Qui What?

By Matthew R. Rechtien, P.E., Esq.

Qui tam. Don't know the phrase? You should. It is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, Latin for "who as well for the king as for himself sues in this matter." *Qui tam* lawsuits are, according to Black's Law Dictionary, lawsuits brought under a law "that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Qui tam* cases are a notable feature of the regulation of public contracting, which, given the amount of public contracting directed towards construction, makes them a prominent aspect of the construction business.

If the Latin name were not giveaway enough, the roots of *qui tam* actions extend back to the English common law writ of the same name, by which a private individual who assisted a prosecution could receive all or part of any penalty imposed. *Qui tam* actions originated in 13th century, Norman-ruled England, as a mechanism to further enforce the King's laws.

Historical Context of the False Claims Act

Whatever may be said of the writ's continuing vitality in the United Kingdom, it is alive and well in the United States, despite its advanced age. Indeed, the first *qui tam* statute enacted by this federal government, the eponymous "Lincoln Law," or False Claims Act, became law in 1863.

Just as future President Grant was poised to maneuver against fortress Vicksburg to solve one problem facing the federal government, then President Lincoln was maneuvering in Congress to solve another: endemic fraud in the explosion of federal contracting arising from the war effort, when the government was too overextended to combat it.

The False Claims Act Today: Liability

Although certainly not alone, the False Claims Act is an enduring tool to combat government fraud. Since 1986, when strengthened during the defense build-up to address contractor price gouging, the Act has helped recover tens of billions of taxpayer funds. (See e.g. **www.dodig.mil/sar/index.html**.) Congress most recently revamped it in 2009 with the passage of the Fraud Enforcement Recovery Act of 2009. The False Claims Act's current manifestation is codified at 31 U.S.C. 3729, *et seq*.

The False Claims Act: Liability

The Act outlaws a broad swath of fraudulent conduct in federal contracting, including – and most important for the construction context – fraud in seeking payment on federal projects. It covers, and makes liable, anyone who "knowingly" (31 U.S.C. 3729(a)(1)):

1) "presents … a false or fraudulent claim for payment or approval;"
2) "makes, [or] uses … a false record or statement material to a false or fraudulent claim;" or
3) conspires to do the same "is liable to the [federal g]overnment."

How liable? Liable for "a civil penalty of not less than $5,000 and no more than $10,000, as adjusted" for inflation, "plus 3 times the amount of damages," i.e., the amount of the fraud, sustained by the government because of the act of that person, plus "the costs of a civil action brought to recover any such penalty or damages." (31 U.S.C. 3729(a)(1) and (3); but see (a)(2) (providing for reduced liability in certain circumstances.) The availability of costs – including attorney fees – make *qui tam* lawsuits popular among the legal profession: plaintiffs need not have their own funds to afford a lawyer.

The breadth of these provisions is, like the devil in the details, here, in the definitions of the key words. Key words are defined broadly. Under the Act, a person acts "knowing[ly]" if, "with respect to information" he or she "acts in deliberate ignorance" or "reckless disregard" "of the truth or falsity of the information." (31 U.S.C. 3729(b)(1).) There is no need for "proof of [any] specific intent to defraud." (31 U.S.C. 3729(b)(1).)

Further, while excluding claims for individual wages, salaries and certain "income subsid[ies]," the Act gives "claim" a similarly broad definition. (31 U.S.C. 3729(b)(2)(B).) A "claim" is a "request … for money … that … is presented to … the United States; or is made to a contractor … if the money is to be spent or used on the [federal g]overnment's behalf or to advance a [g]overment program or interest, and if the … [g]overment … provides or has provided any portion of the money or property requested or demanded … or will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested …" (31 U.S.C. 3729(b)(2).)

The bottom line is that *anyone* involved in false billing on a federal construction project, no matter how far removed from the federal funds, runs the risk of False Claims Act liability. From the contractor who "front-loads" his or her payment schedule, to the design professional who knowingly passes it along. The situations are easy to imagine. The most common is a government contractor, or a subcontractor, submits an invoice for payment before it is due. Another is a subcontractor that submits an invoice for payment based on an incorrect representation that the work complies with specifications or contract requirements. Finally, still a third situation is a contractor who submits an invoice that fails to provide the government, or a downstream contractor or subcontractor, with legitimate credits for offsets. Nor is the liability here limited to the companies involved. Individuals can face individual liability for their individual actions.

The False Claims Act: Enforcement

Of course, the signature aspect of the Act – what makes it a *qui tam* law – is its enforcement mechanisms. It's the original "whistleblower" statute.

In addition to authorizing the Attorney General to sue violators, 31 U.S.C. 3730(a), the Act deputizes pretty much everyone else to do the same, providing that they "may bring a civil action for a violation of" the Act "for the person and for the" federal government."

The False Claims Act's enactment was, according to legend, instigated by unscrupulous contractors who sold the Union Army decrepit horses and mules in poor health, defective arms, and spoiled food and other provisions.

(31 U.S.C. 3730(b)(1).) Such persons are "relators," and, as an exception to the general rule, need not have been personally harmed to have standing to sue.

When relators sue, they sue "in the name of the" federal government; from that point forward, their claims "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." (31 U.S.C. 3730(b)(1).)

Qui tam actions under the Act proceed in one of two ways: conducted by the government, or conducted by the relator. Indeed, on filing of a *qui tam* complaint, the Act obliges the relator to serve the federal government with a copy of the complaint and all "material evidence and information the person possesses." (31 U.S.C. 3730(b)(2).)

The Act also provides that the filing is to "remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." (31 U.S.C. 3730(b)(2).) This allows the federal government to decide whether to take over the case. The federal government may during the 60-day period "proceed with the action, in which case the action shall be conducted by the Government" or "notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." (31 U.S.C. 3730(b)(4).)

The relator's rights vary depending on the government's choice. If the government proceeds, "it shall have the primary responsibility for prosecuting the action." (31 U.S.C. 3730(c).) The relator may continue at that point as a party to the case, but subject to significant constraints: overruled by the government's actions, but generally entitled to a hearing or other process. (31 U.S.C. 3730(c)(2).) If the federal government does not proceed, "the person who initiated the action shall have the right to conduct the action," subject to the federal government's right to be served with the papers filed in the action, and its potential right to intervene later "upon a showing of good cause." (31 U.S.C. 3730(c)(3).)

Why take on the headache of being a relator? The Act incentivizes the very deputies it appoints. Even if the government proceeds, the relator "shall [generally] … receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action," plus "an amount for reasonable expenses … plus reasonable attorneys' fees and costs." (31 U.S.C. 3730(d)(1).) If the federal government does not proceed, the relator "shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages," which "shall not be less than 25 percent and not more than 30 percent of the proceeds of the action" plus "reasonable expenses … plus reasonable attorneys' fees and costs." (31 U.S.C. 3730(d)(2).)

In the latter case, where the government balks, however, there is risk. "If the [federal g]overnment does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." (31 U.S.C. 3730(d)(4).)

The False Claims Act: Other Provisions

As a "whistleblower" statute, the Act not only incentivizes, but insulates relators, barring discrimination against them because of their lawful acts, including "in the terms and conditions of employment …" (31 U.S.C. 3730(h).)

Finally, to prevent relators from climbing onto the "gravy train," the Act bars relators from becoming *qui tam* plaintiffs once the government has sued, or once the claim is public knowledge, unless the relator qualifies as the "original source."

State *Qui Tam* Laws

While Mr. Lincoln's law is the original, and most commonly litigated, *qui tam* statute, it's hardly alone. Not only are there other federal *qui tam* statutes, but many states have adopted analogous statutes of varying scopes. Indeed, as of the publication date, more than 25 states have false claims acts of some sort, though many are narrowly focused on, for example, healthcare claims.

Conclusion

Whether or not a structural engineer ever encounters a *qui tam* action, given the increasing prevalence of government money in the construction industry, and the pervasive reach of *qui tam* laws like the False Claims Act, it is simply not a prudent choice to remain oblivious.▪

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Those interested in further reading on the subject may consider reading *False Claims in Construction Contracts: Federal, State and Local*, Charles M. Sink and Krista Lee Pages, Editors, ABA Publishing, 2007.

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