Environmental Fraud by Government Contractors: A New Application of the False Claims Act

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I. INTRODUCTION

Few government scandals command greater public attention than allegations of wasted tax dollars. In the 1980s, reports of extravagant Pentagon contracts to purchase hammers and coffee makers inspired heightened public scrutiny of the Reagan administration's defense budget.¹ To protect public support for defense spending, then Attorney General Edwin Meese III proposed a campaign to fight government contract fraud.² In 1986, Congress passed a key element of Meese's program: amendments to strengthen a venerable anti-fraud statute called the False Claims Act (FCA).³

The FCA prohibits false or fraudulent claims for the payment of federal monies.⁴ The Act empowers the government to sue contractors for three times the value of a false claim plus fines and court costs.

¹ In a 1984 interview, President Reagan expressed his determination to expose defense contract fraud: “All these figures about $500 hammers and wrenches and so forth, it’s all true. But nobody has pointed out that we’re providing those figures. This is what has been going on, and this Defense Department is finding [fraud] and correcting it.” Interview with Tom Winter & Joseph Baldacchino, Jr., of Human Events, PAPERS OF PRESIDENT REAGAN: 1984, BOOK II 1891, 1892 (Dec. 6, 1984).

² See infra note 46 and accompanying text.


In addition, the FCA includes a *qui tam* provision that allows private citizens to sue on behalf of the government and to collect a substantial bounty. Traditionally, the FCA has been used against defense contractors. Yet the FCA embraces fraudulent claims involving any government-funded program. In theory, the FCA can be used to sue government contractors that overcharge the government for cleaning up hazardous waste sites.

This Comment explores potential applications of the FCA to combat "environmental fraud." As used in this Comment, environmental fraud describes two major practices: (1) fraud in the procurement or performance of contracts to provide environmental services; and (2) fraud in other contracts arising from violations of environmental laws or regulations. Section II presents a brief history of the FCA. Section III examines the modern FCA, analyzing the elements of a false claim, the *qui tam* provisions that authorize private prosecution, and defenses to an FCA action. Section IV examines the significance of *qui tam* actions.
federal contract law in establishing FCA violations. This section also considers the environmental obligations of government contractors. Finally, Section V considers potential applications of the FCA to combat environmental fraud in government-funded programs.

II. HISTORY OF THE FCA

A. The Civilian War Against Defense Fraud

Enacted during the Civil War, the FCA was intended to root out rampant fraud by the contractors that supplied the Union Army. The legislative history suggests congressional concern focused on corruption in the military procurement process. While the FCA targeted defense contractors, the statute’s language was broad enough to embrace any fraud that resulted in financial loss to the federal government. According to an early opinion by the United States District Court for the District of Oregon, Congress enacted the FCA “to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side.”

President Lincoln recognized that the federal government could not adequately police powerful contractors. Lincoln thus insisted that the FCA include a qui tam provision to reward informers who assist the government in prosecuting fraud. Lincoln and his congressional supporters believed that informers would not come forward without

14 Note, Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions, 67 NW. U. L. REV. 446, 453–54 (1972) [hereinafter Tool of the Private Litigant]. Senator Howard, the sponsor of the bill, spoke to the urgency of fraud prevention:

[T]he bill has been prepared at the urgent solicitation of the officers who are connected with the administration of the War Department and the Treasury Department. The country, as we know, has been full of complaints reflecting the frauds and corruptions practiced in obtaining pay from the Government during the present war . . . further legislation is pressingly necessary to prevent this great evil.

Id. at 453 n.32 (quoting CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863)).
16 United States v. Griswold, 24 F. 361, 366 (D. Or. 1885) (denying government motion to satisfy judgement because motion would deprive qui tam relator of his share of the judgment still owed by defendant).
17 See Callahan & Dworkin, supra note 13, at 302 & n.112; see also France, supra note 11, at 47.
18 Callahan and Dworkin, supra note 13, at 302 n.112; France, supra note 11, at 47.
a powerful financial lure. The original FCA guaranteed the informer one-half of the damages collected. Because the Act allowed for double damages, the government would still be fully compensated for its loss. In addition, the qui tam relator was entitled to recover reasonable expenses and costs from the defendant.

B. The 1943 Amendments: Restraining the Relator

After the Civil War, the FCA fell into relative disuse. However, the Act was rediscovered in the 1940s—an era of significant expansion in federal spending. In the pivotal case of United States ex rel. Marcus v. Hess, the Supreme Court heard an appeal by electrical contractors that defrauded the Public Works Administration through collusive bidding. Following a criminal indictment against Hess, Marcus filed a qui tam action and received one-half of a $315,000 judgment. Despite the fact that Marcus may not have provided any new evidence against the defendant, the Supreme Court held that the FCA did not preclude civil suits based on information from a prior indictment.

Following the Marcus decision, Congress debated sweeping amendments to restrict qui tam relators. Legislators questioned the wisdom of allowing private citizens to profit from the prosecution of crimes known to the government. While the House of Representatives attempted to repeal qui tam, the Senate supported “the retention of qui tam suits, with restrictions.” Congress ultimately barred qui tam suits that utilize information possessed by the government,
even in cases where the relator discovered the alleged fraud. In addition, Congress instituted a notice requirement that compelled *qui tam* plaintiffs to advise the government of their claims and to disclose significant evidence. The amendments allowed the United States to join *qui tam* suits and to control the litigation strategy.

The 1943 amendments also reduced relator awards. If the government successfully prosecuted an action begun by a relator, the amendments authorized the court to award the relator a "reasonable" award not to exceed one-tenth of the judgment. If the government did not intervene, the amendments authorized the court to award a "reasonable" sum not to exceed one-quarter of the judgment. In either case, the court had the discretion to provide little or no compensation to the relator.

The 1943 amendments to the FCA resulted in a virtual cessation of *qui tam* lawsuits. According to one commentator, the amendments occasioned an "ice age for FCA *qui tam*" that would last more than four decades. Potential relators feared the government's power to intervene in *qui tam* lawsuits, to control the litigation strategy, and to reduce the relator's financial stake in any judgment.

Another reason for the *qui tam* ice age was strict judicial enforcement of the FCA's jurisdictional bar against private actions arising from information in the government's possession. This jurisdictional bar applied to cases in which the government took no action. The bar even applied to cases where the prospective relator was the original source of the government's information.

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30 Id.
32 In cases where the government initiated proceedings, the 1943 amendments provided that litigation "is conducted only by the Government." 31 U.S.C. § 3730(b)(3) (1982) (amended 1986). This section further provided that "[t]he Government is not bound by an act of the person bringing the action." Id.
35 Id. § 3730(c)(1), (2) (1982) (amended 1986). Both subsections provided that the relator "may receive an amount the court decides is reasonable." Id.
36 Park, supra note 5, at 1066.
37 Id.
38 See supra text accompanying note 30.
40 United States ex rel. Wisconsin v. Dean, 729 F.2d 1100, 1104, 1106 (7th Cir. 1984) (forbidding Wisconsin to act as *qui tam* relator because Federal law required states to disclose evidence of
C. The 1986 Amendments: Revitalizing the Relator

In the early 1980s, government officials began to express renewed concern over the rise in fraud in both defense and human services spending. In 1984, the Department of Defense conducted 2,311 fraud investigations—a thirty percent increase compared to 1982 investigations.41 Testifying before a House of Representatives subcommittee in 1985, Department of Defense Inspector General Joseph Sherick reported that nine of the ten largest defense contractors were under investigation.42 Although instances of military procurement fraud dominated the headlines, the problem of rising fraud plagued other federal programs as well. The Department of Health and Human Services, for example, reported a three-fold increase in entitlement fraud cases over a three-year period.43

Government prosecutors were ill-equipped to handle this exploding case load. For example, while the Department of Justice Civil Division received 2,850 fraud referrals in fiscal year 1984, the division obtained only seventy settlements or judgments.44 Officials at the Department of Justice (DOJ) began to view government prosecution of contract fraud as a losing battle.

The DOJ first proposed amendments to strengthen the FCA in 1979.45 However, the DOJ proposal did not garner significant support until Attorney General Edwin Meese III presented the proposal in 1985 as part of his Anti-Fraud Enforcement Package.46 The Reagan administration viewed the FCA amendments as a rare political opportunity to promote the often conflicting goals of more defense and less government.

In August, 1985, Senator Charles Grassley of Iowa introduced the False Claims Reform Act, which incorporated most of the DOJ proposal.47 Echoing the rhetoric of Civil War legislators, Grassley and his supporters resolved to punish unscrupulous contractors that swindle

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42 Id.
43 Id.
44 In Fiscal Year 1985, the statistics were equally alarming: 2,734 fraud referrals and only 54 settlements or judgments. S. REP. No. 345, supra note 27, at 4 n.10, reprinted in 1986 U.S.C.C.A.N. at 5269.
46 Id.
47 Id.
the government and the taxpayer.\textsuperscript{48} The amendments expanded the FCA definition of fraud\textsuperscript{49} and increased both statutory fines\textsuperscript{50} and damages.\textsuperscript{51} In addition, the amendments attempted to promote \textit{qui tam} suits by liberalizing the requirements for standing\textsuperscript{52} and enhancing relator awards.\textsuperscript{53}

The False Claims Reform Act passed Congress unanimously in October, 1986.\textsuperscript{54} The amendments had an almost immediate impact on \textit{qui tam} prosecutions and awards. While the DOJ received about six \textit{qui tam} cases a year before 1986, the DOJ recorded 100 cases in the first ten months of 1989.\textsuperscript{55} In Fiscal Year 1985, the United States recovered only $27 million under the FCA; in Fiscal Year 1989, recoveries skyrocketed to $225 million.\textsuperscript{56}

Most significant recoveries under the amended FCA have involved defense contracts. These recoveries, however, have inspired a small army of FCA “bounty hunters” who are applying the statute to combat fraud beyond the military-industrial complex. Recently, the FCA has been invoked to challenge fraud in Medicare billings,\textsuperscript{57} federally funded research at universities,\textsuperscript{58} and Small Business Administration loans.\textsuperscript{59} The promise of large FCA recoveries has spawned a growing \textit{qui tam} bar.\textsuperscript{60} The growth of this bar has been fueled by extensive media coverage of FCA lawsuits.\textsuperscript{61}

\textsuperscript{48} See Michael S. McGarry, \textit{Winning the War on Procurement Fraud: Victory at What Price?}, 26 COLUM. J.L. & SOC. PROBS. 249, 257 n.56 (1993) (citing Congress Puts More Teeth in Anti-Fraud Law, CONG. Q. ALMANAC 86 (Mary W. Cohn ed. 1986)). Senator Grassley described the passage of the FCA amendments as “one more sign that the American people have had enough of those who exploit taxpayers and erode national security for their own profit.” \textit{Id.}

\textsuperscript{49} See infra notes 67–77 and accompanying text.

\textsuperscript{50} See infra notes 106–11 and accompanying text.

\textsuperscript{51} See infra notes 112–17 and accompanying text.

\textsuperscript{52} See infra notes 163–67 and accompanying text.

\textsuperscript{53} See infra notes 173–87 and accompanying text.

\textsuperscript{54} France, \textit{supra} note 11, at 46.

\textsuperscript{55} Id. at 48.

\textsuperscript{56} Park, \textit{supra} note 5, at 1067 n.42 (citing James Dever, \textit{Double Jeopardy, False Claims, and United States v. Halper}, 20 PUB. CONT. L.J. 56, 63 n.20 (1990)).


\textsuperscript{58} See, e.g., United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr., 961 F.2d 46, 48, 49 (4th Cir. 1992) (affirming right of \textit{qui tam} relator to sue state university that submitted false data in order to obtain federal grants).

\textsuperscript{59} See, e.g., United States v. Davis, 809 F.2d 1509, 1511 (11th Cir. 1987) (applying the FCA against a borrower who improperly used a loan from the Small Business Administration to remodel home and make payments on boat).

\textsuperscript{60} See France, \textit{supra} note 11, at 46 (“[E]ver more attorneys are attracted by the huge sums of money potentially recoverable and the idea of serving the taxpayers at the same time.”).

\textsuperscript{61} Most coverage of FCA litigation has appeared in law journals and newspapers. Callahan &
III. THE FCA OF 1986

A. Elements of a False Claim

There are three central elements of an FCA action: (1) a claim for payment by the United States government; (2) that is false or fraudulent; and (3) that is knowingly presented. The FCA encompasses claims in a wide variety of payment contexts, including contracts for military procurement, construction, or other services; benefit payments for health care and welfare; government loans; and housing subsidies.

1. Claims Against the United States

The FCA defines a "claim" as any request for money or property by a contractor, grantee, or other recipient. This expansive definition applies to any transaction where the United States "provides any portion of the money or property." In addition to programs directly funded by the federal government, the FCA embraces state, local, and private programs that receive federal reimbursement.

2. False or Fraudulent Claims

The FCA outlines seven different practices that constitute a false claim. The most common is the presentation of a "false or fraudulent

Dworkin, supra note 13, at 317 & nn. 175–76. The broadcast media, however, has recently offered sensationalistic coverage of FCA settlements. One television journalist introduced a story on the FCA as follows: "How would you like to become a multimillionaire, spend the rest of your life playing golf or going fishing? Swindle the government? No, help the government catch some people who did." Minutes: Getting Rich (CBS television broadcast, Jan. 16, 1994) (statement of Lesley Stahl) (transcript on file with the Boston College Environmental Affairs Law Review).


31 U.S.C. § 3729(c) (1988). The FCA defines a claim as follows: "Any request or demand, whether under contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Id.

Id.

See, e.g., United States v. O'Connell, 890 F.2d 563, 564–65 (1st Cir. 1989) (finding FCA violation in fraudulent payment request submitted to state agency that disburses federal development grants).

31 U.S.C § 3729(a) (1988). This section extends FCA liability to any individual who:
claim for [government] payment or approval." It is important to note that the government need not incur an actual financial loss to litigate a false claim for payment. Indeed, the FCA views the submission of "false records or statements" which support a payment request as a false claim.

The FCA neglects to define the phrase "false or fraudulent claim" or to provide illustrative examples. The statute embraces acts of error, oversight, and mismanagement as well as acts of deliberate fraud. Thus, a false claim can be prosecuted for the claim's mere "falseness" without any evidence of fraudulent conduct. The distinct-
tion between false and fraudulent claims reflects the "FCA's requirement that a false claim be 'knowing' but that 'no specific intent to defraud is required.'"73

In addition to outlawing false or fraudulent payment requests, the FCA prohibits related forms of fraud. For example, the FCA prohibits conspiracies to obtain payment or approval of a false claim.74 The Act also forbids fraud in the management and disposition of federal property and money that causes the government to receive less value.75 Finally, the 1986 amendments establish a new category of false claims known as "reverse false claims,"76 which are fraudulent attempts to avoid paying an obligation to the government.77

In amending the FCA definition of false claims, Congress intended that the statute sweep as broadly as possible.78 Consequently, the FCA does not provide specific examples of false claims. Since 1986, FCA plaintiffs have attacked several common practices which are discussed below.

a. Claims for Services that Are Improperly Provided

Perhaps the simplest form of federal contract fraud is the request for government funds to reimburse services that were not properly delivered. Many health care providers, for example, attempt to charge the government for medical procedures that are not provided79 or not needed.80 The government can use the FCA to recoup any expended funds and to collect civil penalties against the defendant. In Medicaid cases, courts have concluded that every medical procedure that is falsely billed represents a separate false claim.81 Thus, FCA plaintiffs

73 Gitlin, supra note 10, at 15 (quoting 31 U.S.C. § 3729(a), (b)); see United States v. DiBona, 614 F. Supp. 40, 43–44 (E.D. Pa. 1984) (noting that the phrase "false or fraudulent" uses disjunctive form of "or" because the FCA does not require intent to defraud). For a more complete discussion of scienter, see infra notes 89–96 and accompanying text.
77 31 U.S.C. § 3729(a)(7). The concept of reverse false claims does not apply to income tax refunds, which are expressly exempted by the statute. See 31 U.S.C. § 3729(e) ("This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954.")
78 The FCA "was intended to reach all types of fraud, without qualification, that might result in financial loss to the government." S. REP. No. 345, supra note 27, at 19, reprinted in 1986 U.S.C.C.A.N. at 5284 (quoting United States v. Neifert-White Co., 390 U.S. 228 (1968)).
80 United States v. Campbell, 845 F.2d 1374, 1381–82 (6th Cir.) (holding that the provision of unnecessary services to a Medicare patient constitutes a false claim because billing form certifies that services were "medically indicated and necessary"), cert. denied, 488 U.S. 908 (1988).
81 Diamond, 657 F. Supp. at 1206.
can seek multiple civil penalties for each fraudulent claim or report submitted to the government.

b. Product Defects and Product Substitutions

Contractors that provide defective or inferior products can be held liable for fraud under the FCA. When contractors knowingly violate contract specifications, the contractors submit false claims for payment.\textsuperscript{82} For example, in Faulk v. United States, the United States Court of Appeals for the Fifth Circuit concluded that a dairy producer committed fraud under the FCA in providing the Air Force with recombined milk rather than fresh milk, which the contract specified.\textsuperscript{83} In United States v. Aerodex,\textsuperscript{84} the Fifth Circuit similarly affirmed an FCA judgment against a defendant that did not provide the specific model of ballbearings that the Navy requested.\textsuperscript{85}

c. False Pricing

When the government solicits bids for specialized services that few contractors can provide, contractors often inflate prices.\textsuperscript{86} The FCA has been used to combat such “false pricing” schemes by government contractors. The Truth in Negotiations Act (TINA) obliges contractors to certify that cost estimates are current, accurate, and complete.\textsuperscript{87} An FCA suit for defective pricing must allege that a contractor knowingly submitted noncurrent, inaccurate, or incomplete pricing data.\textsuperscript{88}

3. The Knowledge Requirement

Before the 1986 amendments, the FCA required that the government establish a defendant’s “actual knowledge” of fraud. In applying this ambiguous standard, some courts asserted that the government must demonstrate a defendant’s specific intent to submit a false claim.\textsuperscript{89} Congress feared that such readings of the FCA enabled corporate

\textsuperscript{82} See infra notes 282–90 and accompanying text.

\textsuperscript{83} 198 F.2d 169, 170, 172 (5th Cir. 1952).

\textsuperscript{84} 469 F.2d 1003 (5th Cir. 1972).

\textsuperscript{85} Id. at 1006, 1008.

\textsuperscript{86} See David O. Stewart, Recent Developments in the False Claims Act, 20 PUB. CONT. L.J. 386, 393 (1991).

\textsuperscript{87} 10 U.S.C. § 2306a (1988); see infra text accompanying notes 245–49.

\textsuperscript{88} See infra text accompanying notes 248–52.

\textsuperscript{89} See, e.g., United States v. Aerodex, Inc., 469 F.2d 1003, 1007 (5th Cir. 1972) (finding specific intent to defraud where contractor altered deficient ball bearings to create appearance that bearings met contract specifications).
leaders to avoid liability by distancing themselves from the management of government contracts. Legislators argued that the amended FCA should reach the "ostrich-like' conduct which can occur in large corporations."  

The 1986 amendments clarify the scienter requirement of the FCA by delineating three mental states that constitute knowledge of a false claim: (1) actual knowledge; (2) deliberate ignorance of truth or falsity; or (3) reckless disregard of truth or falsity. The FCA declares that proof of "specific intent to defraud" is never required. According to the legislative history, "constructive knowledge" may be sufficient to create FCA liability when a responsible official fails to ascertain the accuracy of a claim. Thus, contractors owe the government a duty of "limited inquiry" when submitting claims for payment. Under this standard, employers can be found liable for false claims known to their employees.

4. Burden of Proof

Before the 1986 amendments, the FCA did not establish the government's burden of proof. Consequently, courts were left to infer the intent of Congress. While some courts favored a low standard of "pre-
ponderance of the evidence," other courts favored the higher standard of "clear and convincing evidence." In the 1986 amendments, Congress expressed its preference for the preponderance standard.

5. Damages

Before 1986, FCA defendants were liable for civil penalties of $2,000 per false claim and double damages. In amending the FCA, Congress enlarged both civil penalties and the formula for calculating damages. The sponsors hoped that substantially higher fines and damages would deter contract fraud. In addition to expanding damages, Congress increased *qui tam* awards to encourage greater private enforcement of the FCA. It should be noted that *qui tam* awards are calculated as a percentage of the entire FCA judgment. In other words, the percentage is applied to both civil penalties and civil damages.

a. Civil Penalties

The FCA provides for civil penalties between $5,000 and $10,000 for each violation of the Act. According to the legislative history, these "forfeiture" penalties are "automatic and mandatory for each claim which is found to be false." Thus, civil penalties can become quite sizeable in complex transactions. For example, if a contractor submitted one hundred false invoices, civil penalties could reach $1,000,000.

To collect forfeiture penalties, the government need not prove that it suffered any financial loss. Most courts view forfeiture penalties

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100 31 U.S.C. § 3731(c) (1988) ("In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.").
102 See infra notes 106–11 and accompanying text.
103 See infra notes 112–17 and accompanying text.
104 Callahan & Dworkin, supra note 13, at 303–04.
105 See infra notes 176–77 and accompanying text.
109 See, e.g., Fleming v. United States, 336 F.2d 475, 480 (10th Cir. 1964) (holding that government may recover forfeiture penalty without proof of damage).
as punitive rather than compensatory.\textsuperscript{110} Nevertheless, some defendants have successfully challenged forfeiture penalties that are grossly disproportionate to the government's loss.\textsuperscript{111}

b. \textit{Civil Damages}

In addition to forfeiture penalties, the FCA provides for damages of three times the amount of the government's financial loss arising from a false claim.\textsuperscript{112} These damages may only be recovered upon the government's demonstration of an actual financial loss.\textsuperscript{113} Additionally, the FCA provides for lower damages—two times the government's loss—in cases where the defendant promptly provides the government with all information pertaining to the violation and cooperates fully with the government's investigation.\textsuperscript{114}

The FCA does not provide any specific method for calculating the government's damages.\textsuperscript{115} Thus, the computation of damages varies in different contexts. In a case of collusive bidding, for example, damages typically consist of the difference between the actual contract price and the estimated fair market value of the contract if the bidding process had been open and competitive.\textsuperscript{116} In a case of overpriced goods, damages represent the difference between the actual contract price and the reasonable value of the goods delivered.\textsuperscript{117}

c. \textit{Consequential Damages}

In addition to seeking "actual" damages, some plaintiffs have sought "consequential damages" for repair costs and other expenses incurred by the government. In \textit{Marcus v. Hess}, the Supreme Court concluded that the government was sufficiently compensated for its costs through the double damages provision of the pre-1986 statute.\textsuperscript{118} In \textit{United States v. Aerodex}, the United States Court of Appeals for the Fifth Circuit rejected consequential damages awarded by the district court.\textsuperscript{119}

\textsuperscript{110} See \textit{In re Commonwealth Cos.}, Inc., 913 F.2d 518, 526 (8th Cir. 1990).
\textsuperscript{111} See \textit{infra} notes 201-06 and accompanying text.
\textsuperscript{114} 31 U.S.C. § 3729(a).
\textsuperscript{115} \textit{United States v. Killough}, 848 F.2d 1523, 1532 (11th Cir. 1988) (dictum) (stating that the FCA provides "no set formula" to calculate actual damages).
\textsuperscript{116} \textit{Id.} at 1532.
\textsuperscript{117} \textit{United States v. Aerodex}, Inc., 469 F.2d 1003, 1010-11 (5th Cir. 1972).
\textsuperscript{118} \textit{Marcus v. Hess}, 317 U.S. 537, 551-52 (1943).
\textsuperscript{119} See \textit{Aerodex}, 469 F.2d at 1011.
In Aerodex, the Navy expended $27,000 for defective bearings, which it replaced at a cost of over $160,000.\textsuperscript{120} The court ruled that the government’s costs were fully compensated by double damages of $54,000—twice the contract price of $27,000.\textsuperscript{121}

Although the Aerodex court firmly rejected consequential damages, other courts have awarded “repair” expenses in similar cases. In United States v. Ekelman & Associates, Inc., the defendants falsified applications for loans guaranteed by the Veterans Administration or insured by the Federal Housing Authority.\textsuperscript{122} After the loans went into default, the government expended funds to maintain the property until the property’s resale.\textsuperscript{123} In Ekelman, the United States Court of Appeals for the Sixth Circuit awarded the government not only its losses due to the default but also its maintenance and repair costs after foreclosure.\textsuperscript{124} According to one commentator, post-Aerodex cases like Ekelman have “muddied the waters as to the recoverability of consequential damages.”\textsuperscript{125}

6. Statute of Limitations

Prior to 1986, false claims actions were required to be brought within six years of the alleged violation.\textsuperscript{126} In applying this standard, courts did not exempt lawsuits that were time-barred due to a delay in discovering the violation.\textsuperscript{127} The 1986 amendments remedied this situation by allowing plaintiffs to file suit before the later of two deadlines: (1) six years after the violation; or (2) three years after the violation is known, or should have been known, provided that not more than ten years have elapsed since the violation.\textsuperscript{128} The purpose

\textsuperscript{120} Id. at 1006.

\textsuperscript{121} Id. at 1011. Although FCA liability was limited to $60,000 ($54,000 in double damages plus $6,000 in forfeiture penalties), the court required Aerodex to pay $160,000 for breach of warranty. Id. at 1013.

\textsuperscript{122} 532 F.2d 545, 547 (6th Cir. 1976).

\textsuperscript{123} Id. at 547, 551.

\textsuperscript{124} See id. In awarding these damages, the court stated that Aerodex “is distinguishable on its facts and not inconsistent with our views on this issue.” Id. at 551.

\textsuperscript{125} Michael Waldman, Damage Control: A Defendant's Approach to the Damage and Penalty Provisions of the Civil False Claims Act, 21 PUB. CONT. L.J. 131, 138 (1992). Waldman speculates that the Ekelman court “may have intended to distinguish between 'incidental damages' such as the care of rejected goods and 'consequential damages' such as those present in Aerodex.” Id. at 139 n.32.


\textsuperscript{127} See United States v. Borin, 209 F.2d 145, 147–48 (5th Cir.) (barring FCA action even though prosecution occurred within six years of government’s discovery of fraud), cert. denied, 348 U.S. 821 (1954).

\textsuperscript{128} 31 U.S.C. § 3731(b) (1988).
of this flexible standard is to discourage defendants from concealing evidence of wrongdoing.\textsuperscript{129}

7. Retroactivity of the 1986 Amendments

As noted above, the 1986 amendments strengthened the FCA by broadening liability, increasing damages, and extending the statute of limitations. Consequently, many plaintiffs have sought to apply the amended statute retroactively to violations that occurred before October, 1986.\textsuperscript{130}

Until recently, the question of FCA retroactivity has remained unclear. Although courts have generally supported the principle that new or amended legislation applies only prospectively,\textsuperscript{131} the Supreme Court created exceptions for cases on appeal.\textsuperscript{132} As a result, many lower courts applied the FCA retroactively in the late 1980s.\textsuperscript{133}

In \textit{United States v. Murphy}, the United States Court of Appeals for the Sixth Circuit opposed retroactive application of the FCA.\textsuperscript{134} The Sixth Circuit rejected retroactive application of the FCA's amended definition of knowledge because the new definition would expand the defendant's liability for past violations.\textsuperscript{135} Since the \textit{Murphy} decision, most district courts have rejected retroactive application of the FCA.\textsuperscript{136} Judicial opposition to FCA retroactivity is likely to continue unless Congress amends the FCA.\textsuperscript{137}

\begin{itemize}
\item \textsuperscript{132} \textit{Thorpe V. Housing Auth. of City of Durham}, 393 U.S. 268, 281 (1969); see \textit{Bradley V. School Bd. of City of Richmond}, 416 U.S. 696, 711 (1974) (holding that statutes apply retroactively unless such applications would create a "manifest injustice").
\item \textsuperscript{133} \textit{Stewart}, supra note 86, at 387 n.2.
\item \textsuperscript{134} 937 F.2d 1032, 1038 (6th Cir. 1991).
\item \textsuperscript{135} The \textit{Murphy} decision echoed the Supreme Court's reasoning in \textit{Bowen v. Georgetown Univ. Hosp.}, 488 U.S. 204, 206 (1988). In \textit{Bowen}, the Court questioned the authority of federal agencies to issue retroactive regulations. The Court held that statutes "will not be construed to have retroactive effect unless their language requires this result." \textit{Id.} at 208.
\item \textsuperscript{136} \textit{Metzger & Goldbaum}, supra note 130, at 697; see, e.g., \textit{United States v. Target Rock Corp.}, No. CV-90-4414, 1992 WL 157677, at *5 (E.D.N.Y. June 30, 1992) (stating that FCA applies prospectively because 1986 amendments "are silent as to their retroactive application"). \textit{But see} \textit{United States v. Stocker}, 796 F. Supp. 531, 535 (E.D. Wis. 1992) (approving retroactive application of increased damages because damages "are primarily remedial and not punitive").
\item \textsuperscript{137} In the 103d Congress, Senator Grassley proposed legislation to apply the 1986 amendments retroactively. \textit{Metzger & Goldbaum}, supra note 130, at 701.
\end{itemize}
B. Qui Tam Provisions of the FCA

Civil violations of the FCA can be prosecuted by the Attorney General\(^{138}\) or by private persons,\(^{139}\) who are also known as *qui tam* relators. The relator files an FCA civil action “in the name of the government.”\(^{140}\) The relator must serve the government with a copy of the complaint and must disclose “all material evidence and information.”\(^{141}\) The complaint may not be served on the defendant until the complaint is filed *in camera* for at least sixty days and until the court so orders.\(^{142}\) The government may petition the court to extend the review period upon a showing of good cause.\(^{143}\) Before the review period expires, the government may elect to take over the action.\(^{144}\) If the government declines to take over the action, the relator assumes “the right to conduct the action.”\(^{145}\)

1. Government Intervention

The government does not frequently assert its right to take over *qui tam* civil actions. The DOJ has elected to intervene in less than one-quarter of all *qui tam* actions.\(^{146}\) When the government does intervene, the government acquires “primary responsibility for prosecuting the action.”\(^{147}\)

Although the government is authorized to lead the prosecution of *qui tam* actions in which it intervenes, the relator may still participate.\(^{148}\) As a party to a government action, the relator may engage in pre-trial discovery and may call and cross-examine witnesses.\(^{149}\) The government possesses two tools, however, to control the participation

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\(^{138}\) 31 U.S.C. § 3730(a) (1988) (“The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action against the person.”).


\(^{140}\) Id.

\(^{141}\) Id. § 3730(b)(2).

\(^{142}\) Id. In advocating for *in camera* review of *qui tam* complaints, the DOJ argued that *qui tam* suits could “tip off targets of ongoing criminal investigations.” S. REP No. 345, supra note 27, at 16, reprinted in 1986 U.S.C.C.A.N. at 5281.

\(^{143}\) 31 U.S.C. § 3730(b)(3) (1988). The government may not seek extensions of the review period because of a backlog of other FCA cases. See France, supra note 11, at 47.


\(^{145}\) Id. § 3730(b)(4)(B).

\(^{146}\) Vogel, supra note 62, at 21.


\(^{148}\) Id. Even if the government proceeds with an action, the relator “shall have the right to continue as a party to the action.” Id.

\(^{149}\) See id. § 3730(c)(2)(C), (c)(4).

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of the relator. First, the government may petition the court to stay discovery by the relator if such discovery interferes with the government's investigation or prosecution. Second, the government may petition the court to restrict the relator's participation in the litigation. For example, the court may limit the relator's opportunity to call, question, or cross-examine witnesses.

The government's power to control the litigation strategy is not absolute, however. For example, the court must provide a hearing if the relator objects to a government decision to dismiss or settle a false claims action. In *Gravitt v. General Electric*, relator John Gravitt opposed a $234,000 settlement agreement, which was negotiated by General Electric and the DOJ. The United States District Court for the District of Southern Ohio agreed with the relator that the settlement was inadequate in light of the defendant's potential liability under the FCA for defense contract overcharges. General Electric eventually settled for $3.5 million, and John Gravitt received $770,000.

2. Private Civil Actions

If the government chooses not to prosecute an action initiated by a *qui tam* relator, the relator may prosecute the action. The government can request copies of all pleadings and deposition transcripts. Moreover, the government may petition to take over the action at a later date for good cause. Once a relator commences a *qui tam* suit, however, no other private person may file a related action.
a. The Original Source Requirement

*Qui tam* relators must surmount two jurisdictional hurdles to initiate a false claims action. First, relators may not file an FCA complaint arising from allegations that the government is already litigating civilly or administratively. In other words, relators lack jurisdiction to sue whenever the government has taken legal action through the FCA or a related remedy. Second, relators may not prosecute an FCA complaint that is based on publicly disclosed allegations unless the relator is an “original source” of the allegations. The FCA defines an original source as an “individual who has direct and independent knowledge of the information on which the allegations are based.”

The original source language of the 1986 amendments relaxes the FCA’s longstanding ban on *qui tam* suits that utilize information possessed by the government. Before 1986, the FCA barred private actions even when the government possessed evidence of fraud provided by a relator. Under the new standard, relators who are the original source of allegations may always file suit unless the DOJ has already commenced legal action.

b. Government Employees

The FCA does not explicitly address whether government employees can qualify as *qui tam* plaintiffs. As government workers enjoy unique access to evidence of contract fraud, it is not surprising that courts have often confronted this question. Courts have held that the FCA does not specifically prohibit government employees from filing *qui tam* actions. In one recent case, *United States ex rel. Fine*

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163 Id. § 3730(e)(3) (“In no event may a person bring an action . . . which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.”).

164 Id. § 3730(e)(4)(A) ("No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.").

Although courts cannot hear *qui tam* suits based on publicly disclosed information, the would-be relator may still qualify for some compensation if the government successfully prosecutes the case. See infra notes 179–82 and accompanying text.


166 France, *supra* note 11, at 47.

167 Id. Although “original” relators can attempt to sue based on allegations that are known to the government, the Attorney General is free to take over these actions. See *supra* text accompanying notes 141, 144.


169 Vogel, *supra* note 62, at 21 (“Congress specifically enumerated the classes of persons who could not bring *qui tam* suits and did not include government employees among such classes.”).
v. Chevron, the United States Court of Appeals for the Ninth Circuit ruled that a government auditor who discovers evidence of fraud qualifies as an original source. 170 Other circuit courts, however, have disqualified government employees whose job responsibilities enable them to uncover fraud. In United States ex rel. LeBlanc v. Raytheon, a former government employee attempted to bring a qui tam suit using evidence that he obtained as a Quality Assurance Specialist. 171 The United States Court of Appeals for the First Circuit concluded that such employees cannot file qui tam actions because they do not qualify as “original sources” within the meaning of the FCA. 172

3. Guaranteed Awards for Successful Relators

Before the 1986 amendments, a qui tam relator could receive up to one-quarter of the proceeds from a successful action. 173 However, as courts had the discretion to determine the appropriate level of compensation, relators ran the risk of receiving trifling compensation. 174 The 1986 amendments strengthened the financial incentives for qui tam relators by setting minimum and maximum award levels. 175

In qui tam actions that are litigated by the government, most relators are entitled to receive between fifteen and twenty-five percent of any “proceeds of the action or settlement.” 176 Although the FCA does not define “proceeds of the action or settlement,” courts have interpreted this phrase to include both forfeiture penalties and damages. 177 Within the prescribed range, courts are instructed to

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See, e.g., United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1502-03 (11th Cir. 1991) (stating that the FCA permits any person to file suit “subject to four exceptions” and that these exceptions do not exclude all government employees); see also United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1419-20 (9th Cir. 1991).

170 39 F.3d 957, 960 (9th Cir. 1994). Noting that the 1986 amendments sought to encourage government employees to disclose evidence of fraud, the court ruled that it would be “incongruous . . . to bar a government employee who has gone to his supervisors to report fraud from bringing a qui tam action.” Id. at 962.

171 913 F.2d 17, 18 (1st Cir. 1990).

172 Id. at 20. The court stated that “[t]his conclusion . . . does not mean that there is no government employee who could qualify to bring a qui tam action under the original source exception.” Id.

173 See supra note 34 and accompanying text.

174 See supra note 35 and accompanying text.


176 Id. § 3730(d)(1).

177 See, e.g., United States ex rel. Woodward v. Country View Care Center, Inc., 797 F.2d 888, 891 (10th Cir. 1986). The court stated that the district court correctly computed the qui tam award as a percentage of both damages and forfeitures. Id. The court remanded the case for recalculation of the damages portion of the judgment. Id. at 892-94.
determine an appropriate *qui tam* share in light of the relator's contribution to the action.\(^{178}\)

Although a relator cannot institute a *qui tam* suit based upon publicly disclosed information, the relator can still earn compensation if the government pursues the case.\(^{179}\) The FCA provides a reduced award—not to exceed ten percent of the proceeds—to relators that contribute to FCA actions that rely primarily on disclosures from hearings, reports, audits, and media coverage.\(^{180}\) In determining the relator's award, courts consider the value of the original information and the relator's contribution in advancing the action.\(^{181}\) Congress may have intended this language to permit *qui tam* awards in government suits that utilize both independent information and publicly disclosed allegations.\(^{182}\)

In *qui tam* actions in which the government does not intervene, the relator is guaranteed a higher award. The relator is entitled to receive between twenty-five and thirty percent of all proceeds.\(^{183}\) Within this range, the court must award a share that "is reasonable for collecting the civil penalty and damages."\(^{184}\)

Finally, the FCA authorizes the court to reduce awards in cases where the relator participated in the presentation of a false claim.\(^{185}\) Such a reduction can be levied against relators whether or not the government intervenes in the action.\(^{186}\) In addition, the amended FCA

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179 Id.
180 Id.
181 Id. As this section does not establish a minimum reward, the courts are free to deny compensation to persons who do not make a significant contribution to the government's case. See United States v. TRW, Inc., 4 F.3d 417 (6th Cir. 1993). In this case, *qui tam* plaintiffs attempted to sue TRW and other companies for the submission of false claims concerning military jet engine contracts. *Id.* at 419. The government presented evidence that the relator's case was based on publicly disclosed information. *Id.* at 424. Because the government pursued the case, the would-be relators were eligible for up to 10% of the proceeds under 31 U.S.C. § 3730(c)(1) of the pre-1986 statute. *Id.* at 423, 424. The court affirmed the district court's dismissal of the *qui tam* parties on the ground that the parties did not sufficiently contribute to the government's case:

After carefully reviewing the district court's order, we are satisfied that the district court did not dismiss the plaintiffs on the basis of the jurisdictional bar of section 3730(b)(4) (1982). Rather, the court reviewed the evidence, determined that material facts were not in dispute, and concluded that, as a matter of law, under section 3730(c)(1) (1982) plaintiffs were not entitled to a reasonable informer's fee. *Id.* at 424.

184 Id.
185 Id. § 3730(d)(3).
186 Id.
declares that private persons who are convicted of FCA criminal violations are not eligible for any award.\footnote{187 Id. ("[T]hat person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action.").}

4. Litigation Fees

In addition to providing successful relators with a share of the proceeds, the FCA enables relators to recover attorneys' fees and reasonable expenses.\footnote{188 Id. § 3730(d)(1),(2). If relators do not succeed in recovering litigation fees against defendants, relators may not seek reimbursement from the government. Id. § 3730(f) ("The Government is not liable for expenses which a person incurs in bringing an action under this section.").} These fees are awarded against the defendant only in successful actions, however. It should also be noted that the government may, under certain circumstances, recoup litigation fees against the defendant.\footnote{189 Id. § 3730(g) ("In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.").}

In unsuccessful \textit{qui tam} actions, the court may order the relator to pay the defendant's reasonable fees and expenses if the claim is "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."\footnote{190 Id. § 3730(d)(4).} Such fees can only be awarded against the relator if the government has not intervened in the action.\footnote{191 Id.}

5. Whistleblower Protection for \textit{Qui Tam} Plaintiffs

The 1986 amendments to the FCA also provide protection to \textit{qui tam} relators who act as whistleblowers against their employers. Before 1986, relators who experienced employer retaliation were forced to seek relief under state law, which offered "widely varying" remedies.\footnote{192 See Phillips, \textit{supra} note 8, at 271; see Callahan & Dworkin, \textit{supra} note 13, at 277.} The amended FCA provides a uniform federal remedy for whistleblowers who suffer economic retaliation as a result of their participation in an FCA action.\footnote{193 31 U.S.C. § 3730(h) (1988). The FCA provides relief to employees who are "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment" as a result of their participation in an FCA action. \textit{Id.}} This section not only protects \textit{qui tam} plaintiffs but also individuals who investigate, testify, or otherwise provide assistance in an FCA action.\footnote{194 \textit{Id.}} Courts are empowered to order the reinstatement of whistleblowers.\footnote{195 \textit{Id.}} In addition, courts are
authorized to provide double back pay, interest on back pay, and other special damages including litigation fees.\textsuperscript{196}

C. \textit{Defenses to FCA Actions}

1. Negligence or Innocent Mistake

To demonstrate civil violations of the FCA, the government or \textit{qui tam} plaintiff must prove that the defendant knowingly submitted false or fraudulent claims. Thus, the plaintiff must demonstrate the defendant’s actual or constructive knowledge of a false claim.\textsuperscript{197} According to the legislative history, the FCA was not intended to punish mere acts of negligent conduct.\textsuperscript{198} Consequently, defendants may escape FCA liability by asserting a defense of negligence or innocent mistake.\textsuperscript{199} To assert this defense, defendants may be required to prove that they made a limited inquiry into the accuracy of the claims and that this inquiry failed to uncover the fraud.\textsuperscript{200}

2. Criminal Penalties and Civil Damages May Violate Double Jeopardy

Contractors that violate the FCA can be prosecuted civilly and criminally. In \textit{United States v. Halper},\textsuperscript{201} the Supreme Court reviewed the constitutionality of FCA civil and criminal prosecutions concerning Medicare fraud. Halper, the manager of a medical laboratory, fraudulently submitted sixty-five Medicare claims for a total of $585.\textsuperscript{202} In criminal proceedings, the defendant received a two-year sentence and a $5,000 fine.\textsuperscript{203} When the government then sought civil fines of $130,000, the defendant argued that such a penalty would represent a second punishment in violation of double jeopardy.\textsuperscript{204} The Court held that a civil penalty which is “sufficiently disproportionate” to the government’s actual losses represents an unconstitutional second punishment.\textsuperscript{205} Thus, defendants to FCA civil actions may challenge pro-

\textsuperscript{196} Id.
\textsuperscript{197} See supra notes 92–94 and accompanying text.
\textsuperscript{198} See supra note 94.
\textsuperscript{199} Cantwell, supra note 63, at 276. See, e.g., United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991).
\textsuperscript{200} See supra notes 95–96 and accompanying text.
\textsuperscript{201} 490 U.S. 435 (1989).
\textsuperscript{202} Id. at 437.
\textsuperscript{203} Id.
\textsuperscript{204} Id. at 438–39.
\textsuperscript{205} Id. at 452.
posed civil penalties that are excessive. Following the Halper ruling, the courts have continued to allow both criminal and civil penalties provided that the proposed damages bear some rational relationship to the government's loss.\textsuperscript{206}

3. Substantial Compliance

Given the complexity of many government contracts, contractors may believe they have abided by the terms of their contracts. In FCA actions, contractors can assert a defense of substantial compliance provided that the contractors reasonably believed they followed the contract terms and that any deviations are minor and correctable.\textsuperscript{207} In assessing the reasonableness of a contractor's belief in compliance, courts have examined the number of defects in the product, as well as the contractor's inspection and testing procedures.\textsuperscript{208}

4. Government Acquiescence

If a contractor can establish that the government approved of business practices that were later challenged as FCA violations, the contractor can assert a defense of government acquiescence.\textsuperscript{209} The government cannot demonstrate detrimental reliance on the accuracy of a claim if the government knew of the alleged fraudulent conduct.\textsuperscript{210}

IV. FEDERAL CONTRACT LAW AND THE FCA

The liability of government contractors under the FCA often turns on the contractors' compliance with federal contract law. Federal contract law is governed by a vast array of statutes and regulations.\textsuperscript{211} Most notably, the Federal Acquisition Regulation (FAR) delineates the myriad obligations of government contractors.\textsuperscript{212} This section will

\textsuperscript{206} See, e.g., United States v. Pani, 717 F. Supp. 1013, 1019 (S.D.N.Y. 1989) (allowing civil damages and penalties connected to three criminal counts of Medicare fraud because proposed civil judgement was related to government's loss).
\textsuperscript{207} Cantwell, supra note 63, at 276.
\textsuperscript{208} Id.
\textsuperscript{209} Stewart, supra note 86, at 397. See, e.g., United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (holding that government knowledge of falsity is not defense in itself but that "[s]uch knowledge may show that the defendant did not submit its claim in deliberate ignorance or reckless disregard of the truth").
\textsuperscript{210} Stewart, supra note 86, at 398.
\textsuperscript{211} An in-depth examination of these statutes and regulations is beyond the scope of this Comment. For a general discussion, see JAMES F. NAGLE, A.B.A. SEC. GEN. PRAC., HOW TO REVIEW A FEDERAL CONTRACT (1990).
\textsuperscript{212} The FAR is reproduced in 28 chapters of the Code of Federal Regulations. The first chapter,
briefly examine several key areas of federal contract law that give rise to FCA actions. In addition, this section will highlight a few FAR provisions that address the environmental responsibilities of federal contractors.

A. Types of Government Contracts

The obligations of government contractors vary significantly for different types of contracts. The FAR classifies contracts in a variety of ways. The most significant classifications concern the procurement method and the payment method.213

1. Procurement Methods

Federal agencies can solicit contractual services through two procurement methods: sealed bids or negotiation. In sealed bid contracts, the government provides precise specifications describing the required goods or services.214 After the government issues an Invitation for Bids, offerers submit a bid that meets government specifications.215 A bid that deviates from these specifications is usually rejected as "non-responsive."216 Among the bids that are responsive, the contracting officer must determine which bidders satisfy the "responsibility" requirement.217 Responsible bidders must have the financial, managerial, and technological capacity to perform the contract.218 The contracting officer then selects the lowest bid that is both responsive and responsible.219

which applies to all federal agencies, is jointly issued by the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration. See 48 C.F.R. ch. 1 (1994). The remaining chapters contain supplemental regulations that govern particular agencies including the Department of Defense, 48 C.F.R. ch. 2; the Department of Energy, 48 C.F.R. ch. 9; and the Environmental Protection Agency, 48 C.F.R. ch. 15. A review of these supplemental regulations is beyond the scope of this Comment.

213 Nagle, supra note 211, at 20.
214 Id. at 21.
215 Id.
217 Id. § 9.103(a)-(b).
218 Id. § 9.104-1. According to the FAR, responsible contractors must possess the following: (1) sufficient financial resources to perform contract; (2) the ability to meet proposed delivery of performance schedule; (3) a record of satisfactory performance in recent contracts; (4) a record of integrity and business ethics; (5) necessary skills in accounting, operation controls, technical operations, and the like; (6) necessary equipment and facilities; (7) other skills as needed. Id.
219 Nagle, supra note 211, at 15.
For contracts in which the government cannot provide exact specifications—for example, contracts for the development of new military technologies—the government engages contractors through negotiation.\textsuperscript{220} To negotiate a contract, the government first issues a “request for proposals” or “request for quotations.”\textsuperscript{221} The request outlines the government need in general terms, enabling the offeror to suggest the best method to perform the contract. Agencies enjoy great latitude in setting selection criteria.\textsuperscript{222} During the selection process, the agency may negotiate with the offerer to modify subcontracting arrangements\textsuperscript{223} and pricing.\textsuperscript{224}

2. Payment Methods

Contractors are paid for their services in two principle ways: fixed-price payment and cost-reimbursement. In fixed-price contracts, the government and contractor agree to a final price in advance of performance. Fixed-priced agreements are most appropriate for contracts that include exact specifications according to which the offeror can compute its bid.\textsuperscript{225} Thus, most sealed bid contracts include a fixed-price agreement. Within the rubric of fixed-price contracts, the government may select different methods of payment.\textsuperscript{226}

In cost-reimbursement contracts, the government estimates a total cost that is subject to modifications.\textsuperscript{227} The estimate of total costs represents a ceiling that the contractor may not exceed without the government’s approval.\textsuperscript{228} Reimbursement contracts are selected when

\textsuperscript{220} Id.
\textsuperscript{221} 48 C.F.R. § 15.402(a) (1994).
\textsuperscript{222} Id. § 15.605. Although price and quality are typically considered, the agency may select the proposal that “offers the greatest value to the Government in terms of performance and other factors.” Id.
\textsuperscript{223} Id. §§ 15.700-708.
\textsuperscript{224} Id. §§ 15.800-814. In most negotiated contracts, the offeror must certify the accuracy of its prices. See infra notes 244-49 and accompanying text.
\textsuperscript{225} Nagle, supra note 211, at 21 (“Fixed-price contracts are used when the specifications are relatively definite and precise so that it is fair to impose most risks on the contractor.”).
\textsuperscript{226} 48 C.F.R. § 16.2 (1994). This section provides several methods for computing fixed-price payments. First, the government sets a price that may not be adjusted for any reason. Id. § 16.202-1 (“This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.”). Second, the government may set a fixed price but allow for adjustments based on inflation or other economic contingencies. Id. § 16.203. Third, the government may agree to an initial fixed price but provide incentives based on economic performance. Id. §§ 16.204, 16.4. Finally, the government may agree to re-determine its initial fixed price after partial or full performance. Id. §§ 16.205-206.
\textsuperscript{227} Id. § 16.301-1. The government makes this initial estimate “for the purpose of obligating funds.” Id.
\textsuperscript{228} Contractors that exceed the ceiling price do so at their own risk. Id.
the government does not have precise specifications.\footnote{Nagle, supra note 211, at 21 (“In cost contracts the government assumes a much greater risk because it does not have adequate specifications, such as in research and development contracts, or because it needs the items so urgently that it is willing to assume a greater share of the risk.”).} Most negotiated contracts, therefore, are paid through cost reimbursement. As with fixed-cost contracts, the government may select different payment options for reimbursement contracts.\footnote{See 48 C.F.R. §§ 16.301-307. Some reimbursement contracts do not provide any profits to the contractor. In cost-sharing contracts, the government reimburses a portion of the contractor’s expense and provides no fee. Id. § 16.303. Cost contracts reimburse all expenses but also provide no fee. Id. § 16.302. Other reimbursement contracts include an additional award. In contracts for high risk projects, the government can reimburse costs and provide a fixed fee that is set in advance. Id. § 16.306. For less risky projects, the government may award “cost-plus incentive fee contracts” that reimburse costs and provide a fee adjusted according to financial performance. Id. § 16.304. Finally, the government may reimburse costs as well as provide an award for “excellence in contract performance.” Id. § 16.305.}

Given the great potential for waste in reimbursement contracts, the government imposes significant restrictions on their use. First, cost contracts are only awarded to contractors that possess sophisticated accounting systems that can accurately identify contract-related expenses.\footnote{\[d. § 16.301-3(a).} Second, contractors are only reimbursed for costs that are deemed “allowable” business expenses that are directly related to contract performance.\footnote{Many FCA suits concern a contractor’s submission of non-allowable costs. See infra notes 268-69 and accompanying text.} Finally, the government retains the right to inspect and audit records until three years after final payment.\footnote{48 C.F.R. §§ 52.215-1 to -2 (1994).}

**B. Solicitation and Bidding Requirements**

The FAR prohibits any form of collusion among contractors that develop prices for an offer. Most government contracts require the offeror to sign a “Certificate of Independent Price Determination.”\footnote{Id. § 52.203-2.} This certificate requires offerors to pledge that they did not communicate or negotiate with other offerors in setting prices.\footnote{Id. The offeror must certify: The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered.} In both sealed bidding and negotiation, offerors may not disclose their prices to other offerors.\footnote{Id.} In addition, offerors may not attempt to restrict

\[229\] Nagle, supra note 211, at 21 (“In cost contracts the government assumes a much greater risk because it does not have adequate specifications, such as in research and development contracts, or because it needs the items so urgently that it is willing to assume a greater share of the risk.”).

\[230\] See 48 C.F.R. §§ 16.301-307. Some reimbursement contracts do not provide any profits to the contractor. In cost-sharing contracts, the government reimburses a portion of the contractor’s expense and provides no fee. Id. § 16.303. Cost contracts reimburse all expenses but also provide no fee. Id. § 16.302. Other reimbursement contracts include an additional award. In contracts for high risk projects, the government can reimburse costs and provide a fixed fee that is set in advance. Id. § 16.306. For less risky projects, the government may award “cost-plus incentive fee contracts” that reimburse costs and provide a fee adjusted according to financial performance. Id. § 16.304. Finally, the government may reimburse costs as well as provide an award for “excellence in contract performance.” Id. § 16.305.

\[231\] Id. § 16.301-3(a).

\[232\] Many FCA suits concern a contractor’s submission of non-allowable costs. See infra notes 268-69 and accompanying text.


\[234\] Id. § 52.203-2.

\[235\] Id. The offeror must certify: The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered.

\[236\] Id.
competition by inducing other offerors to submit or not to submit bids.237

In addition to prohibiting collusion among bidders, the FAR outlaws the use of gratuities, fees, and kickbacks intended to secure favorable treatment in contract procurement.238 Contractors may not provide gifts or entertainment to government employees involved with contract selection.239 Similarly, subcontractors may not provide kickbacks to prime contractors "as an inducement of acknowledgment" for subcontracts.240

The FCA has been used to combat fraud in the procurement of contracts. In *United States v. Killough*, two government officials allegedly solicited kickbacks from contractors seeking to provide disaster relief services.241 The United States Court of Appeals for the Eleventh Circuit upheld an award of damages that exceeded the amount of the kickbacks.242 The court stated that the factfinder must determine the government's potential savings if the bidding were fair, open, and competitive.243

C. Accurate, Complete, and Current Pricing

For negotiated contracts where few bidders can provide the needed services, the government often demands the submission of pricing data.244 The Truth in Negotiations Act (TINA) requires agency heads to obtain pricing data for contracts that are not awarded through sealed bids.245 Contractors must certify that their prices are accurate, complete, and current. Moreover, contractors must disclose all factual information that supports the computation of contract prices.246 Until the parties conclude a pricing agreement, contractors are required to update their data and factual information.247 TINA defines defective

237 Id.
238 Id. §§ 52.203-3 to -5, 52.203-7 to -13.
239 See id. § 52.203-5.
240 Id. §§ 3,502-3, 52.203-7.
241 United States v. Killough, 848 F.2d 1523, 1525 (11th Cir. 1988).
242 See id. at 1532.
243 Id.
244 Stewart, *supra* note 86, at 393.
245 10 U.S.C. § 2306a(a)(1)(A) (1988). The submission of pricing data can be waived if the contract price reflects "adequate price competition"; "established catalog or market prices of commercial items"; "prices set by law or regulation"; or "in an exceptional case when the head of the agency determines." Id. § 2306a(b).
246 Id. § 2306a(g) (pricing data includes all facts that "a prudent buyer or seller would reasonably expect to affect price negotiations significantly").
247 Nagle, *supra* note 211, at 45. "Whether prudent buyers and sellers would reasonably expect a fact to affect price negotiations significantly has been determined on a case-by-case basis." Id.
pricing as any data that is "inaccurate, incomplete, or noncurrent" as of the date of the agreement.\textsuperscript{248} If the government overpays for a contract due to defective pricing, the government may obtain price reductions and penalties.\textsuperscript{249}

In addition to seeking remedies under TINA, the government may prosecute "defective pricing" under the FCA. In contracts where pricing data is required, the FAR requires the contractor to sign a "Certificate of Current Cost or Pricing Data."\textsuperscript{250} In addition, the cover sheet for most federal contract bids requires a certification that pricing information "reflects our best estimates and/or actual costs."\textsuperscript{251} When contractors falsely certify the accuracy of pricing data, they submit, in effect, a false claim for payment. In several pending FCA suits, plaintiffs are seeking multi-million dollar judgments against defense contractors for defective pricing.\textsuperscript{252}

D. Allowable Costs

Even when contractors provide accurate pricing data, the government must still scrutinize contract expenditures to determine if they are allowable. Contractors cannot legally charge the government for extravagant or unneeded services.\textsuperscript{253} The two principal elements of allowability are reasonableness\textsuperscript{254} and allocability.\textsuperscript{255} In addition, allowable costs also must comply with applicable accounting standards,\textsuperscript{256} the terms of the contract,\textsuperscript{257} and other FAR cost standards.\textsuperscript{258}

\textsuperscript{249} Id. § 2306a(e).
\textsuperscript{250} 48 C.F.R. § 15.804-4 (1994).
\textsuperscript{251} Stewart, supra note 86, at 393.
\textsuperscript{252} Id. at 393; see, e.g., United States ex rel. Taxpayers Against Fraud v. Singer Co., 889 F.2d 1327, 1329, 1331 (4th Cir. 1989) (approving injunction to restrict corporation from liquidating its assets where corporation allegedly included hidden reserves of $77 million in contract bid).
\textsuperscript{253} Nagle, supra note 211, at 22.
\textsuperscript{254} 48 C.F.R. § 31.201-2(a)(1); see infra notes 259–61 and accompanying text.
\textsuperscript{255} 48 C.F.R. § 31.201-2(a)(2); see infra notes 262–67 and accompanying text.
\textsuperscript{256} Id. § 31.201-2(a)(3). If Cost Accounting Standards are applicable to the contract, the standards affect the determination of allowability. If the standards do not apply, the government will consider generally accepted accounting principles. Id.
\textsuperscript{257} Id. § 31.201-2(a)(4).
\textsuperscript{258} Id. § 31.201-2(a)(5). The FAR provides guidance on the allowability of 52 categories of costs. For example, the following types of costs are generally unallowable: entertainment costs, id. § 31.205-14; fines for violations of federal, state, local, or foreign laws and regulations, id. § 31.205-15; and lobbying costs, id. § 31.205-22. In contrast, the following costs are usually allowable: labor relations costs, id. § 31.205-21; personnel recruitment costs, id. § 31.205-34; and transportation costs, id. § 31.205-45.
1. Reasonable Costs

The FAR considers a cost to be reasonable if the cost would be incurred by a prudent person engaged in competitive business. Where a preliminary investigation indicates that a cost may be unreasonable, the contractor has the burden of proving its reasonableness. Reasonableness is evaluated according to four factors: (1) whether the cost is ordinary and necessary; (2) whether the cost reflects sound business practices and applicable laws; (3) whether the cost is consistent with the contractor's responsibilities to the government, other customers, and the public; and (4) whether the cost deviates from the contractor's established practices.

2. Allocable Costs

In addition to demonstrating the reasonableness of a proposed cost, the contractor must show that the cost is "allocable" to its government contract. Allocable costs must be "assignable or chargeable" to the contract. The FAR establishes three different tests that satisfy allocability. First, a cost is allocable if the cost specifically supports the contract. Second, a cost is allocable if the cost supports both the contract and other work. In this case, the contractor must determine the portion of the cost that benefits the contract. Third, a cost is allocable if the cost supports "the overall operation of the business."

3. Unallowable Costs and the FCA

The FCA can be used to sue contractors that attempt to charge the government for costs that are unreasonable, improperly allocated, or otherwise unallowable. Thus, contractors that overcharge the government for the cost of labor can be sued under the FCA. In addition,
contractors that utilize federal funds to support expenses that do not benefit the government can also be sued.\(^{269}\)

4. The Allowability of Environmental Costs

When contractors are required to abate environmental hazards or to purchase new equipment to meet changing environmental regulations, they generally seek government reimbursement for these costs. However, the FAR does not expressly address whether environmental expenditures can be reimbursed as allowable costs.\(^{270}\)

Heretofore, the government has not developed a consistent policy on the reimbursement of clean-up costs\(^ {271}\) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).\(^ {272}\) While some defense contractors have received reimbursement for CERCLA-related spending, others have not.\(^ {273}\) To receive reimbursement, cost-reimbursement contractors must argue that clean-up costs are allowable according to FAR standards.\(^ {274}\) Thus, contractors must persuade the government that a prudent person in the defense industry would consider hazardous waste abatement to be a reasonable business expense.\(^ {275}\) The government has traditionally viewed CERCLA clean-up costs as fines under the FAR.\(^ {276}\) The FAR prohibits the reimbursement of fines that stem from a violation of federal or state law.\(^ {277}\) Despite this prohibition, some courts have questioned the wisdom of disallowing clean-up costs that may be the result of contractual compliance.\(^ {278}\)

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\(^{269}\) See David C. Hsia, Symposium on Qui Tam Litigation: An Overview and Introduction, 14 J. LEGAL MED. 265, 266 (providing example of false claim in which shipyard charges U.S. Navy for work performed on commercial ship).


\(^{271}\) Id. at 622.


\(^{273}\) Kohns et al., supra note 270, at 622. A recent General Accounting Office report examined the cleanup of four sites used by defense contractors. The report concluded, “[d]ecisions on reimbursement varied from a complete denial to reimbursement in proportion to the Government's share of a company's business.” Id. (quoting 34 Gov't Cont. ¶ 629 (Fed. Pub. Oct. 28, 1992)).


\(^{275}\) See supra note 259 and accompanying text.

\(^{276}\) Kohns et al., supra note 270, at 621.

\(^{277}\) 48 C.F.R. § 31.205-15 (1994); see supra note 258.

\(^{278}\) Kohns et al., supra note 270, at 621 & n.33 (citing United States v. General Dynamics Corp., No. 4-87-312 K (N.D. Tex. May 7, 1987)).
A proposed revision to the FAR would clarify the government's ambiguous treatment of environmental costs. In 1992, the Defense Acquisition Regulations Council proposed to add an "environmental cost principle" to the FAR.279 This principle would create three categories of allowable environmental costs: (1) investments in preventing environmental damages; (2) costs associated with the proper disposal of hazardous wastes; and (3) expenses necessary to comply with environmental laws and regulations.280 The proposed rule, however, would disallow reimbursement for spending to correct environmental damage unless certain conditions are met.281 Thus, contractors that incur environmental obligations due to their disregard for environmental laws or standard industry practices would be ineligible for government reimbursement.

E. Contract Specifications

In addition to scrutinizing the allowability of contractor expenses, government agencies utilize detailed specifications to control the spending practices of contractors. Specifications include written instructions, industry standards, drawings, prints, and other instruments.282 While some specifications provide exacting technical descriptions, others utilize a "size range or performance minimum."283 Contractors cannot deviate from contract specifications without first obtaining government approval.

The FCA can be used to sue contractors that bill the government for services that fail to meet contract specifications. In United States v. Aerodex,284 the defendant provided the Navy with "nonconforming" ballbearings at a cost of $27,000. While the contract required delivery of "P/N 17185" bearings, the defendant furnished "P/N 117971" bearings.285 The United States Court of Appeals for the Fifth Circuit

279 Seymour, supra note 274, at 496 & n.12.
281 Id. § 31.205-9(c) (proposed). This section would bar reimbursement for the correction of environmental damage unless the contractor demonstrates: (1) that performance of a Government contract contributed to the environmental hazard; (2) that the contractor conducted its business prudently, following then-accepted industry standards and all then-existing environmental laws; (3) that the contractor acted promptly to minimize damages; and (4) that the contractor has pursued other legal and financial sources to defray environmental costs. Id.
282 Nagle, supra note 211, at 24.
283 Id. at 25.
284 469 F.2d 1003, 1006 (5th Cir. 1972).
285 Id. at 1006. Aerodex altered the deficient bearings and relabeled the bearings with specified part number. Although the bearings are visually indistinguishable, the bearings are structurally different. Id.
concluded that the defendant had violated the FCA by failing to meet government specifications. The court noted that the government need not prove that nonconforming goods are inferior.

The court calculated the government’s loss to be the difference between contract price and the reasonable value of the goods provided. As the defective goods were useless to the Navy, the court concluded that the contract price of $27,000 represented the government’s loss. The court awarded the government $54,000 under the double damages provision of the pre-1986 FCA. However, the court also ruled that the Navy could not collect “consequential damages” for the cost of replacing the ballbearings.

F. Contract Certifications

Although the federal procurement process is designed to secure needed goods and services at a reasonable cost, the government also considers a variety of social and economic policy goals in awarding contracts. Some of these goals include support for small businesses owned by women, promotion of equal employment opportunities, and compliance with federal environmental laws.

1. Socioeconomic Certifications

To promote these and other federal goals, the government requires contractors to certify compliance with certain laws, regulations, and policies. For example, contracts of more than $500,000 require that the contractor develop a plan to seek out small and disadvantaged businesses when awarding subcontracts. Contractors that fail to follow the plan in good faith commit a material breach of the prime contract.

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286 Id. at 1008.
287 Id. at 1007 (dictum) (“The mere fact that the item supplied under contract is as good as the one contracted for does not relieve defendants of liability if it can be shown that they attempted to deceive the government agency.”)
288 Id. at 1010.
289 Id.
290 Id. at 1011. For a more extensive discussion of consequential damages, see supra notes 118–25 and accompanying text.
291 Nagle, supra note 211, at 31.
293 Id. §§ 22.800–.810.
294 Id. §§ 23.105(a), 52.223-1 to -2.
295 Id. §§ 19.708(b), 52.219-9.
296 Id. § 19.702.
Contractors that violate socioeconomic certifications can be sued under the FCA. Even when contractors otherwise comply with contract terms, they may be sued for breaching a contract certification. In *United States v. Rule Industries*, a government contractor certified that its steel hacksaw blades satisfied the Buy American Act. 297 The United States Court of Appeals for the First Circuit held the contractor liable for fraud even though the contractor provided high quality blades. 298 As the government suffered no financial loss due to the substitution, the government could not collect treble damages against the defendant. 299 However, the government could obtain civil penalties for each fraudulent substitution. 300

2. Clean Air and Clean Water Certifications

The FAR provides that contracts over $100,000 must contain a "Clean Water and Clean Air Certification." 301 This certification requires the contractor to comply with Clean Air Act (CAA) 302 and Clean Water Act (CWA) 303 mandates concerning "inspection, monitoring, entry, reports, and information." 304 Contractors must also agree that no work will be performed in a facility that violated the CAA or the CWA as of the date of contract formation. 305 Moreover, contractors must use "best efforts" to comply with clean air and clean water standards. 306 The ambiguous "best efforts" standard appears to require the contractor to use good faith in meeting statutory requirements.

3. Other FAR Guidelines Concerning Environmental Laws

The FAR includes several other provisions concerning environmental law. For example, federal agencies are required to ensure that contract specifications do not exclude the use of recovered materials or require virgin materials. 307 Unlike the CAA-CWA certification, this

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297 878 F.2d 535, 536 (1st Cir. 1989).
298 Id. at 537–38.
300 Rule Indus., 878 F.2d at 538.
301 48 C.F.R. §§ 23.105, 52.223-1 to -2 (1994). In addition, the certification must be included for indefinite quantity contracts that are likely to exceed $100,000 and for any contracts involving persons or entities that have been convicted under the Clean Air Act or Clean Water Act. Id.
304 Id. § 52.223-2.
305 Id.
306 Id.
provision does not bind contractors unless an agency issues specifications concerning recovered materials.\footnote{48 C.F.R. § 23.404(b) (1994). Agencies can waive the requirements of this section upon determining that recovered materials are not available, would not meet the performance standards of the contract, or would be unreasonably expensive. \textit{Id}.}

The FAR does not address whether contractors must comply with other federal and state environmental laws. The FAR prevents contractors from seeking reimbursement for fines arising from violations of federal and state laws\footnote{Id. § 31.205-15.} and related legal fees.\footnote{§ 31.205-47. When contractors violate laws or regulations, the FAR disallows costs for defending legal actions brought by the government. Seymour, \textit{supra} note 274, at 530 n.107.} The FAR permits the reimbursement of fines, however, where violations arise from compliance with contractual terms.\footnote{See Seymour, \textit{supra} note 274, at 530; see \textit{supra} notes 276–78.}

The effect of environmental violations on contract compliance would be clarified by the proposed environmental cost rule.\footnote{48 C.F.R. § 31.205-9 (proposed), \textit{reprinted in} Kohns et al., \textit{supra} note 270, at 634–35.} Although the proposed rule does not address whether environmental infractions constitute a contractual breach, the rule clearly disallows the reimbursement of environmental costs unless contractors comply with all applicable environmental laws and regulations.\footnote{Id. To qualify for the reimbursement of environmental remediation costs, a contract must demonstrate, inter alia, “compliance with all then-existing environmental laws, regulations, permits, and compliance agreements.” \textit{Id}.}

V. POTENTIAL ENVIRONMENTAL APPLICATIONS OF THE FCA

As discussed earlier, the FCA provides a broad and flexible standard for establishing false claims.\footnote{See supra notes 62–78 and accompanying text.} This standard encompasses activities as far-ranging as inaccurate price quotes and invoices, breaches of contractual specifications and certifications, and violations of federal environmental laws. The FCA can reach fraud in virtually any government-funded program or activity. Consequently, environmental plaintiffs should examine the FCA's potential as a tool to challenge government contractors that harm the environment.

Few cases have applied the FCA against contractors that commit environmental fraud. Consequently, this section focuses on identifying different environmental contexts in which the FCA may be useful.\footnote{The contexts discussed in this section do not represent an exhaustive list of potential environmental applications of the FCA. Plaintiffs should explore established FCA case law to develop additional environmental applications.} Within these contexts, this section makes reference to a few published government settlements and several pending FCA lawsuits.
involving environmental fraud. Although none of these examples represent fully litigated cases, the examples demonstrate the promise of the FCA as a tool to combat environmental fraud.

A. Fraud in the Procurement or Performance of Environmental Contracts

1. The Scope of Fraud in Environmental Contracts

Since the establishment of the Superfund, the federal government has allocated huge sums of money to clean up hazardous waste at both private sites and federal facilities. The government expects to spend $500 billion for environmental cleanups over the next fifty years. For federal facilities alone, the cost of complying with hazardous waste laws and cleaning up contaminated sites may exceed $150 billion.

Most of these funds will flow into the hands of response action contractors. These private contractors perform nearly all of the clean-up work directed by the Environmental Protection Agency (EPA), Department of Energy (DOE), and Department of Defense (DOD). Ironically, many defense contractors have entered the rapidly growing business of environmental restoration at DOE facilities.

As government spending on environmental restoration contracts has increased, so have opportunities for waste, mismanagement, and outright fraud. Between 1988 and 1991, Superfund contractors expended nearly thirty percent of total fees for administrative expenses. The EPA is spending nearly three times its original projections for

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318 Seymour, supra note 274, at 499.

319 Id. at 499 n.17 (citing CBO, Federal Liabilities Under Hazardous Waste Laws, at ix (May 1990).


321 Seymour, supra note 274, at 498–99.

administrative costs. Although it is impossible to extrapolate the scope of environmental contract fraud from these statistics, environmental contractors would appear to have the same opportunities for fraud as other contractors.

2. FCA Actions Against Environmental Contractors

The FCA can be used to sue environmental contractors that knowingly submit false claims against the federal government. FCA suits may target a variety of fraudulent activities which are described below.

a. Contract Acquisition Fraud

The FCA can be used to prosecute contractors that defraud the government in the bidding process. For example, if contractors conspire to fix contract prices or provide kickbacks to government officials, the FCA can be used to recoup the savings the government would have obtained if the bidding process were open and competitive.

In 1988, the EPA announced a settlement agreement with Fischbach & Moores, Inc. (FMI), a contractor that operated wastewater treatment plants in Tennessee and Georgia. In obtaining the EPA contract to operate these plants, FMI was convicted of several counts of bid-rigging. The EPA announced a settlement agreement rescinding a proposed “debarment” of FMI. As one of the conditions of the agreement, FMI agreed to “pay any civil judgment that may be entered against it as a result of the False Claims Litigation, and any settlement that it agrees to pay as a result of the False Claims Litigation.”

b. False Socioeconomic Certifications

The FCA can also be asserted against firms that secure environmental contracts through false socioeconomic certifications.

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323 Id. at 94.
325 See supra notes 241-43 and accompanying text.
327 Id. at 1-2.
328 Id. at 5.
329 Id.
330 See supra notes 295-300 and accompanying text.
ample, the government may sue a firm that falsely certifies ownership by women or minorities. Although false certifications may not always cause a financial loss to the government, these certifications corrupt the contract selection process. Even if the government cannot demonstrate actual damages, the FCA authorizes the imposition of civil fines as well as court costs.

In one pending FCA suit, the DOJ alleges that Kiewit Construction Company used two minority-owned firms as "fronts" to secure environmental construction contracts.\textsuperscript{331} The suit maintains that the minority-owned firms did not perform all of the construction work on a wastewater treatment plant and other projects.\textsuperscript{332} Kiewit allegedly performed certain construction work that was billed through the minority-owned companies.\textsuperscript{333} As of February, 1995, this litigation is still pending.

c. \textit{Defective Pricing in Negotiated Contracts}

When contractors submit defective prices in negotiated contracts, the government can sue to recover the difference between inflated prices and market prices.\textsuperscript{334} For example, if the EPA negotiates with a contractor to clean up hazardous waste at a CERCLA site, the contractor may be required to submit pricing information that "reflects [its] best estimates and/or actual costs."\textsuperscript{335} If the contractor knowingly submits false pricing data, the government or a \textit{qui tam} relator could prosecute the contractor under the FCA.\textsuperscript{336} The contractor can be sued for forfeiture penalties equivalent to the number of invoices that reflect the incorrect pricing data.\textsuperscript{337} In addition, the contractor may be liable for triple damages that reflect the difference between the amount billed and the reasonable value of the services.\textsuperscript{338}

In one pending case, the DOJ has filed an FCA suit against Riedel Environmental Services, Inc. for misrepresenting prices in a negoti-
ated contract for an emergency response cleanup.\footnote{Justice Sues Environmental Contractor for Falsely Representing Insurance Costs, [Current Developments] 24 Envt. Rep. (BNA) 148 (May 21, 1993).} Riedel allegedly informed the EPA that the firm could not obtain liability insurance for less than $900,000, even though the firm received a quote of $234,600.\footnote{Id.} The EPA agreed to provide Riedel with $750,000 per year for four years to enable the firm to self-insure against potential liabilities.\footnote{Id.} Under the FCA, the government could seek three times the value of its loss against Riedel. For each year that the contract operated, this loss may represent $516,000, the difference between the contract price and the quoted price for liability insurance. Consequently, treble damages could exceed $1.5 million per year.

The Riedel litigation demonstrates the great potential of the FCA to punish fraud in environmental cleanups. Like defense contracts, environmental cleanup contracts require large expenditures on technology and liability insurance.\footnote{See PLATER ET AL., supra note 316, at 295–96 (discussing the cost and complexity of insurance policies for hazardous waste).} In light of these costs and risks, the EPA is often forced to negotiate with a handful of specialized firms. Minimal competition leads many firms to inflate prices in the negotiation process. The FCA offers a powerful weapon to punish environmental contractors that inflate costs.

d. Fraudulent Invoices and Overcharges

Contractors that submit claims for clean-up services that are not provided or that are unnecessary can be sued for the amount of the overcharge.\footnote{See supra notes 79–80 and accompanying text.} For example, a response action contractor could overcharge the government for the time of environmental engineers or other specialists. The FAR permits the government to audit contractor records for up to three years after final payment.\footnote{See supra note 233.} If such an audit reveals discrepancies between the contractor’s invoices and time sheets, an FCA action could be filed to collect forfeiture penalties for each fraudulent invoice. In addition, the government could collect treble damages based upon the amount of the labor overcharge.

In one reported settlement, an EPA contractor agreed to pay an FCA claim arising from false test results. The Analytical Service Corporation (ASC) operated the Toxicon Laboratory, which tested
samples from remediation activities. ASC agreed to pay a civil settlement of $490,000 to compensate the government for the corporation's false claims.

**e. Substandard Performance**

As with other highly technical contracts, most contracts for environmental services include detailed specifications concerning the materials, methods, and performance standards to be used by the contractor. Specifications may require the contractor to reduce contaminant levels to an acceptable level of risk or may direct the contractor to treat hazardous wastes in a special manner—for example, incineration. If the contractor knowingly violates these specifications and then seeks payment without informing the EPA of the deficiency, the contractor can be prosecuted for filing a false claim.

In one such case, the EPA contracted with a company called I-Chem for cleansing sample bottles used at Superfund sites. The government filed a suit alleging that I-Chem failed to perform EPA-mandated quality control procedures. I-Chem agreed to pay $435,000 as a settlement for FCA and common law claims.

When environmental contractors violate contract specifications, the FCA method of computing damages is unclear. To correct the damage caused by a substandard cleanup, for example, the EPA may incur costs far in excess of the contract price. Such costs may represent unallowable consequential damages according to the reasoning of Aerodex. While the Aerodex court rejected consequential damages, the court allowed the government to recover damages based upon the full value of the contract. By arguing that a deficient cleanup has no value to

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346 Id. at *2.

347 The acceptable level of a contaminant is measured by assessing when it poses an excess risk of cancer between one in ten thousand and one in ten million. See Plater et al., supra note 316, at 890 (citing 53 Fed. Reg. 51,425–26 (1988)).

348 The incineration of contaminated soil can be far more costly than other methods of containment. For example, the EPA estimated the cost of incinerating soil at a Missouri Superfund site to be $41.5 million; the agency projected the cost of treating the same site by cleaning up the hazardous materials and burying toxic residues in clay to be $3.6 million. See id. at 896–97 (citing Passell, Experts Question Staggering Costs of Toxic Cleanups, N.Y. Times, Sept. 1, 1991, at 22).


350 Id. at *12.

351 Id. at *13.

352 See supra note 119 and accompanying text.

353 See supra note 121 and accompanying text.
the government, the EPA can claim treble damages based upon the full contract price.

B. Fraud Arising From Violations of Environmental Law

1. The Toxic Legacy of Defense Contractors

Defense contractors represent one of the largest classes of environmental polluters. The disposal of munitions has contaminated the soil and groundwater surrounding many government owned-contractor operated (GOO) facilities. In addition, the production of enriched uranium for nuclear weapons and naval propulsion has yielded highly toxic wastes and groundwater contamination. A 1992 study by the General Accounting Office indicated that clean-up costs associated with ten defense contractors could exceed $1 billion. The government has only recently begun to confront this toxic legacy. In Fiscal Year 1992, the DOE received over $1 billion for environmental cleanups.

The liability of defense contractors for any portion of these costs has proved to be a controversial issue. In some cases, defense contractors have challenged environmental lawsuits by invoking the government’s sovereign immunity. Furthermore, in cases where contrac-

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354 See America’s Worst Polluters, 84 BUS. & SOC’Y REV. 21 (1993). The Council of Economic Priorities recently named eight companies as the worst polluters in America. Two of these companies—DuPont and Rockwell—were cited for pollution generated from defense contracts. Id. at 22, 23. Between 1950 and 1989, DuPont operated a nuclear weapons complex in South Carolina. Id. at 22. This plant “has been connected to elevated levels of leukemia, lung cancer, and other diseases.” Id. Rockwell operated a similar plant in Colorado, dumping hazardous waste at least 166 separate times. Id. at 23.

355 Maj. Mark J. Connor, Government Owned-Contractor Operated Munitions Facilities: Are They Appropriate in the Age of Strict Environmental Compliance and Liability, 131 MIL. L. REV. 1, 1 (1991). Most munitions plants are managed as government owned-contractor operated (GOO) facilities. Id. Many GOO facilities have been operating since World War II. Id. at 4–5. As the development and operation of these facilities “pre-dated heightened sensitivity to environmental concerns, environmental problems abound at GOO munitions facilities today.” Id. at 5.


357 Id. at 615. In Fiscal Year 1992, the total budget for Department of Defense environmental compliance and cleanup activities approached $3.7 billion. Id. In Fiscal Year 1993, the Department of Defense environmental appropriation is nearly $4 billion. Id.

358 Id. at 616.

359 Most federal environmental laws contain waivers of sovereign immunity, which extend to federal facilities and contractors. See Kohns et al., supra note 270, at 619. Nevertheless, contractors that operate military installations often claim sovereign immunity. In one case, Presidents Carter and Reagan exempted Fort Allen from compliance with portions of RCRA, the CAA, and other statutes. See Connor, supra note 352, at 48.
tors have incurred liability under CERCLA or other environmental statutes, the government has at times agreed to reimburse all or some of the contractors' costs. Given the difficulty of suing defense contractors under existing environmental statutes, the FCA may offer an important alternative.

2. FCA Actions Against Defense and Other Contractors

The FCA can be employed against DOD, DOE, EPA, and other federal contractors that cause environmental damage in violation of their contractual obligations. Potentially, FCA liability can be established by demonstrating a contractor's failure to abide by promises to comply with the CAA and the CWA or other environmental laws. In addition, fraudulent attempts to bill the government for environmental fines or penalties may violate the FCA.

a. False Certifications of Compliance with the CAA and the CWA

As noted above, the FAR requires government contractors to certify compliance with both the CAA and the CWA for contracts in excess of $100,000. Contractors agree to comply with inspection and monitoring requirements of the CAA and the CWA. Thus, a defense contractor that fails to monitor compliance with these statutes may be liable for submitting false claims. In addition, contractors agree to use "best efforts" to comply with the substantive requirements of the CAA and the CWA. Contractors that fail to use "best efforts" to comply with the substantive provisions of either the CAA or the CWA may be submitting false certifications. These false certifications may be actionable as false claims.

While no FCA cases concerning the CAA-CWA certification have been litigated, the government has settled one FCA case that may have involved these certifications. In 1990, Geo-Con, Inc. contracted with the EPA to clean up a Superfund site in Pennsylvania. Two

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361 See Kohns et al., supra note 270, at 622.
362 See supra notes 301–06 and accompanying text.
363 See supra notes 309–11 and accompanying text.
364 See supra note 301 and accompanying text.
365 See supra note 304 and accompanying text.
366 See supra note 306 and accompanying text.
367 Administrative Settlement Agreement Between Geo-Con, Inc., the Department of the Army, and the Environmental Protection Agency, at *1, May 29, 1992, available in LEXIS, ENVIRN Library, EPABAR File. Although the settlement agreement did not reveal the nature of the alleged FCA claims, the facts identified in the settlement agreement suggest violations of the CAA and the CWA.
368 Id.
Geo-Con employees tampered with critical safety equipment including an air monitoring device and a water meter. In recognition of a "monetary payment to be paid by Geo-Con," the government agreed to refrain from pursuing an FCA action. The computation of damages for violations of the CAA-CWA certification is problematic. Treble damages cannot be awarded unless the government demonstrates a financial injury. The government cannot assert damages based on the total contract price if it received valuable services from the contractor. In this case, the government must show a financial injury arising from a breach of the CAA-CWA certification. As we have seen, most courts will not award damages flowing from cleanup costs as these are consequential damages. Nevertheless, the government can still obtain substantial civil fines for each fraudulent claim.

b. Violations of Other Environmental Statutes

False claims may arise from violations of particular environmental laws in cases where contractors have contractually pledged to obey those environmental laws. In addition, as the FAR prohibits contractors from seeking reimbursement of fines and legal fees connected with violations of state or federal law, the FCA potentially can be used to sue contractors that fraudulently attempt to recoup such costs. In one pending case, James S. Stone, a qui tam relator, has brought an FCA suit against Rockwell International Corporation (Rockwell), a government contractor that operated the Rocky Flats nuclear weapons facility. Rockwell allegedly violated federal environmental laws including the Resource Conservation and Recovery Act (RCRA), the

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369 Id.
370 Id. at *5–6.
371 See supra notes 112–13 and accompanying text.
372 Compare United States v. Aerodex, Inc., 469 F.2d 1003, 1011 (5th Cir. 1972) (awarding damages based upon the total contract price where defective parts were worthless to the government) with United States v. Rule Indus., 878 F.2d 535, 538 (1st Cir. 1989) (rejecting civil damages where foreign-made hacksaw blades violated contract certification but did not cause financial injury to the government). Although Aerodex involves a violation of contract specifica-
tions, the holding would apply to a violation of certifications that result in a financial injury.
373 In addition to the CAA-CWA certification, many federal contracts include agreements or certifications involving other environmental laws. For example, see supra notes 307–08.
374 See supra notes 309–10 and accompanying text.
CAA, and the CWA. Stone has alleged that Rockwell violated federal environmental and safety laws, Colorado environmental laws, DOE orders, and contract agreements concerning plant safety. According to Stone, Rockwell concealed these violations from the DOE in order to secure contract payments.

Rockwell has conceded, in a plea agreement unrelated to Stone’s FCA suit, that the Rocky Flats plant violated RCRA and the CWA. Nonetheless, Rockwell asserts that the DOE acknowledged and condoned the environmental hazards at Rocky Flats. Indeed, Rockwell argues that any alleged false claims were sanctioned by the federal government.

The Rockwell litigation raises two fascinating issues concerning FCA actions for environmental fraud: (1) whether the FCA reaches negligent violations of environmental laws; and (2) whether the FCA

377 Id. at 8-9.
378 See Rockwell Int’l Corp., 144 F.R.D. at 398. A discussion of Stone’s allegations concerning violations of federal safety laws, Colorado environmental laws, DOE orders, and various government agency agreements is beyond the scope of this Comment.
379 Id.
380 Plea Agreement and Statement of Factual Basis at 7-14, United States v. Rockwell Int’l Corp. (Criminal Case) (on file with the Boston College Environmental Affairs Law Review). The plea agreement identifies four counts of intentional violations of RCRA: (1) “illegal storage of mixed hazardous wastes known as ‘poncrete’ and ‘saltcrete,’ in violation of RCRA,” id. at 7-10; (2) “illegal storage of mixed hazardous wastes on the 904 Pad, without RCRA permit or interim status,” id. at 11-12; (3) “illegal treatment and storage of mixed hazardous in Solar Evaporation Pond 207C, without RCRA permit or interim status,” id. at 12-13; and (4) “illegal storage of mixed hazardous wastes known as ‘vacuum filter sludge,’ without a permit or interim status,” id. at 13-14.
381 The plea agreement identifies five counts of negligent violations of the CWA: (1) “discharging and releasing non-sanitary industrial wastes” in violation of National Pollutant Discharge Elimination System (NPDES) permit, id. at 6, 15-18; (2) exceeding NPDES permit limits for five-day Biological Oxygen Demand (Bod-5) in March, 1988, id. at 18, 20; (3) exceeding the Bod-5 and fecal coliform limits of NPDES permit in April, 1988, id. at 20; (4) exceeding the Bod-5 limit of NPDES permit in May, 1988, id. at 21; and (5) allowing chromic acid spill to reach sewage treatment plant and B-3 pond, id. at 24.
The plea agreement also presents one intentional violation of the CWA: “knowingly violating” NPDES permit of Rocky Flats “by ‘spray-irrigating’ water from Pond-3 contrary to good engineering practices.” Id. at 21.
Violations of the CAA or the CWA could be actionable as false claims if Rockwell signed a CAA-CWA certification. See supra note 301 and accompanying text. If Rockwell’s violations implicate the CWA’s testing or monitoring requirements, the violations may be actionable as false claims. See supra note 304 and accompanying text. Alternatively, Rockwell’s violations would be actionable as false claims if Rockwell failed to use “best efforts” to comply with the substantive provisions of the CWA. See supra note 306 and accompanying text. A thorough examination of Rockwell’s compliance with the CWA is beyond the scope of this Comment.
382 Telephone Interview with Christopher J. Koenigs, Attorney at Williams, Youle & Koenigs, P.C. (Defense Counsel for Rockwell International Corporation) (Feb. 16, 1994).
383 Id.; see infra note 393 and accompanying text.
reaches intentional violations that the government may have con­
doned. Rockwell's negligent and intentional violations of RCRA and
other environmental laws may be actionable as false claims—provided
that Rockwell contractually agreed to observe these environmental
laws.

Rockwell has acknowledged that it negligently violated the CWA.384
As noted earlier, merely negligent acts do not constitute false
claims,385 and negligent actors do not meet the FCA’s scienter require­
ment.386 To challenge Rockwell’s negligence defense, Stone must es­
establish that Rockwell knowingly violated the environmental obliga­
tions of its contract.387 Even if Stone cannot establish that Rockwell
knowingly breached environmental obligations, Stone can argue that
Rockwell’s negligent actions constituted gross negligence. Two fed­
eral district courts have ruled that acts of gross negligence satisfy the
FCA’s knowledge requirement.388

In addition to negligent violations of law, Rockwell concedes that it
intentionally violated federal environmental laws.389 In theory, false
claims may arise from intentional violations of the law. The plaintiff
must establish either that the contractor pledged to observe the law
in question390 or that the contractor illegally sought reimbursement of
fines or legal costs.391

384 See supra note 381. It is important to note that many of Stone’s allegations are substanti­
atized in public documents, including the criminal plea agreement. Rockwell has challenged
Stone’s standing as a qui tam relator by pleading that “plaintiff’s allegations are based upon
publicly disclosed information and plaintiff is not the ‘original source’ of such information.”
Defendant’s Answer at 4, United States ex rel. Stone v. Rockwell Int’l Corp. (Criminal Case)
(on file with the Boston College Environmental Affairs Law Review); see 31 U.S.C.
§ 3730(e)(4)(B) (1988). Stone maintains that he is the original source of the allegations:
To the extent that this action may be based on the public disclosure of allegations or
transactions in a criminal, civil, or administrative hearing, in a congressional, adminis­
tative, or Government Accounting Office Report, hearing, audit, or investigation, or
from the news media, Stone is the “original source” of the information . . . .
Complaint Under False Claims Act at 5, United States ex rel. Stone v. Rockwell Int’l Corp. (D.
Colo. filed July 5, 1989) (No. 89-C-1154).
385 See supra notes 94, 199–200 and accompanying text.
386 See supra notes 89–96 and accompanying text.
387 See supra note 92 and accompanying text.
388 Two federal district courts have agreed that the FCA applies in cases of “gross negligence
where the submitted claims to the government are prepared in such a sloppy or unsupervised
fashion that [the submitted claims] resulted in overcharges . . . .” United States v. Enton, 750
389 See supra notes 380–81.
390 See supra notes 301–11 and accompanying text.
391 See supra note 309–10 and accompanying text.
Even if Rockwell knowingly presented false claims by concealing intentional violations, Rockwell can raise the defenses of substantial compliance and government acquiescence. To raise the defense of substantial compliance, Rockwell must demonstrate a reasonable belief in contract compliance.\(^{392}\) To raise the defense of government acquiescence, Rockwell must prove that the government knew of Rockwell's fraudulent conduct.\(^{393}\) In light of the long history of environmental infractions at Rocky Flats,\(^{394}\) Rockwell may prevail on a defense of government acquiescence.

If Rockwell has sought reimbursement for fines arising from violations of state or federal environmental laws, Rockwell may have submitted false claims. Although federal contract law disallows the reimbursement of fines,\(^{395}\) some federal contracts include special terms that permit the recovery of fines and related fees.\(^{396}\) Without a careful examination of Rockwell's contract, it is unclear whether Rockwell can legally obtain reimbursement of environmental fines or legal expenses.\(^{397}\)

VI. CONCLUSION

The FCA may provide the government and private citizens with a powerful weapon against environmental fraud. As the government continues to invest greater resources in environmental programs, environmental fraud is likely to rise. The FCA can be used to sue EPA

\(^{392}\) See supra notes 207–08 and accompanying text.

\(^{393}\) As a defense to Stone's FCA suit, Rockwell has asserted that Stone "is barred by the doctrines of waiver and estoppel in that representatives of the United States government, by their actions and statements, recognized that the claims which are the subject matter of this law suit were allowable." Defendant's Answer at 4, United States ex rel. Stone v. Rockwell Int'l Corp. (Criminal Case) (on file with the Boston College Environmental Affairs Law Review). In a separate defense, Rockwell argues that the alleged FCA violations "were the subject of independent investigation, evaluation, and acquiescence and/or approval by the United States government." Id.

For a discussion of the government acquiescence defense, see supra notes 209–10 and accompanying text.

\(^{394}\) See supra note 354.

\(^{395}\) See supra note 309–10 and accompanying text.

\(^{396}\) See Seymour, supra note 274, at 530. For example, the government would reimburse a contractor for environmental fines and penalties if the contract expressly required "that hazardous substances must be stored, labeled, or transported in particular ways that violate environmental laws ...." Id.

\(^{397}\) Rockwell has sought reimbursement of legal fees under the terms of its "cost plus" reimbursement contract. See Adriel Bettelheim, DOE Picks up Court-Cost Tab for Rockwell, DENVER POST, Sept. 20, 1993, at A1, available in LEXIS, News Library, DPOST File. In fact, the DOE has reimbursed Rockwell for $1.56 million in legal fees arising from Stone's FCA suit. Id.
contractors that cheat the government when providing cleanup services. In addition, the FCA can be used to check defense and other contractors that fail to observe environmental laws.

Application of the FCA to combat environmental fraud will force government contractors to respect environmental laws and to provide cost-effective environmental services. Although it appears doubtful that the FCA can compel defendants to pay environmental cleanup costs, the FCA imposes substantial civil fines and damages. In addition to offsetting government losses, FCA judgments benefit *qui tam* plaintiffs who discover environmental fraud. Thus, the FCA empowers citizens to lead the way in applying an old statute to an emerging problem.