



FEDERAL FALSE CLAIMS ACT “CORRECTED AND CLARIFIED” TO EXPAND CONTRACTOR LIABILITY

In our June 2008 Client Alert, “The U.S. Supreme Court Interprets the ‘Presentment’ Requirement of the Federal False Claims Act, and Adds Intent and Materiality Requirements,” we advised you that the Supreme Court decision in *Allison Engine Co. v. United States* limited – but did not eliminate – the circumstances in which a contractor or subcontractor on a federally funded project may be liable under the federal False Claims Act. Generally speaking, the False Claims Act is violated when (1) a contractor knowingly presents a false claim to the federal Government for payment or approval, or (2) knowingly makes a false record or statement to get a false or fraudulent claim paid by the Government.[1] Now, Congress has passed and President Obama has signed a new law that overrules *Allison Engine* and rewrites important sections of the False Claims Act.

On May 20, 2009, President Obama signed the Fraud Enforcement Recovery Act of 2009 (“FERA”).[2] Embedded in FERA were amendments to the False Claims Act that significantly expand the circumstances in which contractors and subcontractors may be liable for false claims. Because Congress believed that decisions like *Allison Engine* were not only erroneous but greatly weakened the effectiveness of the False Claims Act, it used FERA as a vehicle to correct and clarify the False Claims Act.[3] Below is a discussion of how FERA most significantly affects contractor and subcontractor liability:

❖ **Extends the False Claims Act to claims (e.g., progress payments) under any contract or grant funded or partially funded by the federal Government, whether or not the Government directly approves the claims.**

This provision effectively overturns *Allison Engine* by not requiring direct presentment to the federal Government for liability to arise. Instead, a contractor may be liable even if it submits a claim to a third-party recipient of Government money or property such as a state agency or grantee. Congress noted that removing the presentment requirement makes the False Claims Act internally consistent, as the False Claims Act defines “claim” to include any payment request for which the Government provides all or part of the amount requested, or will reimburse a third party for any amount paid.[4]

Note that FERA does not set any minimum amount of federal funding for the False Claims

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Act to apply. To the contrary, the new law states that it applies whenever the Government provides “any portion” of the money or property for which a claim has been made.

The elimination of the presentment requirement will have broad application to contracts and grants that are funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (popularly known as the “Stimulus Act”). In enacting FERA, Congress was specifically concerned that more than \$1 trillion that has been appropriated to stimulate our economic system would be “dispensed through contracts with non-governmental entities, going to general contractors and subcontractors working for the Government. Protecting these funds from fraud and abuse must be among our highest priorities as we move forward with these necessary actions.”[5] Stimulus Act-funded contracts had already been targeted for special ethics oversight.[6] Now, contractors will face the additional risk associated with potential False Claims Act liability for ethics lapses.

❖ **Replaces the False Claims Act requirement that the contractor intended to defraud the Government with the requirement that the contractor’s false claim was simply “material” to the decision to pay the claim.**

This provision of FERA also addresses *Allison Engine’s* ruling that an intent to defraud the Government was necessary for liability under the second basis for false claims liability, i.e., use of a false record or statement to get a false claim paid. As interpreted by the Supreme Court in *Allison Engine*, a contractor’s false record or statement had to have been intended to defraud the Government. Under the False Claims Act as amended by FERA, a contractor’s false record or statement must simply be “material” to the decision to pay the claim.[7] This means the false record or statement must “have a natural tendency to influence” or be “capable of influencing” the payment decision. Intent has thus been effectively eliminated from the False Claims Act.[8]

❖ **Exposes contractors to False Claims Act liability if they knowingly fail to return overpayments to the Government, even if no false claim or statement has been made.**

Before this provision, contractors were liable if they used false records or statements to conceal, avoid, or decrease obligations to pay the Government,[9] known as making “reverse” false claims. FERA imposes liability if a contractor simply conceals, avoids, or decreases its obligation to pay, regardless of whether a claim has been submitted. FERA defines “obligation” specifically to include the retention of an overpayment. Even if a contractor is the innocent recipient of an overpayment, the amount of the overpayment has to be returned to the Government or the contractor risks liability under the False Claims Act. Note that, pursuant to new Federal Acquisition Regulation (“FAR”) provisions enacted in November 2008, [10] contractors and subcontractors may also be suspended or disbarred for failing to disclose significant overpayments on Government contracts.



Bottom Line: The amendments to the False Claims Act wrought by FERA demonstrate that the movement towards stricter federal ethics requirements has gained even more momentum. With FERA's reworking of False Claims Act provisions, contractors and sub-contractors assume an even greater risk of liability, and the importance of a robust and effective compliance program is further magnified.

[1] 31 U.S.C. § 3729(a)(1) and (a)(2).

[2] S. 386.

[3] The primary purpose of FERA, however, is to increase accountability for corporate and mortgage fraud. S. Rep. No. 111-10, 111th Cong. (2009).

[4] 31 U.S.C. § 3729(c) (2000).

[5] S. Rep. No. 111-10, 111th Cong. (2009), at p. 10.

[6] See Peckar & Abramson's Client Alert, "Stimulus Act Update" (April 2009) at http://www.pecklaw.com/PDF_files/Client_Alert-Stimulus_Act_Update.pdf

[7] Congress eliminated the words "to get," which were interpreted by the Allison Engine court as connoting an intent that the false record or statement would lead to payment of a false claim. FERA substituted the words "material to" for the "to get" language.

[8] FERA also eliminated the intent requirement for conspiring to submit a false claim. 31 U.S.C. § 3729(a)(3).

[9] 31 U.S.C. § 3729(a)(7) (2000).

[10] See Peckar & Abramson's Client Alert, "NEW FEDERAL REGULATIONS REQUIRE CONTRACTORS TO 'SELF DISCLOSE' VIOLATIONS OF FEDERAL CRIMINAL LAWS, VIOLATIONS OF THE CIVIL FALSE CLAIMS ACT, AND OVERPAYMENTS ON CONTRACTS" (November 2008) at http://www.pecklaw.com/PDF_files/Client_Alert-New_Fed_Regs.pdf