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Amendments to the California False Claims Act: What Every Contractor Doing Business with the State or a Political Subdivision Needs to Know

Introduction

On September 27, 2012, Governor Jerry Brown signed into law Assembly Bill 2492 (“AB 2492”) amending the California False Claims Act (“CFCA”),¹ bringing it more into line with the Federal False Claims Act (“FFCA”).² The amendments to the CFCA took effect on January 1, 2013. The impetus behind the amendment was the California Attorney General being notified by the Office of Inspector General of the U.S. Department of Health and Human Services that the State was no longer in compliance with federal law, and that to continue to collect a 10% share of recoveries in Medicaid-related false claims act suits, the CFCA had to be “at least as effective” as the FFCA in rewarding and facilitating actions brought by Whistleblowers.³

CFCA Background

The CFCA is codified in Government Code (the “Code”) sections 12650-56. Pursuant to Code sections 12651(a)(1) and 12651(a)(2) respectively, any person who knowingly presents or causes to be presented a false or fraudulent claim for payment or approval, and/or knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim, will be deemed to have violated the CFCA. Defendants that present false claims often have utilized false records or statements in support of their claims. Consequently, conduct violating Code section 12651(a)(1) often, in turn, also violates Code section 12651(a)(2).

The term “knowingly” is defined by Code section 12650(b)(3) as a person, with respect to information, that does any of the following:

- (A) Has actual knowledge of the information.
- (B) Acts in deliberate ignorance of the truth or falsity of the information.
- (C) Acts in reckless disregard of the truth or falsity of the information.

The application of the CFCA becomes more difficult when dealing with the definitions of “deliberate ignorance” and “reckless disregard” as set forth in Code sections (b)(3)(B) and (C). As an example, courts have imposed liability on a party for a failure to examine its own records as constituting deliberate ignorance or reckless disregard. In essence, any information in a contractor’s own files showing that a claim was false, such as job cost records or submissions from subcontractors that are inconsistent with

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¹ Cal. Gov’t Code section 12650-56.

² 31 U.S.C. section 3729-33.

³ See Bill Analysis at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_2451-2500/ab_2492_cfa_20120815_175821_asm_floor.html.

the information submitted with the claim, can be used as evidence to support the “knowledge” element of the statute.

To be certain, the requirements under the CFCA place significant burdens on contractors doing business with the State. Therefore, it is critical that contractors do everything possible to ensure compliance, especially when taking into account the potential penalties for violating the CFCA. Those penalties include, but are not limited to, monetary fines, debarment from working with the State on future projects, and the potential obligation to disclose the fact that an entity has been debarred when responding to future bids, regardless of location and funding source.

Key Amendments to the CFCA

The following are several key amendments to the CFCA, pursuant to AB 2492, which have been incorporated into Government Code section 12650 et seq. For the reasons outlined below, every company doing business with the State, or a political subdivision, should be aware of these amendments to the CFCA:

Liability

- The definition of “claim” has been expanded to include submissions to a “contractor, grantee, or other recipient, if the money, property, or service is to be spent or used on a state or any political subdivision’s behalf or to advance a state or political subdivision’s program or interest.”⁴
- The definition of “obligation” now includes potential liability for “retention of any overpayment.”⁵
- The definition of “original source” has been expanded to include individuals who have “knowledge that is independent of, and materially adds to, the publicly disclosed allegations” of false claims, and individuals who have voluntarily disclosed to the state the information upon which a claim is based.⁶
- Under the prior law, suits based on public disclosures were barred. The amendments to the CFCA includes a provision requiring dismissal in the event of a public disclosure “unless opposed by the Attorney General or prosecuting authority of a political subdivision,” creating the potential to override the public disclosure bar in the event the prosecuting authority opposes dismissal.⁷
- If the California Attorney General files a complaint in intervention, it will relate back to the filing date of the Whistleblower’s complaint.⁸

Penalties

- Civil penalties have been increased to between \$5,500 and \$11,000 for each false claim.⁹

⁴ Cal. Gov’t Code section 12650(b)(1)(B).

⁵ Cal. Gov’t Code section 12650(b)(5).

⁶ Cal. Gov’t Code section 12652(d)(3)(C).

⁷ Cal. Gov’t Code section 12652(d)(3)(A).

⁸ Cal. Gov’t Code section 12654.5.

⁹ Cal. Gov’t Code section 12651(a).

Whistleblowers

- A Whistleblower that has been retaliated against in the form of termination, demotion, or other retaliation will be able to seek relief, including reinstatement with the same seniority status, double damages for back pay, interest on back pay, special damages, punitive damages, attorneys' fees and court costs.¹⁰
- These anti-retaliation measures will apply when Whistleblowers are discriminated against for acts done in furtherance of a CFCA action, or acts done to stop violations of the CFCA.¹¹
- Whistleblowers are now potentially eligible for a reduced award even if they planned and initiated the violation upon which the CFCA action was based.¹²

WHAT THIS ALL MEANS TO YOU

Contractors across California, and the United States for that matter, find themselves faced with heightened scrutiny in regard to their compliance with laws and regulations by governmental agencies at the federal, state and local levels. The expanded protections and increase in civil penalties set forth in the modifications to the CFCA, as detailed above, will likely incentivize Whistleblowers and third party plaintiffs to bring potential claims to the State.

As a result, it is necessary for companies that do business with the State, or any of its political subdivisions, to revisit their compliance programs with the CFCA amendments in mind. More specifically, all contractors should have programs in place that establish detailed policies and procedures for dealing with Whistleblower complaints or any other potential claim which, if run effectively, will allow a contractor to investigate, assess and respond quickly and accurately to any potential issue that may arise on a given project.

For a more detailed understanding of the CFCA, any questions about its requirements, or how it affects your ongoing business, please contact Nathan Cohen or Todd Bressler at Peckar & Abramson, P.C. (310) 228-1075.

¹⁰ Cal. Gov't Code section 12653.

¹¹ Cal. Gov't Code section 12653(a).

¹² Cal. Gov't Code section 12652(g)(5).