG that it was using an SDVOSB subcontractor to perform work despite knowing that SDVOSB company was acting as a pass-through for a large business
- \$1.1M settlement to resolve allegations that large construction company set up a front company to qualify for SDVOSB set-asides
- \$188K settlement to resolve allegations that DBE-certified construction contractor continued to re-certify DBE eligibility and obtain set-aside contracts despite owner's personal net worth increasing beyond threshold to qualify for the program

Small Business/Set-Aside Fraud - Examples

- \$2.5M settlement by engineering company and owners to resolve criminal and civil investigations into allegations that firm created a new SDVOSB company technically owned by a relative but controlled by large business to obtain SDVOSB set-asides

Workshare Non-Compliance

- Limitations on subcontracting for small business and set-aside contracts
 - Prime must perform at least 50% of amount paid by USG for performance (services contract); 50% of cost of manufacturing minus materials (products, subject to non-manufacturing rule)
 - On construction contracts, prime must perform at least 15%, not counting materials
- Joint Ventures/Mentor-Protégé JVs
 - Joint Venture must perform at least 50% of amount paid by USG for performance (or 15% on construction contracts)
 - Small business/set-aside entity must perform 40% of Joint Venture's work
- Subcontracting Plans

Workshare Non-Compliance - Examples

- \$700K settlement to resolve allegations that large business contractor entered into joint venture with 8(a) contractor for 8(a) set-aside procurement, only to take control of the joint venture and perform 97% of construction work
- \$1M settlement to resolve claims that large business contractor performed all of Disadvantaged Business Enterprise's assigned work in violation of performance of work requirements in contract
- \$2M fine in criminal proceeding for large business controlling construction project and driving small business workshare below 15%

Non-Compliant or Substandard Products or Services

- Products or services do not meet standard required by contract
- Products or services do not meet minimum industry standard, i.e., “worthless services” which fall so below the standard expected that they are tantamount to no service at all
- “Diminished value of services” theory does not exist

Non-Compliant or Substandard Products or Services - Examples

- \$10M settlement to resolve allegations that construction contractor produced and sold substandard steel components for installation on Navy submarines
- \$4.35M settlement to resolve allegations that construction contractor failed to provide hot mix asphalt for road construction that included insufficient amounts of binder or glue to hold the mix together
- \$637K settlement to resolve allegations that construction contractor materially altered components of bridges by cutting or burning multiple sections of reinforcing steel out of the reinforced-concrete substructures that support the bridges, contrary to work specifications

Non-Compliant or Substandard Products or Services - Examples

- \$35.2M settlement to resolve allegations that contractor failed to properly repair housing for servicemembers and lied about repairs to receive incentive fees
- \$1.75M settlement to resolve allegations that construction contractor used unauthorized and substandard materials

Contract Non-Compliance

- Regulations may impose requirements on contractors, but contract language controls
- Contracts may impose style, brand, or quality requirements that must be complied with
- Contract language forms the basis for express and implied certifications of performance

Contract Non-Compliance - Examples

- \$4.6M settlement to resolve allegations that contractor knowingly failed to perform quality assurance testing as required by construction contract
- \$457K settlement to resolve allegations that construction contractor knowingly misrepresented compliance with contractual requirements to build roads in accordance with detailed contract specifications
- \$161K settlement to resolve claims that construction contractor imported roofing materials from China without country of origin markings, contrary to contract and customs laws
- \$11M settlement to resolve allegations that construction contractor failed to test electrical connectors in compliance with contract requirements

Inflated REA/Claims

- Requests for Equitable Adjustment and claims for payment related to a contract are “claims” under the FCA
- REAs and claims must be adequately supported and truthful in light of work actually performed

Inflated REA/Claims - Examples

- USG often will ask to stay claims and appeals in Court of Federal Claims and Boards of Contract Appeals pending results of FCA investigation
- USG stays \$4M construction delay claim on grounds that USG claims delay claim damages are overestimated and fraudulent
- USG stays \$9M construction labor and materials claim on grounds that labor hours underlying REA were not actually worked

Surety Liability

- Surety liability for contractor's FCA violation is, at this stage, still just a theory
- Surety is responsible for cure or payment to USG for breaches by contractor
- Surety knew or should have known contractor was in breach

Surety Liability - Examples

- In 2017, Scollick v. Narula, federal court found that sureties can be liable under the FCA for bonding out fraudulent set-aside contractors
- In 2022, in the same case, the surety obtained summary judgment; judge found no evidence that surety defendants knew SDVOSB program requirements or intended to deceive the government; judge also found that sureties were not required to know the government regulations applicable to contracts because sureties do not participate in those programs

Timesheet Fraud

- Billing for hours not worked
- Instructing workers to always enter 8 hours in a workday

Timesheet Fraud - Examples

- Contractors sued in federal court under FCA by security guard whistleblower who tracked certain employees' entrance to and exit from security stations, with data indicating workers did not meet 8 hours per day requirement (case dismissed on other grounds)
- Contractor sued under FCA where it was alleged that contractor overstated hours worked on OCONUS project and instructed employees to always provide a timesheet showing a full work day (case pending)

Davis-Bacon Act/Certified Payrolls

- Davis-Bacon Act applies to contracts in excess of \$2,000 where contract is subject to USG funding
- Requires payment of prevailing wages and fringe benefits in locality
- Requires certification of payrolls and other record keeping requirements
- Some courts have determined that FCA cases based on violation of Davis-Bacon Act are preempted and must be dismissed as exclusively within the jurisdiction of the Department of Labor

Davis-Bacon Act/Certified Payrolls - Examples

- \$561K settlement to resolve allegations that construction contractor failed to pay prevailing wages under DBA and submitted falsified certified payrolls to hide the deficiency
- \$400K settlement to resolve allegations that construction subcontractor failed to pay workers prevailing wages and did not compensate workers for overtime despite certifying compliance with wage payment requirements
- \$2.5M judgment against contractor based on employee misclassification and failure to pay appropriate wages under prevailing wage obligations

Service Contract Act

- McNamara-O'Hara Service Contract Act requires contractors and subcontractors performing services on contracts in excess of \$2,500 to pay service employees prevailing wages and fringe benefits

Service Contract Act

- Contractor sued in federal court on allegations that over prolonged period, contractor did not pay SCA prevailing wages and fringe benefits to qualified workers but certified compliance to the government (undisclosed settlement during litigation)

Retaliation

- FCA prohibits retaliation against any “employee, contractor, or agent” including discharge, demotion, suspension, threat, harassment, or any other discrimination in terms and conditions of employment because of lawful acts done by the employee, contractor, or agent in furtherance of the FCA

Questions?



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