



FRAUD AND FALSE CLAIMS ACT INVESTIGATIONS AND LITIGATION

*Key Emerging Issues and Risk Management
Strategies for Government Contractors*

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Seth Locke is a Partner at Perkins Coie and Co-Chair of the firm's Government Contracts Practice. In his counsel to government contractors, Seth protects clients' rights and interests in a range of matters, including disputes with the Government, bid protests, and cost accounting claims. Among other areas, he advocates before the U.S. Court of Federal Claims, Boards of Contract Appeals, and the Government Accountability Office. Risk management and litigation prevention in the government contracting process are at the core of Seth's counsel to his clients, who include defense contractors, logistics contractors, global aerospace manufacturers, healthcare contractors, and several technology companies.

Ranked by Chambers for Government Contracts, Seth teaches at The George Washington University Law School, his alma mater, as a guest seminar lecturer on Board of Contract Appeals litigation, and he has also taught courses for Federal Publications Seminars and provides a range of continuing legal education presentations for clients.

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Alexander Canizares represents government contractors and other companies in litigation, investigations, and regulatory matters involving federal departments and agencies. As a former trial attorney with the U.S. Department of Justice's (DOJ) Civil Division, Alex draws on his experience serving as lead counsel in dozens of cases involving the federal government to advise companies in the aerospace and defense, technology, healthcare, professional services, and other industries in a range of areas, including False Claims Act matters, contract claims and disputes, bid protests, and counseling. Alex also represents clients in FAR/DFARS compliance, cybersecurity, data rights, M&A diligence, and issues related to emerging defense technology.

Alex speaks and writes frequently on government contracts issues and is an adjunct professor of *Performance of Government Contracts* at The George Washington University Law School. He is a co-chair of the ABA Public Contract Law Section's Contract Claims and Disputes Resolution Committee.

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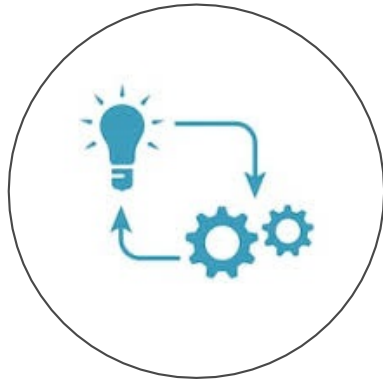
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Erin Shoudt is Associate General Counsel, Litigation, Government Investigations and Legal Operations at Pacific Architects and Engineers, LLC. She provides advice and guidance on state and federal litigation matters across the company's business units, including the False Claims Act, breach of contract, fraud and negligence actions. She also represents the company in responding to investigations and inquiries from various OIG offices and other government agencies, such as OSHA and the Department of Labor. She has extensive knowledge of ediscovery rules and procedures, manages the company's legal hold process and monitors the company's engagement of outside counsel and legal spend. Prior to joining PAE, she was Counsel at Dentons US, LLP where she focused primarily on health care and securities fraud litigation.

Agenda



**FALSE CLAIMS ACT –
KEY EMERGING AREAS**



**SCENARIOS AND RISK
MITIGATION STRATEGIES**



**FRAUD ISSUES IN
GOVERNMENT
CONTRACTS LITIGATION**



QUESTIONS?



FALSE CLAIM ACT – KEY EMERGING AREAS



FCA: What to Expect Under the Biden Administration

BIDEN ADMINISTRATION—DOJ

- Main Justice leadership changes
 - AG Garland
 - Appointments
 - U.S. Attorneys
- DOJ policies to watch:
 - Data analytics
 - Cooperation credit
 - DOJ FCA dismissals
 - Focus on individual liability
- Congress/oversight community
 - Sen. Grassley/FCA
 - Scrutiny of pandemic spending



FCA: What to Expect Under the Biden Administration

DOJ'S FY 2020 STATISTICS:

- \$2.2 billion in recoveries lowest since 2008
- Health care continues to drive FCA/*qui tam* activity
- Drop in procurement fraud settlements/judgments
- *Qui tam* suits continue to generate bulk of FCA recoveries; \$309M paid out to relators in FY 2020

BOUNCE-BACK LIKELY IN 2021

- October 2021 \$2.8B opioid settlement
- Increase in new *qui tam* cases (672 in FY 2020 up from 648 and 638 in FY 2019)
- Sharp increase in DOJ-initiated cases—250 in 2020 is largest non-*qui tam* cases in one year since 1994
- Highlights roles of agency referrals and statistical sampling

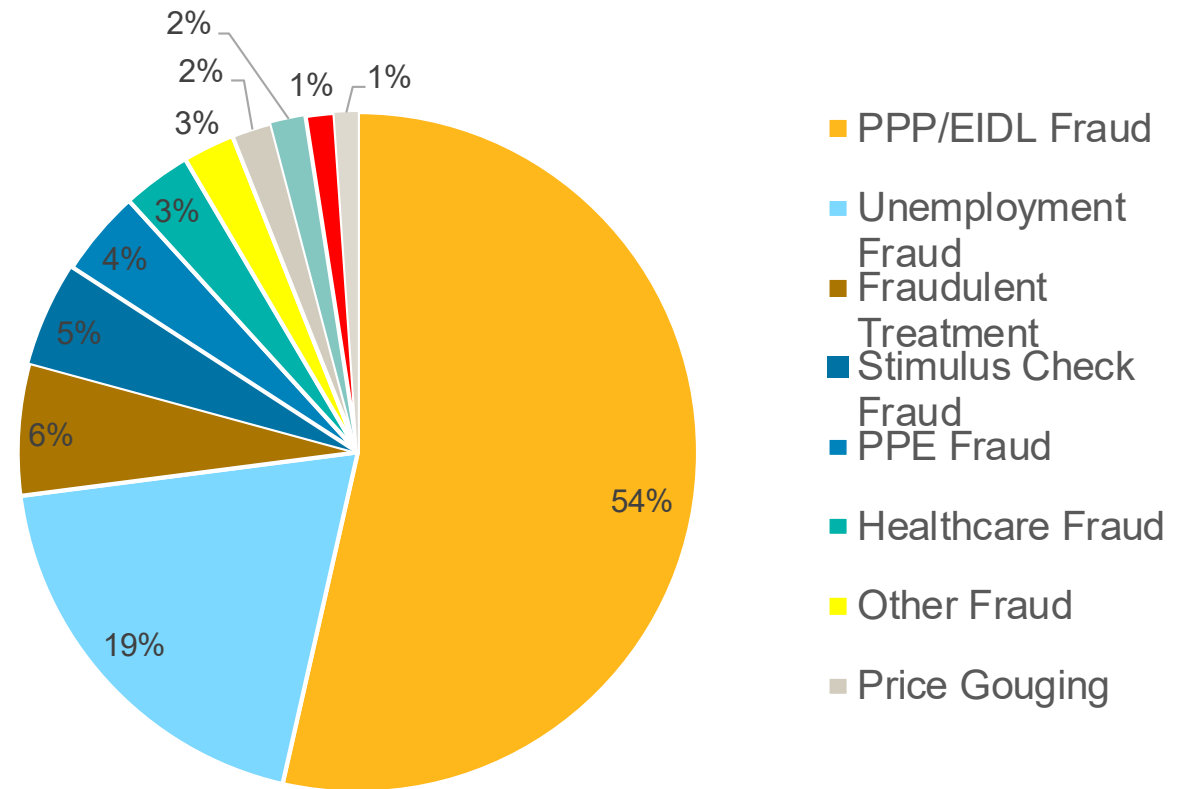
False Claims Act: Emerging Areas of Focus

A LOOK AHEAD

- Increased number of DOJ-initiated cases is likely to continue
- Health care areas of focus: opioids + electronic health records + elder care fraud
- Pandemic stimulus funding
 - Acting AAG Civil Division Brian Boynton: FCA “will play a significant role in the coming years as the government grapples with the consequences of this pandemic.”
- Cybersecurity
 - DAAG Granston (Dec. 2020): “[C]ybersecurity related fraud is another area where we could see enhanced False Claims Act activity.”
 - SolarWinds attack fueling administration’s focus on cybersecurity
- “Made in America” and Section 889 of FY 2019 NDAA
 - “Made in America” EO signals Biden Administration focus on Buy American Act

COVID-19 Fraud Enforcement Breakdown

- DOJ has brought fraud enforcement actions against over 300 defendants.
- **SlideBelts** First FCA settlement related to PPP in February 2021.
- Areas to watch in PPP cases:
 - Misuse of funds
 - Loan eligibility
 - Lenders
 - Private Equity exposure



Current as of April 12, 2021

False Claims Act—Key Case Law Developments

- **Post-Employment Retaliation Claims**
 - New split as to whether 3730(h) gives relators cause of action for retaliation based on post-employment conduct.
 - ***Felton*** (6th Cir. Mar. 2021): FCA protects former employees alleging post-termination retaliation.
 - ***Potts*** (10th Cir. 2018): FCA excludes post-employment retaliation
- **Falsity** – Circuit split over how to prove falsity.
 - ***Aseracare*** (11th Cir. 2019): to be false, terminal illness certifications must be “objectively false.”
 - ***Care Alternatives*** (3rd Cir. 2020) + ***Winter Gardens*** (9th Cir. 2020): objective falsity not required, in hospitalization cases.
- **Materiality**
 - *Escobar*’s materiality requirement will continue to drive litigation.
 - Discovery into government conduct and reaction to alleged fraud





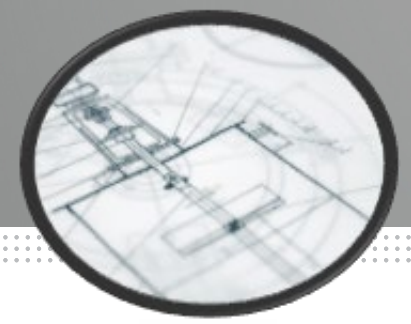
SCENARIOS AND RISK MITIGATION STRATEGIES

Managing Risks and Allegations of Fraud

5 SCENARIOS

- Subcontracting/Small Business Fraud
- Cybersecurity and the FCA
- Civil-Criminal Parallel Proceedings
- Settlement and Cost Management in FCA Cases
- Fraud Issues in Contract Disputes

Scenario 1: Subcontracting/Small Business Risks



SUBCONTRACTING PLAN

- XYZ preparing proposal on ID/IQ contract with DOE.
- Required to submit a subcontracting plan under newly revised FAR 52.219-9.
- Forward Construction certified in SAM as SDVOSB.
- XYZ submits a plan with Forward. Wins the contract.
- Receives demand from DOJ.

KEY CONSIDERATIONS

- Internal first steps
 - Internal communications
 - Document preservation and review
- Whether, when, and what to investigate.
- Responding to DOJ CIDs.

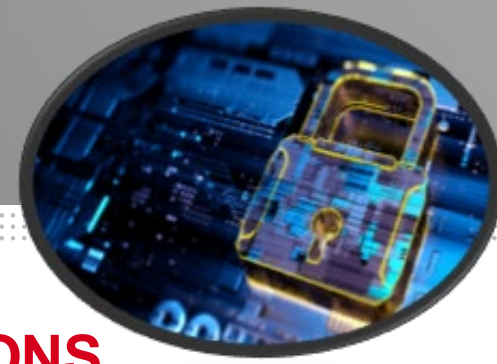
Subcontracting Plan and FCA Risks

- ***PCA Integrity Assocs.*** (D.D.C. 2020)
 - *Qui tam* alleged breach of subcontracting requirements
 - Purportedly small companies were allegedly “affiliated”
 - Court dismissed complaint for lack of particularity/Rule 9(b).
- ***Caddell Construction Co.*** (S.D.N.C. March 31, 2021)
 - *Qui tam* relator: JV subcontracting reports misrepresented woman-owned small business status.
 - Court held monthly progress payment requests were not claims.

Key Takeaways

- Representations re: size, socioeconomic status and subcontracting goals are areas of potential scrutiny.
- FAR 19.705-7 & 52.219-9
 - June 2020 changes
 - Addresses “good faith” compliance with subcontracting plans.
 - Cites examples of failure to make good faith effort.
- Importance of diligence on sub representations

Scenario 2: Cybersecurity



NIST SELF ASSESSMENT

- Defense Services, Inc. processes CDI. Army contract contains DFARS 252.252.-7012 cybersecurity clause.
- Limited cybersecurity controls.
- Pearson filed ethics hotline complaint and retaliation allegation last year.
- NIST SP 800-171 Basic Assessment score is initially 20 out of 110—company later submits 80 to DoD. Wins contract.
- Pearson quits. Threatens legal action.

KEY CONSIDERATIONS

- Managing whistleblower risks
- NIST SP 800-171 assessments/cybersecurity and FCA risks
 - Internal Controls
 - IT/Legal/Compliance/mgt.
 - Documentation (SSP etc.)
 - Representations to USG
 - Training and awareness

FCA and Cybersecurity



- **Cybersecurity will continue to create FCA exposure**
 - Evolving regulatory requirements (CMMC/DFARS).
 - NIST 800-171 certifications can generate FCA risks.
 - Large number of personnel involved in compliance.
 - Diligence of subs presents challenges for primes/higher-tier subs amid focus on supply chain vulnerabilities.
- **Key Issues to Watch:**
 - **CMMC.** Impact of third-party certification on FCA.
 - **Knowledge.** Objectively reasonable interpretations and ambiguity in cybersecurity rules and regulations.
 - **Materiality.** Application of *Escobar* materiality requirement to cybersecurity-related representations and statements.
 - **Aerojet Rocketdyne** E.D. Cal. 2019: denied MTD
 - **Adams** D.D.C. 2020: dismissed for lack of materiality

Scenario 3: Parallel Proceedings/Mischarging



CRIMINAL/CIVIL CASES

- ABC Corp. maintenance contracts to DoD and civilian agencies under GSA Schedule contract.
- Armstrong raises concerns about Vendor Inc.'s invoices for labor.
- Emails with ABC Contracts Manager raise questions.
- Grand jury subpoena re: investigation inflated labor hours.
- Then receives CID from DOJ.

KEY CONSIDERATIONS

- Criminal and Civil FCA proceedings
- Individual liability issues
- Bribery/kickback issues
- Suspension or debarment risks

Mandatory Disclosures and Protecting Privilege

- ***In re Fluor*** (4th Cir. 2020)

- Internal investigation of alleged conflict of interest re: employee. Employee terminated. Contractor made disclosure to OIG.
- District Court found waiver of A/C.
- 4th Cir. reversed; granted mandamus:
 - No waiver b/c no communication with an attorney disclosed.
 - Contractors “should not fear” waiver here. Otherwise companies would err on side of vague or incomplete disclosures.

- **Practice Tips**

- FAR 52.203-13 and credible evidence standard.
- Attention to characterizations of facts in voluntary or mandatory disclosures.
- Conclusions made with the advice of counsel are entitled to privilege.



FRAUD ISSUES IN GOVERNMENT CONTRACTS LITIGATION

Scenario 4: Settlement and Cost Management



FCA INVESTIGATION COSTS

Tolliver Group, 146 Fed. Cl. 475 (2020)

- *Qui tam* suit alleged Tolliver violated FCA by falsely certifying compliance with technical data package.
- DOJ declined to intervene. Tolliver obtained dismissal; relator appealed and 4th Circuit affirmed dismissal.
- Tolliver filed CDA claim against USG seeking reimbursement of legal fees incurred in successfully defending against *qui tam* relator.

KEY CONSIDERATIONS

- Responding to *qui tam* suits
- Managing costs (discovery)
- Insurance coverage
- Investigation timing issues
- Cost recovery
 - Attorney fees
 - Releases/closeout
 - Allowability and cost principles (FAR 31.205-47)

Scenario 5: Contract Claims and Fraud Risks



Square One Armoring Servs, COFC 16-cv-124C, Feb. 22, 2021

- Square One had ID/IQ contract with State Department for armored vehicles.
- Filed CDA suit seeking \$17.7M for claim alleging constructive changes that required additional armoring work.
- DOJ amended answer to assert counterclaims in common law fraud. Alleged SO repeatedly overcharged for vehicles and submitted fraudulent invoices causing USG to overpay.
- **Held:** Granted leave to amend answer.

- COFC's Tucker Act jurisdiction extends to counterclaims in fraud
- DOJ may pursue multiple claims
 - False Claims Act
 - Special Plea in Fraud
 - CDA anti-fraud provision
- Fed Circuit precedent limited
- DOJ counterclaims typically brought after discovery, resulting in litigation (Rule 15 and 9(b))
- Highlights risks tied to preparing and substantiating REAs/claims.

Fraud Allegations in Government Contracts Litigation

FRAUD ISSUES IN CLAIMS

Mountain Movers ASBCA Aug. 2020

- Denied Gov. MTD where CO withdrew final decision due to fraud issues.
- CO cannot unilaterally divest the board's jurisdiction over CDA claim.

Public Warehousing ASBCA 2014

- Dismissed case without prejudice due to pending criminal case.

Public Warehousing ASBCA 2017

- Stay for one year rather than dismiss.

KEY CONSIDERATIONS

- Due diligence on contract claim.
- Fraud allegations may invite Government motions to dismiss.
- Availability of stays to address pending investigations.
- Availability of other forum to address fraud and counterclaim.



QUESTIONS?

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