



Welcome to the inaugural issue of the Groff Murphy newsletter.

Dear client,

In this and future issues, we look to keep our clients and colleagues updated on news and events that are of current interest to the construction industry. In this first issue, we address a topic that has become increasingly relevant in these challenging economic times - false claims. The Federal Government recently passed legislation expanding the reach of the Federal False Claims Act. The Washington State Legislature considered, but did not pass, legislation that would have enacted a Washington False Claims Act.

Expansion of the Federal False Claims Act

The Federal False Claims Act ("FCA") dates back to the Civil War. It imposes both civil and criminal liability for "knowingly presenting or causing to be presented to an officer or employee of the United States Government a false or fraudulent claim for payment or approval." Case law has expanded the scope of the FCA to also include the use of information in a claim on federally funded projects with "deliberate ignorance" or "reckless disregard" of the truth or falsity of information.

On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act ("FERA"), which further expands the reach of the FCA and provides the Federal Government with more tools and resources to investigate and prosecute financial frauds. Pursuant to FERA, a contractor will face liability under the FCA if it submits false information that is "material," i.e., capable of influencing the government in making a payment. The Government is no longer required to establish a contractor's intent to submit a false claim.

FERA also clarifies a split among the Federal Circuit Courts related to the "presentment" requirement of the FCA. It is no longer a requirement that the contractor present false information to the Federal Government to be liable under the FCA, but must only submit false information on a project that is at least partially funded by Federal dollars. In addition, FERA increases FCA enforcement and oversight by establishing the Government's authority to

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Groff Murphy offers free educational and training seminars on current construction law topics relevant to clients, including the following:

- Construction risk management in challenging economic times
- False claims avoidance
 - Claim notice, documentation & compliance
- Lien & bond claims
- Construction Insurance
 - Indemnity & Risk Transfer

For information on scheduling a free seminar please contact Dave Groff, Mike Grace or Marisa Bavand at (206) 628-9500

make Civil Investigative Demands ("CIDs") during the course of an investigation. CIDs provide the Government with significant investigative tools to obtain access to documents, witnesses and other resources in the course of conducting an FCA investigation. Coupling this with the over \$200 million in stimulus money earmarked for the hiring of Inspector Generals to oversee the spending of Federal funds and prosecute financial frauds, we expect to see a significant increase in FCA investigations.

The Washington False Claims Act - Gone For Now - But For How Long?

This spring, the Washington State Legislature concluded the 2009 legislative session. The session was unusually productive with respect to construction related legislation. There was a wide variety of legislation related to the construction industry, from bills that authorized funding for significant public works projects, to bills that affect contract rights on public projects.

Perhaps the most notable piece of legislation was a bill introduced by Senator Kline that didn't pass. SB 5144 was entitled the "Washington False Claims Act," and would have introduced a significant new dynamic into the owner-contractor relationship on public projects.

In a general respect, the bill was modeled after the Federal False Claims Act. As originally introduced, the bill defined a false claim as "any claim that contains or is based upon a materially incorrect fact, statement, representation, or record." However, the term "claim" was defined more broadly than the term is used in construction contracts, to include any "request or demand, whether under a contract or otherwise, for money or property which is made to a government employee or official, contractor, grantee, or other recipient if a governmental entity provides any portion of the money or property which is requested or demanded[.]" As is evident from the proposed language, a false claim could have been a request for a change order, as well as a contract claim or request for equitable adjustment.

A person that violated the act by would be liable for a civil penalty ranging from \$5,000 - \$10,000. In a subsequently proposed amended version of the bill, a person that violated the act could have been liable for uncapped treble damages, plus attorney's fees and costs.

The bill was supported by the Washington State Trial Lawyers Association. As one might surmise from WSTLA's support, the bill also provided Qui Tam provisions and incentives for third party enforcement (i.e., whistleblowers). Depending on how the false claim was prosecuted - in particular, whether the government chose to take control of an action after initiation by the whistleblower - the whistleblower could stand to recover between 15-30% of the amount recovered for the false claim.

Ultimately, the bill didn't pass. However, our take is that the Washington False Claims Act - whether in this form or modified - will be back. False claims are a hot topic these days, given the economic climate and the numerous high profile examples of fraud and corruption in the news over the past year.

So how can a False Claims Act be a bad thing? As drafted, the language in the bill was quite broad. There was no requirement of intent to defraud or to

make a false claim. Liability could have been imposed for mistaken information that was included in a "request for money." If the Act were passed as drafted, the breadth of its language, combined with the tight timelines imposed by Mike M. Johnson, would have provided another tool for owners to defeat and discourage legitimate contractor claims. A contractor would not only face the waiver penalty imposed by Mike M. Johnson, but also potential monetary penalties as well. In our opinion, this simply shifts the balance too far in favor of owners.

Other Selected Legislation That Passed

Despite the failure of the False Claims Act, the State Legislature did pass numerous other bills related to construction and public works, including the following:

HB 1195 - Payment of Undisputed Claims on Public Projects: This new law is a first short step towards addressing some of the inequity that results when public owners refuse to issue change orders for changed work. The law requires the State or municipality to issue a change order for the full dollar amount of any undisputed portion of additional work within 30 days of satisfactory completion of the additional work. If the owner fails to issue the change order within 30 days, the owner is liable for 12% annual interest on the amount due for the undisputed work. The law goes into effect on July 26, 2009.

SSB 5613 - Stop Work Orders for Failure to Secure Industrial Insurance: This new law authorizes the Director of Labor & Industries to issue a stop-work order against a general or specialty contractor or a general or specialty electrical contractor that has failed to secure payment of industrial insurance. The stop-work order may be served on a worksite by posting a copy in a conspicuous location, and is effective as to the employer's operations on that worksite. Upon issuance, business operations of the employer must cease immediately upon service. An employer who violates a stop-work order is subject to a \$1,000 penalty for each day not in compliance. The law goes into effect on July 26, 2009.

Transportation Bills - The legislature passed multiple bills that authorized or provided funding for public transportation projects, including the following:

- **Economic Stimulus Transportation Funding -** This new law authorizes the WSDOT to spend up to \$341.4 million in Federal Funding, and updated the State transportation budget to account for these funds.
- **SR 520 Corridor -** This bill authorizes tolls on the 520 floating bridge, replacement of the bridge, and other related projects on the SR 520 corridor.
- **Alaskan Way Viaduct Replacement Project -** This bill requires the Alaskan Way Viaduct Tunnel to be located under 1st Avenue in Seattle. The bill also caps the amount of State funding for the tunnel at \$2.4 billion, requires \$400 million in toll revenues, and expedites the environmental review and design process.