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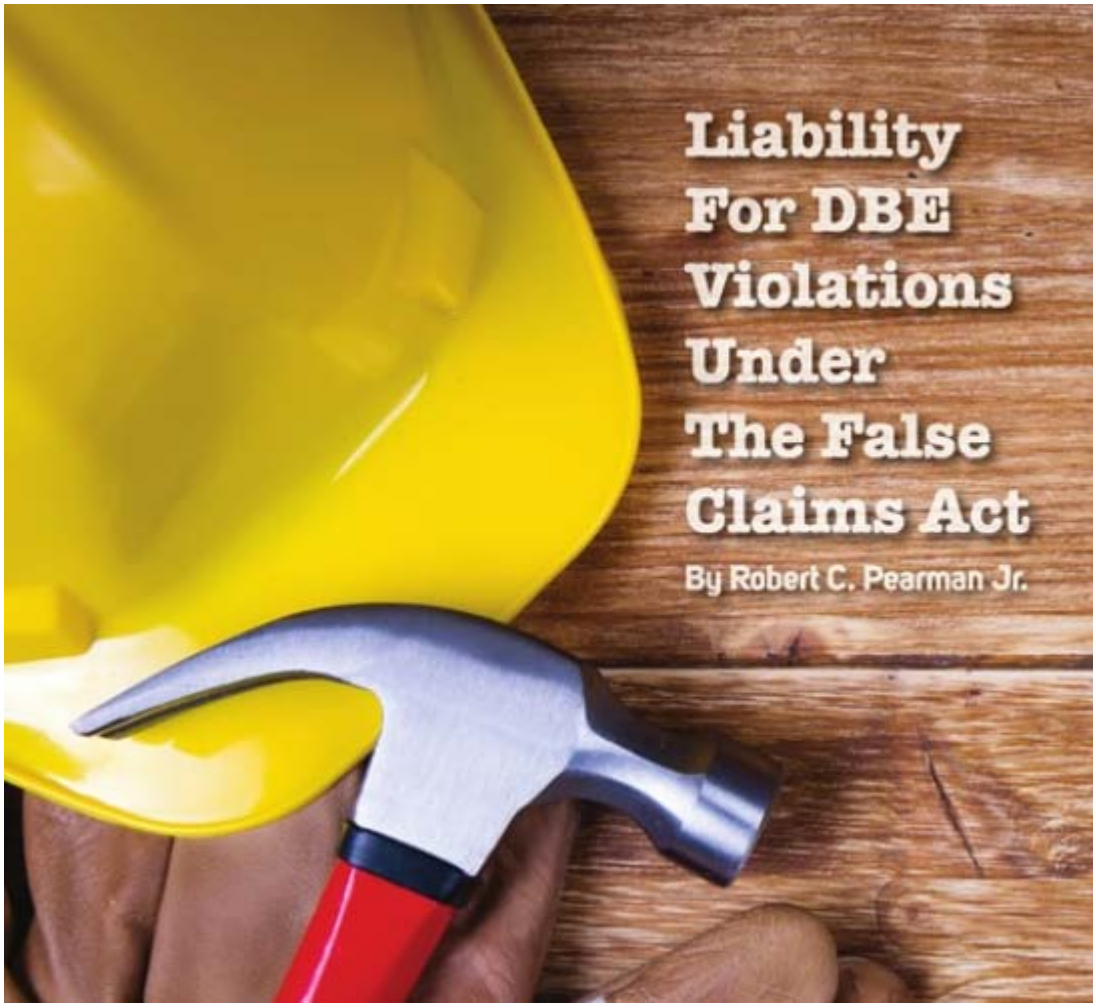

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LIABILITY UNDER THE FALSE CLAIMS ACT FOR DBE PROGRAM NON-COMPLIANCE

I

Are you a contractor contemplating bidding for and performing contract work on state and local public work projects, such as bridge reconstruction or passenger rail lines that are partially funded by the Federal government? You are probably aware of possible contract requirements for utilization of Disadvantaged Business Enterprises (DBE) firms in your proposal and in the actual performance of the work. What you may not realize is that failure to monitor compliance with such DBE requirements and the DBEs performance of work, much less deliberate violations of those requirements, may cause your company to face civil penalties and even criminal sanctions for such failures. False Claims Act violations can be lurking in your own contractual backyard, as it has been for a number of major public works construction companies with frequency in recent years. Headline grabbing actions by U.S. Attorney's Offices and Offices of Inspector Generals have flourished of late.

What if you engage DBE subcontractors for such projects, but some of your employees: aid in providing inaccurate information to help a favored firm obtain DBE certification status; pass through a payment claim for a first tier subcontractor which wrongly includes certification of usage of DBE second tier subcontractors; or certify work as having been performed by a DBE when in reality it performed little of the work in a real and substantial way with its own forces?

Is there a problem? May any of these events be considered a false claim? Have you now violated federal law? Unfortunately, the answers may be *Yes*.

II

To begin, the federal False Claims Act (FCA)(31 U.S.C.§ 3729–33) provides a broad definition for the term "claim":

> Any request or demand, whether under a contract or otherwise, for payment by or reimbursement from Federal money 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.

Under the Act, false claims may arise when a contractor:

> Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
>
> knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

conspires to commit a violation of the conduct prohibited by the Act; or

knowingly makes, uses, or causes to be made or used, a material false record or statement to conceal, avoid or decrease an obligation (e.g., under a law, regulation or by contract) to pay or transmit money to the Government (also known as a "reverse false claim").

A number of states also have similar acts, some of which are even more expansive. E.g., California imposes possible liability on "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."

III

Federal DBE programs provide opportunities to businesses owned by minorities and women, as well as socially and economically disadvantaged individuals, to participate in federally funded construction and design projects.

Over the years, however, there are instances of fraudulent practices by those trying to take perverse advantage of such programs and the billions of government dollars that flow from them. One common abuse has featured non-DBE firms who partner with firms who meet DBE eligibility criteria on paper but who perform little or no actual work—or, in the words of DBE regulations, perform no "commercially useful function"—on the government-funded project. Accordingly, public prosecutors and agencies have increasingly embraced the use of the False Claims Act as a weapon to attack these types of abuses.

Do you submit:

- monthly reports showing dollars paid to DBEs in that reporting period, and include self-described "verification" of such payments, which may include positive declarations of payments earned by the DBE subcontractors?

- forms listing the amount you have paid to DBE firms on the project stating under penalty of perjury that the statements are true?

- a monthly document listing amounts paid to DBE trucking firms and certify that the information is complete and correct?

- a DBE monthly progress report listing the amount paid for work performed by a DBE in that time period, including certification by a company official that "the above is a true and correct statement of the amounts paid to the DBE firms listed above?"

And are any of these documents submitted by you as part of the paperwork you submit to receive payment by the public agency of your invoices?

If so, beware that falsities in any of these types of documents may lead to liability under the False Claims Act. The FCA is comprehensive in its reach, extending beyond demands for money that fraudulently overstate an amount otherwise due. It extends "to all fraudulent attempts to cause the Government to pay out sums of money."

For example, if you certify adherence to a statute or regulation, but in fact were not in compliance with regulations, and your certification was a prerequisite to governmental payment or influenced government's decision to pay, that may form a basis for a claim under the FCA.

Under the so-called implied certification theory, "[a] contractor who knowingly fails to perform a material requirement of its contract … yet seeks or receives payment without disclosing the nonperformance, has presented a false claim to the government and may be liable therefor."

Remember, the "knowledge" the violator must possess to trigger liability is not the everyday definition of knowledge, but the statutory definition that can mean simply "deliberate ignorance" or "reckless disregard of the truth or falsity of the information"; and the government is not required to prove a specific intent to defraud!

IV

The consequences for violating the FCA may be severe, including a civil penalty of no less than $5,500 and not more than $11,000 *per claim (*may be inflation adjusted), plus *3* times the amount of damages which the government sustains.

Additionally, violators shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

For any contractor who is dependent on public work, federal or state, the risk of debarment and suspension as a result of false claims is an equally potent sanction. A cause for debarment is making false claims. And government agencies can in essence engage in de facto debarment to the extent they can take into account past performance and False Claims Act violations, either i) in a negotiated procurement to adversely rank the contractor in nonprice evaluations, or ii) make a finding of non-responsibility based upon such previous unsatisfactory conduct.

Violations of the False Claims Act may have to be disclosed to contracting agencies, and the failure to do so itself may be a cause for debarment or suspension.

V

Given that the penalty (e.g., $11,000) can be assessed on a per-claim basis, the penalties can become substantial on a project with numerous invoices over time. The literal language of the FCA indicates that the imposition of the penalties is mandatory. Some courts, however, have ruled this penalty should be disallowed if violative of the Eighth Amendment, which prohibits the imposition of "excessive fines," or fines that are grossly disproportional to the gravity of the offense.

In the recent *United States ex rel. Bunk v. Birkard Globistics GMBH,* , it was stipulated that the defendants filed 9,136 invoices under the contract at issue. In theory, that would call for FCA penalties amounting to between $50,248,000 and $100,496,000 for 9,136 false claims. But the Virginia federal district court awarded *no* civil penalties because even the minimum penalty of $50 million would be unconstitutionally excessive. It appeared the economic harm to the government, if any, was in the range of $3,000,000 at most, and the court did not find any substantial non-economic harm from the defendants' activities.

VI

Taking the following measures will facilitate compliance with DBE program requirements, and therefore help avoid liability under the FCA:

- Establish a position for an Ethics and Compliance Officer;
- Create contractor compliance manuals for Disadvantaged Business Enterprises;
- Provide a code of ethics and business conduct packet;
- Incorporate mandatory DBE and ethics compliance courses for your employees;
- Establish a DBE advisory group for feedback and support;
- Have personnel trained in DBE compliance issues to observe and question performance of DBE subcontractors on the job site.

Additionally, if you do find yourself under investigation at the hands of the government (remember, private persons may also bring actions for violations of the False Claims Act under so-called qui tam proceedings) for FCA violations, cooperate and be as transparent as possible because that may result, at the least, in a reduction of the trebling of damages to a doubling, in the court's discretion.

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