

NEW YORK CITY FALSE CLAIMS ACT SIGNED INTO LAW

On May 19, 2005, effective August 17, 2005 (but applicable retroactively), a False Claims Act was signed into law by Mayor Bloomberg, as part of the City's Administrative Code. The Act, modeled loosely after the Federal False Claims Act, was passed to protect the City from "false or fraudulent" claims. In addition, the Act is intended to encourage whistleblowers to come forward and notify the City when they believe that a City contractor (construction or otherwise) has "knowingly" filed a "false or fraudulent" claim in connection with contracts with the City or any City agency, department, division, bureau as well as on contracts with any board, committee, institution, agency of government, local development corporation or public benefit corporation the majority of whose members are appointed by City officials.

Exactly what is meant by a "false or fraudulent" claim is unclear. While what constitutes a "fraudulent" act is well defined under the law generally, a "false" claim is not so well defined. The Act itself lends little guidance, as it only defines a "false claim" as "any claim, or information relating to a claim, which is false or fraudulent." It is therefore conceivable that the City could try to extend the interpretation of the Act to include any request for payment or a contract adjustment. Consequently, the City could attempt to contend that the Act applies to any portion of a change order request or payment application that the City may properly reject.

The "knowingly" requirement is also somewhat vague and broadly defined, as it is not limited to actual knowledge that claims information is false or fraudulent. As defined in the Act, "knowing" or "knowingly" includes acting with actual knowledge of the falsity of information, but also includes acting in deliberate ignorance of, or with reckless disregard for, the truth or falsity of claims information. Notably, the Act specifically states that "specific intent to defraud is not required," for a finding of liability.

The Act encourages individuals to come forward and report "false or fraudulent" claims by permitting them to potentially share in up to 30% of any recovery by the City in an action initiated as a result of their "blowing the whistle" on a false or fraudulent claims filer. A Court would ultimately decide how much the whistleblower receives, within given statutory ranges. Any individual may report a claim, including the company's own employees.

Notably, the term "claim" under the Act may be argued to include considerably more than what construction contractors normally consider a "claim." Under the Act, a claim is broadly defined as:

request or demand, whether under a contract or otherwise, for money or property which is made to any employee, officer, or agent of the city, or to any contractor, grantee or other recipient, if the city provides the money or property which is requested or demanded or will reimburse such contractor, grantee or other recipient for the money or property which is requested or demanded. 'Claim' also encompasses any record or statement used in presenting an obligation to pay or transmit money or property either directly or indirectly to the city.

It may be argued that any payment application, change order request, and any subcontractor pass-through change order requests, in addition to traditional "claims" for extra compensation, may fall within the scope of the Act, if the claim is "false or fraudulent." Additionally, any backup documentation, take-offs or estimates submitted as supporting documentation, could be considered "false or fraudulent" as well.

Notably, the Act permits lawsuits to be brought against alleged "false or fraudulent" claim filers by either the City's Corporation Counsel or private individuals

(subject to oversight by the City's Corporation Counsel). These private whistleblower actions are referred to as *Qui Tam* lawsuits (taking their name from a Latin phrase meaning "Who pursues this action on our Lord the King's behalf as well as his own."). The act provides protection to whistleblowers from retaliatory action by their employers, by permitting them to seek injunctive relief, reinstatement if fired and two times back pay plus interest and other damages.

The Act does not give free reign to whistleblowers, however, as it provides that the City's Corporation Counsel is to act as a gatekeeper in reviewing whistleblowers' allegations. The Act requires Corporation Counsel to review private whistleblowers' complaints and determine whether to bring a civil action itself, "deputize" the private whistleblower or its counsel to bring the civil action (in which case such "deputized" counsel and the Corporation Counsel will share authority over the action) or to decline to do either, all within given time frames. The Act also requires the Corporation Counsel and the Department of Investigation to promulgate rules establishing a protocol for addressing proposed civil complaints and rules necessary to implement the law.

Steep potential penalties for filing "knowingly" making "false or fraudulent" claims, include:

- (i) a civil penalty of between five and fifteen thousand dollars for each violation;
- (ii) liability of up to three times the amount of damages the City sustains as a result of the "false or fraudulent" claim (the statute does not define what damages the City may claim, however one may expect that if the City overpays as a result of "false or fraudulent" information, the City will try to argue that if it can recover triple the amount of overpayment); and
- (iii) exposure to the costs, expenses and attorneys' fees of a civil enforcement action brought either by the City or a *Qui Tam* "deputy," plus the costs of the City's investigation.

The Act is not entirely lopsided, however, as it provides that if a Court determines that a private civil enforcement (*Qui Tam*) action was "frivolous," then the wrongly accused defendant may recover attorneys fees and costs from the "deputized" *Qui Tam* claimant. The "frivolous" standard may be a very difficult hurdle to leap, however, for wrongly accused contractors.

Some key issues to be aware of with respect to the Act:

- The term "false" is not clearly defined in the Act and, thus, its ambiguity could lead to confusion and possibly abuse in prosecution;
- The Act does not clearly account for the fact that a good faith claim could ultimately be determined to be without merit. Another possible abuse of the Act could be to assert that a contractor is liable even when they submitted a colorable claim in good faith or where a Contractor submitted some erroneous information when trying to comply with short time limitations for making claims under relevant contracts;
- Similar legislation enacted in California has been criticized by the construction industry as having been abused to put contractors making legitimate claims on the defensive.

Although we believe that some of the arguments or positions that we describe would result in an abuse of the Act for purposes beyond what is intended, there is no more information as to how the Act will be enforced, utilized or constructed by the courts at this time. Contractors would be well advised to consider the "worst case" interpretation of the Act until more is known about how the Act will be interpreted.

Watch for future articles in our firm newsletter as we monitor the rules promulgated under the Act and how the Act is applied in practice in New York City. ❖

Peckar & Abramson Bulletin

SUMMER 2005

New Jersey	201.343.3434
New York	212.382.0909
San Francisco	415.837.1968
Los Angeles	213.489.9220
Miami	305.358.2600
Fort Lauderdale	954.764.5222
Washington, DC	202.293.8815

©Copyright 2005 by Peckar & Abramson, Attorneys at Law.
Permission to reprint is granted with appropriate credit.
This bulletin provides general information only. It is not legal advice and should not be used as a substitute for review of your specific situations with counsel.