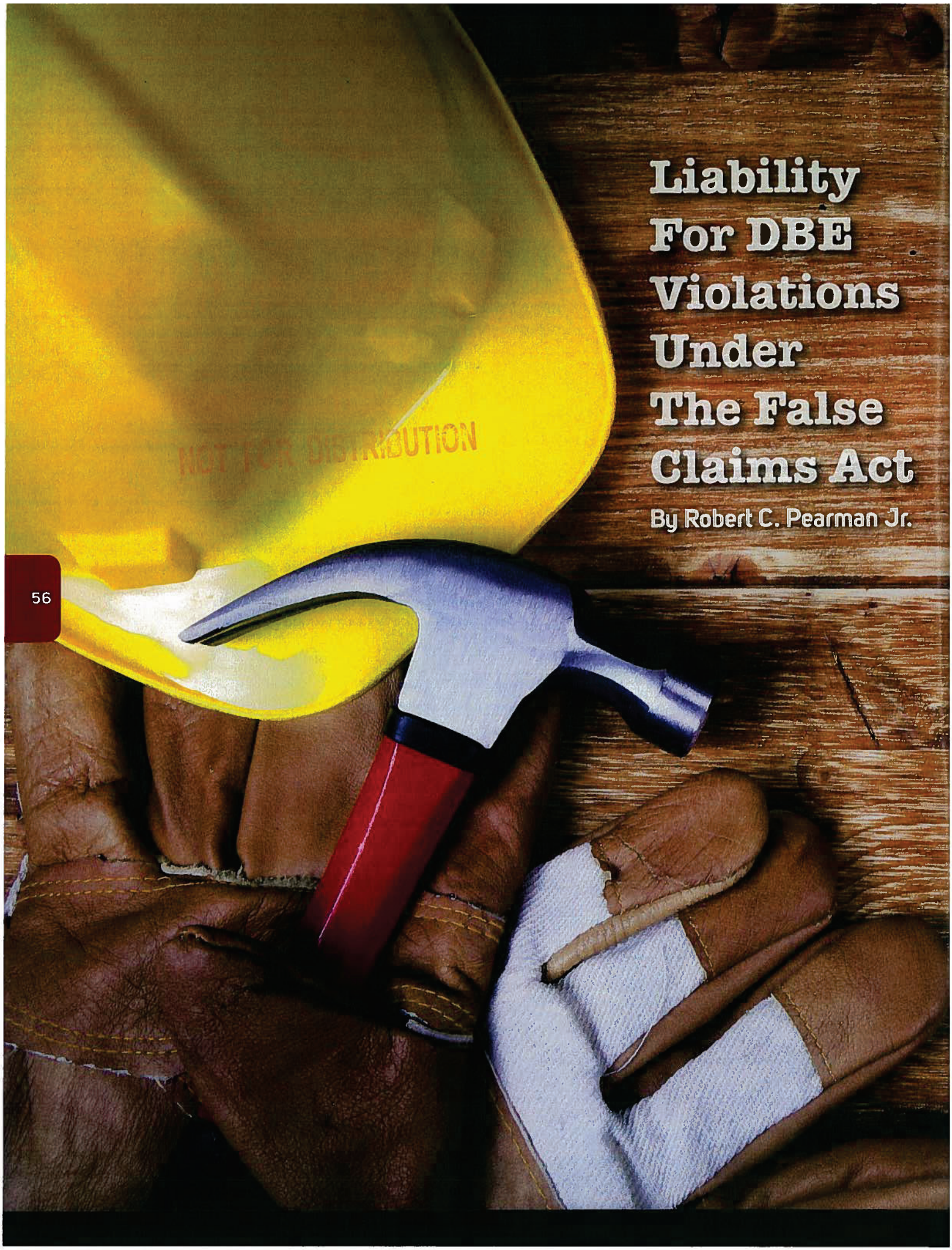

Liability For DBE Violations Under The False Claims Act

By Robert C. Pearman Jr.

Are you a contractor considering bidding on state and local public work projects, such as bridge reconstruction or passenger rail lines that are partially funded by the Federal government? If so you are probably aware of possible contract requirements for utilization of Disadvantaged Business Enterprises (DBE) firms in your proposal and the actual performance of the work.

What you may not realize is that failure to monitor compliance with such DBE requirements, much less deliberate violations of those requirements, may cause your company to face civil penalties and even criminal sanctions under the federal False Claims Act.

Federal DBE programs provide opportunities to businesses owned by minorities and women, as well as socially and economically disadvantaged individuals, to participate in federally funded projects. A number of states have similar programs. Over the years there have been instances of fraud by those trying to take advantage of such programs and the billions of government dollars that flow from them.

One common abuse features non-DBE firms that partner with firms that meet DBE eligibility criteria on paper, but perform little or no actual work—or, in the words of DBE regulations, perform no "commercially useful function." Public prosecutors and agencies have increasingly embraced the use of the False Claims Act as a weapon to attack these types of abuses.

It can be considered a False Claim violation if you engage DBE subcontractors, but some of your employees aid in providing inaccurate information to help a favored firm obtain DBE certification status; pass through a payment claim for a first tier subcontractor which wrongly includes certification of usage of DBE second tier subcontractors; or certify work as having been performed by a DBE when in reality it performed little real work.

The federal False Claims Act defines the word "claim" broadly, as any request or demand, whether under a contract or otherwise, for payment by or reimbursement from federal money that is presented to an officer, employee, or agent of the United States, or is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the government's behalf or to advance a government program or interest.

FALSE CLAIMS

False claims may arise when a contractor:

- Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.
- Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.
- Conspires to commit a violation of the conduct prohibited by the Act.
- Knowingly makes, uses, or causes to be made or used, a material false record or statement to conceal, avoid or decrease an obligation (e.g., under a law, regulation or by contract) to pay or transmit money to the Government (also known as a "reverse false claim").

The False Claims Act is comprehensive, extending beyond demands for money that fraudulently overstate an amount otherwise due. It extends "to all fraudulent attempts to cause the Government to pay out sums of money."

For example, if you certify adherence to a statute or regulation but in fact were not in compliance, and your certification was a prerequisite to government payment or influenced government's decision to pay, that may form a basis for a claim under the FCA.

Under the so-called implied certification theory, "[a] contractor who knowingly fails to perform a material requirement of its contract . . . yet seeks or receives payment without disclosing the nonperformance, has presented a false claim to the government and may be liable therefor."

Remember, the knowledge the violator must possess to trigger liability is not the everyday definition of knowledge, but the statutory definition that can mean "deliberate

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THE GOVERNMENT IS NOT REQUIRED TO PROVE A SPECIFIC INTENT TO DEFRAUD.

Liability For DBE Violations

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ignorance" or "reckless disregard of the truth or falsity of the information." The government is not required to prove a specific intent to defraud.

Falsehoods in a number of documents submitted in connection with federally funded projects can lead to liability under the False Claims Act. These include monthly reports showing dollars paid to DBEs, and self-described "verification" of such payments; forms listing the amount paid to DBE firms on the project stating under penalty of perjury that the statements are true; a DBE monthly progress report listing the amount paid for work performed by a DBE in that time period, including certification by a company official that "the above is a true and correct statement."

CONSEQUENCES

The consequences for violating the FCA may be severe, including a civil penalty of no less than $5,500 and not more than $11,000 per claim, plus three times the amount of damages which the government sustains. Additionally, violators are liable for the costs of a civil action brought to recover any such penalty or damages.

For any contractor dependent on public work, federal or state, the risk of debarment and suspension as a result of false claims is an equally potent sanction. Government agencies can in essence engage in de facto debarment to the extent that they can take into account past performance and False Claims Act violations. Violations of the False Claims Act may have to be disclosed to contracting agencies, and the failure to do so itself may be a cause for debarment or suspension.

Given that the penalty can be assessed on a per-claim basis, the penalties can become substantial on a project with numerous invoices over time. The literal language of the FCA indicates that the imposition of the penalties is mandatory. Some courts, however, have ruled this penalty should be disallowed if violative of the Eighth Amendment, which prohibits the imposition of "excessive fines," or fines that are grossly disproportional to the gravity of the offense.

In the recent *United States ex rel. Bunk v. Birkard Globistics GMBH*, it was stipulated that the defendants filed 9,136 invoices under the contract at issue. In theory, that would call for FCA penalties amounting to between $50,248,000 and $100,496,000 for 9,136 false claims. But the Virginia federal district court awarded no civil penalties because even the minimum penalty would be unconstitutionally excessive.

AVOIDING DBE LIABILITY

The following measures will facilitate compliance with DBE program requirements and help avoid FCA liability.

- Establish a position for an Ethics and Compliance Officer.
- Create contractor compliance manuals for Disadvantaged Business Enterprises.
- Provide a code of ethics and business conduct packet.
- Incorporate mandatory DBE and ethics compliance courses for your employees.
- Establish a DBE advisory group for feedback and support.
- Have personnel trained in DBE compliance issues observe and question performance of DBE subcontractors on the job site.

Additionally, if you do find yourself under investigation by the government (private persons may also bring actions for violations under so-called qui tam proceedings) for FCA violations, cooperate and be as transparent as possible. That may result, at the least, in a reduction of the trebling of damages to a doubling. ■

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