

New York State Enacts the False Claims Act

By Henry Goldberg, Esq.
Goldberg & Connolly

Following the nationwide trend to combat the costs and losses incurred by municipalities from improper claims made against them, New York State enacted the False Claims Act (the “Act”), which went into effect when the Legislature ratified the 2007 New York State budget. This follows New York City’s enactment of its own false claims statute in August 2005, which I discussed in an article in the March 2006 *Subcontractor News Legal Log*.

These Acts should not deter contractors from entering into contracts with the State or New York City or discourage filing valid claims, but contractors should act carefully before submitting applications for payment and change order proposals.

The Act, like the Federal False Claims Act, permits “qui tam” actions by whistleblowers who receive a share of the proceeds. “Qui Tam” actions are nothing new and have existed in various forms at least since the mid-1860s. In a qui tam action an individual with knowledge of a fraud may bring a law suit on behalf of the State and share in the recoveries.

Contractors must be aware of the existence, requirements, potential liability and consequences under the Act. More importantly, before submitting claims contractors must be prepared to support their claims through meticulous records of all aspects of their jobs in order to avoid the potential pitfalls under the Act (not to mention to properly prosecute any claims).

How A Contractor May Be Liable Under The Act

Liability under the Act exists when one (1) submits a “claim” (2) that is false, and (3) does so “knowingly.” A contractor may, therefore, be exposed to liability for: knowingly submitting or causing another person to submit a false claim for payment; making false records or statements to support a false claim; engaging in a conspiracy to get the State to pay a false claim; possessing or controlling property or money used, or to be used, by the State and intending to defraud the State or conceal the money or property; making or delivering a receipt without knowing that the information contained therein is true; and making false records or statements to reduce or avoid an obligation to the State.

What Qualifies as a “Claim” Under the Act

The term “claim” is broadly defined under the Act to include any request or demand, whether under a contract or otherwise, for money or property which is made to any employee, officer, or agent of the state or a local government, or to any contractor, grantee or other recipient, if the state or a local government provides any portion of the

money or property which is requested or demanded or will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded. This means that a claim need not be submitted directly to the State to qualify as a claim under the Act if the State is ultimately the party which pays the demand or request. Thus, a request for payment which is submitted by a subcontractor to a contractor may be categorized as a “claim” pursuant to the Act.

What is “False”?

The Act defines “false” as “any claim which is, either in whole or part, false or fraudulent.” For example, a false claim might occur if a contractor seeks payment for supplies that it failed to deliver or work it never performed. Additionally, a contractor may be liable for submitting a false claim if it violated an applicable law or regulation and the payment of the claim was conditioned upon the contractor’s compliance with the law, such as often is the case with certain Lien Law provisions. However, submitting an erroneous claim to the State will not expose a contractor to liability unless the submission of the false claim is done knowing the falsity.

What is a “Knowing” Submission of a False Claim?

The Act only imposes liability for “knowing” submissions of false claims to the State. A contractor will be held to have acted knowingly when it: (1) has actual knowledge of such claim or information; (2) acts in deliberate ignorance of the truth or falsity of such claim or information; or (3) acts in reckless disregard of the truth or falsity of such claim or information.

An element of conscious wrongdoing must be present for liability under the Act to occur. A contractor will not be liable for acting in a grossly negligent manner or for making innocent mistakes when submitting a claim. The Act is not intended to discourage contractors from submitting claims and recognizes that there is always a margin of error in construction projects and in requests for payments.

However, a contractor who is found liable under the Act will be forced to pay (i) the State not less than six thousand dollars and not more than twelve thousand dollars, plus three times the amount of damages that the State sustains because of the act of that person; and (ii) any local government three times the amount of damages sustained by such local government because of the act of that person. A contractor who violates the Act shall also be liable for the costs, including attorneys’ fees, of any civil action brought to recover any such penalty or damages.

What Type of Actions Could Create Liability For Contractors?

When a contractor submits an invoice or claim to the State that misrepresents (i.e. intentionally or recklessly) the type of work, the amount of work done or the amount of money due, a contractor could be held liable under the Act.

As a result, contractors must be careful when submitting requisitions or change orders for contract or extra work. In such cases, it is especially important to maintain clear records and detailed documentation of the work to unquestionably establish the performance and value of the work. Any exaggerated work or unsubstantiated charges could be considered a knowingly untrue submission.

Where a contract with the State requires compliance with a certain condition as a prerequisite for payment, a contractor must be absolutely certain that it has complied, otherwise they could be found liable under the Act.

G & C Commentary

Now when working for New York City, the federal government or New York State a contractor must be very careful when submitting “claims”. The Act, like the New York City and federal acts, should not discourage the contractor from making valid claims, but should cause a contractor to act carefully. However, contractors should make their personnel aware of these new “false claims” issues and should implement a standardized documentation procedure in order to assure that when requisitions and claims are submitted they are valid and can be supported by an accurate, detailed and complete “paper trail.” Be mindful that the “Qui Tam” provision in the Act allows a contractor or one of its employees to bring an action on behalf of the State. In the event the State informs a contractor that it is suspected of submitting a false claim or the contractor believes another individual or entity has submitted a false claim, it should collect and review its records, and contact an experienced attorney for advice.

Michael J. Rosenthal, an associate with Goldberg & Connolly, assisted with the preparation of the article.

To contact Mr. Goldberg, call (516) 764-2800 or e-mail him directly at hlgoldberg@goldbergconnolly.com.