



**NASBP 2020 Virtual Event:
Bonding with Bandwidth**

Emerging False Claims Act Risks: 2020 and Beyond

Speakers



- **Tim Heffernan**
- Senior Partner, Watt, Tieder, Hoffar & Fitzgerald, L.L.P., Member of Board of Directors
- Member, management committee for Global Construction & Infrastructure Legal Alliance
- Advises clients on issues involving performance bond claims, surety takeover and tender agreements, extra-contractual claims, and compliance matters
- (703) 749-3064 and theffernan@watttieder.com



- **David Robbins**
- Partner, Crowell & Moring, LLP. Co-leader False Claims Act practice; member, Government Contracts Practice steering committee
- Former Air Force Deputy General Counsel (acting), Procurement Fraud Remedies Coordinator and Suspending and Debaring Official
- (202) 624-2626 and drobbins@crowell.com



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Agenda

- 1) About the False Claims Act (FCA)
- 2) Emerging FCA risks to surety industry participants (producers, sureties, and principals)
- 3) Legal theories of potential liability
- 4) Common sense tips to protect the business



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False Claims Act elements

Elements, when any person (or company):

- “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval”; or
- “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim. 31 U.S.C. § 3729(a)(1)(A), (B).

Includes express and *impliedly* false certifications material to payment.

Stated differently, by making a material false statement, or concealing a material fact in an effort to get the government to pay money or avoid recouping money, an individual (or company) may face False Claims Act risk.



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False Claims Act elements - continued

Important questions relating to FCA liability:

- 1) what is a claim?
- 2) what is materiality?
- 3) what is knowing? (reckless disregard, deliberate ignorance, intentional and how judged)

Indirect presentment – Share for surety industry participants



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False Claims Act elements - continued

Game Changer: in August 2014, the “Presumed Loss Rule” went into effect

The rule creates a rebuttable presumption where a firm willfully misrepresents its size or status in order to receive a set-aside contract

- Small Business (SBA) as well as socio-economic programs (8(a), WOSB, HUBZone or SDVOSB)

The loss is presumed to be the total amount expended by the Government on the contract

- Government no longer has to prove actual damages

Greater incentive for DOJ and (qui tam relators) to prosecute misrepresentation cases under the False Claims Act



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Emerging False Claims Act Risks

What Are the Surety's Risks?

Direct (to Surety)

- Default termination of the bonded set-aside contract / performance bond penal sum
- Civil Liability
 - False Claims Act, 31 U.S.C. § 3929-33 (treble damages; penalties)

Indirect (to Account)

- Suspension or Debarment
- Civil Liability
 - False Claims Act, 31 U.S.C. § 3929-33 (treble damages; penalties)
 - Forfeiture of Fraudulent Claims Act, 28 U.S.C. § 2514
- Criminal penalties



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Emerging False Claims Act Risks – cont'd

Small disadvantaged business/set-aside overview – central to many ongoing cases

- Example: SDVOSB
- Example: 8(a)
- Example: MBE/DBE credit for state/municipal work

Most common types of DBE fraud:

front scheme (paper company only, not controlled by DBE individual)

pass-through scheme (DBE performs no commercially useful function, just pushes paper)

false certification (false info concerning size or financial status/hidden assets)



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Emerging False Claims Act Risks – cont'd

The government's primary theory of surety FCA liability

- discussions of how that can arise
- understanding what duty we owe, and where that duty is owed
 - ask questions, follow up



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Common Sense Compliance Tips

Training

Red flags to watch for

Escalation processes to seek additional guidance

For producers:

- Expect questions, running interference for principals who do not want to answer may cause risk
- Guidance for how to keep bond file records



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Questions?



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