

The False Claims Act is Going Local in Maryland

By

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If you do business with any Maryland cities or towns, it's time to recheck your anti-fraud programs.

Starting October 1 under a new state law, Maryland's 157 cities and towns will have the authority to leverage the Maryland False Claims Act to go after fraud and abuse by local government contractors and vendors. So if you do any business with municipal governments in Maryland, now is the time to review your compliance efforts and make sure your house is in order when it comes to those contracts.

While Maryland created its own version of the False Claims Act ("FCA") back in 2015, that legislation inadvertently excluded municipalities, meaning that only state agencies and county governments could take advantage of its tools for preventing and punishing contractor fraud. Sen. Cheryl Kagan sponsored Senate Bill 26 to correct the oversight so that municipal governments in Maryland and whistleblowers acting on their behalf would have access to the same tools and protections. After unanimous approval in the State Senate and overwhelming support in the House of Delegates, Governor Hogan signed SB 26 on May 26, 2017.

The law now gives municipal governments and their whistleblowers the power to sue contractors in civil court for money damages and fines. The same provisions from the 2015 law will now apply to cities and towns, including:

- Violations for knowingly submitting false claims for payment or other material false or fraudulent records or certifications, as well as so-called "reverse FCA" claims for knowingly holding or buying certain government property or funds without authorization.
- Fines of at least \$10,000 for each violation (which can add up quickly depending on how each individual instance of fraud is counted), plus up to treble damages for the government's loss. This is in addition to any other criminal sanctions or administrative penalties under other laws that may apply to the violator's actions.
- Allocation of a percentage of any judgment or settlement to the whistleblower who brings a case, based on a set formula and listed factors, as long as certain conditions are met. In some cases the whistleblower can also get his or her attorney's fees and expenses. These provisions are designed to reward and encourage legitimate whistleblowing and are common to both the federal and state versions of the FCA.
- Protections for whistleblowers against retaliation by employers.
- Just like Maryland state and county whistleblower cases – but notably unlike with the FCAs of the federal government and other states – a whistleblower's lawsuit will be dismissed before it is ever even unsealed if the local government does not agree to intervene in the case. This process is unique to Maryland's FCA and is designed as a filter against frivolous suits.
- Finally, like the state and county governments, municipalities will now have to file annual reports on their FCA activities.

Contractors who already provide services or goods to state agencies and county governments should already be aware of, and taking steps to comply with, Maryland's False Claims Act, so the addition of municipalities should not result in any major changes to your operations. But this is a good excuse to take stock. Documented internal procedures and training of personnel can go a long way to reducing risk. And for those vendors, suppliers, and service-providers who haven't contracted with state or county agencies before, you will need to make sure you are complying with the Maryland FCA on any municipal contracting activity going forward.

A few tips for compliance include:

- Develop detailed written procedures for responding to any allegations of fraud or false claims, with consideration for self-reporting, early cooperation with government officials, prompt corrective action, and other mitigating factors.
- Stick to your plan consistently for responding to all allegations of fraud, and treat all such allegations seriously, even if they are meritless.
- Implement a code of conduct and professional ethics that your employees must follow, and take care to hire good candidates who will take such standards seriously and to promote a culture of compliance.
- Have written policies in your handbook to ensure that employees are not fired, demoted, or otherwise negatively impacted because of their whistleblowing activity.
- Conduct mandatory training of all employees whose work involves the preparation, submission, or review of bids, invoices, certifications, contracts, or other reports and documents for government customers.
- Apply good internal controls, audits, and other oversight efforts as a check on any documents to be submitted to the government to ensure both accuracy and consistency with requirements.
- Regularly evaluate and reform any business practices that may incentivize personnel to cut corners or bend rules for the sake of generating more revenue from government contracts.
- Never alter any documents related to a government contract without making it clear to the government that you are doing so and what your reasons are. If you are using white-out, chances are good you are risking an FCA violation.
- Work with good outside counsel on whom you can rely. Not only will they help you navigate these issues to preemptively avoid exposure and to properly respond in the event of an allegation, but consultation with counsel may also serve as evidence that you did not “knowingly” violate the FCA.