

Real Estate Title Insurance & Construction Law

Looking Through the Lens of the New False Claims Act

Liability for contractors
and attorneys could be
created

By Steven Cohen and Gary Strong

The federal civil False Claims Act (“FCA”) has been the federal government’s favored weapon of enforcement in its antifraud initiatives, particularly in the construction industry. Through the FCA, the U.S. government recoups billions of dollars a year, while deterring fraud and recovering funds lost to fraud. New Jersey has now joined 20 other states and the District of Columbia in enacting its own version of the federal law to target alleged fraud by companies that do business with the state.

On January 13, Gov. Jon S. Corzine signed the New Jersey False Claims Act (“NJFCA”), which took effect 60 days later, on March 13, see N.J.S.A.

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2A:32C-1 to -17. New Jersey’s new statute mirrors the federal version, and invites suits by those that do business with the state or “any contractor, grantee, or other recipient of State funds.” Federal officials have utilized the FCA to cover a broad range of alleged fraud against the government. The legislative history of the NJFCA suggests that New Jersey will do the same.

What Conduct Does The NJFCA Cover?

The following acts are prohibited by the NJFCA, see N.J.S.A. 2A:32C-3:

- Knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval to an employee, officer or agent of the State, or to any contractor, grantee, or other recipient of State funds;
- Knowingly making, using, or causing to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the State;

- Conspiring to defraud the State by getting a false or fraudulent claim allowed or paid by the State;

- Knowingly making, using, or causing 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;

- Having possession, custody, or control of public property or money used or to be used by the State and knowingly delivering or causing to be delivered less property than the amount for which the person receives a certificate or receipt;

- Being authorized to make or deliver a document certifying receipt of property used or to be used by the State and, intending to defraud the entity, making or delivering a receipt without completely knowing that the information on the receipt is true; or

- Knowingly buying, or receiving as a pledge of an obligation or debt, public property from

any person who lawfully may not sell or pledge the property.

Qui Tam

The NJFCA employs the same “qui tam” element as its federal counterpart, see N.J.S.A. 2A:32C-9. “Qui Tam” has a Latin derivation and refers to one who sues on behalf of the king as well as for himself. Essentially, this allows private informers, or “whistleblowers,” to bring the action on behalf of the government and share in the recovery if the government decides not to pursue it. The rationale for this is that allowing private persons to gain in the recovery is one of the least expensive and most effective means of preventing fraud. The statute provides for treble damages, attorneys’ fees and penalties.

Projects to Which the NJFCA Applies

The “State” is defined to include all agencies and independent authorities of the State government. Though county and municipal government entities are not within the definition, a false claim on a local project could be covered if the claim is submitted to a “contractor, grantee, or other recipient of State funds.” Arguably, this would include all school projects that receive any School Development Authority funding, regardless of whether the contract is with the local school board or the state itself, see N.J.S.A. 2A:32C-2.

Specific intent to defraud is not required. As in the FCA, “knowing” and “knowingly” go beyond “actual knowledge,” and include acts in “reckless disregard” or “deliberate ignorance” of the truth or falsity of the information. While “innocent mistake” and “mere negligence” are express defenses, plaintiffs will likely argue that the knowledge requirement is satisfied if a defendant submits a claim without due regard for its accuracy (reckless disregard) or consciously refuses to obtain additional facts that would disclose the inaccuracy (deliberate ignorance). Accordingly, the existence of an effective corporate compliance program, even if it

fails to prevent submission of every inaccurate claim, should help to show that an alleged violation was, at worst, “innocently mistaken” or “merely negligent” rather than “knowing.” See N.J.S.A. 2A:32C-2.

What is a False Claim?

Liability stems from submitting a claim to the government that is false. Claims are not limited to requests for compensation above and beyond the contract. Rather, they include requests for progress payments that are based on a representation of the percentage of work that has been completed.

What is “false” is a question that can only be answered by the court’s analysis of the NJFCA. In some circumstances, falsity is obvious, as in the situation where a contractor seeks payment for a product it never delivered or work it never performed. Not all situations are as easily defined. A request for payment could arguably be deemed false if the work for which the contractor seeks payment does not comply with contract specifications, even if the noncompliance results in a product with the same basic performance characteristics as those specified in the contract.

Questions of scientific or engineering judgment may result in claims that are difficult to characterize as true or false. The same is true of questions of interpretation of specifications, drawings, or other technical contract requirements. Another source of liability stems from a variety of laws and regulations that can apply to a contractor’s contract performance in the fields of environmental law and wage and hour regulations. Under the NJFCA, a contractor could be liable for submitting a false claim if it violated applicable laws or regulations, but only if the government’s payment of the claim was based upon the contractor’s compliance with the law or regulation at issue.

Construction Attorneys Face Potential Exposure in Connection with the NJFCA

Attorneys for contractors that work on

public projects need to familiarize themselves with the elements of a false claim under the NJFCA. An attorney retained to advise a client about payment on a public project should discuss the applicable sections of the NJFCA and diligence the client should employ to ensure that any “claims” it submits are true. Likewise, attorneys for subcontractors and suppliers would be wise to counsel their clients about the accuracy of claims they submit to prime contractors to pass through to owners. These might include bids, invoices, certifications and many other documents regularly provided to public owners in connection with construction projects. If construction clients do not understand the importance of these laws, they could be exposed to potential false claims liability, and their attorneys could be exposed to potential liability.

False claims laws may subject attorneys representing prime contractors to liability in a second way as well. Many public owners, including the federal government, do not allow subcontractors or suppliers to submit claims directly to the public owner. In projects with those owners, the prime contractor is the only party that can submit a claim. In those situations, the prime contractor must “sponsor” any claims of its subcontractors or suppliers.

When advising a prime contractor client about sponsoring such claims, attorneys should be careful not to create an implied attorney-client relationship with their client’s subcontractor or supplier. An attorney may do so, unwittingly, by undertaking responsibility for investigating the facts underlying the claim to determine its merit. If the attorney undertakes such responsibility and advises the prime contractor that it may submit the claim to the public owner, and the claim turns out to be false, the subcontractor or supplier may also be liable under the applicable false claims law, creating exposure for the attorney. Therefore, the attorney for the prime contractor should take measures to assure that the burden for accuracy remains with the subcontractor or supplier. Making a written record of this is

essential. It would also be wise for the attorney to expressly state that it is not representing the subcontractor or supplier, and, if possible, obtain the subcontractor or supplier's agreement to indemnify and defend the prime contractor and its attorney against any false claims allegations arising out of the sponsored claim.

The landscape on which claims are made and request for payment submitted has been dramatically altered in the state of New Jersey with the NJFCA. It is now critical that attorneys and their construction clients have an understanding of the ramifications of the conduct that violates the NJFCA and the consequences of the

failure to comply. While the noble intent of the law is to put an end to the filing of false claims, the language of the NJFCA can create liability for contractors, and attorneys, who do not examine their claims and their request for progress payment, through the lens of this new statute. ■