Emerging False Claims Act Risks: 2020 and Beyond

Speakers

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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

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.
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 – Snare for surety industry participants

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
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

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)
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

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
Questions?