



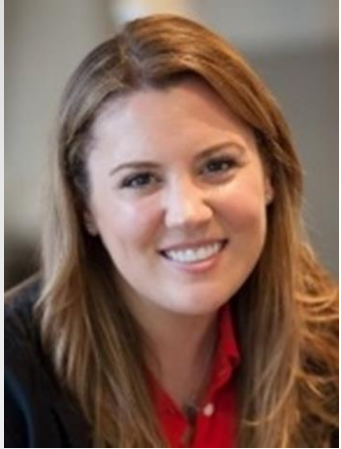
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# Women & Federal Contracting: Preparing Yourself for the Opportunities & Risk

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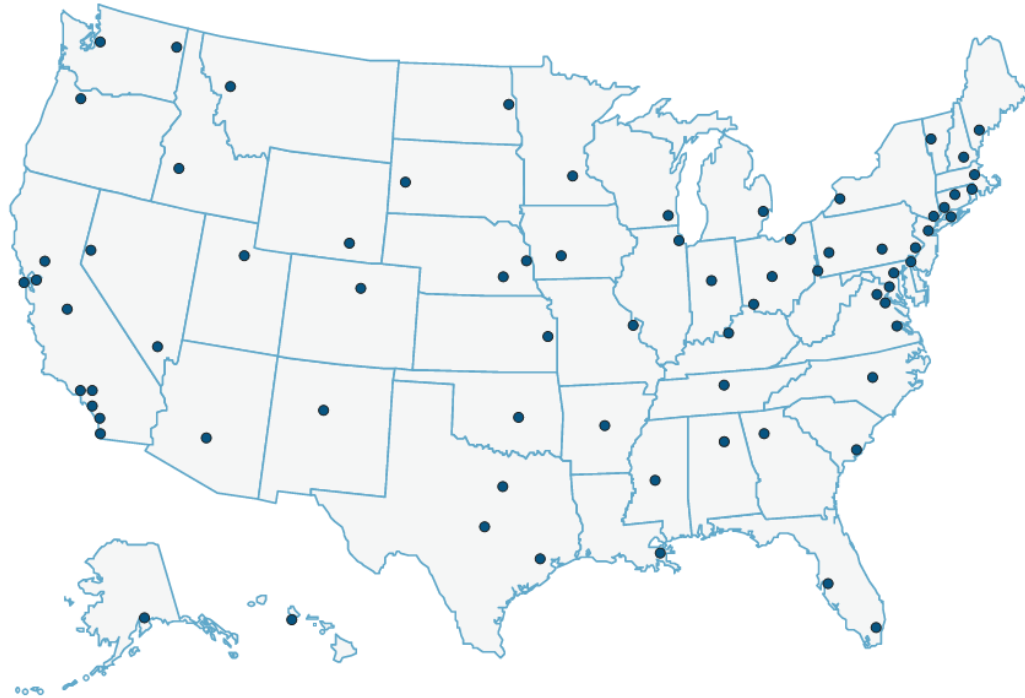
- Meredith Thielbahr is the Managing Partner of the Boise and Spokane offices. She handles complex commercial litigation matters, bid protests, internal compliance investigations, and contract and regulatory compliance.
- Her practice focuses in handling civil litigation on behalf of her construction industry and government contract clients. She assists contractors and suppliers in dispute resolution in both the commercial and public contracting arena. She is licensed in Alaska, Idaho, Oregon, and Washington, as well as the District of Columbia.

# INTRODUCTIONS



**Christine D. Barker**

- Christine Barker is the Managing Partner of the Orange County office. She counsels owners, general contractors, design professional and subcontractors during all phases of contract negotiations, bidding, change order disputes, delays, defect claims, and construction remedies, including mechanics liens, stop notices, performance/payment bond claims, and prompt payment laws.
- Her public procurement practice includes advising on bid protests, contract drafting/negotiation, contract performance and compliance issues, claims and dispute resolution.



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Corporate Equality Index

## Agenda/What We Will Cover

- Statistics in Women Federal Contracting & Leveling the Playing Field
- Qualifying for Federal Contracts
  - Certification
  - Checks and Balances
  - Program Eligibility Requirements
- Where to Find Federal Contract Opportunities
  - Federal Resources
  - Trade Groups/Organizations
- Limitations on Small Subcontracting
  - Teaming Arrangements
  - Affiliation Issues
  - Percentage of Work Requirements
  - Joint Ventures
- Challenges in Procurements or Performance
  - SBA
  - Protest Timelines
  - Filing Requirements
  - Decision/Appeal
- False Claims Act Exposure

## Leveling the Playing Field for Women – Or Did They?

- Historically, big contractors and government agencies play lip service to hiring women-owned businesses (WOBs); not reality when work is awarded
- 2009 Obama Stimulus Package
  - The American Recovery and Reinvestment Act of 2009
  - Signed into law February 2009; \$787 billion package (later revised to \$831 billion)
  - In relevant part, designed to modernize nation's energy and communication infrastructure, and U.S.'s energy independence
- Under the Act, women business enterprises (WBEs) were to get 5% of stimulus federal contracts awarded

## Statistics: Women in Federal Contracting Awards

- In 1997, WOBs received 1.8% of fed contracts
- 2012, that figure hit 4%, remained between 4 and 5% since then.
- Only twice, exceeded the 5% goal threshold – 2015, hit 5.05% and in 2019, hit 5.19%
- **FY16 to FY19, WOBs doubled their numbers of contracts executed, increasing from 275,000 to nearly 574,000 contracts.**
- In FY20 alone, WOBs executed **344,000 contracts across the U.S. with 4,500 related to COVID-19 support.**
- The Biden administration is working to expand contracting opportunities for underserved small businesses; wants to raise the share of contracts to minority-owned businesses by 50% over the next 5 years, translating to \$100 billion to those businesses.
- The fact that the metric is still at 5% doesn't really make a whole lot of sense...nearly 15 years later.

## Why the Barriers?

- Contracts valued at less than \$250k are automatically set-aside for WOBs
  - Still takes significant effort and expense to bid on smaller projects as the larger ones
  - Throw money out window for projects may not get – where does a WOB put her risk?
- WOBs have indicated applying for fed contracts is too complicated and time consuming – certifying and qualifying.
- Perception (or reality) that WOBs are not prioritized
- If the WOB has not worked for the government in past, will get passed over
  - Past performance & experience qualifying factors

## Qualifying for Federal Contracts : Certification

- Certification. To qualify, your business needs to be certified as a women-owned business enterprise, and in most cases, appear in the Central Contractor Registry
  - What is the Central Contractor Registry – or CCR? The SBA maintains this database, a massive list of companies that wish to do business with the U.S Federal Government. Must first be registered with the CCR if you want these opportunities.
  - What is Small-Business Certification? Gives formal acknowledgment in contracting review process that a business is owned or operated by a qualifying person, which is under-represented in an industry.
    - WOSB
    - EDWOSB- Economically Disadvantaged WOSB
    - And Others (for example, VOSB – Veteran-Owned Small Business, HUB-Zone – Historically Underutilized Business Zone)
  - **Self-Certification for WOSBs Exception – previously allowed for first time bidders**
    - **No longer allowed under 2020 SBA Final Rule**
  - Third-Party Certification (TPCs)
  - Certifications can be challenged



## Certification: Checks & Balances

- In 2020, certification for WOSBs and EDWOSBs changed.
- Updated regs make it easier for qualified WOBs to participate in the program, while strengthening SBA's oversight and maintaining integrity in the certification process
  - Updated regs → Federal Register @federalregister.gov
- SBA's free online certification process for WOSBs and EDWOSBs @beta.certify.sba.gov
- SBA still allows approved TPCs (third-party certifiers) to obtain WOSB or EDWOSB certification
  - Different options for TPCs
    - National Women's Business Owners Corporation (NWBOC)
    - Women's Business Enterprise National Council (WBENC)
    - U.S. Women's Chamber of Commerce
    - El Paso Hispanic Chamber of Commerce
- All WOSBs must take action in beta.certify.sba.gov in order to compete for WOSB Fed Set-Aside Awards, i.e. create an account and complete application.

## Program Eligibility Requirements

- To be an eligible WOSB:
  - 51% owned **and controlled** by women who are U.S. citizens
    - See 13 CFR 127.201 and interpreting case law
  - Be a small business according to SBA size standards (by NAICS code/your industry)
  - Women manage day-to-day operations who also make long-term decisions
- To be an eligible EDWOSB:
  - Meet all WOSB requirements *plus*
  - Be owned and controlled by one or more women, each with a personal net worth *less* than \$750,000
  - Be owned and controlled by one or more women, each with \$350,000 less in adjusted gross income averaged over the previous 3 years
  - Be owned and controlled by one or more women, each \$6m or less in personal assets

## Where to Find Federal Contract Opportunities

- SAM.gov – U.S. Government System for Award Management
  - SAM.gov and beta.SAM.gov merged – now all SAM.gov
- Join Associations
  - NAWIC - National Association of Women in Construction
  - Professional Women in Construction
  - Women Construction Owners & Executives USA
  - National Association of Black Women in Construction
  - They do not all need to be women-focused:
    - ABA
    - AGC
    - Teaming/JVs – we will discuss this

## Limitations on Small Subcontracting

- Teaming Arrangements – large prime teams with small WOSB to perform certain percentage of the solicited work.
- Large prime has access to contract it otherwise would not be eligible for.
- In turn, WOSB gets experience to secure future contracts on its own.
- Failure to comply with teaming and % of work requirements could destroy a WOSB's concerns “small” status and render it ineligible to participate in future SBA programs.
- Small businesses often lose status in 1 of 2 ways:
  - (1) Finding an “affiliation” between the large prime and small WOSB (large prime essentially controls the small WOSB). 13 CFR 121.103
    - Look at ownership, management, day-to-day operations.
  - (2) Percentage of work requirements. SBA has very specific rules regarding % of work the WOSB must perform. WOSBEDWOSB found at 13 CFR 125.6(a).
    - Type of work being performed matters – services, materials/supplies, general construction.
- Joint Ventures:
  - Mentor-Protégé JVs
  - Small-Small JVs (13 CFR 125.8)

## Challenges to Procurement or Performance: Bid Protests

- The SBA is the governing body that determines size/small business status protests: whether a business entity is small, and therefore eligible for set-aside awards.
- SBA regulations on small businesses size protests are at 13 CFR Part 121.
- Protests are statutorily time sensitive – just 5 days after notification of award to file
- Protests are filed with the CO, not with the SBA.
- Any interested party has standing to file a size protest: unsuccessful bidder, Cos, or the SBA.
- CO provides protest to SBA Government Contracting Area office, usually decision within 15 days.
- Decision can be appealed to SBA's OHA – Office of Hearings and Appeals.

## FCA Exposure

- What is the FCA?
- Types of False Claims?
- What is a “Claim”?
- What is “knowledge” – actual versus implied. Courts are split.
- How bad is it really – treble damages exposure

## The False Claims Act : What is it?

- ❑ Punishes the submission of false claims to the government
- ❑ Whistleblower provisions allow private citizens to file suit on behalf of government (and recover bounties)
- ❑ Extraordinary damages and penalties, including suspension and debarment
- ❑ May result in parallel criminal investigations

## The False Claims Act: Types of “Claims”

- **Knowingly presents false or fraudulent claims for payment or approval**
- **Knowingly makes or uses false records or statements material to false or fraudulent claims**
- **Conspiring to violate the FCA**
- Knowingly delivers less property than is owed to the government
- Makes or delivers a receipt of property without complete knowledge of the truth of the information
- Knowingly receives property from an official not authorized to pledge it
- **Knowingly makes or uses false records to avoid or decrease an obligation to pay the government (reverse false claim)**



## The False Claims Act: What is a “Claim”?

- Any request or demand for money or property –
  - presented to and officer, employee or agent of the United States, or
  - made to a contractor, grantee or other recipient if the money or property is to be spent or used to advance a government program or interest, and if the United States
    - Provided any part of the money or property or
    - Will reimburse the contractor, grantee or other recipient
- Irrelevant whether the United States has title to money or property that is the subject of a false claim

## False Claims Act: “Knowingly” Present a Claim

- FCA is not a common law fraud statute; specific intent ***is not*** required
- FCA liability attaches where claimant “knows” of falsity or is “deliberately indifferent to” or “recklessly disregards” the truth or falsity of a claim
- Innocent mistakes, “mere negligent misrepresentations” and differences of opinion about contract requirements are not enough

## The False Claims Act: How Bad Is It?

- Treble damages
- Civil penalties between \$11,181 - \$22,363 **per false claim**
- Suspension, Debarment & Forfeiture
- Criminal liability

## Implied Certification: What Does It Mean?

- Occurs when a claimant submits a claim for payment and fails to inform the government of noncompliance with a material term of the agreement
- E.g., country of origin, prevailing wage, small business subcontracting, etc.
- Where many SBA violators get caught

## Implied Certification

### □ *Pre-Escobar* Circuit Split

- First, Fourth, and D.C. Circuits –
  - Broadly applied
  - Any knowing and material breach or violation of a contract, statute, or regulation that reasonably can be viewed as a prerequisite to payment can give rise to liability
- Second, Third, Sixth, Ninth, Tenth, and Eleventh Circuits –
  - Narrowly applied
  - Liability only imposed where compliance with the applicable statute, regulation, or contract provision itself contains an express prerequisite to payment
- Fifth and Seventh Circuits: Refused to adopt the implied certification theory

## Implied Certification

- *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*
  
- Implied certification theory can be a basis for FCA liability at least where two conditions are present:
  - The claim does not merely request payment, but also makes specific representation about the goods or services provided; and
  - The defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations "misleading half-truths", even if not directly tied to payment

## Implied Certification & Materiality Element

- “Statutory, regulatory, and contractual requirements are not automatically material, even if they are labeled conditions of payment....”
- **“What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government’s payment decision.”**

## Implied Certification

- Evidence that the defendant knows that the government consistently refuses to pay claims based on noncompliance with the particular statutory, regulatory, or contractual requirement is evidence that it is material.
- Evidence that the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated is “very strong evidence” that the requirements are not material.



## FCA Statistics

- Justice Department obtained more than \$5.6 Billion in Fiscal year 2021 from civil cases involving fraud and false claims against the Government.
- Health Care fraud is the leader
- Procurement fraud included in this figure
- Paycheck Protection Program (PPE) loans and the FCA?
  - September 13, 2022, first-ever FCA settlement received related to PPE lender
  - Prosperity Bank agreed to pay \$18k to resolve allegations it improperly processed a PPP loan on behalf of an ineligible customer.
  - First of more to come?

Questions?

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