

U.S. Department of Justice Takes Aim at Extensive PPP Loan Fraud: Is Focusing its Lens on the Construction Industry

By: Christopher D. Adams, Robert B. Hille and Rachel A. Frost

The U.S. Department of Justice (DOJ) recently affirmed what many have suspected – that the federal government will continue to persistently pursue fraud related to the Paycheck Protection Program (PPP), the total of which is estimated to be as high as \$80 billion. Federal prosecutors are calling this theft of taxpayer money intended to help those harmed by the coronavirus pandemic “the largest fraud in U.S. history” as it represents approximately 10% of the \$800 billion handed out to small businesses in low-interest uncollateralized loans during the pandemic. The prevalence of pandemic-related relief fraud has been known for some time, but the extent and implications of the fraud are now coming into focus.

PPP relief was designed to provide an incentive to keep workers employed, but far too many business owners instead pocketed the money or misappropriated the funds. Due to the urgency caused by the pandemic’s impacts on the business sector, the need to dispense this important worker relief came at the sacrifice of instituting a more stringent applicant vetting process. Although many businesses and individuals benefitted by using their relief payments as intended, this fast-tracked process led to a relaxation of internal controls that also, in turn, increased the risk of PPP fraud.

Construction Industry Focus

Of the PPP funds provided to business entities, the Small Business Administration (SBA) reports that well over \$75 billion went to the construction industry, including its various sub-specialties. A majority of analysts

Greenbaum Rowe
Smith & Davis LLP
COUNSELORS AT LAW



agree that the construction industry accounted for the largest percentage of approved dollars in all phases of PPP, which now makes it the largest target for fraud and abuse investigations. In late March of 2022, the DOJ stated that only 178 individuals nationwide had been convicted in PPP fraud cases to date, however the government signaled that many more prosecutions are coming, making those initial convictions just the tip of the iceberg.

Numerous reports of indictments and convictions for PPP-related fraud by various construction firms and contractors are being publicly released by the DOJ and its 94 district offices of United States Attorneys, creating an index of sorts of the different types of frauds being charged against contractors. Many cases involve what are widely regarded as more traditional frauds and schemes: using PPP funds for personal and/or luxury expenses such as automobiles and boats; using PPP funds to acquire land or

property to develop; or otherwise using the funds as seed money in other ventures.

However, some prosecutions have been for more technical reasons, such as employees or shareholders who would otherwise disqualify the company from PPP funds because of prior convictions or active investigations by law enforcement authorities. For example, in one such prosecution the government alleged that a shareholder of a New Jersey construction company falsely certified in the PPP application that neither the company nor any individual owning 20% or more of its equity was subject to an indictment or other criminal charges. The government alleges that when the shareholder completed the application, he knew that another shareholder was the subject of a criminal investigation that would lead to charges.

Many cases targeting businesses in the construction industry are being investigated by traditional means through use of the IRS and FBI, but other cases are coming to the DOJ’s attention through *qui tam* actions brought by “whistleblowers” under the federal False Claims Act (FCA). In a *qui tam* action, a private party brings an action on the government’s behalf and if the government succeeds, the private party receives a share of the award. Under the FCA, *qui tam* actions are brought against parties who have defrauded the federal government. If successful, the party who brought the FCA *qui tam* action can receive up to 30% of the government’s award. This has served as critical financial motivation for those aware of questionable conduct to bring the claim. In addition to the civil penalty/award

Continued on page 13

About the Authors:

Christopher D. Adams and Robert B. Hille are partners, and Rachel A. Frost is an associate, at Greenbaum, Rowe, Smith & Davis LLP. Mr. Adams is Chair of the firm’s Criminal Defense & Regulatory Compliance Practice Group, of which Robert B. Hille and Rachel A. Frost are members. The group assists public and private business entities and individuals with navigating government investigations, enforcement actions, and prosecutions – additional details and contact information can be found online at www.greenbaumlaw.com.

A Message From NJBA President

Continued from page 2

to its regular place in early Spring, March 28-30, 2023. Please save the dates. I encourage everyone to visit njba.org/ events for a list of all our upcoming seminars and gatherings.

Although we have an ambitious agenda, I am enthused by the energy and passion of our staff and in the progress we are making. I told you that “Rust Never Sleeps” and NJBA’s staff is putting me to the test but I think I am holding my own so far. Stay tuned and I hope to see you all soon!

U.S. Department of Justice Takes Aim at Extensive PPP Loan Fraud

Continued from page 3

available in the *qui tam* action, the civil section of the DOJ can ordinarily refer the conduct to the criminal section for investigation and potential prosecution. In many cases, the offending construction company or its principals are subject not only to a financial penalty under the *qui tam* action, but also to possible fines and incarceration for the criminal prosecution.

Critical Next Steps for PPP Loan Recipients

In the course of the DOJ’s pursuit of PPP fraud prosecutions, it may become challenging for the government to discern between borrowers that intended and affirmatively acted to commit fraud and those that were well-intentioned but nonetheless failed to comply with this fast-tracked federal relief program. As a result, many unwitting borrowers may find themselves caught in the DOJ’s fishnet of fraud charges.

It is critical for those business owners who received PPP funds to immediately review their compliance, mitigate any non-compliance, and address corrective measures and exposure to enforcement with the appropriate government agency. An essential first step is obtaining knowledgeable legal counsel or other experts who can accurately assess whether there was sufficient compliance, what any potential exposure might be, and how, if necessary, to effectively address that exposure. Construction companies cannot afford to be reactive and wait until the government comes knocking on their doors, as those who are proactive stand a better chance of obtaining a more favorable outcome.

New Jersey’s Outdated Sewer And Water Connection Fee Statute And Challenges To Municipal Calculations

Continued from page 4

in the Township, the court struck down the ordinance for not complying with the statute.

Though the Township had subsequently updated its sewer and water connection fee ordinance a few years later, Squiretown would only be subject to the valid ordinance in effect at the time it paid the connection fees, which was the original connection fee ordinance as opposed to the 2014 Ordinance or subsequent increases.

This case was somewhat unique in the sense that the developer had already paid the lower connection fee amount and started construction so at that point the only issue was money.

Notwithstanding, this is one of the few cases that focus on the connection fee calculation and the requirement the municipality’s perform a study as opposed to making assumptions or using NJDEP estimations when determining the average daily flow for the average single-family residence in service area.