

## Construction & Infrastructure Law Blog

Posted at 1:30 PM on July 14, 2010 by Sheppard Mullin

### [Breach of Contract May Lead to False Claims Liability on Public Works Contracts](#)

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The California First District Court of Appeal has issued an opinion which may place a heavy burden on public works contractors under the California False Claims Act, Cal. Gov't Code § 12650 et seq. In *San Francisco Unified School Dist. v. Laidlaw Transit, Inc.*, the Court of Appeal applied the federal "implied certification" doctrine to hold that when a contractor on a public works project submits a request for payment to the public entity at a time when the contractor knows it is in breach of the express terms of the contract, the contractor may be held to have submitted a false claim, and may be subject to liability under the state False Claims Act. *San Francisco Unified School District ex rel. Manuel Contreras, et al. v. Laidlaw Transit, Inc.*, 182 Cal. App. 4th 438 (2010)

*Laidlaw* provided school bus services to the *School District*, and had done so for a number of years under a series of contracts. Under the contract at issue, *Laidlaw* was required, among other things, to "maintain its buses in 'excellent mechanical condition,'" to "replace all vehicles that are deemed to be unfit for providing the required service," and to provide buses to "meeting a specified particulate matter emissions standard" or provide emission control devices. 182 Cal. App. 4th at 443.

The plaintiffs in the case were qui tam (whistleblower) plaintiffs. *The School District* itself declined to participate in the lawsuit. The plaintiffs alleged that when *Laidlaw* had submitted requests for payment to the *School District*, it had impliedly certified that it was in compliance with all of the requirements of the contract. The plaintiffs further alleged that *Laidlaw* was in breach of various of the contract requirements when it submitted the requests for payment. Plaintiffs alleged *Laidlaw* had violated the contract provisions because, among other things, it had provided buses that "were in inadequate and/or unsafe operating condition and failed to meet the pollution control requirements in the Contract." 182 Cal. App. 4th at 444.

The California False Claims Act subjects contractors to civil penalties, treble damages and other penalties for, among other things, "knowingly presenting a false or fraudulent claim [to the public entity] for payment or approval." Cal. Gov't Code § 12651(a). At the time of the alleged violations in *Laidlaw*, the statute provided for liability only where the contractor submitted a "false claim." A "claim" is defined under the Act to include a request for payment or money.

Although the contract between *Laidlaw* and the *School District* apparently did not contain any provision requiring *Laidlaw* to certify that it was in compliance with all of the contract terms when it submitted a request for payment, the plaintiffs' theory was that when a contractor presents a request for payment to a public entity, the contractor *impliedly certifies* that it is in compliance with all of the material terms of the contract. Under this theory, if the contractor "knows" it is not in compliance with one or more material terms of the contract when it submits its request for payment, it has submitted a claim which is false in violation of the False Claims Act.

*Laidlaw* defended against the claim in part on the ground that the plaintiffs theory of liability "would enable any private party to sue [under the Act] based on any purported breach of any public entity's contract." 182 Cal. App. 4th at 452. The court rejected this argument for four reasons. First, the court explained, only persons who had knowledge of an actual breach would be entitled to sue, because the statute requires the plaintiff to be the "original source" of the information underlying the lawsuit. Second, the court observed that the implied certification must be "material to the government's decision to pay money out to the claimant," and thus that not all breaches of contract will suffice to impose liability under the False Claims Act. Third, the court stressed that the plaintiff must show the contractor had knowledge of its breach, and thus "knowingly" presented a false claim. 182 Cal. App. 4th at 453. Finally, the court further reasoned that if it rejected the implied certification theory of liability, that would "exclude a large category of fraud from the False Claims Act," and the Act "would provide no remedy against government contractors who intentionally breach their contracts, often in a manner evading detection." 182 Cal. App. 4th at 453.

*Laidlaw* has potentially serious implications for public entities and contractors working on public works projects. In at least some respects, *Laidlaw* arguably runs against recent California Supreme Court precedent in which the Court emphasized the distinction between contract and tort damages, and rejected theories seeking to "tortify" what are otherwise ordinary breaches of contract. See, e.g., *Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.*, 7 Cal. 4th 503 (1994) (holding that a party in breach of contract cannot be held liable for tort damages over and above ordinary contract damages on a theory that the party tortiously interfered with the contract). While *Laidlaw's* rationale is based on a statutory remedy, the net effect of its holding could be the conversion of a garden-variety breach of contract case to something far more serious.

In addition, while the *Laidlaw* court stressed the requirement that a contractor must know that it is in breach at the time it submits a request for payment, the court's opinion is not completely clear as to what qualifies to show that a contractor "knew of" any particular breach. For example, what persons are required to have knowledge -- is it sufficient that one of the contractor's workers knew he had installed work in violation of the specifications? How is the knowledge issue to be resolved in a situation where the fact of a breach is disputed at the time the contractor

submits its request for payment, but it is ultimately determined at trial that the contractor was in breach? The *Laidlaw* case was decided on demurrer without a trial, so there was no factual record regarding what the contractor did or did not know to enable the court to make a ruling on these issues. As *Laidlaw* was decided without a strong factual record, the opinion might encourage qui tam plaintiffs to make allegations for which they have little or no factual basis, and then go on a "fishing expedition" in discovery to find a substantive basis for their claims, a process which can be extremely costly and time-consuming for all parties. Given these and other similar unresolved issues, *Laidlaw* may be a fruitful source of additional litigation under the False Claims Act.

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