

# Washington nixes state false claims act

■ *The law could have cost contractors because it would have carried with it a host of unintended consequences, such as the potential for more lawsuits.*

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For the second consecutive year the Washington Legislature has decided against a state-based false claims statute.



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This leaves fraud prevention on public works projects to the federal False Claims Act, a comprehensive statutory scheme that has received recent criticism for becoming too broad. The criticism stems from revisions Congress made to the act last May, making the federal law equally applicable to fraud at the state and local levels, regardless of whether the false claim was submitted to the federal government or whether the false claim sought payment directly from federal funds.

Washington's proposed state law would have done little to improve on this broadened federal scheme. But, it would have required diverting Washington resources toward investigating and prosecuting claims that the federal government already has authority to pursue on its own. Further, the state law carried with it a host of unintended consequences, especially the potential to drive up costs as contractors priced in the risk of defending against abusive lawsuits filed under the guise of the state false claims statute.

Considering the costs of implementing a state law that did little more than ape an existing federal scheme, Washington legislators made a shrewd decision in yielding to the federal

government's superior ability to fight the same fraud that the redundant state law took aim at.

## False Claims Act 2.0

Amongst the federal government's arsenal of anti-fraud statutes, the False Claims Act is unique in that it allows private citizens to initiate lawsuits in the government's name, allege losses suffered by the government as a result of fraud, then share in the government's recovery of any ill-gotten gains.

This can be lucrative for the private plaintiff, who can command up to a 30 percent cut of the total recovery, plus payment of the plaintiff's attorney fees.

As an example, in December, two former University of Phoenix employees brought suit against the school for using federal funds for kickbacks to recruiters sending students to the online university. When the university agreed to an out-of-court settlement, the school's two former employees walked out of the settlement negotiations \$19 million richer.

In May of 2009, Congress re-tooled the False Claims Act to provide a comprehensive means for rooting out fraud across the nation. The act now broadly applies when any federal funds are used. Because the vast majority of state and local public works projects typically include some ingredient of federal money, the revised act effectively regulates federal, state and local public works projects alike.

Furthermore, contractors are now liable under federal law for simply presenting a false claim for payment, or for making a false statement that would otherwise influence the decision to pay the false claim. Gone from the federal law is the requirement that the false claim be presented to a federal officer or

employee; and gone is the requirement that a false statement be made with the intent to directly defraud the federal government.

## Public works in Washington

The value of a false claims statute is that it provides incentive for private parties to come forth with valuable information that the government would not have otherwise known. With the broadening of the federal False Claims Act in May, that incentive is provided for nearly every public project in the state.

Now unmistakable in its wide application, the act governs Washington public works contractors, subcontractors, and material and equipment suppliers alike, regardless of whether these businesses are dealing with each other, a local government official, a state agency or the federal government.

As Washington looks forward to an era of unprecedented infrastructure projects — from the expansion of the 520 bridge to the Alaskan Way Viaduct replacement to continued expansion of light rail and mass transit — the presence of federal funding will mean the presence of the federal False Claims Act.

Defeat of a state false claims act should be greeted as welcome news by Washington contractors. But there is always the potential that local governments will not exhibit the same restraint as the state Legislature and will instead enact false claims acts of their own, such as those seen in major cities like New York, Chicago and Miami.

Washington contractors must beware that their businesses remain subject to false claim suits — although thanks to the state Legislature, the contractors will not suffer the double threat of state and federal liability.

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