

# *The False Claims Act-What the Designer and Construction Manager Should Know*

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A Practical Guide for Design Professionals

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## *Introduction*

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Design professionals and construction managers who work for public entities are in a unique position. On the one hand, they typically act as the public's agent, looking out for the interests of the public. On the other hand, they act as private contractors to the public entity, and need to look out for their own economic interests. This unique position presents both responsibilities and potential liabilities under the federal and state False Claims Acts. This paper summarizes these responsibilities and potential liabilities.

## *The Origin and Evolution of the False Claims Act*

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The federal False Claims Act was enacted in 1863 to combat the corruption and fraud of Civil War defense contractors. Over time, Congress has revised the False Claims Act to keep pace with changes in government contracting practices. Recently, it has been used to rectify the over-pricing of, among other things, toilet seats and hammers sold to the federal government. It is also an effective tool against fraud in government construction and procurement contracts.

Despite its relative success on the federal level, only a handful of states have adopted similar provisions. These states include California, Illinois, Florida, Montana, Massachusetts, and Hawaii.

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## *The Federal False Claims Act – U.S.C. 31 §3729 et seq.*

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The federal False Claims Act is found in section 3729 *et seq.* of the United States Code.<sup>1</sup>

### **DEFINITIONS**

To understand the scope of the False Claims Act,<sup>2</sup> it is important to understand its terms. Section 3729 defines key terms used in the Act. Generally, terms defined in the Act are given broad meaning.

#### *Claim*

One of the Act's key terms is "claim." Under the Act a "claim" includes,

... any request or demand, whether under a contract or otherwise, for money or property made to a contractor, grantee, or other recipient if the United States government provides any portion of the money or property which is requested...

This broad definition of claim encompasses demands made for payment to the United States itself; to any of the government's agencies; to any contractor or agent of the government and to any other entity that receives federal funding. Basically, any demand for payment of monies that are ultimately issued by a public entity qualifies as a "claim" under the Act.

#### *Knowing*

Another of the Act's key terms is "knowing." Under the Act "knowing" means that a person:

- Has actual knowledge;
- Acts in deliberate ignorance of truth or falsity; or,
- Acts in reckless disregard of truth or falsity.

Proof of specific intent to defraud is not required to fall within the definition of knowledge. For example, a construction manager who passes a contractor's claim on to a public entity without reviewing it is charged with knowledge of the claim if the construction manager was reckless in not reviewing the claim. In other words, to be charged with knowledge under the Act, a party need not actually know that a claim is overstated; it is enough that the party had no reasonable basis for believing that the claim was proper, or had reason to believe that the claim might be false – but took no steps to determine the accuracy or legitimacy of the claim.

### **ACTIONS CONSTITUTING A FALSE CLAIM**

Section 3729 also defines actions that constitute a false claim. False claim liability attaches to any person who:

- Knowingly presents or causes to be presented to an officer or employee of the United States a false claim for payment or approval;
- 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 state or by the government;
- Conspires to defraud the government by getting a false claim allowed or paid;
- Has possession, custody, or control of public property or money used or to be used by the government, and knowingly delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt;

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<sup>1</sup> All statutory references are to U.S.C.A. 31 unless otherwise indicated.

<sup>2</sup> Hereinafter the "Act."

- Is authorized to make or deliver a document certifying receipt of property used or to be used by the government and with intent to defraud makes the receipt without completely knowing that the information is true;
- 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;
- 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 state or to any political subdivision.

**POTENTIAL LIABILITY FOR SUBMITTING A FALSE CLAIM**

Section 3729 also defines the damages and costs recoverable for violations of the Act. Violators are subject to treble damages, punitive damages, payment of the government’s costs, and, in some instances, attorneys’ fee awards. The Act mitigates the harshness of these damages for those who comply with certain statutory requirements.

*Treble Damages*

To begin, any person who commits a false claims act “is liable to the United States government for three times the amount of damages which the government sustains because of the act of that person.” Accordingly, if a contractor performs \$50,000 worth of work but submits, and is paid, on an invoice for \$85,000, the contractor’s minimum treble damage liability is \$105,000.<sup>3</sup>

*Punitive Damages*

A person who commits any of the above acts may be liable to the government for a civil penalty of up to ten thousand dollars (\$10,000) for each false claim. For example, if a construction manager on a multi-prime construction project ignores obvious irregularities and approves false claims from four prime contractors, the construction manager faces possible punitive liability of up to \$40,000.

*Costs and Attorneys’ Fees*

A person who commits a false claims act “shall also be liable to the United States government for the costs of a civil action brought to enforce the act.” These costs can be significant and typically include filing fees, juror food and lodging, service of process fees, witness fees, court reporter fees, and trial exhibit costs. Additionally, for actions brought by private citizens on the government’s behalf, the Act provides for the award of reasonable attorneys’ fees.

*Mitigation of Damages*

Persons committing false claims acts can mitigate their damages if they have:

- (1)... furnished officials of the United States 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; and
- (2)... fully cooperated with any government investigation of such violation.

Additionally,

... [a]t the time the person furnished the United States 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.

If a violator meets these requirements “the court may assess not less than 2 times the amount of damage which the government sustains.”

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<sup>3</sup> This is a minimum treble damage liability because it is based solely on the overcharge and does not account for interest on the overpayment or other related costs allowed as damages by the Act.

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*Criminal Sanctions* In addition to civil damages and penalties, those submitting false claims to the state also face criminal liability.

**ENFORCEMENT OF THE FALSE CLAIMS ACT**

The statutory scheme allows for the enforcement of the Act by the Attorney General or a private individual. Violators of the Act may be sued by either of these.

*Attorney General*

Section 3730(a) states that “[t]he Attorney General diligently shall investigate a violation under Section 3729. If the Attorney General finds that a person has violated or is violating Section 3729, the Attorney General may bring a civil action under [the Act].”

This language allows the Attorney General’s office to commence false claims actions against violators who misappropriate funds.

*Private Citizen: the “Qui Tam” Plaintiff*

Section 3730(b) allows private citizens to enforce the Act as qui tam plaintiffs. *Qui tam* is an abbreviation of the Latin phrase “*qui tam pro domino rege quam pro si ipso in hac parte sequitur.*” Translated, this phrase means “who sues on behalf of the King as well as for himself.” Private individuals who sue to enforce the Act must state in their complaint that they sue for the state as well as for themselves; thus the name *qui tam*.

When a *qui tam* action is filed, the initial complaint is filed *in camera*<sup>4</sup> and under seal. Upon the filing of the initial complaint, the *qui tam* plaintiff must notify the Attorney General, who then has the option to prosecute the action. Should the Attorney General decline to prosecute the action, then the *qui tam* plaintiff is allowed to prosecute.

A *qui tam* plaintiff who prosecutes an action is entitled to recover reasonable attorney fees’ if it prevails on the action. Additionally, the Act allows for the *qui tam* plaintiff to share in the damages awarded, whether it prosecutes the violation or not. Specifically, if the Attorney General elects to prosecute an action commenced by a *qui tam* plaintiff, the *qui tam* plaintiff is entitled to receive at least 15%, but no more than 25%, of any recovery. Furthermore, if the *qui tam* plaintiff is allowed to prosecute the violation, it is entitled to receive no less than 25% and no more than 30% of any recovery, in addition to costs and reasonable attorneys’ fees.

### *State False Claims Act*

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A number of states have also enacted their own False Claims Acts. Many of the state Acts are based upon the Federal Act. Generally, State False Claims Act apply to any claim that is ultimately paid by state resources.

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<sup>4</sup> *In camera* means that the complaint is filed only with the judge and is not available for public review. Under seal means that the complaint remains confidential unless a judge orders that it be made public.

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## *False Claims Issues for the Design Professional*

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False claims liability for design professionals and construction managers<sup>5</sup> can flow from two primary sources. Design professionals can originate and submit their own false claims, or they can pass through the false claims of subconsultants, contractors, and subcontractors.

### **FALSE CLAIMS ORIGINATED BY THE DESIGN PROFESSIONAL**

Design professionals who work for public entities are generally contractors to the public entity. Whether contracted directly with a public entity or acting as a subconsultant to a party who is contracted with a public entity, all payment requests generated on a public project fall within the Act's broad definition of a claim. If the money sought ultimately comes from a public entity, then the request for the money is a claim. Accordingly, any number of aggressive billing practices by design professionals arguably create False Claims Act liability. Furthermore, intentional misstatements made to get a false claim paid also carry False Claims Act liability. The following are a number of practices that could lead to False Claims Act liability for the design professional:

- Submitting invoices for hours not worked;
- Submitting invoices itemizing documents not produced;
- Billing for services not rendered;
- Billing on a percentage basis ahead of actual work accomplished;
- Front loading of billings;
- Inflated additional services;
- Inflated overhead multipliers;
- Double billing;
- Misrepresenting the scope of additional services;
- Misrepresenting the need for additional services;
- Misrepresenting employee or firm qualifications in order to justify higher rates;
- Conspiring with contractors to approve deficient work.

### **FALSE CLAIMS PASSED THROUGH THE DESIGN PROFESSIONAL**

Design professionals also face liability for false claims submitted through them to the public entity. This liability can arise from claims submitted by subconsultants. For design professionals with construction management responsibilities, liability can also arise for false claims submitted by contractors.

Section 3729 creates false claims liability for any person who “knowingly” presents, or causes to be presented, a false claim to any officer or employee of a public entity. “Knowingly” includes actual knowledge that the claim is false, as well as reckless disregard of a claim’s falseness. Accordingly, a prime consultant who presents the false claim of a subconsultant to the employee of a public entity faces false claims liability if it knew the subconsultant’s claim was false, or was reckless in not ascertaining that the claim was false.

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<sup>5</sup> Collectively referred to as “design professionals.”

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For example, if an HVAC subconsultant submits an invoice on an additional service to the architect for five times the actual cost of the work, and the architect knows that the invoice is five times too high and passes it on to the public entity for payment, the architect faces false claims liability. Similarly, suppose the architect does not actually know the inflated amount of the HVAC invoice, and passes it on to the public entity for payment without reviewing it. To the extent the architect could have realized the overbilling by reviewing the invoice, the architect is arguably reckless and may be charged with knowledge of the false claim.

A similar scenario exists for those design professionals who assume construction management responsibilities, especially when these responsibilities include the approval of contractor progress payment requests, cost loaded schedules, change order estimates, and quality assurance responsibilities. To the extent the construction management obligations of a design professional involve the passing of contractor billings to a public entity, the design professional faces potential false claims liability for the contractor's false claims. Again, in order to be exposed to this liability, the design professional must submit a false claim to a public entity with knowledge that it is false, or with reckless disregard for its falseness.

Some examples of possible contractor false claims, of which a construction manager should be aware, are as follows:

- Front end loaded progress payment requests;
- Inaccurate progress payment requests (e.g. work not completed, work deficient, over-billed items);
- Over-priced change orders;
- Inflated extended overhead rates;
- Inflated equipment rental rates;
- Work certified complete that is not;
- Misstated and unjustified time impacts.

## *Conclusion*

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Whether working as a design professional for the federal government, the state, or other public entity, the potential for false claims liability exists. In order to limit this liability, the prudent design professional should approach all of its projects with the utmost integrity, and demand the utmost integrity from its subconsultants.