





# Is Your Company Doing Business with the Government?

## Tips You Can Use to Avoid Pitfalls and Maximize Business Opportunities

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# Introduction

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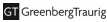

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## Recent State and Federal Capital/Spending

- Illinois recently passed a \$45B Capital Bill ("Rebuild Illinois"), which included \$33.2B for transportation projects over the next six years
- Recent federal budget agreement (not yet passed) calls for an increase in federal spending of \$320B – this amount includes increases for both domestic and military programs

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**Competitive Bidding: Essential Considerations and “Do’s and Don’ts”**

- Planning for bidding/offering process
- Responding to the Invitation for Bids (“IFB”) or Request for Proposals (“RFP”)
- Post-submission/pre-award contacts with agency
- Bid protests
- Litigation

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**Planning for Bidding/Offering Process**

- Engage existing or set up procurement team
- Consider retention/engagement of outside counsel
- Analyze prior IFBs/RFPs and awards
  - Exclusionary/limiting specifications
  - Legal requirements/issues
- Determine/assess relevant process, rules, regulations, including timing for bid protests

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**Responding to the Invitation for Bids or Request for Proposals**

- Technical compliance
- Legal compliance: deadlines, legal terms, form of response
- Requirements for being a responsible bidder/offeree
- Requirements for responsive bid/offer
- Submission of questions
- Potential protest regarding content of RFP
- Quality control: final bid/offer review to avoid errors

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**Post-Submission/Pre-award  
Contacts with Agency**

- Notification of rejection of bid/offer by agency
- Questions and requests for clarification by agency
- Request for bid/offer revisions by agency
- Request for best and final offer ("BAFO") by agency
- Clarification/correction of bid/offer by contractor

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**Filing Bid Protests**

- Comprehensive FOIA request
- Mobilize technical and legal team
- Was winning bidder/offeror responsible and responsive?
- Was the process fair (e.g., apples to apples)?
- Practical considerations: costs vs. benefits

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**Defending Bid Protests**

- Agency is responsible for responding to protest
- Contractor has no ability to defend as of right but may opt to do so
- Need to request copy of protest
- Practical considerations: costs vs. benefits

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Litigation

- Right to appeal?
- Timing
- IFB vs. RFP
- #2 bidder/offeror or lower?
- Cost
- Mootness
- Relationship with agency

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Post-Award Considerations

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Contract Negotiations: Government vs.  
Private Commercial Transactions

- Limited ability to negotiate
  - Terms may be "Set In Stone" in RFP (and proposal)
  - Offerors generally bound to terms absent expectations
  - Agencies generally conservative regarding risk

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### Contract Process

- Driven by the Agency
- Contract documents are almost always drafted by Agency
- Execution of documents may be very fast or very slow – each has its own implications

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### Implementation and Contract Performance

- Project Management Approach
  - Consider applicable law for each facet of the project (contract, labor & employment, regulatory, etc.)
  - Develop a plan to work with each stakeholder on each facet

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### Disputes

- Analyze issue(s), considerations include:
  - Background/events leading to the dispute
  - Identify source of dispute
  - Consequences for Contractor
- Identify goals and limitations of Contractor and Agency
- Consider dispute resolution process outlined in contract

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**False Claims Act – State and Federal**

- Illinois False Claims Act, 740 ILCS 175
- Federal False Claims Act, 31 U.S.C. 3729(a)(1)
- There are some notable differences

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**Exposure – Damages and Penalties**

- Current federal penalty range: \$10,957 to \$21,916
- State penalty range: Same as federal (and adjusts when the federal penalty range adjusts)
- Treble damages
- Attorneys' fees

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### What is a False Claim? Theories of “Falsity”

- Factual Falsity – false statement of fact about the product or service billed
  - Claimed good/service not actually provided
  - Claim stated 50 widgets when 25 were provided
  - Upcoding
- Legal Falsity – factually accurate claim but misrepresents compliant with underlying statute, regulation or applicable contract through a certification

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### Types of “Certifications”

- Express Certification
  - Claim expressly certifies compliance with ancillary legal requirements, either with the claim for payment or at some other point
- Implied Certification
  - Claim “implicitly” certifies that company has complied with relevant legal requirements each time it submits invoice to the government, even if there is no express certification of compliance

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### U.S. Supreme Court Decision of *Universal Health Services v. U.S. Ex Rel. Escobar*

- The issue: whether the “implied certification” theory of legal falsity under the FCA is viable
- Key part of the holding: The implied false certification theory can be a basis for FCA liability when a defendant submitting a claim makes specific representations about the goods or services provided, but fails to disclose noncompliance with **material** statutory, regulatory, or contractual requirements that make those representations misleading with respect to those goods or services

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## Developments Since Escobar

- Understand that circuits are still working through how to apply Escobar
- Discussion of some examples

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## Recent Supreme Court Decision Impacting FCA Statute of Limitations

- Cochise Consultancy, Inc. v. U.S. ex rel. Hunt
- An explanation of the 6-year/10-year dynamic in the False Claims Act
- Essentially: if the government discovers a fraud the day it occurred, then it has six years to bring that lawsuit; if a whistleblower (relator) discovers the fraud on the day it occurred and the government does not discover it, then the whistleblower could have as many as 10 years to bring the suit

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## DOJ Issued New Policy for False Claims Act Cases in May 2019

- Formal guidance regarding the manner the Department of Justice awards credit to defendants who cooperate in a False Claims Act investigation
- A copy of the updated policy is in your packet
- Discussion of key components of the policy
- Compare to State of Illinois approach to false claims

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**Important Note**

This presentation provides general information as to selected issues. It is not legal advice and should not be used as a substitute for review of your specific situation with legal counsel.

Efforts have been made to provide accurate information; however, we advise you to seek counsel and advice from a qualified lawyer regarding legal matters. Legal obligations may vary according to the facts and circumstances, as well as the jurisdiction.

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# Speaker Biographies

## Gabriel Aizenberg

Shareholder  
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Gabi is a commercial litigator representing corporate and individual plaintiffs and defendants in complex proceedings in federal, bankruptcy and state courts and arbitration forums. He focuses his practice on litigation areas such as fraud, contractual disputes, business torts, breach of fiduciary duty, claims of violations of non-competition and non-solicitation agreements, trade secret misappropriation, and government contracts. Gabi also litigates bid protests and related Freedom of Information Act disputes and advises clients on issues relating to the award and performance of state and local government contracts, responses to competitive bid requests and requests for proposals, terms of contracts, and compliance with M/WBE and DBE business requirements. Most recently, he has assisted clients in protests related to contracts awarded by agencies of the State of Illinois.

## Matthew J. Cannon

Shareholder  
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CannonM@gtlaw.com

Matt has two decades of criminal and civil litigation experience. His experience includes serving as lead trial counsel in numerous federal jury trials, including multi-week-long fraud trials. Prior to working for Greenberg Traurig, Matt served as a federal prosecutor and was the Lead Prosecutor for the LOGCAP Working Group – a group that prosecuted warzone corruption matters related to the multibillion-dollar LOGCAP III and IV prime contracts awarded to private contractors to provide logistical support to the United States Army in relation to the military conflicts in Iraq, Kuwait, and Afghanistan. The LOGCAP Working Group had numerous prosecutions and investigations involving bribes, kickbacks, Major Fraud Act, and civil False Claims Act matters, including qui tams. Matt has experience handling False Claims Act matters for and against the government, including handling matters related to defense contractors, health care providers, and financial institutions. He has been listed in The Best Lawyers in America for qui tam law in 2015-2019.

## Frida S. Ramos

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Frida is General Counsel for Applus Technologies, Inc., a subsidiary of Applus, a global leader in testing, inspection and certification services based in Spain and operating in more than 70 countries worldwide. Applus Technologies provides vehicle inspection and technology solutions to government and private entities throughout the United States. In her role, Frida manages all aspects of the company's legal function. This includes advising and supporting executives and business leaders in navigating the legal and regulatory landscape of government contracting across various jurisdictions.



## **4-4.112 – Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters**

### **Introduction**

These guidelines identify factors that will be considered and the credit that will be provided by Department of Justice attorneys when entities or individuals voluntarily self-disclose misconduct that could serve as the basis for False Claims Act (FCA) liability and/or administrative remedies, take other steps to cooperate with FCA investigations and settlements, or take adequate and effective remedial measures.

In addition to the factors discussed below, the Department of Justice, in its discretion, takes into account many considerations when evaluating the appropriate resolution of FCA matters, including the nature and seriousness of the violation, the scope of the violation, the extent of any damages, the defendant's history of recidivism, the harm or risk of harm from the violation, whether the United States' interests will be adequately served by a compromise, the ability of a wrongdoer to satisfy an eventual judgment, and litigation risks presented if the matter proceeds to trial. Some of these considerations may reduce the credit available to an entity or individual, or in egregious circumstances, may render the entity or individual ineligible for any credit. The discussion in these guidelines does not limit Department attorneys' discretion to consider all appropriate factors in determining whether and on what basis to resolve an FCA matter.

### **Disclosure, Cooperation, and Remedial Action**

*Voluntary Disclosure.* The Department has a strong interest in incentivizing companies and individuals that discover false claims to voluntarily disclose them to the government. Voluntary self-disclosure of such misconduct benefits the government by revealing, and enabling the government to make itself whole from, previously unknown false claims and fraud, and may also enable the government to preserve and gather evidence that would otherwise be lost. Entities or individuals that make proactive, timely, and voluntary self-disclosure to the Department about misconduct will receive credit during the resolution of a FCA case. During the course of an internal investigation into the government's concerns, moreover, entities may discover additional misconduct going beyond the scope of the known concerns, and the voluntary self-disclosure of such additional misconduct will qualify the entity for credit.

*Other Forms of Cooperation.* In addition to voluntarily self-disclosing misconduct, an individual or entity can earn credit by taking steps to cooperate with an ongoing government investigation. A comprehensive list of activities that constitute such cooperation is not feasible because of the diverse factual and legal circumstances involved in FCA investigations. However, the following measures illustrate the type of activities by entities or individuals under investigation that will be taken into account. These measures are not mandatory and an entity or individual does not have to satisfy all of them to qualify for some cooperation credit.

- i. Identifying individuals substantially involved in or responsible for the misconduct;
- ii. Disclosing relevant facts and identifying opportunities for the government to obtain evidence relevant to the government's investigation that is not in the possession of the entity or individual or not otherwise known to the government;
- iii. Preserving, collecting, and disclosing relevant documents and information relating to their provenance beyond existing business practices or legal requirements;



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- iv. Identifying individuals who are aware of relevant information or conduct, including an entity's operations, policies, and procedures;
- v. Making available for meetings, interviews, examinations, or depositions an entity's officers and employees who possess relevant information;
- vi. Disclosing facts relevant to the government's investigation gathered during the entity's independent investigation (not to include information subject to attorney-client privilege or work product protection), including attribution of facts to specific sources rather than a general narrative of facts, and providing timely updates on the organization's internal investigation into the government's concerns, including rolling disclosures of relevant information;
- vii. Providing facts relevant to potential misconduct by third-party entities and third-party individuals;
- viii. Providing information in native format, and facilitating review and evaluation of that information if it requires special or proprietary technologies so that the information can be evaluated;
- ix. Admitting liability or accepting responsibility for the wrongdoing or relevant conduct; and
- x. Assisting in the determination or recovery of the losses caused by the organization's misconduct.

In considering the value of any voluntary disclosure or additional cooperation, government counsel will consider the following factors: (1) the timeliness and voluntariness of the assistance; (2) the truthfulness, completeness, and reliability of any information or testimony provided; (3) the nature and extent of the assistance; and (4) the significance and usefulness of the cooperation to the government.

*Remedial Measures.* Department attorneys will also consider whether an entity has taken appropriate remedial actions in response to the FCA violation. Such remedial actions may include:

- i. demonstrating a thorough analysis of the cause of the underlying conduct and, where appropriate, remediation to address the root cause;
- ii. implementing or improving an effective compliance program designed to ensure the misconduct or similar problem does not occur again;<sup>1</sup>
- iii. appropriately disciplining or replacing those identified by the entity as responsible for the misconduct either through direct participation or failure in oversight, as well as those with supervisory authority over the area where the misconduct occurred; and
- iv. any additional steps demonstrating recognition of the seriousness of the entity's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

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<sup>1</sup> In addition to considering a company's decision to implement or improve a compliance program after an alleged violation, the Department may take into account the prior existence of a compliance program in evaluating a defendant's liability under the False Claims Act. For example, the Department may consider the nature and effectiveness of such a compliance program in evaluating whether any violation of law was committed knowingly. In making such an evaluation, the criteria to be considered may include those set forth in the Department of Justice Manual at § 9-28.800.



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### **Credit for Disclosure, Cooperation, and Remediation**

An entity or individual that seeks to earn maximum credit in a False Claims Act matter generally should undertake a timely self-disclosure that includes identifying all individuals substantially involved in or responsible for the misconduct, provide full cooperation with the government's investigation, and take remedial steps designed to prevent and detect similar wrongdoing in the future. However, even if an entity or individual does not qualify for maximum credit, they may receive partial credit if they have meaningfully assisted the government's investigation by engaging in conduct qualifying for cooperation credit. *See* Department of Justice Manual, § 4-3.100(3).

Where the conduct of the entity or individual warrants credit, the Department has discretion in FCA cases to reward such credit. Most often, this discretion will be exercised by reducing the penalties or damages multiple sought by the Department.

The maximum credit that a defendant may earn may not exceed an amount that would result in the government receiving less than full compensation for the losses caused by the defendant's misconduct (including the government's damages, lost interest, costs of investigation, and relator share).

The Department may consider, in appropriate circumstances, additional avenues that would permit an entity or individual to claim credit in FCA cases, including:

- Notifying a relevant agency about an entity's or individual's disclosure, other cooperation, or remediation, so that the agency in its discretion may consider such factors in evaluating its administrative options, such as suspension, debarment, exclusion, or civil monetary penalty decisions;
- Publicly acknowledging the entity's or individual's disclosure, other cooperation, or remediation; and
- Assisting the entity or individual in resolving qui tam litigation with a relator or relators.

The foregoing options are ways in which the Department may in its discretion credit disclosure, other cooperation, or remediation; they are not entitlements that arise whenever these factors are present. As noted above, the value of credit awarded to an entity or individual will vary depending on the facts and circumstances of each case.

### **Other Considerations**

Nothing in these guidelines changes any preexisting obligation an entity or individual has under the law to report to or cooperate with the federal government.<sup>2</sup>

Cooperation does not include disclosure of information required by law, or merely responding to a subpoena, investigative demand, or other compulsory process for information. However, cooperation credit may be awarded where an entity or individual meaningfully assists the

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<sup>2</sup> For example, the Federal Acquisition Regulation requires contractors to self-disclose credible evidence of certain violations of law and significant overpayments in connection with the award or performance of a federal contract or subcontract. Contractor Business Ethics Compliance Program and Disclosure Requirements, 48 C.F.R. pts. 2, 3, 9, 42 and 52.



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government's investigation by, for example, disclosing additional relevant documents or information, or otherwise proactively aiding the government in understanding the context or significance of the documents or information produced. Cooperation also does not include the disclosure of information that is under an imminent threat of discovery or investigation.

The Department will not award any credit to an entity or individual that conceals involvement in the misconduct by members of senior management or the board of directors, or to an entity or individual that otherwise demonstrates a lack of good faith to the government during the course of its investigation. *See* Department of Justice Manual, § 4-3.100(3).

Entities and individuals are entitled to assert their legal rights and, unless required by law, do not have to cooperate with a government investigation. Nothing about the guidelines herein changes those rights. Entities and individuals remain free to reject these options and forgo any potential credit consistent with the law.

Eligibility for credit for voluntary disclosure or other forms of cooperation is not predicated on waiver of the attorney-client privilege or work product protection, and none of the guidelines herein require such a waiver.

The measures set forth in these guidelines are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any party.

[new May 2019]