An analysis of the Federal and California False Claims Acts and the implications for the California Department of Transportation

Henry Eugene Stultz

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AN ANALYSIS OF THE FEDERAL AND CALIFORNIA FALSE CLAIMS
ACTS AND THE IMPLICATIONS FOR THE CALIFORNIA DEPARTMENT OF
TRANSPORTATION

A Project
Presented to the
Faculty of
California State University,
San Bernardino

In Partial Fulfillment
of the Requirements for the Degree
Master of Public Administration

by
Henry Eugene Stultz Jr.
September 2004
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ABSTRACT

The Federal and California False Claims Acts (FCA) are "whistle blower" legislation which encourage anyone who is aware of a false claim, to come forward and win a percentage of the money collected in successful litigation. These laws are based on European laws and were first instituted in the United States by President Lincoln during the Civil War. Revised versions of these laws made them more useful and much FCA litigation has brought in considerable dollars across the United States. This paper explores the implications of these laws in particular for the California Department of Transportation.

The construction of state highway projects is bid out each year at approximately three billion dollars. Claims from contractors for additional compensation are common. This paper investigates the policies and procedures for handling claims and explores the FCA case law and its' implications for the Department of Transportation's contract administration.

The FCA case law establishes the constitutionally of the act, defines the public disclosure bar and original source provisions of the law and provides guidance with respect to the government intervention provisions of the law. In addition the case law gives good examples relevant
to the construction industry. The act has proven itself constitutionally sound. Supreme Court rulings have addressed concerns with violation of the separation of powers requirements of the constitution, whether a qui tam (plaintiff) has standing and the possible violation of the due process requirements of the constitution.

Caltrans has well-established methods for handling construction claims for additional compensation, including Dispute Review Boards, Board of Reviews and a legal department to handle settlements and arbitration. Many changes occur during the administration of a construction project. These changes are handled through contract change orders. Many times however, disputes between the state and the contractors over the merit and cost lead to unsettled claims for additional compensation. Most times the claims are honest contract disputes, however sometimes these claims are fraudulent and costs are exaggerated. This paper addresses the implications of FCA actions by the government and/or private qui tam litigation against contractors and the claims submitted to the state on Caltrans' construction projects.
ACKNOWLEDGMENTS

I WISH TO THANK DR. DAVID BELLIS AND DR. CHARLES CHRISTIE FOR THEIR GUIDANCE IN WRITING THIS PAPER.
DEDICATION

THIS PAPER IS DEDICATED TO MY FAMILY, MY WIFE JANE AND MY CHILDREN HENRY, RENEE AND JANELLE.
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CHAPTER ONE
BACKGROUND

Introduction to the Study

As the author of this paper I currently work for the California Department of Transportation. I am a Senior Bridge Engineer working in construction. It is the Senior Bridge Engineer’s responsibility to supervise Resident Engineers, Structure Representatives, and Assistant Structure Representatives. The primary function of these staff is to administer the department’s construction contracts. Often questions are asked regarding the False Claims Acts and the implications for the California Department of Transportation highway construction programs.

The California Department of Transportation is responsible for the planning, design, construction, improvement, operation, maintenance, rehabilitation and seismic retrofit of the state highway system (20:49). California’s state highways support the vast majority of all travel in the state, including both personal and commercial transportation. “The state highway system, which comprises less than nine percent of the total roadway mileage in California, handles fifty-three percent of the miles traveled (10:82)".
The department’s highest priorities are maintaining and rehabilitating roads and highways while building new projects. The Capital Outlays Projects program funds the contracts for this work (14:3). These contracts are typically awarded to the lowest bidder.

Private construction contractors are responsible for the fulfillment of these contracts. The Department of Transportation’s engineers are given the responsibility of administrating these contracts. The State Transportation Improvement Program (STIP) makes up the majority of these construction contracts and has an annual budget of approximately three billion dollars (7:6). The STIP determines which contracts will be funded chronologically for the state of California on a seven-year time frame.

The construction companies awarded the construction contracts are required by each project contract to adhere to the plans, specifications and special provisions of the state. Administration of these contracts requires inspection to guarantee that the contract requirements are meet. The state’s engineers are responsible for construction inspection. Additionally, the engineer must process payments based upon job completion levels throughout the course of the project.
The Caltrans Organization Chart

Like many other bureaucracies the Caltrans' organizational chart can be characterized as a rational, conscious and institutionalized arrangement of the division of labor (27:4). Similar to the Weberian concept of bureaucratic organizations where the division of labor must be carried out through non overlapping functional divisions, with a hierarchy of coordination and control with procedures and rules of action (28:4). The Caltrans' organizational chart is arranged in two fashions both horizontally and vertically (See Appendix A). The horizontal one is a hierarchical ordering from the organizations' director enumerating down to each deputy director as the department heads are called. The organization chart functions as an image map that link organization chart "boxes" to the respective function statements for each division. For example, the Accounting and Budget departments are below the Finance Deputy Director, as the Network Operations Department is under Information Technology Deputy and the Construction and Design departments are under Project Delivery Deputy. These charts graphically illustrate the administrative structure of the different functional units within the organization.
Additionally on the far right of the chart it is organized vertically. Each vertical box represents a region with the state of California. The regions are divided geographic regions. These regions are called districts and numbered 1 through 12 statewide (See Appendix A). Traditionally these regions try to follow already dictated boundaries like the county line. For example, Region 8 contains the geographical areas of Riverside and San Bernardino counties.

Statement of the Problem

On state construction projects often the construction contractor will file a "notice of potential claims" for additional compensation. These claims may be based upon alterations of the original contract or unforeseen work or ambiguities in the contract. When merit is found in the contractor’s claim, changes are handled with contract change orders (CCOs). The CCOs are laid out on a standardized form and are most times negotiated by the state engineers on the project and the contractor’s superintendent at the job site. Statewide, these claims amount to hundreds of millions of dollars annually. These claims are either settled at the project level with CCOs,
settled after the contract is completed, or settled in arbitration.

Many of the claims submitted are considered to be without merit by the state at the project level. However, these claims are often settled as a "business decision" after the project completion. Typically, this is a more cost-effective solution rather than the cost of litigation in arbitration.

Purpose of the Study

The purpose of this study is to analyze the Federal and State of California’s False Claims Acts and ascertain the implications for the California Department of Transportation. The California Department of Transportation is believed to be experiencing a significant number of false claims in the Capital Outlays (Construction) Projects. The study will utilize legislative, managerial and financial analysis techniques to examine the impacts of false claims upon the Department of Transportation Construction Projects.

This study is significant because of the large amount of money spent on claims considered to be without merit or fraudulent statewide. Throughout the construction process, it is the engineer’s responsibility to protect the state’s interest and the state’s dollars. The investigation will
expand upon the legislative analyses and discuss the ramifications of the implementation of these laws with respect to past and current situations.

This study differs from previous studies on the False Claims Act, since it focuses on the implication for the California Department of Transportation. Specifically, this investigation is limited to the new construction and rehabilitation projects, included in the Capital Outlays’ funds. Other reviews and studies of the False Claims Act will be illustrated in the literature review section. They will be used to support the analysis portion of the study and to demonstrate the problem through case reviews. This investigation extends present knowledge by examining it under the context of construction issues.

Crucial to the research goals are studying the department’s organizational structure and the construction claims process. This paper will include a detailed look at the organizational structure from planning to design through construction to maintenance. The construction process will be examined focusing on the claims process. The objective will be a thorough understanding of the process. The research will also examine data collected statewide relative to claims, settlements and arbitrations.
An analysis of statewide construction projects will be included. Data will be complied for a study of construction claims throughout the state. Cost on claims will be reviewed on a district by district basis. Settlement and arbitration results will be compiled, again by district; to determine construction claims costs. The Capital Outlays Project budget will be studied to better understand the impacts of claims on the State Transportation Improvement Program.

Departmental organization charts will be included and shown to illustrate the hierarchy used to make policy decisions. Interviews and surveys will be conducted to ensure all possible policies are researched and investigated. Caltrans' officials will be asked for personal accounts of administration where false claims are suspected. And all findings, conclusions and recommendations will then be presented in the work.

Theoretical Basis and Organization

The work is organized based on a categorical system. Review of the case law is based upon each unique aspect of the legislation. The history of the advent of the legislation is organized in a chronological fashion dating from its inception, through the Lincoln presidency, and to the current versions of the federal law. The state version
of the law for California and other states will be
discussed as it may pertain to case studies.

Lawyers publicize many other False Claim studies, in
order to keep them abreast of the legislation so that they
may represent clients to the best of their abilities.
Prosecuting or defending parties to False Claims Act suits
can enhance a lawyer’s reputation and are often publicized
due to the large monetary awards associated with some of
the cases.

Other research on the False Claims Act is performed
by non-profit organizations such as the Taxpayers Against
Fraud. This organization hopes to alleviate over spending
in the public sector so that all Americans benefit by
paying less tax.

Additionally other non-profit organizations like the
Government Accountability Project (GAP) act to litigate
whistleblower cases. Their mission is to protect the
public interest by promoting government and corporate
accountability through advancing occupational free speech
and ethical conduct, defending whistleblowers, and
empowering citizen activists. Founded in 1977, GAP is a
public interest organization and law firm that receives
funding from foundations, individuals, and legal fees
(15:1).
The theoretical basis for the study is that the State of California through the Caltrans’ Capital Outlay’s budget is paying too many falsely submitted construction claims for new highway construction and rehabilitation projects. Is this caused by fraud? Does submitting a fraudulent notice of potential claim constitute a violation of the False Claims Act? Does payment have to be made in order for a false claim to be a violation of the False Claims Act? Can the state benefit from the Department of Transportation’s use of the Federal or State False Claims Acts? Will this legislation help reduce costs for the Caltrans’ organization? Is there a down side to the prosecution of state contractors using the False Claims Act?

The conceptual framework is that the laws provide a financial remedy for abuse. Is the state able to utilize these laws for it’s financial advantage? Can the state recoup any loses they have already incurred on construction fraud? Will utilizing the legislation increase Caltrans’ legislative budget? How would the implementation of these laws affect the organization? A look at the potential impacts on the department will include the affects on policy, management and the budget.
One hypothesis is that the state is paying millions in construction claims. Are all these claims warranted? Are they being settled properly to the financial advantage or disadvantage of the state? Another hypothesis is that by utilizing the Federal or State False Claims Acts the state will reduce construction claims and thereby save money.

Limitations of the Study

One of the primary limitations of the study is that we will use historical claims for analysis since we are not aware of all current construction claims as they are occurring on a daily basis all across the state of California and the nation. This presents us with a methodological limitation for the study. The research will work around this limitation by using this historical background as a lessons-learned basis for future claim analysis.

Another limitation of the study is that "engineering judgement and discretion" are often factored into the negotiation of construction claims. This represents a content limitation for the study. The research will work around these limitations by offering different interpretation of the engineer's judgement when necessary in an attempt to explain the construction difficulty.
One other content limitation is that the study will use case law from other industries (medical, aerospace, technology, etc...) where it is relevant to the analysis. The study will work around this limitation by using the case law for demonstration purposes only.

One delimitation for the work is that we will not study every federal and state False Claims Act case. Currently, the federal cases number 4,281 and have recovered over 12 billion dollars since 1986 (9:1). Inclusion of this many case studies would be prohibitive. Cases will be selected based on the nature of the law that they illustrate and as they relate to construction issues.

Nomenclature

- Arbitration: the hearing and determination of a case in controversy by an arbiter (a person with power to decide a dispute)
- Bounty: a reward, premium, or subsidy especially when offered or given by a government: as an extra allowance to induce entry into the armed services or a grant to encourage an industry
- Caltrans: The California Department of Transportation
- CCOs: contract change orders, changes to the original contract, which are contracts within themselves
• Capital Outlays: are expenditures that result in acquisitions of, additions to, replacement of or major repairs to fixed assets that will benefit current and future fiscal periods. Capital outlays are accounted for within the state of California budget.

• Claim: is defined as including "...any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other

• CPB: Construction Procedures Bulletin, issued by Caltrans to keep field engineers updated on latest changes in construction procedures.

• DRBs: Dispute Review Boards, began in 1990 as a remedy for settling claims on construction projects statewide. They act as a neutral third party on construction conflicts to provide an opinion on the merit of claims for large projects.

• Dicta: a noteworthy statement: as a formal pronouncement of a principle, proposition, or opinion or an observation intended or regarded as authoritative or a judge's expression of opinion on a point other than the precise issue involved in determining a case.
• Due process: a course of formal proceedings (as legal proceedings) carried out regularly and in accordance with established rules and principles -- called also procedural due process or a judicial requirement that enacted laws may not contain provisions that result in the unfair, arbitrary, or unreasonable treatment of an individual -- called also substantive due process

• Interest: an excess above what is due or expected or feeling that accompanies or causes special attention to an object or class of objects or something that arouses such attention

• Knowing: is having actual knowledge of information, acts in deliberate ignorance of the truth or falseness of information. Additionally, knowing means to act in reckless disregard of the truth or falsity of the information. From a legal perspective no proof of specific intent to defraud is required

• PFCRA: Program Fraud Civil Remedies Act is a mini False Claims Act remedy. Useful for small claims, under $150,000, enacted in 1986

• Person: includes any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust (4:3)
• Preponderance: a superiority in weight, power, importance, or strength or a superiority or excess in number or quantity

• Profiteer: one who makes what is considered an unreasonable profit especially on the sale of essential goods during times of emergency

*Qui tam*: is short for a Latin phrase, "*qui tam pro domino rege quam pro se ipso in hac parte sequitur,*" which roughly means "...he who brings an action for the king as well as for himself. (2:1)"

• Recipient: one that receives

• Rehabilitation: to restore or bring to a condition of health or useful and constructive activity

• Seismic: of, subject to, or caused by an earthquake; also of or relating to an earth vibration caused by something else

• Redressability: is a substantial likelihood that the requested relief will remedy the injury

• Relator: For the purposes of the False Claims Act the relator is defined as the individual who brought a case of fraud to the attention of the government

• Bipartisan: of, relating to, or involving members of two (political) parties
• Relief: removal or lightening of something oppressive, painful, or distressing (elaborate here based on the case law)

• STIP: California’s State Transportation Improvement Program, a seven-year document published by the state, which dictates the schedule of future construction projects

• Whistle-blower: one who reveals something covert or who informs against another
CHAPTER TWO
REVIEW OF THE LITERATURE

Introduction

The literature review will be accomplished predominately through the use of case law. The review will begin with the historical beginnings of the original Federal False Claims legislation. Next relevant amendments to the legislation will be surveyed. Applicable case law will be used to demonstrate the components of the legislation. Relevant construction cases will be addressed in a separate section.

The California False Claims Act will be included for its relevance to the organization we are reviewing. A history of the California legislation will be added for illustration of similarities and differences in the laws.

Finally, additional case law will be employed to illustrate outcomes of construction fraud cases that are relevant to the work and the organization.

History of the False Claims Act

"The action originally gained popularity in 13th century England"(4:2). Most United States laws are based on English common law. Common law relies on lawyers to represent the client's case. Decisions under common law
were made based on prior tradition and precedence. The form of reasoning used in common law is known as casuistry or case-based reasoning. Common law may be unwritten or written. The common law, as applied in civil cases was a way of compensating the injured party for wrongful acts known as torts. (17:1)

As the colonies of the United States formed its new government after the revolution we relied on European history to guide our practice. The Continental Congress in the early days of government in the United States enacted a number of qui tam provisions. Benjamin Franklin has been quoted as saying: "There is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government" (2:1).

The Federal False Claims Act being used today passed during the American Civil War. The act is commonly referred to as the "Lincoln Law" and was passed, by Congress on March 2, 1863. This law was enacted out of a frustration with poor goods and services being provided to the government by dishonest suppliers. During the war, boxes of sawdust were being delivered in place of guns, and instances of the same horses being sold over and over to the Union Army were discovered. One war profiteer
boasted “You can sell anything to the government at almost any price you’ve got the guts to ask” (4: 1).

The War Department (now known as the Department of Defense) did not have the resources to track down the fraudulent suppliers. Additionally, the U. S. Attorney General Office did not have the staff to attack the problem. As a result President Abraham Lincoln pushed for passage of the False Claims Act. (30:1)

The False Claims Act included "qui tam" provisions that allowed private citizens to sue, on the government’s behalf, companies and individuals that were defrauding the government. "Qui tam" is short for a Latin phrase, "qui tam pro domino rege quam pro se ipso in hac parte sequitur," which roughly means "he who brings an action for the king as well as for himself." (30:2) The purpose of the False Claims Act was to provide a means to motivate private individuals to “blow the whistle” on known cases of fraud perpetrated against the government. The individual who brought a case of fraud to the attention of the government (referred to as the relator in the False Claims Act) would be given a percentage of the fines imposed on the guilty party.

The penalty for defrauding the government was a two thousand dollar fine for each false claim plus double the
amount of the false claims submitted. The relator, who brought the suit to the attention of the government, received 50% of the amount collected plus his legal costs.

In 1943, the Supreme Court ruled in United States ex rel. Marcus v. Hess that the relator could bring action under the Federal Claims Act on behalf of the U.S. government, even though the action was based solely on information acquired from the government. (41:2) This meant the relator did not need to have first hand knowledge of the fraud, but simple could use the information learned from newspaper accounts and government records. A number of cases were brought by relators, where the information was based solely on government documents, congressional hearings and news accounts. As a result the False Claims Act was significantly amended in 1946.

The 1946 amendment to the False Claims Act attempted to correct the ruling of the Supreme Court. However, it went too far and made the False Claims Act ineffectual. The 1946 amendment reduced the percent the relator received from 50% to 25% (10% if the government joined the action). And more significantly, it prohibited lawsuits based on evidence or information the government was already aware of. This meant, if any government official had any knowledge or information regarding the claim, or
if any government file or record contained any information concerning the case, then the relator could not use this information when bringing the suit. This was true even if the government officials were not investigating the case or if the relator was the source of the government knowledge. As a result the False Claims Act became virtually unusable for the next forty years.

This was true until the mid-1980s, when President Reagan proposed a new philosophy. President Reagan campaigned on the concept of increased responsibility of the private sector, privatization of government functions and the use of market forces to enhance government services. (37:2) President Reagan also dramatically increased defense spending, which lead to numerous highly publicized cases of over-spending on government contracts. The ability of the government officials to administrate and control this increase in spending was insufficient due to lack of resources and legal tools. Government officials also stated it was difficult to get individuals with knowledge of fraud to speak up for fear they would lose their jobs.

In 1985, the Department of Defense reported that 45 of the largest 100 defense contractors -- including nine of the top 10 -- were under investigation for multiple
fraud offenses.” (30:2) In 1986, after high-profile hearings revealed that the Department of Defense was purchasing $435 claw hammers, $640 toilet seats, and $7,600 coffee makers, Congress decided to take action (24:2). It amended the False Claims Act, after congressional hearings exposed widespread military contractors' fraud, including defective products, substitution of inferior materials and illegal price gouging. The 1986 amendment empowered ordinary citizens to act as private attorneys general by filing *qui tam* whistleblower suits against individuals or entities that have defrauded or cheated the government. (5:2)

A bipartisan passage of a series of amendments to False Claims Act was put into law on October 27, 1986 (See Appendix B). These amendments provided better ability for “whistle blowers” to file suit in *qui tam* cases. Frank Hunger, the Assistant Attorney General for the Civil Division praised the work of Senator Charles Grassley of Iowa and Representative Howard L. Berman of California, who sponsored the 1986 whistle blower provisions (9:1).

In addition, the percent a whistle blower would receive was increased to 30% (15% if the government partnered in the action). Attorneys were also given assurance that their legal fees would be covered in
successful litigation. Companies filing fraudulent claims, in addition to paying triple the amount of the claims, can also be fined $5,000 to $10,000 for each false claim.

Since the passage of the amendments to the False Claims Act in 1986, the number of cases filed has increased dramatically. "More than 3,000 qui tam cases have been filed since 1986." (9:2)

The False Claims Act Law

The United States Code section 3729, Title 31 Money and Finance, Subtitle III - Financial Management, Chapter 37 - Claims, Subchapter III - Claims Against The United States Government, Section 3729 - False Claims, states "Any person who knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States Government a false or fraudulent claim for payment or approval... is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person..." (24:1) Additionally, any person who conspires to defraud the Government by getting a false or fraudulent claim allowed or paid is liable. Any person who has "has possession, custody, or control of property or money used,
or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt" (35:1), is liable. Any person who is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true" (35:1), is liable. Any person who "knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property" (35:1), is liable. Any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government" (35:1), is liable.

The term "knowing" is defined by having actual knowledge of the information, acts in deliberate ignorance of the truth or falsity of information. Additionally, "knowing" means to act in reckless disregard of the truth
or falsity of the information, and no proof of specific intent to defraud is required.

The term “claim” is defined as including “...any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient...” (35:2) Provided “...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.” (35:2)

There are exceptions when “the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information.” (35:2) This person must cooperate fully with any Government investigation. There can be no criminal prosecution, civil action or administrative action commenced under the title with respect to violation.

Under section 3730 - Civil actions for false claims, the responsibility of enforcement is given to the Attorney General. The Attorney General is required to diligently
investigate any violation. After investigation, the Attorney General may bring civil action.

Anybody may bring action for a violation of the False Claims Act and must do so in their name and in the name of the Government. Dismissal of the action requires a court and the Attorney to give written consent to the dismissal with reasons for the dismissal. If the Government decides to proceed with an action, this must be done within 60 days of receiving the complaint and evidence in the case. With good cause the Government may ask for extensions from the court. If the defendant can show to the court that the litigation brought by the person is for the purposes of harassment the court may limit the participation by the person bringing the litigation.

In cases where the Government decides not to proceed with the action, the person bringing the litigation shall have the right to conduct the action. If the Government request the copies of pleadings and transcripts, they shall be provided to the Government.

If the Government proceeds with the action, the person bringing the action (the relator) shall receive at least 15% but not more the 25% of the proceeds of the action. This is true unless the court determines the findings are primarily based on evidence other than that
provided by the relator. In this case, the relator is entitled to no more than 10%. In addition to the percentages listed above the relator is entitled to expenses, plus attorney fees and costs.

If the Government does not proceed with the action, the relator is entitled to 25% to 30%. The court decides the amount between 25% and 30% based on the contribution to the case by the relator. In addition to this percentage, the relator is entitled to expenses, plus attorney fees and costs.

In the cases where the defendant prevails in the action, the court may award the defendant attorney fees and costs. This is true when the court finds that the person bringing the action was clearly vexatious, frivolous or brought primarily for the purpose of harassment.

Certain persons are barred by the law in bringing action. No member of the armed forces may bring an action against the armed forces, arising from service in the armed forces. No action may be brought against a member of Congress, a member of the Judiciary or a senior executive branch official, if the action is based on information or evidence known to the Government when the action is brought. No action may be brought when the Government is
already a party in the case. No action may be brought based on public disclosure, transactions in a criminal hearing, civil hearing, administrative hearing, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Any person fired, demoted, suspended, threatened, harassed, or in any other manner discriminated against in terms of his employment by his employer due to legal actions taken with regard to the False Claims Act, shall be entitled to all relief necessary to make the employee whole. This relief shall include reinstatement at the same level, two times the back pay plus interest and compensation for any special costs sustained. This includes any legal fees and costs.

Rules and Procedures

Civil action brought under the False Claims Act may not be made more than six years after the date the violation occurred, or an action may not be made more than three years after the date the facts of the case are known or should have been known by an official of the responsible for taking action, but in no case may an action be made ten years after the violation has occurred (which ever occurs first). Any case brought under the
False Claims Act, the United States is required to prove all elements of the cause, including damages, by a preponderance of the evidence. The rules listed are a summary and not inclusive.

Civil Investigative Demands

The Attorney General may demand, when a person is believed to possess material or information, the information be produced. The individual must when ordered provide written answers to questions involving the material or information and give testimony concerning the material or information. The demands for the material or information shall include a statement of the nature of the conduct constituting the alleged violation of the False Claims Act. The material or information required must be described with sufficient definiteness to permit the material to be fairly identified. The questions, for which the answers are to be provided, must be in the form of written interrogatories. And any person required to give testimony shall be notified of the right to have an attorney present. The civil investigative demands discussed are not inclusive.
CHAPTER THREE

METHODOLOGY

Design of the Investigation

The design of the investigation will be to utilize the federal and state of California's False Claims Acts' case reviews included to analyze the Caltrans' construction claims process. Additionally, to review the organizational structure at Caltrans to ascertain if the claims made are being handled in the most efficient and cost effective way given the organizations resources available. Finally, the analysis will review if using the legal history of the False Claims Acts can benefit the organization as a cost savings tool for arbitrations on construction disputes and claims.

The Caltrans' construction claims, arbitration reviews and the organizational charts will be studied in detail to provide background to complete an analysis on the usefulness of the legislation for the organization. Many variables will be identified throughout the investigation, including procedures already in place within the organization and prior legal remedies that the courts have adjudicated.
Population

The principal characteristics of the population under review are the general or primary contractors that obtain contracts from Caltrans. Also involved are subcontractors, whom although they do not directly have a contract with the organization may also benefit from the state and federally funded highway projects that the organization inspects and administers.

The sampling of the population will be a quasi-experimental in design in that there will be questions asked of participants but they will be in an interview format and as such will not necessarily be identical for each participant. Additionally, most of the analysis will be based on historical cost figures as there is always time needed to gather and analyze the information provided by the organization.

Treatment

The instruments used to gather the research are varied and consist of phone conversations, one-on-one interviews, powerpoint presentations, Internet research, legal research and literature reviews. Also used is the Governor’s budget for the financial component of the Caltrans’ construction budget and the STIP for the time-line component of the analysis. Attorney’s fees and
workload analysis will be used to ascertain the cost incurred to the organization to prosecute alleged false claims under the legislation.

The validity of the instruments will be difficult to ascertain since they have not been studied in detail by other researchers at this time. Other researchers and attorneys have reviewed the False Claims legislation and they are included to speak to the validity of the work.

Data Analysis Procedures

The procedures used to gather the data are different for each data source. Data gathered on the case reviews may be supplied by legal research organizations such as the Taxpayers Against Fraud or by attorney’s statements on cases defended and prosecuted. All results will be verified as possible with the US Attorney General’s and the Department of Justice’s statistics for federal cases. For state of California cases the Attorney General’s office has been consulted for data. Additionally data has been gathered from newspaper accounts, publications and Internet sites on case studies.

Data on construction claims has been gathered from the organizations itself. Caltrans’ records and presentations will be used in the analysis. Published documents like organization charts will be used in this
capacity also. The organizations' Intranet capabilities will be used to access additional data sources (i.e. forms and electronic files) as warranted.

The data analysis procedures include calculations on the number of false claims both federally and at the state level which have been prosecuted. Judgements are reviewed to ascertain cost analysis for cases concluded. Construction statistics from the state are summarized to show levels of claims made.

Additional data analysis will be performed on Dispute Review Board statistics. DRB summaries are used to show claims contested at the state level. Calculations are made to determine the percentage of favorable outcomes at the state level from the DRB cases. Illustrative charts and graphs are included from calculations of relevant statistics.
In Riley v. St. Luke's Episcopal Hospital (S.D. Tex. Oct. 21, 1997), a Texas District Court ruled the *qui tam* provisions of the False Claims Act were unconstitutional. This decision was contradictory to many years of court decisions regarding constitutionality of the False Claims Act. According to the Judge in the case, Congress cannot "confer standing upon a *qui tam* plaintiff who has suffered no cognizable injury under Article III of the Constitution . . . consistent with principles of 'separation of powers.'" (12:1) The district court analysis included a description of the constitutional requirements for standing. Quoting three elements of standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992):

First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of ... Third, it must be "likely" as
opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Additionally, the court decided that "prudential requirements also bear on standing." Therefore, according to the court a plaintiff must "assert his own legal rights and interests and not those of third parties." (35:3)

The Texas District Court based its' decision on a critique and rejection of the 9th Circuit's analysis and holding in U.S. ex rel. Kelly v. Boeing Co. 9 F.3d 743 (9th Cir. 1993), which up held the constitutionality of the qui tam provisions based on the assignment theory. The assignment theory is that the Government may assign its' interest in the case to a "relator", through the False Claims Act.

"First, the district court rejected the Kelly court's finding that, in addition to the Government as "the real party in interest" meeting the injury requirement, the relator also meet it by having a personal stake in the outcome of the suit. While the Kelly court found that the relator must "fund the prosecution of the suit," he is eligible to receive "a sizeable bounty if he prevails," and "may be liable for costs if the suit is found to be frivolous," the district court rejected these as merely "byproducts" of the litigation that fail to evidence
injury in fact." (35:3) The Texas District Court also determined the assignment theory assumes Congress assigned the Government's interest and injury to a *qui tam* relator fails for three reasons. The first being there was "no indication in the statute that Congress was attempting to bestow a contract right to recover damages on the *qui tam* plaintiffs, who were not even identified at the time of passage, and are not identifiable until they themselves initiate a suit." Second to effectively assign a contract right, "the owner of that right must manifest an intention to make a present transfer of the right without further action by the owner or by the obligor." However, according to the Texas District Court, Congress is not given the power to prosecute fraud cases. Based on the Constitutional separation of powers, "Congress is powerless to distribute powers that it does not have". Additionally, common law does not allow assignment of in the future rights as recognizable. "There must be a 'present transfer of an existing right'". Third, permitting relators to suit on behalf of the Government "would effectively permit Congress to circumvent...standing assigning a governmental cause of action to an individual. "The court found that, in light of standing being an integral part of our system of separation of powers,
Congress should not be allowed to legislatively circumvent Article III’s standing requirements". (35:4)

The Texas District Court also rejected precedence in previous False Claims Act cases which upheld constitutionality of “Congress simply extended the Article III standing to [relators] under the statute” by creating a legal interest in the statute and conferring the standing to assert it. The Texas District Court stated the Supreme Court has rejected theory that a statutory right eliminates the need for “injury in fact.” “Injury in fact is not a prudential requirement that can be discarded by passage of legislation, and the Article III inquiry cannot turn on the source of the asserted right.” (35:4) The Texas District Court also discounted Supreme Court dicta presumably approving of the qui tam provisions, finding that it predated the “Courts modern conception of standing.” The long history of the qui tam provisions did not persuade the court, as proof of its’ constitutionality. The Texas District Court stated that “Article III’s requirements are clear, and are not to be avoided by courts eager to uphold the constitutionality of congressional enactments.” (35:4)

“In short, the district court concluded that the relator suffered no injury in fact nor did she show any
'causal' link between an injury (even if there were one) and the conduct complained of. Further, 'Congress cannot statutorily assign the Executive's future interest in pursuing a particular fraud claim to an unnamed theoretical plaintiff.' Otherwise, Congress would 'circumvent Article III standing requirements, which are essential to the principle of a limited judicial role under our separation of powers.'" (36:18)

Another Texas District Court disagreed with the unconstitutionality of the qui tam provision of the False Claims Act in U. S. ex rel. Thompson v. Columbia / HCA Healthcare Corp. et al., Order, Civil Action No. C-95-110 (S.D. Tex. Aug. 18, 1998). The court rejected the defendant's assertion that the qui tam provision of the False Claims Act was unconstitutional. The "relator James Thompson, M.D., alleged that Columbia/HCA Healthcare Corporation and certain affiliated entities created incentive arrangements and provided financial inducements to physicians for patient referrals in violation of the anti-kickback statute and self-referral laws." (36:18) The court first considered the constitutionality of the qui tam provisions. The court decided contrary to a decision reached earlier that year in the same district by another court. This court disagreed with the ruling in Riley v.
St. Luke's Episcopal Hospital, "'because it goes against 134 years of case law specifically concluding or assuming that the qui tam provisions are constitutional and/or that the relator has standing to bring the action even though the relator has suffered no injury.' The court instead concurred with the numerous circuit courts that have addressed the issue and found the qui tam provisions to be constitutional. Citing other circuit decisions, the court noted that where the Government has suffered an injury-in-fact, the relator merely steps in as its representative or assignee to carry out the statute’s purpose of remedying fraud against the Government. Moreover, the FCA provides sufficient executive control of the qui tam suit and the relator has a personal stake in the outcome of his suit. The court also observed that 'appellate courts scrutinize their jurisdiction before reviewing the issues of each case, and none, including the Supreme Court, in ruling on FCA cases has yet determined that it lacked jurisdiction because an FCA qui tam relator lacked standing.'" (36:18)

Again in U.S. ex rel. Olloh-Okeke v. Home Care Services Inc. a "Texas district court denied the defendants' motion to dismiss Clara Olloh-Okeke's qui tam suit on constitutional..." (21:16) This court, explicitly rejected the Texas court's ruling in U.S. ex rel. Riley v.
St. Luke’s Episcopal Hospital, 982 F.Supp. 1261 (S.D.Tex. 1997), and instead relied on the opinion by Judge Harmon in U.S. ex rel. Thompson v. Columbia/HCA, 20 F.Supp. 2d 1017, 1044-46 (S.D.Tex. 1998), stating that “[t] his court joins Judge Harmon and every other federal appellate court that has considered the issue in disagreeing with Riley because it goes against 134 years of case law specifically concluding or assuming that the qui tam provisions are constitutional.” (41:16) And once again in Hopkins v. Actions, Incorporated of Brazoria County, 1997 WL 789429 (S.D. Tex. Dec. 19, 1997) another Texas district court “held that a plaintiff need not have standing as a relator to utilize the FCA § 3730(h) retaliation provision. Furthermore, in an express rejection of its own district’s recent decision in U.S. ex rel. Riley v. St. Luke’s Episcopal Hospital, the court alternatively held that the plaintiff did have constitutional standing as a relator. The court stated “In light of the congressional purpose underlying the FCA and its plain language, this court rejects the St. Luke’s reasoning. Moreover, a close reading of Robertson reveals that the Fifth Circuit finds the standing question to be a non-issue on these facts. Indeed, in one of the few cases addressing the standing of a qui tam plaintiff, the Fifth Circuit (in U.S. ex rel. 39
Weinberger v. Equifax, Inc., 557 F.2d 456, 460 (5th Cir. 1977)) described the FCA as a statute that 'grants informers standing to sue and an award for successful action under the statute.'” (21:16)

In U.S. ex rel. Fallon et al. v. Accudyne Corp. and Alliant Techsystems, Inc., the defendants argued that the relators again lacked standing because the controversy was between the United States and the defendants. The relators had not suffered injury in fact. The defendants also argued again that the qui tam provisions of the False Claims Act violated the separation of powers' principles. The defendants also argued, the Appointments Clause of Article II commands that the President "shall take care that the laws be faithfully executed." Lastly, the defendants cited a case which held that private attorneys appointed must be personally disinterested in criminal prosecution. Therefore, the defendants claimed that the due process clause is violated by permitting private citizens with an interest in the outcome of the proceeding to prosecute claims on behalf of the United States. The court disagreed with each of the arguments, finding that standing was not at issue since the real party in interest was the United States, which simply assigned its right to sue to the relators. Further, since relators were
advancing their own funds in prosecution of the suit and were entitled to receive a share of any recovery, there was "a direct and adversarial controversy" between relators and defendants. With respect to the Appointment Clause of Article II, the court found that, given the substantial control the Government retains over a relator's action, executive power is not improperly usurped and relators are not vested with sufficient authority to be deemed "officers of the United States." And finally with respect to a possible violation of the due process clause, the court again rejected the argument, stating "the cited authority involved criminal (not civil) prosecutions and did not suggest that appointing a prosecutor with an interest in the litigation's outcome rose to the level of a due process violation." (21:16)

In *U.S. ex rel. Fallon et al. v. Accudyne Corp. and Alliant Techsystems, Inc.*, the defendants also argued that since the case involved alleged no compliance with environment provisions of the contract, the violations did not threaten a financial interest. The district court also rejected the defendants' argument that the suit "was not supportable because the U.S. was not exposed to any financial risk as a result of Accudyne's alleged failure to comply with the environmental compliance provisions."
The court stated: 'If such provisions are to have effect their knowing violation must have the potential to support FCA claims even though violations do not threaten a financial interest. Accordingly, courts have consistently held that damage to the financial interests of the government is not a prerequisite to a FCA claim.'” (21:16)

However, in U.S. ex rel. Minnesota Association of Nurse Anesthetists v. Allina Health System Corp. et al., Opinion and Order, No. 4-96-734 (D. Minn. March 16, 1999), “a Minnesota district court ruled that a relator lacks constitutional standing where the Government has not suffered economic damages. According to the court, if the Government has not suffered economic injury, it does not satisfy the injury-in-fact requirement for Article III standing, and therefore has no standing to assign to a qui tam relator.” (36:1)

The Supreme Court decided two constitutional issues in Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 120 S.Ct. 1858 (May 22, 2000). The first was whether or not a qui tam relator can suit (has standing) on behalf of the United States. And second whether or not a State can be considered a “person” and a defendant in a false claims suit.
The Court unanimously ruled that the relator, Stevens, met Article III's standing requirements. Article III of the U. S. Constitution, requires a plaintiff must establish "an injury-in-fact. This injury-in-fact must be "concrete" and "actual or imminent". It can not be of conjectural or hypothetical basis. Additionally the causation must be fairly traceable, with a connection between the injury-in-fact and the conduct of the defendant. Also, in order for there to be standing, there must be redressability. Redressability is a substantial likelihood that the requested relief will remedy the plaintiff's injury. Stevens argued and the court agreed that his qui tam suit provided remedy for injury suffered by the United States. The court found the injury to the United States sovereignty, due to violation of its’ law and alleged fraud injured the United States proprietarily.

Regarding the assignment and recovery by the relator, Stevens, "The Court also found that the portion of the Government’s recovery Stevens could receive upon prevailing constituted a concrete private interest in the outcome of the suit. Stating, however, that “[t]he interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right,” the Court stressed that the concrete interest must be
related to the injury-in-fact. As Stevens’ right to his share of the Government’s recovery could not fully materialize until the litigation was over, this interest would be merely a “byproduct” of the suit and would not serve to obtain compensation for or prevent a violation to a legally protected right.” (39:2) Additionally, the Supreme Court found adequate basis for standing by Stevens as relator, and the assignment theory. The court stated the False Claims Act “can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.” (39:2) In making it’s ruling the “Court heavily relied upon the qui tam concept’s grounding in English and American legal history. The Court stated: [H] istory is particularly relevant to the constitutional standing inquiry since …Article III’s restriction of the judicial power to “Cases” and “Controversies” is properly understood to mean “cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.” The Court observed that qui tam actions in various forms have been a part of English legal tradition since the end of the 13th century, when private individuals sued to vindicate royal interests as well as their own. The Court also recognized the qui tam tradition in the American legal system, noting particularly its use
immediately before and after the framing of the Constitution. Referring to *qui tam*’s historical roots, the Court concluded its analysis of this issue by stating: “When combined with the theoretical justification for relator standing discussed earlier, it leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing.” (39:2)

Regarding the issue of whether or not a State is a "person" and can be held liable under the False Claims Act, the Supreme Court decided in a split decision that: "a state or state agency is not a "person" subject to *qui tam* liability under § 3729 of the False Claims Act.” (39:4) The False Claims Act states “[a]ny person who knowingly presents or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval.” And the Court, looking at a "longstanding presumption that the term person does not include the sovereign, the Court found no affirmative showing of congressional intent to the contrary in the FCA. The Court stated: ‘The presumption is particularly applicable where it is claimed that Congress subjected the States to liability to which they had not been subject before.’ According to the Court, the FCA as originally enacted in 1863 "bore no indication
that States were subject to its penalties’ and none of the subsequent amendments to the statute, including the 1986 amendments, suggested a broadening of the term person.” (39:5). The Supreme Court supported it’s findings using three aspects of the False Claims Act language. First, the language requires the Attorney General to investigate demands to “any person” with information regarding a False Claims Act violation. In this case the language expands the definition of “any person” to include states, while the False Claims Act liability provisions contain no reference to states being included as “any person”. Second, the Court interpreted the False Claims Act as “essentially punitive in nature,” therefore cannot be imposed on government entities. And third, prior to the 1986 Amendment to the False Claims Act the Program Fraud Civil Remedies Act (PFCRA) was enacted which specifically does not include states as subject to liability. The Supreme Court stated it would be “most peculiar” to “subject states to the damages and penalties provisions of the False Claims Act while exempting them from the smaller damages imposed under the PFCRA. The Court found further support for its holding in two doctrines of statutory construction. The Court applied the ordinary rule of statutory construction known as the clear statement rule,
which holds that 'If Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.'

Reiterating its finding that Congress did not manifest such an intent in the FCA, the Court moved on to the second doctrine, which holds that 'statutes should be construed so as to avoid difficult constitutional questions.' Of this the Court stated: 'We of course express no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment, but we note that there is 'serious doubt' on that score.'" (39:3)

Two dissenting votes by Justices Stevens and Souter disagreed that a State could not be considered a "person" in a *qui tam* lawsuit. In their opinion they stated "[t]he False Claims Act is ... all-embracing in scope, national in its purpose, and as capable of being violated by state as by individual action." "...when Congress uses" persons "...in federal statutes enforceable by the Federal Government or by a federal agency, it applies to States and state agencies as well as to private individuals and corporations." (39:3)
While the Supreme Court concluded that an individual in a *qui tam* action cannot sue a state, the Court did not decide whether or not a suit could be brought by the United States against a state. Justice Ginsburg stated "the clear statement rule applied to private suits against a State has not been applied when the United States is the plaintiff." therefore "I read the Court’s decision to leave open the question whether the word ‘person’ encompasses States when the United States itself sues under the False Claims Act." (39:5)

Also unresolved, by the Supreme Court is whether or not municipalities, municipal agencies, counties and other local government entities can be considered “persons” and liable under the False Claims Act. Additionally, no resolution was made whether a State or local “proprietary” or “independent” entity can be sued and whether or not State or other government employees can be sued as “persons” under the False Claims Act.

**Public Disclosure Bare and Original Source Case Law**

Section 3730 of the False Claims Act requires the relator to be the original source of false claim information in a *qui tam* suit, and the information can not be disclosed publicly previous to the suit. In *U.S. ex
rel. Grayson et al. v. Advanced Management Technology et al., the 4th Circuit court dismissed the case based on both, that the relator was not the original source and the false claim information was previously disclosed publicly. In this case the false claim information was derived from an administrative complaint previously filed with the FAA by an unsuccessful bidder of the government contract. The court also held the relator "Grayson and Hoffman", who were acting as attorneys for the Camber Corporation were not the original source and the information provided by others was insufficient as "direct" and "independent" knowledge as required by the statute. (41:1)

In U.S. ex rel. Hansen v. Cargill, Inc. et al., the Shell Oil Litigation Settlement Trustee Committee purchased 10,000 acres in the San Francisco North Bay area (known as the Napa Salt Marshes) for $10 million. The purchase was a litigation settlement for environmental preservation. The relator, Hansen, filed the suit against Cargill Inc., and its appraisers stating Cargill Inc., defrauded the United States by submitting a $34 million public interest value on the land. Hansen asserted the land had a negative value due to environmental clean up that would be necessary at the Napa Salt Marshes. The California district court ruled the relator did not have
“direct knowledge” and did not meet the original source requirements of the False Claims Act, because the information presented had been publicly disclosed by the news media. The court made this ruling while acknowledging the relator had been the source of the disclosure to the media. (41:2).

In U.S. ex rel. Coleman v. State of Indiana et al., an Indiana district court decided that the public disclosure bar of the False Claims Act included state administrative proceedings and hearings. The court dismissed the case stating his was not the original source, since the Indiana General Assembly, Administrative Rules Oversight Committee met and discussed a similar compliant previous to the Coleman suit.

In U.S. ex rel. Downy v. Corning, Inc. et al., a New Mexico district court ruled in favor of the relator and that a general public discussion did not meet the public disclosure bar. “The court ruled that the disclosure did not trigger the bar pursuant to the test established in U.S. ex rel. Springfield terminal Ry. Co. v. Quinn, 14 F.3d 645, 654 (D.C. Cir. 1994), which held that Congress intended to prohibit qui tam actions “only when either the allegations of fraud or the critical elements of the fraudulent transaction themselves [are] in the public
domain." (41:4) In Downy the New Mexico court decided the general public discussion did not disclose the allegations of fraud, but only involved questions of policy. "The relator’s complaint was not ‘based upon’ the public disclosure despite the fact that it involved the same general subject matter." (41:4)

Government Intervention Case Law

In U.S. ex rel. Newsham and Bloem v. Lockheed Missiles and Space Company, Inc., the 11th Circuit Court stated “once a qui tam suit is filed, the Government has sixty days to choose one of only two options: to intervene and proceed with the action, or to decline intervention. If the Government elects the former, it may control the prosecution of the case, subject to the relator’s right to continue as a party and to obtain a hearing and court approval regarding any settlement or dismissal of the action.” (21:12) In this case “the relator’s share is 15 to 25 percent of the recovery. On the other hand, if the Government chooses to decline, the relator has the right to conduct the action subject to the Government’s right to intervene at a later date upon a showing of good cause, and the relator is entitled to 25 to 30 percent of the recovery.” However in this case the court found “The
government has from the beginning flagrantly and repeatedly violated the provisions of the statute." To begin with, the Government failed either to intervene or notify the court of its declination to do so within sixty days of its receipt of the complaint, and, "[w]ithout under-taking either of these authorized alternatives, the government succeeded in having Williams' complaint erroneously dismissed on a jurisdictional issue." Second, "in flagrant disregard of the statute," the Government did not seek leave of court to intervene or make a showing of good cause before settling with NEC. Finally, the Government failed either to notify Williams of the settlement or to seek court approval for it. "In settling with NEC, the government brazenly ignored both Williams' right to a hearing and the statutory prerequisite of court authorization." The 11th Circuit also "held that the FCA does not contain a general prohibition against government employees filing qui tam suits and that the §3730(e)(4) public disclosure bar did not apply to Williams' lawsuit." (21:13)

The Government in the case "argued that the court did not have jurisdiction to award Williams a statutory share of the settlement because the Government was not a 'party' to the action. The Government further argued that Williams
had no entitlement because the facts of the case did not fall into either of the *qui tam* recovery provisions set out in §3730(d). That is, (d)(1) was inapplicable because the Government did not 'proceed with [the] action,' and (d)(2) was inapplicable because Williams did not 'collect the civil penalty and damages.'" (21:13) The Government also maintained that its settlement with NEC was not a settlement of Williams' *qui tam* action. And that Williams had not make the case that the settlement included the claims in his complaint. "The 11th Circuit characterized the Government's arguments as 'specious' and as an attempt 'to take advantage of its blatant violations of the statute.'" (21:13)

The court ruled that the Government's settlement with NEC was an "intervention" in the lawsuit within the meaning of the FCA. Further, the settlement effectively terminated the lawsuit, except for the determination of Williams' statutory compensation of between 15 and 25 percent (as well as attorneys' fees and expenses). The court ruled that Williams was entitled to 15 percent of the $34 million settlement. "While noting that the district court generally determines the relator's exact percentage, the 11th Circuit concluded that it should determine the relator's share on the record before it
'In light of Williams' death and the government's head in the sand, arbitrariness in opposing Williams' efforts to preserve his testimony.' (21:13)

California's False Claims Act

Twelve states nationwide as of 2003 have False Claims Legislation. These are: Nevada, Hawaii, Texas, Washington, Louisiana, Arkansas, Florida, Tennessee, Virginia, Massachusetts, Illinois and California (22:2). The California Law was enacted in 1987. The law is similar to the federal legislation that it was modeled from, but is designed to protect the state of California not the federal government (6:1).

When the law was passed, there was a perception that there was an increase in fraud at the state and local government levels and that this legislation would protect the state. The California legislation addresses false claims against the state or any political subdivision. "This is the most important aspect of the California Act: that claims brought on behalf of such entities as city and county governments, public schools and colleges, and special transportation districts may all be brought under the Act's provisions (26:4). The legislature meant for this to have the broadest possible construction to benefit the public interest.
Although modeled after the federal legislation there are some significant differences between them (11:101). The California False Claims Act includes local public funds and can involve both state and local programs. Additionally, the California False Claims Act is not exclusive, thereby allowing other legal remedies to be sought (28:3).

The federal government has benefited enormously from the federal False Claims Act. In 1992, for example, a settlement was reached in a _qui tam_ whistleblower case that recovered $110 million from National Health Laboratories (NHL). NHL had billed the Medicare program for medically unnecessary tests. The case was initiated when an employee of a competitor's lab tipped off the government through a _qui tam_ whistleblower notice to the attorney general. The ensuing investigation of NHL revealed irregular billing practices from other laboratories as well, and a four-year examination of the independent laboratories turned up $800 million in damages and penalties. When the federal government announced completion of a settlement with the Healthcare Corporation of America, the largest operator of private hospitals in the country, bringing the total recovery from that company, including penalties and sanctions, to almost $2
billion (1:3). That case started with a private complaint of the type that the whistleblower act so appropriately encourages, this outcome is the type that California legislators hope to achieve.

Although the California law lay dormant for most of the 1980s, in the 1990s the public sector felt inundated by a barrage of unjustified claims and began to use the California False Claims Act as a defensive measure (42:2). In a case regarding Toshiba, the office of the Attorney General recently recovered $1.7 million from a vendor who used false documents to defraud the state in a computer purchase (29:1). In another CFCA case, the Deputy City Attorney in San Francisco was the lead Deputy on the case of Stull v. Bank of America -- a major false claims (qui tam) lawsuit against the bank on behalf of San Francisco and 300 other municipal entities. This case resulted in a settlement of $200 million. This is the largest settlement in history under California's False Claims Act (3:3).

"California's attorney general, for example, is investigating fraud in a wide range of government programs; prison construction projects are particularly ripe for fraud. Construction vendors in California have been known to substitute inferior products and fail to provide promised equipment (29:1)."
It is not unusual for public-project subcontractors and second-tier suppliers to write off such laws on the theory that they are not providing labor or materials directly to a governmental body and, therefore, they are not submitting claims for payment to a governmental body. As demonstrated in City of Pomona v. Superior Court, 89 Cal. App. 4th 793 (2001), however, contractors and suppliers do not need a direct contractual relationship with a governmental body to be found liable under a False Claims Act.

In City of Pomona, a supplier in California sold piping and other water distribution parts through catalogues provided to distributors. In its catalogues, the supplier represented that its products complied with certain industry corrosion standards. In 1991, without modifying the representations in its catalogues, the supplier began selling piping and other parts that failed to meet these corrosion standards.

Over the next six years, the City of Pomona purchased the supplier's products from a distributor through the supplier's catalogues. After the city learned that the catalogues' representations concerning compliance with industry standards were false, the city brought an action
against the supplier for allegedly violating the California False Claims Act ("the Act").

At trial, the court found no violation of the Act, holding that the city had failed to prove the supplier submitted a false claim because the supplier's false representations were made generally in its catalogues, not specifically within the city's purchase orders or the distributors' invoices to the city. Upon dismissal of its action, the city appealed the trial court's ruling to the California Court of Appeals.

The appellate court rejected the trial court's decision and restored the city's action. Noting that California's Act is based on the federal False Claims Act, the court first concluded that, like the federal Act, California's Act was intended to reach all types of fraud that might result in financial loss to government. To violate the Act, a claim submitted to a governmental entity need not be false itself so long as it is underpinned by fraud. Therefore, according to the court, a person may be liable for presenting a false claim for payment under the Act even though the person did not directly apply for or obtain any government funds.

The court then considered and rejected the supplier's defense that it was not liable under the Act because it
had no knowledge that the city would be the end user of products it supplied to its distributors. The court found that, because the supplier intended to attract customers such as the city with its catalogues and sales literature, the supplier was liable for the fruits of its marketing. In the court's eyes, no other finding would serve the purposes of the Act.

Finally, examining the circumstances presented in City of Pomona, the appellate court held that, by taking orders for the materials advertised in its catalogues and supplying distributors with such materials for purchase by the city, the supplier caused its distributors to submit false claims for payment to the city. The court reasoned that the distributors' claims were false for two reasons. First, the city would not have entered into a contract with the distributors to buy the supplier's products had it known that the supplier's products did not meet industry standards. Second, while the distributors billed the city for products the city ordered from the catalogues, the products that the city received and paid for did not match the specifications in those catalogues.

Although City of Pomona deals specifically with California's False Claims Act, there is good reason to believe that other states, particularly those whose laws
are based on the federal Act, would also construe their laws to extend liability to persons or entities that have no contractual relationship with, or do not directly present claims to, a governmental body. Accordingly, contractors and suppliers who indirectly furnish services or materials to public bodies need to be as careful about submitting claims for payment as though they were submitting such claims to the government itself.

In 1997, the legislature amended the California False Claims Act with Assembly Bill 2678 written by Figueroa (29:3). This amendment limits the privilege areas. This amendment will create a more powerful weapon in fighting claims fraud.

In addition to the California False Claims Act being modeled after the federal legislation a new California insurance fraud law is also modeled after the federal False Claims Act. "In what is being called a landmark fraud decision" a California jury ordered payment of 8.2 million dollars to Allstate Insurance Company from a group of doctors and clinics accused of false billing practices (47:1).

"A July 1996 Court of Appeals decision, Stacy & Witbeck, Inc. v. City and County of San Francisco, 47 Cal. App. 4th 1, 54 Cal. Rptr. 2d 530 (1996) held that the
litigation privilege does not apply to protect statements made in the contract claim submission process. In that case, Stacy and Witbeck was a contractor to the City of San Francisco on a municipal project. Stacy and Witbeck was encouraged by the City engineering staff to submit documentation in support of its claims, in anticipation of settlement discussions. Stacy and Witbeck submitted the documentation, the claims were denied, and the contractor filed litigation. The City contended that the claims submitted were false, and filed a cross-complaint against the contractor alleging violation of the False Claims Act and seeking treble damages and other penalties. Stacy and Witbeck sought dismissal of the cross-complaint on the grounds that the claims submission process was undertaken in anticipation of litigation, and was therefore privileged. The Court of Appeal disagreed, holding that, while one purpose of the contract claims submission was anticipation of litigation, the litigation privilege did not apply because there was an independent purpose, i.e. Stacy and Witbeck's compliance with the contract requirements. The effect of this case was to strip the contractor from immunity for False Claim liability for statements and claims made in the course of a contractual claims submission procedure” (29:7).
In an interesting California case, *LeVine v Weis* (1998), a teacher at a Ventura County juvenile home school facility was terminated from his employment. LeVine, the teacher felt that this arose due to his complaints that the school site was understaffed and as a result he wound up responsible for 90 to 120 students. The jury found Weis, the County Superintendent of Schools liable for violation of the False Claims Act. The jury awarded LeVine $350,000 for emotional distress, $86,158 for lost back pay and $50,000 for other economic loss. The trial court doubled the award of back pay and added interest pursuant to section 12653, subdivision (c). The total award was $627,207. Also given to the plaintiff was $241,975 for attorney’s and court fees (41:3). This is significant in that it demonstrates the level of relief awarded and also allows that the Superintendent (a public entity employee) was a person as defined by the act.

Construction Contracts, Relevant Case Law

In the case of the *United States versus Azzarelli Construction Company* in 1981 the defendants allegedly rigged a bid on a state highway project. The case involved a federal act under which the United States contributed a fixed sum to each state for highway construction. The
court held that the defendants did not present a claim 'upon or against the government of the United States. "The court reasoned that even if the defendants defrauded a federal grantee, the federal government contributed nothing more to the state as a result" (33, 4). Since the state and not the federal government suffered the fraud this case was dismissed.

In United States ex rel. Ashol Bhatnagar v. Kiewit Pacific Co., State of California, Department of Transportation, a U.S. District Court for Northern California dismissed the case. The False Claims Act relator, Ashok Bhatnagar, sued both entities based on claims made by Kiewit to the Department of Transportation (Caltrans), paid by the Caltrans, submitted by Caltrans for Federal reimbursement, and for retaliation by Caltrans toward Bhatnagar.

Bhatnagar argued the claim submitted by Kiewit for stormwater protection cost should not have been paid as extra work to the original contract, because the original contract included providing stormwater protection. Bhatnagar quoted the contract special provisions, which stated the cost for providing stormwater protection measures were included in the contract and that no additional compensation would be provided for the costs.
Bhatnagar also argued that Caltrans submitted these costs for federal reimbursement as traffic control work and Caltrans retaliated against him for "whistleblowing". The federal government did not join in the suit against Kiewit or Caltrans.

The District Court decided that since the California Regional Water Quality Board mandated more stringent control of stormwater runoff after the contract had been signed, the claim was not a false claim issue but a contract dispute issue. The court also decided that since Caltrans was a state entity, it was not liable for submitting the cost for federal reimbursement under the False Claims Act, nor liable regarding the False Claims Act provision regarding retaliation. The District Court based its' decision on Vermont Agency of Natural Resources v. United States ex rel. Stevens, where the Supreme Court held states are not liable under the False Claims Act in actions by private individuals. The District Court expanded on Stevens, in that states are not liable regarding the provisions of retaliation in the False Claims Act (34:1).

In U.S. ex rel. Shaw v. AAA Engineering & Drafting, Inc. et al., a 10th Circuit court found the defendant liable under the False Claims Act for not complying with
the environmental requirements of the contract. In a contract with the Tinker Air Force Base, AAA Engineering & Drafting, Inc. agreed to provide photographer services. The contract required the photographic operations to provide an Environmental Protection Agency regulation for disposal of film processing solution. AAA was required to remove all traces of silver from the solution prior to disposal. The suit alleged AAA did not perform the silver recovery, yet invoiced for full payment of the contract. AAA argued they only billed for the fixed price of the contract, there was no misrepresentation and therefore could not be held liable for fraudulent billing. "The court found, however, that AAA had implied certification with each monthly invoice that it complied with the silver recovery provisions of its contract with the Government. The court reasoned that because the contract required AAA to practice silver recovery in its laboratory, AAA was being paid not only for photography services but also for environmental compliance." (41:7) The court held that by falsely certifying (with the monthly billing) AAA had express or implied compliance. "The court cited to a statement by the Senate Judiciary Committee at the time of the amendments: '[A false claim under the FCA] may take many forms, the most common being a claim for goods and
services not provided, or provided in violation of contract terms, specification, statute, or regulation.'”

(41:7) Additionally, “the court found that the language of § 3729(a)(1) supports the theory of implied false certification. Whereas § 3729(a)(2) premises liability on the presentation of a ‘false record or statement to get a false or fraudulent claim paid or approved’, liability under the language of § 3720(a)(1) does not require evidence of a false record or statement.” (41:8) The court admitted contradictory judgements in other cases, however in this case AAA clearly knew they were not adhering to the silver recovery requirements, yet submitted invoices for full payment of the contract. And any negative precedence could easily be differed from the facts in this case. The defendant also argued that since the Government had access to the work orders, the Government knew of the failure to comply with the environmental requirements. Therefore, there could be no fraud or intent to violate the False Claims Act. The court acknowledged that when the Governments knowledge is extensive, there could not be, as a matter of law, the state of mind to warrant falsity in the payment invoice. However, in this case there was not extensive knowledge by the Government of the non-compliance. And the Governments alleged acknowledge did
not negate the evidence that AAA knowingly submitted false billing based on full compliance of the contract. (41:5)

California Superior Court judge Joseph Katlin found in favor of the Los Angeles Metropolitan Transportation Authority (MTA) in a FCA case against Tutor-Saliba Corporation. The construction contract, to build the subway and subway stations, required numerous contract change orders for ambiguities and omissions in the contract plans and specifications. Many of the requests for additional compensation for work in 1995 were made, however Tutor-Saliba sued the MTA for 19.5 million dollars in unpaid claims. The MTA responded with a FCA suit in 1999 and was awarded 29.5 million. The judge imposed additional awards of 2.4 million and another 34 million was litigated for legal fees (33:3). The award was made due to false submittals of bills for extra work, lack of cooperation in turning over bidding documentation and improper listing of subcontractors (41:1).

The MTA joined in on a FCA suit against Shea-Kiewit-Kenny (SKK), requesting nearly $100 million in damages. “The agency has accused SKK of improperly using low-grade wooden wedges, which failed to meet strength requirements specified in its contract, between segments of its concrete tunnel linings”. Additionally the MTA accused SKK
of regularly filling spaces between tunnel liner segments with trash, wood scraps and plaster. According to the attorney for the relator Buffington, Shea-Kiewit-Kenny (SKK) "consistently sought more ways for billing money for doing less" (34:3). The MTA fired SKK in July of 1995, when a portion of the Hollywood Boulevard over the tunnel work sank into a large sinkhole. Buffington, an employee of the contract management firm Parsons-Dillingham, brought the FCA suit and the MTA joined in the action. Buffington stated in an interview that he tried to tell his bosses at Parsons-Dillingham and executives at the MTA that SKK billed for work not completed and billed for materials and equipment it never used. When they failed to take legal action against the builder, Buffington decided to file the FCA suit. "I was paid to ensure that taxpayers got what they paid for..." said Buffington. "I asked myself whether I could turn my head on wrongdoing, and my answer was no." (31:1)
Engineers and Contractors Debate over Contract Change Orders

Contract change orders (CCOs) arise as an attachment to contracts for many reasons. Common causes include a change in contract plans, to authorize an increase or decrease in contract work, to make adjustments in compensation, to change the quantity of an item, to compensate for delays to the contractor, or to make a change in payment for changes in character of the work. Caltrans has a preexisting, elaborate system for preparing and using CCOs.

To begin a CCO the engineer must fill out a Form CEM-4900 “Contract Change Order” and a Form CEM-4903 “Contract Change Order Memorandum” for each change. These forms are numbered and forwarded to the district office and are entered into an electronic system for tracking.

Among the preliminary considerations to be made when writing a CCO are necessity, impact, time and money. Engineers should consult with the contractor when writing a CCO to discuss all the elements of the change to avoid conflict later in the construction process.
The CCO should be clear, concise and explicit. Items that should be included, if applicable are: what work is to be done, the location and limits of the work, any specification changes and reference to the manual, the CCOs affect on the timeline of the job completion, and method and amount of compensation for the CCO.

On the description of the work section of the CCO, the engineer should be as specific as possible. Often times a drawing or a copy of plans will be included with the Form 4900 to illustrate the proposed change. All attachments should show dimensions and calculations to illustrate the change. Additionally all attached sheets should reference the original contract number, the sheet number and the CCO number.

For adjustments in compensation due to changes in the character of the work or requirements of extra work, the contractor is required to provide an estimate of the cost, through a force account analysis. This will include a detailed estimate of the hours for labor and equipment, plus materials. Contract specified markups are also included.

Increases and decreases on contract item are occasionally required when errors in the contract’s “Engineers Estimate” is incorrect with respect the
quantities of items of work. When this occurs the contract allows 25% increase or decrease without change to the original bid price for the item. If the increase or decrease is greater than 25% then an adjustment in the price of the item is made based on a force account analysis of the work.

Occasionally delays caused by the state to the contractor's work schedule occur. Analysis of the original schedule submitted by the contractor, compared to the delay caused by the state, will determine if and how much compensation is due to the contractor. The delay must impact the controlling items of work. The controlling items of work are defined by the "critical path", which is a sequential list of work items that must be completed to finish the project. Delays caused by the state on items of work which are not on the critical path do not delay the completion of the project and therefore are not considered delays to the project. Issues concerning the actual costs of the delay, additional overhead costs, lost opportunity costs, costs to subcontractor and suppliers, and so on, are often raised by the contractor. The analysis of delays caused by the state can be complex and the CCOs to handle the additional compensation are often highly debated.
The CCO follows a prescribed path throughout the organization. At Caltrans there is a CCO desk at the district level. New engineer’s rotate through this assignment for training purposes and review all CCOs on a district-wide basis. CCOs of greater dollar or excessive time require review, in addition to the district level, by the state department of transportation headquarters in Sacramento. These serve as a second form of review after the engineers’ first review of the CCO.

Dispute Review Boards

To ensure that the claim or contract change order disputes are handled in a cost efficient manner the organization has established dispute review boards (DRBs). The name is appropriate in that the purpose of the DRBs is to review disputes between the contractor and Caltrans. The thought process was that if DRBs were established early in the project and kept apprised of the progress of the project, they would be there to help as a neutral third party when a dispute did arise.

The board is a panel of three experts, one appointed by the state and one appointed by the contractor. These two appointed positions choose the third person for the panel.
The goals of the DRBs include; early resolution of disputes on the contract administration, minimizing surprise disputes at project completion and by their mere existence to encourage parties to resolve disputes or face DRB process.

The first goal, focuses resources on dispute resolution early in the life of the contract to avoid costlier, more litigious and typically less satisfying results later on. The fact that the non-binding DRB recommendation can be introduced in subsequent arbitration is a key motivator for both sides to research the dispute thoroughly prior to the issue meeting.

The second goal on minimizing surprises is aided by the present state specification that requires referral of a dispute to the DRB or the Contractor can not pursue the issue as an exception (Claim) to the proposed final payment or take the matter to arbitration.

Finally the last goal, by their existence, they encourage both sides to work together to resolve disputes without going through DRB process. This goes to the issues of timeliness and cost of further delays.

Additionally, minor issues may not be brought before the DRB because of the expense that the contractor or the state may incur. Also issues without basis may not be
brought before the DRB because the party may risk influencing the DRB negatively on future issues within the project completion (16:6).

DRBs began as a pilot project in Los Angeles in the year 1990. The original pilot started with six DRBs for the Los Angeles construction projects. The DRB is put into place when the contract with the state cost involved is ten million dollars or more and the engineers estimate concludes that they will be working for 200 or more days on the project. The success of the pilot project lead the way to the "optional" specification on DRBs being included in the 1994 version of the Caltran's "Standard Special Provisions". Consultant analysis that Caltrans procured in 1996 lead to the DRBs becoming mandatory on large state projects.

By 1998, the DRBs became a mandatory specification on qualified construction projects. While the DRBs continued to evolve throughout the 1990s the organization learned that given the option, the construction contractor would only establish a DRB nine percent of the time that one was optional. For those cases where a DRB was established, they were often started "considerably into the project after disputes had arisen" (16:3).
An analysis of DRB statistics reveal that since the ideas inception DRBs have been established on 190 projects since 1990 (16:5). In the year 2002, there were 80 DRBs statewide. These 80 DRBs accounted for over four billion dollars of construction projects across the state. Further analysis showed that less than half (43%) of projects with an established DRB have had an issue presented to the board.

The table below shows the results of an analysis of 175 DRB cases where the state received substantially complete information (See Figure 1).

![Dispute Review Board Recommendations](image)

**Figure 1. Dispute Review Board Recommendations**


As illustrated the DRBs ruled in the states favor 42% of the time, the contractor’s 52% and for both parties 6% of the time.

The primary concerns expressed by DRBs were the timeliness and communication issues. One example of DRB concern is the late establishment of a DRB when the
construction project are well under way or the parties are already involved in a dispute. The failure to hold DRB status meetings regularly and issue meetings not being heard in a timely manner was cause for complaint. Issue meetings held near or after contract acceptance and new issues being brought out after the acceptance of the contract were additionally cited complaints. Communication issues revolved around delayed notifications of intent to reject the DRB recommendations and information on the DRBs formation, status, disputes and completion not being appropriately forwarded to all involved parties.

Timeliness is a major issue for DRBs due to the statutory timelines imposed by the State Contract Act Section 10240.2. From the date of contract acceptance, day 1 through day 240 is detailed in the timeline shown below (See Figure 2).

Figure 2. Claims Resolution Timeline Day 1 Through Day 240

The next table illustrates DRB acceptance rates. These statistics were based on the 175 cases reviewed where the state received substantially complete information (See Table 1).

Table 1. Dispute Review Board Recommendation Acceptance Rates by Party

![Bar chart showing acceptance rates by party.]


Acceptance rates were higher by the state at 85% on the overall statistics and 73% on unfavorable rulings. The contractors’ rates were lower at 74% for overall and 42% for unfavorable rulings.

Most DRB cases (109 of the 175 reviewed) are structures (bridge and building construction) related, in that they involve the Structures Construction Office.
Analysis of these cases reveals that the most frequent issues are pilings, temporary facilities, welding, tiebacks and soil nails. The following chart illustrates the frequency percentages from the case analysis (See Table 2).

Table 2. Frequency of Dispute Review Board Issues

<table>
<thead>
<tr>
<th>DRB Issues</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pilings</td>
<td>27%</td>
</tr>
<tr>
<td>Temporary Facilities</td>
<td>9%</td>
</tr>
<tr>
<td>Welding</td>
<td>9%</td>
</tr>
<tr>
<td>Tiebacks/ Soil Nails</td>
<td>7%</td>
</tr>
<tr>
<td>Other Items</td>
<td>48%</td>
</tr>
</tbody>
</table>


The analysis of the cases showed that 62% of all DRBs involved structures. These structures cases revealed a slightly larger percentage (46%) of favorable decisions for the state than the statewide percentage (42%) (See Figure 3).
Figure 3. Dispute Review Board Recommendations on Structure Cases


Recent DRB Modifications include revisions in the Standard Special Provisions which adds a retention clause, a time frame for issue meetings, clarifications on the completion of the DRB process, and details for DRB member removal. Additionally, the changes improve the pay scale for DRB members. Traditionally the DRB is a three-man panel that is assigned to a construction project. Currently the DRB members are paid $150.00 per hour plus expenses as of 2003 wages. Also Construction Procedures Bulletin (CPB) 02-1 Dispute Review Board Process and Responsibilities establishes written policy and procedures for DRB administration including handling of recommendations and provides DRB status forms for the Department to evaluate the DRB program effectiveness.
To improve acceptance rates by parties of DRBs rulings, planning and training sessions for staff and interested parties are available. These include a DRB effective presentation course and a dispute training course.

Board of Review

The Board of Review is a state panel, which provides one of the last forms of remedy for construction disputes. The Board of Review is engaged after the DRB process has concluded. The Board of Review is made up of state managing employees.

The table below reveals details of the financial awards made to the contractors compared to the amounts claimed by the contractors. As you can see very little is paid at this point. This is because, before a claim gets to the Board of Review the issue has usually been discussed with management during the project and has the management’s support in denying payment on the issue. After the Board of Review decision the contractor can require the issue go to formal litigation (arbitration). Below is a table showing the amount claimed versus the amount awarded by the Board of Reviews (See Table 3).
Arbitration

Arbitration is the legal process that occurs when the State and the contractor can not come to agreement and formal litigation is required. This process is very expensive to both the state and the contractor and typically the cost of the claim increases significantly. The state usually limits the cases going to arbitration to only those with the best chance of winning decisions for the state. However, the pay out on the cases decided against the state is usually much higher than the original claim presented at the project level. Below is the number

Table 3. Board of Review Awards

<table>
<thead>
<tr>
<th>Year</th>
<th>Dispute Amount</th>
<th>BOR Award Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997-98</td>
<td>10,000,000</td>
<td>20,000,000</td>
</tr>
<tr>
<td>1998-99</td>
<td>50,000,000</td>
<td>40,000,000</td>
</tr>
<tr>
<td>1999-00</td>
<td>30,000,000</td>
<td>30,000,000</td>
</tr>
<tr>
<td>2000-01</td>
<td>20,000,000</td>
<td>15,000,000</td>
</tr>
</tbody>
</table>

of cases since 1979 that Caltrans took to arbitration. You can see an increase leading up to 1999 (See Table 4). This is due to a large number of small contracts during the bridge seismic retrofit programs.

Table 4. Caltrans Construction Arbitration Filing History Through December

<table>
<thead>
<tr>
<th>Years</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>


Since 1979, there have been 548 Arbitration Complaints filed and 482 resolved. This leaves 66 unresolved cases at this time. Since 1994, there have been 304 filings for a value of $458,552,383. Of this amount, $99,464,913 has been paid out as awards. And since 1994, 88 cases have had arbitration awards. These 88 cases had claim amounts of $151,162,849, with arbitration required
payments of $45,082,259. Also, since 1994, 118 cases have been settled with a total claim amount of $105,694,544 and a total settlement amount of $39,197,604. The graphical representation of awards to settlement from 1996 to 2002 is shown below (See Table 5).

Table 5. Arbitration Results 1996-2002


Below you can see the percent paid compared to the claim amount with respect to arbitration awards and settlements. The average percent paid compared to the complaint amount is 42% for those claims settled by
arbitration award. The percent paid compared to the complaint amount averages higher for arbitration awarded compensation (See Table 6).

Table 6. Arbitration Results 1996-2002

![Graph showing arbitration cases 1996-2002]


The following graph shows the number of arbitration cases completed from 1996 to 2002. Additionally, each year the number of awarded cases versus settled cases is shown (See Table 7).
Table 7. Arbitration Results 1996-2002


Following you can see the number of claims, which went to arbitration with respect to the twelve districts for the year 2002 (See Table 8).
Table 8. Current Arbitration Status by District Number of Complaints Filed in 2002


The total ongoing cases in arbitration by district (in dollars) is depicted next (See Table 9).
Table 9. Dollars Claimed by District for 2001


The cumulative unresolved cases from 1979 to 2002 can also be seen (See Table 10).
Table 10. Current Unresolved Cases

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>79</td>
<td>0</td>
</tr>
<tr>
<td>80</td>
<td>5</td>
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<tr>
<td>81</td>
<td>10</td>
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<td>83</td>
<td>20</td>
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<td>01</td>
<td>10</td>
</tr>
<tr>
<td>02</td>
<td>5</td>
</tr>
</tbody>
</table>


And the cumulative number of active arbitration cases at each year's end is shown below (See Table 11).

Table 11. Cumulative Active Arbitration Cases

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>79</td>
<td>0</td>
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<tr>
<td>80</td>
<td>5</td>
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<tr>
<td>81</td>
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<td>01</td>
<td>10</td>
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<tr>
<td>02</td>
<td>5</td>
</tr>
</tbody>
</table>

The increase in claims submitted by contractors over the years represents changing attitudes of contractors and the increasing complexity of construction contracts. The bidding process is very competitive and the margin of profit is minimal. Therefore, with the increased complexity of new designs and contract specifications any opportunity to claim additional compensation is a regular occurrence. Contractors have become much more savvy to delay claims, overhead claims, lost opportunity claims, differing site condition claims, and inefficiency due to change in character claims. These claims are legitimate, however, often difficult to quantify.

When claims submitted by the contractor cannot be agreed upon between the state and the contractor, arbitration is the last resort. Business decisions are made at this point by both the contractor and the state based on the strength of each side of the issue. The level of documentation and the clarity of the contract regarding the issue usually determine whether a case will be settled or taken to the arbitrator. After the decision as to whether the claim has merit or not is made, then the determination of the compensation is made. The amount of compensation is usually based on a cost analysis, which includes time spent for labor and equipment, plus
materials. Documentation of the day to day work by the state and the contractor will agree often. This is true for easy to quantify extra work claims, however claims involving lost efficiency, delay, overhead cost, etc., are much more difficult to quantify. Arbitrators, once the claim has been determined to have merit, have the difficult challenge of quantifying the value of the compensation. Many times when the contract or documentation is weak, it is usually in the best interest of the state to settle with the contractor. Usually settlements, compared to the original claim amount, have a lower percentage paid, than arbitrator assessed cost.

The twelve districts in the state have differing approaches to handling claims. Most have an aggressive attitude to handling claims at the project level. Much discretionary judgement is given to the project level engineers. Other districts are more conservative in making additional compensation when faced with contractor claims. For the most part the engineers at the project level hold a firm line with respect to making additional compensation for contractor claims. Business decisions are not permitted at the project level. Strict interpretation of the contract specifications is the rule of thumb. Decision regarding weakness or ambiguities in the contract are
easier to make at the management level. Still business decisions to make compensation based on the potential for greater cost in arbitration is not made until the claim goes past the Board of Review level.

The number of claims that go to arbitration and are not awarded compensation leaves the question of how many of these claims are falsely submitted. Many of these claims can be honest contract disputes, however many could be considered fraudulent claims or falsely inflated claims. Even if a claim is determined to have merit, often the claim amount is inflated and an inflated cost analysis submitted by the contractor is considered a false claim.
CHAPTER SIX

SUMMARY, CONCLUSION AND RECOMMENDATIONS

Summary

The California Department of Transportation mission statement, in part, states it is responsible for insuring the mobility of the public across California. One of the values included in the mission statement is stewardship. Being good stewards of the states’ available resources requires getting the most with the available resources. This means constantly looking to improve cost savings tactics.

The funding provided through the State Transportation Improvement Program provides the majority of the money for highway construction projects. These projects are contracted out, typically to the lowest bidder. However, these contracts are often extremely complex, with hundreds of pages for plans, standard specifications and special provisions on each contract. This leads to opportunity for a large numbers of contract disputes. With the contracts being awarded to the lowest bidder, the margin for profit by these contractors is minimal. Contractors have become skilled in the art of seeking additional compensation after the contract is awarded. Contract issues regarding changes to the original planned work, lost opportunity and
overhead cost associated with delays in the work, and inefficiencies and extra work due to changes is characteristic of the work and often causes contract disputes. Notices of potential claims are submitted to the state for each of these contract disputes. Analysis of the associated cost itself has become big business. Many consultant firms focus on providing assistance to the contractor in evaluating the cost associated with time related overhead claims, construction progress schedule delay claims and differing site condition claims. Project engineers, contractors and experts struggle to handle and settle these claims for additional compensation at the project level.

Elaborate systems are in place to handle changes and requests for additional compensation that arise during the construction project. Many checks and balances are built into the system. Often larger projects will have individual Dispute Review Boards (DRB) built into the contract. However, the DRB usually only determines whether a claim has merit or not, and does not consider the amount of the cost associated with the claim. The potential exists for false cost submittals when the DRB has determined merit is found. DRB rule in the states’ favor 42% of the time, and in the contractors’ favor 52% of the
time. The state and the contractor can reject the DRB's decision, however the ruling is included in the reports for further consideration by Board of Reviews and Arbitration. Acceptance of the DRBs' decision is 85% by the state overall and 73% for unfavorable decisions. Contractors' acceptance of DRBs' decision is 74% overall and 42% for unfavorable decisions to the contractor. A project with or without a DRB will probably still have unresolved claims at the end of the project. These claims are then sent to the Caltrans' Boards of Review. However, few claims are settled at this point and most go to the legal department and arbitration. This is true because the Caltrans' Boards of Review are made up of Caltrans' Managers and these individuals are usually consulted during the project level discussion and consideration of the claims. Usually the costs associated with these claims escalate from the project level to arbitration. The percent paid, at arbitration, of claims submitted varies from year to year. The amount paid also varies and is in part a function of the settlements made prior to arbitration decisions. The further the claim gets from the project level, the wider the dispute becomes. This leads to another potential for increased submissions of false claims.
The False Claims Act (FCA) originally conceived by England in the 13th century, and first initiated in the United States by President Lincoln during the Civil War, allows private individuals to sue on behalf of the government for the submission and payment of false claims for compensation from the government. These “qui tam” provisions of the FCA allow “whistle blowers” to be paid a percentage of the fines imposed on the guilty party.

The current-day version of the FCA law, proposed by President Reagan, empowers ordinary citizens to act as private attorneys generally by filing qui tam whistleblower suits against those who defraud the government. Prompted by widely publicized cases of fraud against the military in their procurement of supplies, the new amended law allow citizens to receive 30% of the action or 15% if the government agency participates. The guilty party in a qui tam case, may pay fines between five and ten thousand dollars for each act and as much as three times the damages to the government. In the federal arena the Attorney General is required to investigate violations of the law. Since the passage of the amended FCA in 1986, more than 3,000 qui tam cases have been filed.

In order to prove guilt under the FCA the party must have “knowingly” contributed, that is have actual
knowledge of the information and deliberately ignores the truth. A claim under the FCA can be any demand for money or property. The person alleging the false claim must bring suit in both their names and the governments' name.

The government has 60 days to decide if it will join in the action under the FCA. The individual bringing the action, if successful, is entitled to reimbursement of all legal fees and court costs in addition to the judgement. Government officials are not allowed to bring an action to court.

The legislation seeks to protect the person bringing the action, hence the "whistle blower" law. This protection can extend to their employment. Any person who is fired, suspended or harassed in any way due to a FCA can seek relief under the legislation. This can include being reinstated at work or whatever it takes to make the employee feel whole again.

This paper reviews the legislation and court rulings to determine their relevance for Caltrans. Caltrans must defend the public dollars during the construction process. Included is the California False Claims legislation since Caltrans is a branch of California government.

The case law for the FCA is extensive. The courts have addressed the constitutionality of the FCA, and
whether are not a *qui tam* plaintiff has standing under Article III of the Constitution (consistent with the principles of the separation of the powers provisions). The possible violation of the due process clause has been addressed, along with defining whether a state could be considered a "person" in a FCA action. Additionally, the "public disclosure bar" included in the FCA legislation has been addressed in the case law, along with the "original source" and the "government intervention" requirements of the FCA law.

Based on the Constitutional separation of powers "Congress is powerless to distribute powers that it does not have". This holding was from a Texas District Court, in *U.S. ex rel. Kelly v. Boeing Co.* 9 F.3d 743 (9th Cir. 1993). The court also claimed Congress is not given the power to prosecute fraud cases. The court stated that standing was an integral part of our separation of powers and Congress should not be allowed to circumvent the Article III standing requirements. However, this ruling was contradictory to years of case law and another Texas court in the same district and later the same year, disagreed with the unconstitutionality of the *qui tam* provision of the False Claims Act. In *U. S. ex rel. Thompson v. Columbia / HCA Healthcare Corp. et al.*, Order,
Civil Action No. C-95-110 (S.D. Tex. Aug. 18, 1998), this Texas District Court noted that where the government has suffered an injury-in-fact, the relator merely steps in as its representative or assignee to carry out the statute’s purpose of remedying fraud against the government. Moreover, the FCA provides sufficient control of the qui tam suit and the relator has a personal stake in the outcome of his suit. This court also observed that none, including the Supreme Court has ruled the relator lack standing in FCA litigation.

With respect to due process, in U.S. ex rel. Fallon et al. v. Accudyne Corp. and Alliant Techsystems, Inc., the defendants cited a case, which held that private attorneys appointed, must be personally disinterested in criminal prosecution. Therefore, the defendants claimed that the due process clause is violated by permitting private citizens with an interest in the outcome of the proceeding to prosecute claims on behalf of the United States. The court rejected the argument stating the case cited was a criminal case and not a civil case and appointing a relator (or prosecutor) with an interest in the litigation does not rise to a due process violation.

The Supreme Court decided in split decision that: "a state or state agency is not a "person" subject to qui tam
liability under § 3729 of the False Claims Act.” (39:4) The Court, looking at a longstanding resumption that the term person does not include the sovereign, the Court found no affirmative showing of congressional intent to the contrary in the FCA. According to the Court, the FCA as originally enacted in 1863 “bore no indication that States were subject to its penalties” and none of the subsequent amendments to the statute, including the 1986 amendments, suggested a broadening of the term person (39:5). The Court applied the ordinary rule of statutory construction known as the clear statement rule, which holds that “if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.” While the Supreme Court concluded that an individual in a qui tam action cannot sue a state, the Court did not decide whether or not a suit could be brought by the United States against a state. Justice Ginsburg stated,

"the clear statement rule applied to private suits against a State has not been applied when the United States is the plaintiff.” therefore “I read the Court’s decision to leave open the question whether the word ‘person’ encompasses States when the United States itself sues under the False Claims Act.” (39:5)
Also unresolved, by the Supreme Court is whether or not municipalities, municipal agencies, counties and other local government entities can be considered "persons" and liable under the False Claims Act. Additionally, no resolution was made whether a State or local "proprietary" or "independent" entity can be sued and whether or not State or other government employees can be sued as "persons" under the False Claims Act.

The original source and public disclosure bar provisions in the FCA have been addressed in U.S. ex rel. Grayson et al. v. Advanced Management Technology et al. Section 3730 of the False Claims Act requires the relator to be the original source of false claim information in a qui tam suit, and the information can not be disclosed publicly previous to the suit. In this case the false claim information was derived from an administrative complaint previously filed with the FAA by an unsuccessful bidder of the government contract. The court also held the relator "Grayson and Hoffman", who were acting as attorneys for the Camber Corporation were not the original source and the information provided by others was insufficient as "direct" and "independent" knowledge as required by the statute. (41:1) Also with respect to the public disclosure and direct knowledge provisions, in U.S.
ex rel. Hansen v. Cargill, Inc. et al., a California district court ruled the relator did not have "direct knowledge" and did not meet the original source requirements of the False Claims Act, because the information presented had been publicly disclosed by the news media. The court made this ruling while acknowledging the relator had been the source of the disclosure to the media. (41:2) In U.S. ex rel. Coleman v. State of Indiana et al., an Indiana district court decided that the public disclosure bar of the False Claims Act included state administrative proceedings and hearings. The court dismissed the case stating his was not the original source, since the Indiana General Assembly, Administrative Rules Oversight Committee met and discussed a similar compliant previous to Coleman suit. And in U.S. ex rel. Downy v. Corning, Inc. et al., a New Mexico district court ruled in favor of the relator and a general public discussion did not meet the public disclosure bar. The court concluded that the intent was to prohibit qui tam actions only when either the allegations of fraud or the critical elements of the fraudulent transaction themselves are public.

Government intervention provisions of the FCA are studied in U.S. ex rel. Newsham and Bloem v. Lockheed
Missiles and Space Company, Inc. The 11th Circuit Court stated "once a qui tam suit is filed, the Government has sixty days to choose one of only two options: to intervene and proceed with the action, or to decline intervention. In this case the court found "The government has from the beginning flagrantly and repeatedly violated the provisions of the statute." The 11th Circuit also "held that the FCA does not contain a general prohibition against government employees filing qui tam suits..." (21:13). The court ruled that the Government's settlement with NEC was an "intervention" in the lawsuit within the meaning of the FCA. Further, the settlement effectively terminated the lawsuit, except for the determination of Williams' statutory compensation of between 15 and 25 percent (as well as attorneys' fees and expenses). The court ruled that Williams was entitled to 15 percent of the $34 million settlement.

Relevant FCA cases studied in the construction industry include the City of Pomona v. Superior Court, 89 Cal. App. 4th 793 (2001), Stacy & Witbeck, Inc. v. City and County of San Francisco, 47 Cal. App. 4th 1, 54 Cal. Rptr. 2d 530 (1996), United States versus Azzarelli Construction Company in 1981, United States ex rel. Ashol Bhatnagar v. Kiewit Pacific Co., State of California,
Department of Transportation, U.S. ex rel. Shaw v. AAA Engineering & Drafting, Inc. et al., and cases with the Los Angeles Metropolitan Authority versus its' contractors Tutor-Saliba Corporation and Shea-Kiewit-Kenny.

In the City of Pomona case, we learned a supplier was held accountable for out of specification materials used on a city project. Although the supplier had no contractual connection with the government, the California FCA was used to litigate. The city contractor purchased and installed pipe from a catalog, stating the pipe met the specified corrosion requirements. However, the supplier had changed the pipe construction without changing the catalog. The supplier was found to be liable under the FCA and required to pay damages even though the supplier had no contract with the city and had made no direct claim for payment with the city.

In Stacy & Witbeck, Inc. v. City and County of San Francisco, the contractor stated the documentation provided to the city during the contractual claims process was inadmissible in the FCA case filed by the government. Stacy and Witbeck asserted the claims were submitted in anticipation of litigation and therefore privileged. The court disagreed, stating the submission was a contractual requirement and the contractor had no immunity for False
Claim liability, for statements and claims made in the course of the contractual claims submission process.

In the case of the United States versus Azzarelli Construction Company in 1981 the defendants allegedly rigged a bid on a state highway project. However, the court ruled even if the alleged rigging of the bid was true, the federal government had not paid additional money as a result. The money paid by the federal government to states for highway construction was fixed and was unchanged by the bidding. Therefore, the federal government had not been damaged and the case was dismissed.

In the case United States ex rel. Ashol Bhatnagar v. Kiewit Pacific Co., State of California, Department of Transportation, a U.S. District Court for Northern California dismissed the case. Bhatnagar brought the FCA action against Kiewit Pacific stating Kiewit Pacific claimed additional compensation to provide storm water control. The contract included storm water protection as part of the original bid price, however the requirements for storm water protection were changed by the California Regional Water Quality Board after the bid was awarded. The judge dismissed the action stating this was a contract dispute issue.
Bhatnagar also brought action against the State of California, Department of Transportation (Caltrans), for retaliation against Bhatnagar and for submitting request for federal reimbursement under an approved traffic control change order. The judge also dismissed the action against Caltrans, stating the state was not liable under the FCA since the state was not considered a "person".

In U.S. ex rel. Shaw v. AAA Engineering & Drafting, Inc. et al., the contractor was paid full payment for an item of work which included disposal of materials per the Environmental Protection Agency (EPA). The contractor stated the government knew the disposal was not being performed per the EPA requirements and the fixed bid price for the work and there was no misrepresentation. The court disagreed and found AAA liable under the FCA. The court asserted that by the monthly billing, AAA has expressed or implied compliance with the contract and the EPA requirement.

In the cases with the Los Angeles Metropolitan Transit Authority (MTA) versus its' contractors Tutor-Saliba Corporation and Shea-Kiewit-Kenny (SKK), the court found the contractors liable under the FCA despite ambiguities and omissions in the contract plans and specifications. SKK had left out of the original bid price
what he thought was work that had been omitted or unclear on the contract plans. After the contract was awarded many subsequent requests for change orders and additional compensation were made that increased the project costs by more than $179 million (25:2). Additionally, MTA accused SKK of using substandard materials. In the Tutor-Saliba Corporation case the judge stated the contractor was liable for unfair business practices, including false claims and improper listing of contractors (31:1). The judge ruled in favor of the MTA for approximately 31.4 million dollars (34:3).

Conclusion

The implications for the California Department of Transportation (Caltrans) can be studied in the individual cases. The federal and state FCAs are proving to be effective tools against fraud in government contracts. Awards in the millions and billions of dollars have been issued as a result of FCA litigation. The acts have sustained Supreme Court and lower courts scrutiny. Aspects of the FCA laws have been well defined by recent court ruling. FCA litigation can be brought by the government agencies involved or by private individual. The qui tam provisions of the act allow whistleblowers whom are the
original source of the false claim to receive a substantial percentage of the fines and penalties in a successful litigation. In the case of United States ex rel. Ashol Bhatnagar v. Kiewit Pacific Co., State of California, Department of Transportation, the contract between Kiewit and Caltrans clearly required Kiewit to adhere to the California law regarding storm water protection. However, the increased enforcement of the law by Caltrans, a result of pressure from the California Regional Water Quality Board, cost the contractor more than his bid reflected. Even though the contract required storm water protection included in the bid, the contractor based his bid on the historic enforcement of the requirement. Mr. Bhatnagar contended in his FCA action that claiming the cost for meeting the requirements of the California Regional Water Quality Board and Caltrans amounted to a false claim, because the language of the contract specified meeting the storm water protection requirements as part of the contract. Despite the fact the contract required this work and the contractor filed a claim for addition compensation, the court decided this was a contract dispute issue and not a false claim. It is not uncommon for additional compensation to be claimed, even when the contract is clear on the required work, when
historically the enforcement of the required work has been less. A contract for a construction project will typically have four main documents as part of the contract. These include the plans, standard specifications, standard plans, and special provisions for the project. In addition, the standard specifications will include and refer to Federal and State laws, which thereby become part of the contract as well. These additional documents and laws are numerous and the rules and enforcement of the laws change due to legal rulings, policy changes, etc. As we learn from the *Bhatnagar versus Kiewit* case provisions clearly stated in the contract can be legitimately claimed and considered a contract dispute and not a false claim. Basing the bid price on the historical enforcement of the contract language, then claiming additional cost when enforcement and policies change is economically sound for the state, since this keeps the bidding prices low until a particular issue comes to light and increased work is demanded.

With respect to the *Bhatnagar versus Kiewit* case we also learned the state and its' agencies are not liable for retaliation under the FCA. Additionally, the state and its' agencies are not liable in federal litigation under the FCA. The fact that the storm water protection claim
and payment was submitted for federal reimbursement under the traffic control change order of the contract did not negate the states' immunity to the FCA.

In a similar case can be made where the contract required adherence to the EPA law, the court found the contractor liable under the FCA for not meeting the requirement. According to U.S. ex rel. Shaw v. AAA Engineering & Drafting, Inc. et al., the contractor was paid full payment for the item of work contracted which included disposal of materials. The contractor stated the government knew he was not meeting the EPA law, however paid him for the work. The implication for Caltrans is that private individuals can sue government contractors for noncompliance of numerous state and federal regulations, when full payment is made for the item work associated with the government regulations.

A publicly disclosed noncompliance or false claim cannot be litigated under the FCA. In U.S. ex rel. Hansen v. Cargill, Inc. et al., the FCA relator Hansen filed litigation after the media had released the information supporting the action. The court ruled the defendant was not liable under the FCA due to the public disclosure bar provision of the act, despite the fact Hansen was the source to the media release. And in U.S. ex rel. Coleman
v. State of Indiana et al., we learn the public disclosure bar includes administrative hearing. This is not the case however, where fraud or fraudulent transactions themselves are not discussed as in U.S. ex rel. Downy v. Corning, Inc. et al.

The implications for Caltrans of the FCA ruling in U.S. ex rel. Newsham and Bloem v. Lockheed Missiles and Space Company, Inc. are both government employees can bring FCA action and the government agency cannot settle the litigation out of court independent of the relator. The settlement by the government in this case effectively terminated the lawsuit, except for the determination of Williams' statutory compensation of between 15 and 25 percent (as well as attorneys' fees and expenses). The court ruled that Williams was entitled to 15 percent of the $34 million settlement.

With respect to the City of Pomona v. Superior Court case we learn a significant implication regarding subcontractor, and suppliers not directly contracted with Caltrans. In this case, the supplier for the contractor provided materials which did not meet the specifications of the contract, yet implied to the contractor, in catalogs, the materials did meet the specifications. Even though there was no contract with the supplier, the City
of Pomona was able to use the California FCA to sue the supplier. Caltrans' projects will have one contract with the prime contractor. The prime contractor will have numerous subcontractors and suppliers. These subcontractors and suppliers have no contract with the state, however will routinely submit claims for additional compensation from the state through the prime contractor. The FCA is proven in the City of Pomona case to be a viable course to address fraud by companies with no contractual obligation to the government agency.

In Stacy & Witbeck, Inc. v. City and County of San Francisco, the implication for Caltrans is that the contractual requirement for "notice of potential claims" documentation can be used in later FCA action. The Standard Specifications requires a notice of potential claim be submitted within 15 days of the contractor learning of an issue that might yield a claim. This notice of potential claim starts a process of project level discussion regarding the issue and sometimes leads to contract change order (payment), dispute review board hearings, or negotiations of the issue. Documentation of costs are required for the notice of potential claim. In the Stacy and Witbeck case the defendant argued the documentation submitted was privileged since further
arbitration was anticipated. The court decided however, these documents were admissible in FCA actions. Even though a fraudulent notice of potential claim probably cannot be considered a FCA violation, the documentation submitted in the notice of potential claim process can be used if a formal claim is later submitted.

And finally with respect to Caltrans we learn in the MTA case against Tutor-Saliba Corporation and Shea-Kiewit-Kenny failure on the part of the contractor to submit pre-bid documents during claims discussions are FCA violations. Additionally, many requirements regarding bidding practices, submitting of extra work bills and contractual requirements for listing subcontractor can be used in FCA litigation. Caltrans routinely experiences claims for additional compensation for ambiguities and omissions in the plans and specifications left out of the original bid. Called “low ball” bidding where omissions from the bid are made then later requested in additional compensation through contract change orders or claims, these practices are unfair. Pre-bid calculations are required during claims negotiations and failure to submit this documentation is a violation of the FCA.

The Caltrans processes and procedures for handling contract change orders, notice of potential claims,
claims, settlements and arbitrations are comprehensive. It is difficult to say of the many claims submitted, how many are fraudulent. Most claims are legitimate contract disputes. The contract specifications require notice of potential claims so discussion can be started at the project level. Many of these notices of potential claims result in contract change orders where additional compensation is made. Approvals of these change orders require several levels of concurrence.

Any additional compensation that has any doubt in appropriateness would not be approved and required to go to a Dispute Review Board (DRB). At the Dispute Review Board level these claims for the majority are considered to have merit and usually additional compensation is made. For the most part, a ruling by the DRB is accepted by both parties, however not always.

The Caltrans Board of Review decides again if the claim is unsettled and before it goes to Caltrans legal department for settlement or arbitration. Contractor claims for additional compensation which go to arbitration are the cases Caltrans feels most likely the state will win. Otherwise the claim is typically settled. In order for a fraudulent claim to be paid, theoretically, it would have to pass the arbitration process. This is not likely,
because a fraudulent claim is by definition not simply a contract dispute and is easily seen by the arbitrator as false in nature.

Recommendations
This paper recommends that the federal and state FCAs might not be a good tool against false or fraudulent Caltrans construction claims. Many of the state contractors are repeat bidders. Most claims submitted by these contractors are honest contract disputes. It is possible that contractors, subcontractors and suppliers submit claims, which might be considered false. However, the Caltrans system for handling claims, from the initial notice of potential claim, to the DRB, Board of Review and arbitration, effectively weeds out the inappropriate claims. The FCA could be used as a punitive tool for contractors submitting false claims, however the long term result might be more costly than a benefit. The FCA action can be brought by private citizens as well as government agencies. If the legitimate state contractors were forced to face numerous FCA litigation, the result would be reflected in higher project bid prices and possibly lower the number of bidders. Actions brought by private citizens would undermine the governmental agencies authority and big picture concerns for the best public interest. Actions
brought by the government agency might encourage more private actions brought and thus opening a Pandora’s box. The upside of punishing the dishonest contractors would be outweighed by the additional cost incurred by the honest state contractors subjected to FCA litigation. The exception to the rule is the possible FCA litigation of subcontractor and suppliers when there is no direct contract with the subcontractor or supplier, as in the City of Pomona versus Superior Court case. However, even in the case of subcontractors and suppliers, the potential downside of increased FCA cases to all contractors suggest other recourse should be sought.
APPENDIX B

FEDERAL FALSE CLAIMS ACT
31 USC Sec. 3729

TITLE 31 - MONEY AND FINANCE
SUBTITLE III - FINANCIAL MANAGEMENT
CHAPTER 37 - CLAIMS
SUBCHAPTER III - CLAIMS AGAINST THE UNITED STATES GOVERNMENT

Sec. 3729. False claims

a) Liability for Certain Acts. - Any person who -

1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; 

2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; 

3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; 

4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt; 

5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; 

6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or 

7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that -

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information; 

(B) such person fully cooperated with any Government investigation of such violation; and
(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation; the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and Knowingly Defined. - For purposes of this section, the terms 'knowing' and 'knowingly' mean that a person, with respect to information -
(1) has actual knowledge of the information;
(2) acts in deliberate ignorance of the truth or falsity of the information; or
(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim Defined. - For purposes of this section, 'claim' includes any request or demand, whether under a 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.

(d) Exemption From Disclosure. - Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. - This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

-SOURCE-


-Historical and Revision Notes-

In the section, before clause (1), the words ''a member of an armed force of the United States'' are substituted for ''in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United
States' and 'military or naval service' for consistency with title 10. The words 'is liable' are substituted for 'shall forfeit and pay' for consistency. The words 'civil action' are substituted for 'suit' for consistency in the revised title and with other titles of the United States Code. The words 'and such forfeiture and damages shall be sued for in the same suit' are omitted as unnecessary because of rules 8 and 10 of the Federal Rules of Civil Procedure (28 App. U.S.C.). In clauses (1)-(3), the words 'false or fraudulent' are substituted for 'false, fictitious, or fraudulent' and 'Fraudulent or fictitious' to eliminate unnecessary words and for consistency. In clause (1), the words 'present, or causes to be presented' are substituted for 'shall make or cause to be made, or present or cause to be presented' for clarity and consistency and to eliminate unnecessary words. The words 'officer or employee of the Government or a member of an armed force' are substituted for 'officer in the civil, military, or naval service of the United States' for consistency in the revised title and with other titles of the Code. The words 'upon or against the Government of the United States, or any department of the United States, or any department or officer thereof' are omitted as surplus. In clause (2), the word 'knowingly' is substituted for 'knowing the same to contain any fraudulent or fictitious statement or entry' to eliminate unnecessary words. The words 'record or statement' are substituted for 'bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition' for consistency in the revised title and with other titles of the Code. In clause (3), the words 'conspires to' are substituted for 'enters into any agreement, combination, or conspiracy' to eliminate unnecessary words. The words 'of the United States, or any department or officer thereof' are omitted as surplus. In clause (4), the words 'charge', 'or other', and 'to any other person having authority to receive the same' are omitted as surplus. In clause (5), the words 'document certifying receipt' are substituted for 'certificate, voucher, receipt, or other paper certifying the receipt' to eliminate unnecessary words. The words 'arms, ammunition, provisions, clothing, or other', 'to any other person', and 'the truth of' are omitted as surplus. In clause (6), the words 'arms, equipments, ammunition, clothes, military stores, or other' are omitted as surplus. The words 'member of an armed force' are substituted for 'soldier, officer, sailor, or other person called into or employed in the military or naval service' for consistency with title 10. The words 'such soldier, sailor, officer, or other person' are omitted as surplus.

REFERENCES IN TEXT

The Internal Revenue Code of 1986, referred to in subsec. (e), is classified generally to Title 26, Internal Revenue Code.

AMENDMENTS


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1986 - Subsec. (a). Pub. L. 99-562, Sec. 2(1), designated existing provisions as subsec. (a), inserted subsec. heading, and substituted "Any person who" for "A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person" in introductory provisions.

Subsec. (a)(1). Pub. L. 99-562, Sec. 2(2), substituted "United States Government or a member of the Armed Forces of the United States" for "Government or a member of an armed force".

Subsec. (a)(2). Pub. L. 99-562, Sec. 2(3), inserted "by the Government" after "approved".

Subsec. (a)(4). Pub. L. 99-562, Sec. 2(4), substituted "control of property" for "control of public property" and "by the Government" for "in an armed force".

Subsec. (a)(5). Pub. L. 99-562, Sec. 2(5), substituted "by the Government" for "in an armed force" and "true;" for "true; or".

Subsec. (a)(6). Pub. L. 99-562, Sec. 2(6), substituted "an officer or employee of the Government, or a member of the Armed Forces," for "a member of an armed force" and "property; or" for "property;"


Subsecs. (b) to (e). Pub. L. 99-562, Sec. 2(7), added subsecs. (b) to (e).

**INCREASED PENALTIES FOR FALSE CLAIMS IN DEFENSE PROCUREMENT**

Pub. L. 99-145, title IX, Sec. 931(b), Nov. 8, 1985, 99 Stat. 699, provided that: "Notwithstanding section 3729 of title 31, United States Code, the amount of the liability under that section in the case of a person who makes a false claim related to a contract with the Department of Defense shall be a civil penalty of $2,000, an amount equal to three times the amount of the damages the Government sustains because of the act of the person, and costs of the civil action."

(Section 931(c) of Pub. L. 99-145 provided that section 931(b) is applicable to claims made or presented on or after Nov. 8, 1985.)

-SECREF-

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in sections 3730, 3731, 3732, 3733 of this title; title 10 section 2324; title 15 section 657a; title 20 section 1078-9; title 41 section 256; title 42 section 1395i.
APPENDIX C

CALIFORNIA FALSE CLAIMS ACT
CALIFORNIA FALSE CLAIMS ACT

CALIFORNIA CODES
GOVERNMENT CODE
SECTION 12650-12655

12650. (a) This article shall be known and may be cited as the False Claims Act.
(b) For purposes of this article:
   (1) "Claim" includes any request or demand for money, property, or services made to any employee, officer, or agent of the state or of any political subdivision, or to any contractor, grantee, or other recipient, whether under contract or not, if any portion of the money, property, or services requested or demanded issued from, or was provided by, the state (hereinafter "state funds") or by any political subdivision thereof (hereinafter "political subdivision funds").
   (2) "Knowing" and "knowingly" mean that a person, with respect to information, does any of the following:
      (A) Has actual knowledge of the information.
      (B) Acts in deliberate ignorance of the truth or falsity of the information.
      (C) Acts in reckless disregard of the truth or falsity of the information. Proof of specific intent to defraud is not required.
   (3) "Political subdivision" includes any city, city and county, county, tax or assessment district, or other legally authorized local governmental entity with jurisdictional boundaries.
   (4) "Prosecuting authority" refers to the county counsel, city attorney, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, a particular political subdivision.
   (5) "Person" includes any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust.

12651. (a) Any person who commits any of the following acts shall be liable to the state or to the political subdivision for three times the amount of damages which the state or the political subdivision sustains because of the act of that person. A person who commits any of the following acts shall also be liable to the state or to the political subdivision for the costs of a civil action brought to recover any of those penalties or damages, and may be liable to the state or political subdivision for a civil penalty of up to ten thousand dollars ($10,000) for each false claim:
   (1) Knowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim for payment or approval.
   (2) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision.
   (3) Conspires to defraud the state or any political subdivision by getting a false claim allowed or paid by the state or by any political subdivision.
(4) Has possession, custody, or control of public property or money used or to be used by the state or by any political subdivision and knowingly delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt.
(5) Is authorized to make or deliver a document certifying receipt of property used or to be used by the state or by any political subdivision and knowingly makes or delivers a receipt that falsely represents the property used or to be used.
(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property.
(7) Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state or to any political subdivision.
(8) Is a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim.
(b) Notwithstanding subdivision (a), the court may assess not less than two times and not more than three times the amount of damages which the state or the political subdivision sustains because of the act of the person described in that subdivision, and no civil penalty, if the court finds all of the following:
(1) The person committing the violation furnished officials of the state or of the political subdivision responsible for investigating false claims violations with all information known to that person about the violation within 30 days after the date on which the person first obtained the information.
(2) The person fully cooperated with any investigation by the state or a political subdivision of the violation.
(3) At the time the person furnished the state or the political subdivision with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.
(c) Liability under this section shall be joint and several for any act committed by two or more persons.
(d) This section does not apply to any controversy involving an amount of less than five hundred dollars ($500) in value. For purposes of this subdivision, "controversy" means any one or more false claims submitted by the same person in violation of this article.
(e) This section does not apply to claims, records, or statements made pursuant to Division 3.6 (commencing with Section 810) of Title 1 or to workers' compensation claims filed pursuant to Division 4 (commencing with Section 3200) of the Labor Code.
(f) This section does not apply to claims, records, or statements made under the Revenue and Taxation Code.

12652.
(a) (1) The Attorney General shall diligently investigate violations under Section 12651 involving state funds. If the Attorney General finds that a person has violated or is violating Section 12651, the Attorney General may bring a civil action under this section against that person.
(2) If the Attorney General brings a civil action under this subdivision on a claim involving political subdivision funds as well as state funds, the Attorney General shall, on the same date that the complaint is filed in this action, serve by mail with "return receipt requested" a copy of the complaint on the appropriate prosecuting authority.

(3) The prosecuting authority shall have the right to intervene in an action brought by the Attorney General under this subdivision within 60 days after receipt of the complaint pursuant to paragraph (2). The court may permit intervention thereafter upon a showing that all of the requirements of Section 387 of the Code of Civil Procedure have been met.

(b) (1) The prosecuting authority of a political subdivision shall diligently investigate violations under Section 12651 involving political subdivision funds. If the prosecuting authority finds that a person has violated or is violating Section 12651, the prosecuting authority may bring a civil action under this section against that person.

(2) If the prosecuting authority brings a civil action under this section on a claim involving state funds as well as political subdivision funds, the prosecuting authority shall, on the same date that the complaint is filed in this action, serve a copy of the complaint on the Attorney General.

(3) Within 60 days after receiving the complaint pursuant to paragraph (2), the Attorney General shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the Attorney General shall assume primary responsibility for conducting the action and the prosecuting authority shall have the right to continue as a party.

(B) Notify the court that it declines to proceed with the action, in which case the prosecuting authority shall have the right to conduct the action.

(c) (1) A person may bring a civil action for a violation of this article for the person and either for the State of California in the name of the state, if any state funds are involved, or for a political subdivision in the name of the political subdivision, if political subdivision funds are exclusively involved. The person bringing the action shall be referred to as the qui tam plaintiff. Once filed, the action may be dismissed only with the written consent of the court, taking into account the best interests of the parties involved and the public purposes behind this act.

(2) A complaint filed by a private person under this subdivision shall be filed in superior court in camera and may remain under seal for up to 60 days. No service shall be made on the defendant until after the complaint is unsealed.

(3) On the same day as the complaint is filed pursuant to paragraph (2), the qui tam plaintiff shall serve by mail with "return receipt requested" the Attorney General with a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses.

(4) Within 60 days after receiving a complaint and written disclosure of material evidence and information alleging violations that involve state funds but not political subdivision funds, the Attorney General may elect to intervene and proceed with the action.

(5) The Attorney General may, for good cause shown, move the court for extensions of the time during which the complaint remains under
seal pursuant to paragraph (2). The motion may be supported by affidavits or other submissions in camera.

(6) Before the expiration of the 60-day period or any extensions obtained under paragraph (5), the Attorney General shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the Attorney General and the seal shall be lifted.

(B) Notify the court that it declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(7) (A) Within 15 days after receiving a complaint alleging violations that exclusively involve political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure of material evidence and information to the appropriate prosecuting authority for disposition, and shall notify the qui tam plaintiff of the transfer.

(B) Within 45 days after the Attorney General forwards the complaint and written disclosure pursuant to subparagraph (A), the prosecuting authority may elect to intervene and proceed with the action.

(C) The prosecuting authority may, for good cause shown, move for extensions of the time during which the complaint remains under seal. The motion may be supported by affidavits or other submissions in camera.

(D) Before the expiration of the 45-day period or any extensions obtained under subparagraph (C), the prosecuting authority shall do either of the following:

(i) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the prosecuting authority and the seal shall be lifted.

(ii) Notify the court that it declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(8) (A) Within 15 days after receiving a complaint alleging violations that involve both state and political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure to the appropriate prosecuting authority, and shall coordinate its review and investigation with those of the prosecuting authority.

(B) Within 60 days after receiving a complaint and written disclosure of material evidence and information alleging violations that involve both state and political subdivision funds, the Attorney General or the prosecuting authority, or both, may elect to intervene and proceed with the action.

(C) The Attorney General or the prosecuting authority, or both, may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). The motion may be supported by affidavits or other submissions in camera.

(D) Before the expiration of the 60-day period or any extensions obtained under subparagraph (C), the Attorney General shall do one of the following:

(i) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the Attorney General and the seal shall be lifted.

(ii) Notify the court that it declines to proceed with the action but that the prosecuting authority of the political subdivision involved
intends to proceed with the action, in which case the seal shall be lifted and the action shall be conducted by the prosecuting authority.

(iii) Notify the court that both it and the prosecuting authority decline to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(E) If the Attorney General proceeds with the action pursuant to clause (i) of subparagraph (D), the prosecuting authority of the political subdivision shall be permitted to intervene in the action within 60 days after the Attorney General notifies the court of its intentions. The court may authorize intervention thereafter upon a showing that all the requirements of Section 387 of the Code of Civil Procedure have been met.

(9) The defendant shall not be required to respond to any complaint filed under this section until 30 days after the complaint is unsealed and served upon the defendant pursuant to Section 583.210 of the Code of Civil Procedure.

(10) When a person brings an action under this subdivision, no other person may bring a related action based on the facts underlying the pending action.

(d) (1) No court shall have jurisdiction over an action brought under subdivision (c) against a Member of the State Senate or Assembly, a member of the state judiciary, an elected official in the executive branch of the state, or a member of the governing body of any political subdivision if the action is based on evidence or information known to the state or political subdivision when the action was brought.

(2) A person may not bring an action under subdivision (c) that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the state or political subdivision is already a party.

(3) (A) No court shall have jurisdiction over an action under this article based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing, or audit conducted by or at the request of the Senate, Assembly, auditor, or governing body of a political subdivision, or by the news media, unless the action is brought by the Attorney General or the prosecuting authority of a political subdivision, or the person bringing the action is an original source of the information.

(B) For purposes of subparagraph (A), "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based, who voluntarily provided the information to the state or political subdivision before filing an action based on that information, and whose information provided the basis or catalyst for the investigation, hearing, audit, or report that led to the public disclosure as described in subparagraph (A).

(4) No court shall have jurisdiction over an action brought under subdivision (c) based upon information discovered by a present or former employee of the state or a political subdivision during the course of his or her employment unless that employee first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and unless the state or political subdivision failed to act on the information provided within a reasonable period of time.
(e) (1) If the state or political subdivision proceeds with the action, it shall have the primary responsibility for prosecuting the action. The qui tam plaintiff shall have the right to continue as a full party to the action.

(2) (A) The state or political subdivision may seek to dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified by the state or political subdivision of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity to oppose the motion and present evidence at a hearing.

(B) The state or political subdivision may settle the action with the defendant notwithstanding the objections of the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances.

(f) (1) If the state or political subdivision elects not to proceed, the qui tam plaintiff shall have the same right to conduct the action as the Attorney General or prosecuting authority would have had if it had chosen to proceed under subdivision (c). If the state or political subdivision so requests, and at its expense, the state or political subdivision shall be served with copies of all pleadings filed in the action and supplied with copies of all deposition transcripts.

(2) (A) Upon timely application, the court shall permit the state or political subdivision to intervene in an action with which it had initially declined to proceed if the interest of the state or political subdivision in recovery of the property or funds involved is not being adequately represented by the qui tam plaintiff.

(B) If the state or political subdivision is allowed to intervene under paragraph (A), the qui tam plaintiff shall retain principal responsibility for the action and the recovery of the parties shall be determined as if the state or political subdivision had elected not to proceed.

(g) (1) (A) If the Attorney General initiates an action pursuant to subdivision (a) or assumes control of an action initiated by a prosecuting authority pursuant to subparagraph (A) of paragraph (3) of subdivision (b), the office of the Attorney General shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims.

(B) If a prosecuting authority initiates and conducts an action pursuant to subdivision (b), the office of the prosecuting authority shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims.

(C) If a prosecuting authority intervenes in an action initiated by the Attorney General pursuant to paragraph (3) of subdivision (a) or remains a party to an action assumed by the Attorney General pursuant to subparagraph (A) of paragraph (3) of subdivision (b), the court may award the office of the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery under subparagraph (A), taking into account the prosecuting authority's role in investigating and conducting the action.

(2) If the state or political subdivision proceeds with an action brought by a qui tam plaintiff under subdivision (c), the qui tam plaintiff shall, subject to paragraphs (4) and (5), receive at least 15 percent but not more than 33 percent of the proceeds of the action.
or settlement of the claim, depending upon the extent to which the qui tam plaintiff substantially contributed to the prosecution of the action. When it conducts the action, the Attorney General's office or the office of the prosecuting authority of the political subdivision shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims made against the state or political subdivision. When both the Attorney General and a prosecuting authority are involved in a qui tam action pursuant to subparagraph (C) of paragraph (6) of subdivision (c), the court at its discretion may award the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery, taking into account the prosecuting authority's contribution to investigating and conducting the action.

(3) If the state or political subdivision does not proceed with an action under subdivision (c), the qui tam plaintiff shall, subject to paragraphs (4) and (5), receive an amount that the court decides is reasonable for collecting the civil penalty and damages on behalf of the government. The amount shall be not less than 25 percent and not more than 50 percent of the proceeds of the action or settlement and shall be paid out of these proceeds.

(4) If the action is one provided for under paragraph (4) of subdivision (d), the present or former employee of the state or political subdivision is not entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff those sums from the proceeds as it considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision goes forth with the action or 50 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, and the scope of, and response to, the employee's attempts to report and gain recovery of the falsely claimed funds through official channels.

(5) If the action is one that the court finds to be based primarily on information from a present or former employee who actively participated in the fraudulent activity, the employee is not entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff any sums from the proceeds that it considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision goes forth with the action or 50 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, the scope of the present or past employee's involvement in the fraudulent activity, the employee's attempts to avoid or resist the activity, and all other circumstances surrounding the activity.

(6) The portion of the recovery not distributed pursuant to paragraphs (1) to (5), inclusive, shall revert to the state if the underlying false claims involved state funds exclusively and to the political subdivision if the underlying false claims involved political subdivision funds exclusively. If the violation involved both state and political subdivision funds, the court shall make an apportionment between the state and political subdivision based on their relative share of the funds falsely claimed.

(7) For purposes of this section, "proceeds" include civil
penalties as well as double or treble damages as provided in Section 12651.
(8) If the state, political subdivision, or the qui tam plaintiff prevails in or settles any action under subdivision (c), the qui tam plaintiff shall receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable costs and attorney's fees. All expenses, costs, and fees shall be awarded against the defendant and under no circumstances shall they be the responsibility of the state or political subdivision.
(9) If the state, a political subdivision, or the qui tam plaintiff proceeds with the action, the court may award to the defendant its reasonable attorney's fees and expenses against the party that proceeded with the action if the defendant prevails in the action and the court finds that the claim was clearly frivolous, clearly vexatious, or brought solely for purposes of harassment.
(h) The court may stay an act of discovery of the person initiating the action for a period of not more than 60 days if the Attorney General or local prosecuting authority show that the act of discovery would interfere with an investigation or a prosecution of a criminal or civil matter arising out of the same facts, regardless of whether the Attorney General or local prosecuting authority proceeds with the action. This showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Attorney General or local prosecuting authority has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.
(i) Upon a showing by the Attorney General or local prosecuting authority that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Attorney General's or local prosecuting authority's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, including the following:
1. Limiting the number of witnesses the person may call.
2. Limiting the length of the testimony of the witnesses.
3. Limiting the person's cross-examination of witnesses.
4. Otherwise limiting the participation by the person in the litigation.
(j) The False Claims Act Fund is hereby created in the State Treasury. Proceeds from the action or settlement of the claim by the Attorney General pursuant to this article shall be deposited into this fund. Moneys in this fund, upon appropriation by the Legislature, shall be used by the Attorney General to support the ongoing investigation and prosecution of false claims in furtherance of this article.
12652.5. Notwithstanding any other provision of law, the University of California shall be considered a political subdivision, and the General Counsel of the University of California shall be considered a prosecuting authority for the purposes of this article, and shall have the right to intervene in an action brought by the Attorney General or a private party to investigate and bring an action,
subject to Section 12652, if it is determined that the claim involves the University of California.

12653. (a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed under Section 12652.

(b) No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against, an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652.

(c) An employer who violates subdivision (b) shall be liable for all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, compensation for any special damage sustained as a result of the discrimination, and, where appropriate, punitive damages. In addition, the defendant shall be required to pay litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate superior court of the state for the relief provided in this subdivision.

(d) An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the state or a political subdivision shall be entitled to the remedies under subdivision (c) if, and only if, both of the following occur:

1. The employee voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed.

2. The employee had been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place.

12654. (a) A civil action under Section 12652 may not be filed more than three years after the date of discovery by the official of the state or political subdivision charged with responsibility to act in the circumstances or, in any event, no more than 10 years after the date on which the violation of Section 12651 is committed.

(b) A civil action under Section 12652 may be brought for activity prior to January 1, 1988, if the limitations period set in subdivision (a) has not lapsed.

(c) In any action brought under Section 12652, the state, the political subdivision, or the qui tam plaintiff shall be required to
prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, a guilty verdict rendered in a criminal proceeding charging false statements or fraud, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, except for a plea of nolo contendere made prior to January 1, 1988, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subdivision (a), (b), or (c) of Section 12652.

(e) Subdivision (b) of Section 47 of the Civil Code shall not be applicable to any claim subject to this article.

12655. (a) The provisions of this article are not exclusive, and the remedies provided for in this article shall be in addition to any other remedies provided for in any other law or available under common law.

(b) If any provision of this article or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the article and the application of the provision to other persons or circumstances shall not be affected thereby.

(c) This article shall be liberally construed and applied to promote the public interest.
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