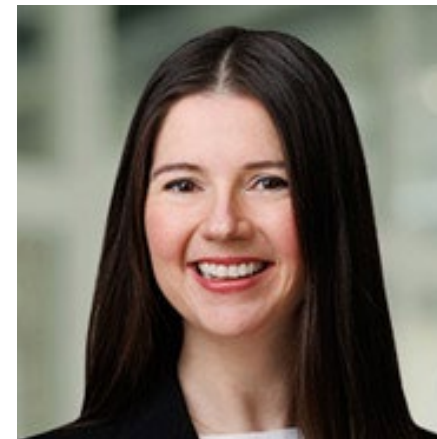
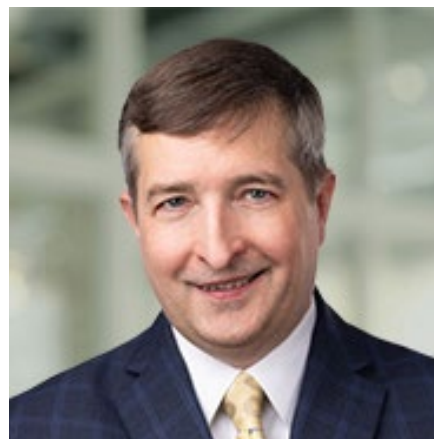
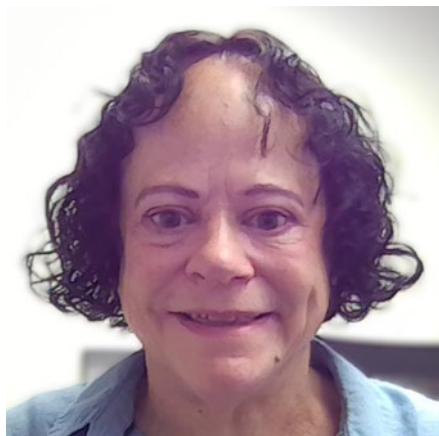


# With Great Power Comes Great Responsibility: Counsel Perspectives on Guiding Clients and Managing False Claims Act (FCA) Risk

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# Panelists



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# False Claims Act – Quick Primer

# 2025 Civil False Claims Act Statistics

- Record \$6.8 billion in settlements and judgments for FY 2025
- \$85 billion in recoveries since 1986
- 1297 new relator (qui tam) suits (cases brought by whistleblowers) filed in FY 2025 – almost 25 new cases per week
- More than \$330 million paid to whistleblowers in FY 2025



# False Claims Act, 31 U.S.C. § 3729 et seq.

- Imposes liability for the following:
  - **False Claim:** Knowingly submitting a false claim to the government or causing another to do so
  - **False Statement:** Knowingly making, using, or causing to be made or used a false record/statement material to a false claim
  - **Reverse False Claim:** Knowingly concealing or decreasing an obligation to pay money to government
  - **Conspiracy** to commit # 1, 2, or 3 above
- Applies when even \$1.00 of federal money is used to fund the project. *U.S. v. Custer Battles*, 562 F.3d 295 (4th Cir. 2009).
- “A defendant who induces a victim to enter into a transaction under materially false pretenses may be convicted of federal fraud even if the defendant did not seek to cause the victim economic loss.” *Kousisis v. United States*, 605 U.S. 114 (2025)

# False Claims Act – Key Elements

- **Falsity** – claim or statement must be false
  - Factual falsity where claim misrepresents the goods or services provided
  - Legal falsity through fraudulent inducement or implied certification theory
- **Knowledge** – defendant must know claim or statement is false:
  - Three paths to knowledge:
    - Has actual knowledge of falsity
    - Acts in deliberate ignorance of truth/falsity
    - Acts in reckless disregard of truth/falsity
  - Subjective standard looks to what defendant believed at the time of conduct, *U.S. ex rel. Schutte v. SuperValu Inc.* (2023)
- **Materiality** – falsehood must be material to the government's decision to pay
  - Rigorous and demanding standard, *Universal Health Services, Inc. v. U.S. ex rel. Escobar* (2016)

# False Claims Act – What's the Risk

- **Treble Damages** – 3x the amount of damages sustained by the government (could be full value of contract)
- **Civil Penalties**
  - Current penalty range: \$14,308 to \$28,619 for each false claim or statement
  - Could assess penalty for every invoice submitted on project
- **Other Potential Risks**
  - Costs of litigation
  - Forfeiture of legitimate claims
  - Suspension/debarment from federal contracting
- **Criminal False Claims** – another potential avenue of enforcement, carries fines, potential restitution, and jail time



# FCA Risks and Considerations in DOE Contracting

- Mandatory Disclosure Rule, FAR 52.203-13
- Subcontractor Liability
- Liability for Subcontractor Violations

# OIG Mandatory Reporting

- FAR 52.203-13, Contractor Code of Business Ethics and Conduct
  - (b)(3)(i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed—
    - (A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
    - (B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733)
- FCA is the only civil statute on the mandatory disclosure list

# Mandatory OIG Reporting and Subcontractors – False Claims Act versus Fraud

- Most subcontractor acts which could constitute an FCA violation could also potentially be criminal fraud, with the Criminal False Claims Act (18 U.S.C. § 287) and False Statements (18 U.S.C. § 1001) being the closest to civil FCA
- **BUT the FCA has a much lower mental state requirement**– Civil FCA expressly does not require specific intent to defraud and includes deliberate indifference and reckless disregard
- In contrast, False Statements statute requires knowing and willful conduct and Criminal False Claims requires “knowing” conduct.

# Subcontractor Liability under the FCA

## Statutory basis for subcontractor liability:

- FCA expressly includes indirect claims

31 U.S.C. § 3729(a)(1)

IN GENERAL.—Subject to paragraph (2), any person who—

- A. knowingly presents, **or causes to be presented**, a false or fraudulent claim for payment or approval;

. . . .

is liable to the United States Government for a civil penalty . . . plus 3 times the amount of damages

# Subcontractor Liability under the FCA

- Definition of “claim” includes indirect claims:

## 31 U.S.C. § 3729(b)(2) – “Claim”

- A. means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—
  - i. is presented to an officer, employee, or agent of the United States; or
  - ii. is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest, and if the United States Government—
    - I. provides or has provided any portion of the money or property requested or demanded; or
    - II. will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded



# Potential Sources of Subcontractor Liability

- Foreign funding, affiliations, or talent programs in research
- Timecard fraud
- Failure to meet contract specifications
- False small business certification
- Inadequate cybersecurity controls
- Many more

# Prime Contractor FCA Liability for Subcontractor FCA Violations

- Prime's liability is not automatic
- FCA mental state requirement:

31 U.S.C. § 3729(b)(1)

the terms "knowing" and "knowingly"-

- A. mean that a person, with respect to information-
  - i. has actual knowledge of the information;
  - ii. acts in deliberate ignorance of the truth or falsity of the information; or
  - iii. acts in reckless disregard of the truth or falsity of the information

# Prime's Mental State Requirement, Continued

- Can be liable under the FCA for reckless disregard or deliberate ignorance, **but mere negligence of any kind, including gross negligence is not enough to create FCA liability:**
- U.S. ex rel. Farmer v. City of Houston, 524 F.3d 333 (5<sup>th</sup> Cir. 2008):  
*“These . . . factors would suggest to the jury that even if the reimbursement forms submitted by the third-party contractors in fact contained false statements, it would have been relatively difficult for the defendants to ascertain that fact. Granted, defendants might have been negligent in failing to identify the overcharges, but the jury would conclude that the presence of these additional factors tends to mitigate against finding that defendants acted knowingly.”*

# Caveat – Ames and Lawrence Berkeley National Labs and the FCA

- The FCA applies to “persons” (31 U.S.C. §3729(a)(1)).
- Ames Lab is managed and operated by Iowa State University which is an instrumentality of the State of Iowa
- Lawrence Berkeley Lab is managed and operated by the Regents of the University of California
- States are not “persons” for the purposes of qui tam FCA suits: Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 529 U.S. 765 (2000)
- State may be “persons” for purposes of FCA suits brought by United States

# Strategy to Avoid Liability for Subcontractor Violations

- **Prime must defend against “deliberate indifference” or “reckless disregard” of the truth or falsity of the Subcontractor’s claims**
- Strong internal controls
  - Policies/procedures requiring prepayment review of subcontractor invoices by staff knowledgeable of the Subcontractor’s work requirements as well as staff familiar with DOE allowability requirements
  - Subcontractor compliance with applicable regulations and statutes also critical to potential FCA liability
- Follow up investigation on invoices or with red flags
- Audits of invoices post payment

# Division of Damages and Penalties

- FCA liability can apply to both Prime contractor and Subcontractor
- Damages: Prime and Subcontractor are jointly and severally liable for entire government loss. *United States v. Cooperative Grain and Supply, Co.*, 476 F2d 47 (8<sup>th</sup> Cir. 1973)
- Civil Penalties/ Forfeitures: Each party penalized for each claim that party submitted. *United States v. Bornstein*, 423 U.S. 303 (1976)

# Allowability of Prime Contractor Claim for Subcontractor FCA Violations

- Under FAR Part 31, to be allowable, contractor expenses must be:
  - Reasonable, and
  - Allocable

# Recent Developments in FCA Enforcement

# Revised Interpretation of Federal Anti-Discrimination Laws

- Trump Administration, including EEOC, has taken the position that affirmative action programs, and some diversity, equity, and inclusion efforts are illegal discrimination in violation of Civil Rights Act of 1964
- Examples of illegal DEI, when based on race, sex, or other protected characteristic:
  - Targeted recruiting and hiring efforts
  - Employee training and mentorship
  - Employee Resource Groups that limit membership
- DOJ Civil Rights Fraud Initiative – will pursue FCA charges against institutions that violate federal anti-discrimination laws

# IBM Settlement

- DOJ announced \$17 million FCA settlement with IBM Corporation April 10
  - \$8.2 million in restitution to government
- Alleged liability based on
  - IBM's failure to comply with anti-discrimination laws while performing federal contracts
  - IBM allocating costs for DEI practices to federal contracts and seeking reimbursement
- Alleged conduct dating back to 2019
  - Compensation tied to achieving demographic targets
  - Taking protected characteristics into account in hiring and recruiting, including by altering interview eligibility criteria based on race, color, or sex
  - Developing race and sex demographic goals and making employment decisions accordingly
  - Limiting some training and mentorship opportunities based on race, color, or sex
- Settlement agreement references FAR 52.222-26 - denounced by EO 14173

# Executive Order 14173

- “Ending Illegal Discrimination and Restoring Merit-Based Opportunity” signed January 21, 2025
- Revoked long-standing Executive Order 11246, “Equal Employment Opportunity” (1965)
- Federal Affirmative Action Plans, 41 CFR § 60-2, no longer required or permitted
- New contract term requiring certification by contractors and grant recipients that they do not operate illegal DEI programs
  - Could be incorporated into SAM.gov certifications
- New contract term requiring contractors and grant recipients to agree that compliance with Federal anti-discrimination laws is “material” under the FCA

# DOE Implementation – DOE-H-2089

## COMPLIANCE WITH FEDERAL ANTI-DISCRIMINATION LAWS (APR 2025)

(a) *Definition.* As used in this clause—

Program promoting diversity, equity, and inclusion means a program whose purpose is to promote preferences based on race, color, religion, sex, or national origins, such as in training or hiring.

(b) *Compliance.* The Contractor shall comply with all applicable Federal anti-discrimination laws. These laws apply whether or not the company is a Government contractor. Compliance with applicable Federal anti-discrimination laws is material to eligibility for and payment under this contract for purposes of 31 U.S.C. 3729(b)(4).

(c) *Certification.* By requesting payment under this award, the contractor certifies that, to the best of its knowledge and belief, it does not operate programs promoting diversity, equity, and inclusion that violate any applicable Federal anti-discrimination laws.

(End of Clause)

# March 26, 2026 Executive Order

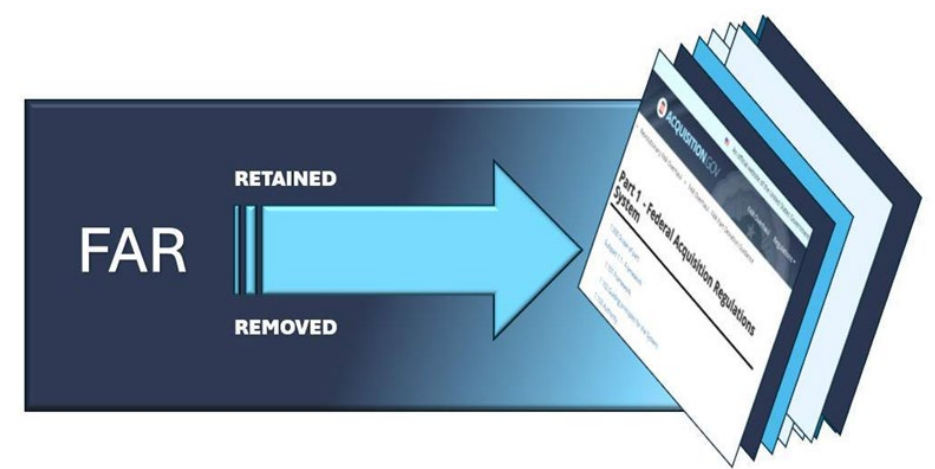
- “Addressing DEI Discrimination by Federal Contractors”
- Requires agencies to include prescribed DEI clause in all federal contracts, subcontracts, and contract-like instruments
- Prohibits racial discrimination in subcontracting and in allocation of contractors’ resources
- Deems violation of clause “material” under the FCA
- Directs DOJ to
  - Consider prosecuting violations of clause under FCA
  - Prioritize investigating qui tam FCA complaints of procurement fraud

“In connection with the performance of work under this contract, [the contractor/appropriate party (contractor)] agrees as follows:

1. The contractor will not engage in any racially discriminatory DEI activities, as defined in section 2 of the Executive Order of March 26, 2026 (Addressing DEI Discrimination by Federal Contractors);
2. The contractor will furnish all information and reports, including providing access to books, records, and accounts, as required by the contracting agency pursuant to the Executive Order of March 26, 2026 (Addressing DEI Discrimination by Federal Contractors), for purposes of ascertaining compliance with this clause;
3. In the event of the contractor’s or a subcontractor’s noncompliance with this clause, this contract may be canceled, terminated, or suspended in whole or in part, and the contractor or subcontractor may be declared ineligible for further Government contracts;
4. The contractor will report any subcontractor’s known or reasonably knowable conduct that may violate this clause to the contracting department or agency and take any appropriate remedial actions directed by the contracting department or agency;
5. The contractor will inform the contracting department or agency if a subcontractor sues the contractor and the suit puts at issue, in any way, the validity of this clause; and
6. The contractor recognizes that compliance with the requirements of this clause are material to the Government’s payment decisions for purposes of section 3729(b)(4) of title 31, United States Code (False Claims Act).”

# Revolutionary FAR Overhaul

- Goals:
  - Remove many non-statutory requirements
  - Remove 1000+ “shalls” and musts”
  - Enable commercial-like, agile procurements
  - Increase competition
- Two phases of implementation
  - Phase 1: FAR Council issues deviations that must be adopted by each agency to take effect [COMPLETE]
  - Phase 2: Formal notice & comment rulemaking [YET TO BEGIN]
    - 41 U.S.C. § 1707 procedures
    - Will incorporate public feedback on deviations



# DOE Implementation

- Adopted RFO deviations for Parts 1, 6, 10, 11, 13, 14, 34, 37, 41, 42, 43, 47, 49, 53
- Parallel “Project Velocity” – Deregulation initiative seeking to rewrite safety, construction, and oversight rules
  - Series of 80+ DOE orders meant to speed up contracting process
  - Construction approval limits raised
  - Fewer approvals required for construction administration
- Increased FCA risk?
  - More discretion placed on contractors due to fewer clear requirements and direct approvals
  - More tenuous working relationship with DOE contracting personnel
  - Variance across projects could increase contract compliance ambiguity

# Cybersecurity and Controlled Unclassified Information

- Government-wide focus on protecting government data
- New rules on controlled unclassified information (CUI):
  - Proposed FAR CUI rule
  - DOD's CMMC rollout
  - GSA's "Protecting Controlled Unclassified Information (CUI) in Nonfederal Systems and Organizations Process"
- DOJ Civil Cyber Fraud Initiative – targets contractors who fail to comply with contractual cybersecurity requirements
  - Nine cybersecurity-related FCA settlements in FY 2025 alone (\$52 mil)

# DOE Implementation

- DOE Order 205.1D, Department of Energy Cybersecurity Program (2024)
- DOE Order 471.7, Controlled Unclassified Information (2022)

# Key Takeaways

- Refresh Code of Business Ethics & Conduct, equal employment opportunity policies and practices, and compliance training for federal project personnel
- Monitor subcontractors' compliance with key contractual requirements and meaningfully review invoices
- Closely review new contracts, modifications, and SAM.gov certifications for inclusion of new anti-discrimination clause/certifications
- Communicate in writing with contracting officer regarding ambiguous contract requirements