

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA, *et al.*, )  
*ex rel.* RYAN KEISER, )  
)  
Plaintiffs, )  
) No. 08 C 2443  
v. )  
) Chief Judge Castillo  
JAMES McHUGH CONSTRUCTION )  
CO., *et al.*, )  
)  
Defendants. )

**SETTLEMENT AGREEMENT**

This Settlement Agreement (“Agreement”) is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the United States Department of Transportation (collectively, the “United States”), and the State of Illinois, acting through the Illinois Attorney General and on behalf of the Illinois Department of Transportation, the Illinois State Toll Highway Authority, and the Regional Transportation Authority (collectively, “Illinois”), James McHugh Construction Co., Inc. (“McHugh”), and Ryan Keiser (“Relator”). This agreement will refer to the United States and Illinois collectively as the “Governments” and to the United States, the State of Illinois, McHugh, and Relator collectively as the “Parties.”

**RECITALS**

A. As described more fully below, McHugh, a Chicago-based construction company, entered into contracts to perform seven public construction projects in which it agreed to abide by federal and state requirements for the participation of disadvantaged business enterprises.

B. On or about April 29, 2008, Relator filed a *qui tam* action in the United States District Court for the Northern District of Illinois captioned *United States of America, et al., ex rel. Ryan Keiser v. James McHugh Construction Co., et al.*, No. 08-C-2443 (N.D. Ill.) pursuant to the *qui tam* provisions of the federal False Claims Act, 31 U.S.C. § 3730(b), the Illinois Whistleblower Reward and Protection Act, 740 ILCS § 175/4(b)(1) (since re-titled the Illinois False Claims Act), and the City of Chicago False Claims Ordinance, Municipal Code of Chicago, § 1-22-30(b)(1) (the “Civil Action.”). The complaint alleged that defendants violated federal and state programs that seek to increase the participation of disadvantaged business enterprises in state and local contracting opportunities and made false statements and claims for payment to the Governments regarding their compliance with those programs.

C. The United States and the State of Illinois contend that they have certain civil claims against McHugh arising under the federal and Illinois False Claims Acts, 31 U.S.C. §§ 3729-3733 and 740 ILCS § 175/1 *et seq.* These claims are based upon certain of the public construction contracts included in Relator’s complaint, as well as further claims under the federal and Illinois False Claims Acts regarding additional contracts, as described below. The United States and the State of Illinois allege as follows:

The Governments have claims under the federal and Illinois False Claims Acts, 31 U.S.C. §§ 3729-3733 and 740 ILCS § 175/1 *et seq.*, against McHugh arising from seven public construction contracts executed and performed in Illinois between 2004 and 2011, funded in whole or in part with federal and/or Illinois funds. The contracts are the Washington/Monroe Viaducts over I-90/94 (Chicago Department of Transportation

(“CDOT”) Project No. E-1-001, executed May 18, 2005), the Chicago Transit Authority (“CTA”) Red Line Howard Station (Contract No. C05FR100178574, executed February 16, 2006), the North Avenue Bridge (CDOT Project No. E-5-422, executed April 27, 2006), the CTA Brown Line (Contract No. C05FI100209763, executed September 12, 2006), the Eastbound I-88/Fox River Bridge (Illinois State Toll Highway Authority (“ISTHA”) Contract No. I-06-5472, executed July 31, 2007), the Westbound I-88/Fox River Bridge (ISTHA Contract No. I-06-5462, executed December 18, 2008), and the Wacker Drive Viaduct Reconstruction from Randolph Street to Monroe Street (CDOT Project No. E-9-127, executed December 27, 2010) (collectively referred to as the “Contracts”). The Governments contend that in its bids for these Contracts, in the final Contracts, and in claims for payments under the Contracts, McHugh falsely stated that Perdel Contracting Corp. (“Perdel”) and Accurate Steel Installers, Inc. (“ASI”), which were both certified Disadvantaged Business Enterprises (“DBEs”) owned by Elizabeth Perino, would perform or had performed a commercially useful function in satisfaction of federal and Illinois DBE participation requirements in the Contracts. Under the U.S. Department of Transportation’s DBE regulations and federal and Illinois DBE participation requirements in the Contracts, payments to a DBE contractor may be counted toward DBE goals only if the DBE performs a “commercially useful function.” A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved, and when it is responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the

material itself. 49 C.F.R. 26.55. The Governments contend that, in contravention of McHugh's representations that Perdel and ASI would perform or had performed a commercially useful function on the Contracts, Perdel and ASI often functioned as "pass-throughs," performing little if any contracted work.

In particular, the Governments contend that Perdel and ASI's work for McHugh often exceeded the companies' capacity and experience. Although Perdel and ASI's projects with McHugh were substantially greater in size and scope than Perdel and ASI had previously performed, the capacity and expertise of the companies to perform larger and more complex construction projects did not change correspondingly.

In addition, the Governments contend that for each of the seven Contracts, Perdel and ASI frequently did not perform, manage, or supervise the work McHugh represented that Perdel and/or ASI would complete. Rather, McHugh frequently managed union workers hired by Perdel and ASI who performed the work. In some cases, McHugh directed Perdel and ASI as to which union crews to hire.

The Governments further contend that McHugh, not Perdel or ASI, also selected certain suppliers on each of the seven Contracts, determined the quantity and quality of those materials and supplies, negotiated the price, often drafted a purchase order that it would forward to Perdel or ASI to put on their letterhead, and in some cases continued to coordinate directly with the suppliers thereafter. Rather than managing and supervising the work, Perdel and ASI's project managers generally processed paperwork, such as invoices and payroll.

As a result of the above, the Governments contend that neither Perdel nor ASI performed a commercially useful function on the Contracts, that McHugh's statements

that Perdel and ASI would and did perform substantial portions of the Contracts in compliance with the contract DBE requirements were false, and that McHugh submitted false claims for payment in violation of the federal and Illinois False Claims Acts. The alleged conduct described in this paragraph (C) is referred to below as the “Covered Conduct.”

D. This Settlement Agreement is neither an admission of liability by McHugh nor a concession by the United States or the State of Illinois that their claims are not well founded. McHugh expressly denies that the Governments have claims under the federal and Illinois False Claims Acts for the Covered Conduct.

E. Relator claims entitlement under 31 U.S.C. § 3730(d) and 740 ILCS § 175/4(d)(1) to a share of the proceeds of this Settlement Agreement and to Relator’s reasonable expenses, attorneys’ fees, and costs.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the Governments’ claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

#### TERMS AND CONDITIONS

1. McHugh shall pay to the United States and the State of Illinois a total of \$12 million (the “Settlement Amount”) and interest on the Settlement Amount at the rate provided for post-judgment interest in accordance with 28 U.S.C. § 1628 as if judgment had been entered on October 25, 2013.

a. McHugh will pay the United States \$7,200,000 plus interest as set forth above (the “Federal Settlement Amount”) by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney’s Office for the

Northern District of Illinois. The electronic funds transfer will be made no later than 5 days after the Effective Date of this Agreement.

b. McHugh will pay the State of Illinois \$4,800,000 plus interest as set forth above (the “State Settlement Amount”) by electronic funds transfer pursuant to written instructions to be provided by the Illinois Attorney General’s Office. The electronic funds transfer will be made no later than 5 days after the Effective Date of this Agreement.

c. Contingent upon the United States receiving the Federal Settlement Amount from McHugh and as soon as feasible after receipt, the United States agrees to pay \$1,224,000 from the Federal Settlement Amount to Relator by electronic funds transfer pursuant to instructions provided by Michael Kanovitz of Loevy & Loevy, (“Counsel for Relator”).

d. Contingent upon the State of Illinois receiving the State Settlement Amount from McHugh and as soon as feasible after receipt:

- i. the State of Illinois agrees to pay \$816,000 of the State Settlement Amount to Relator by electronic funds transfer pursuant to instructions provided by Counsel for Relator;
- ii. the Illinois Attorney General shall direct the Illinois State Treasurer to disburse \$1,621,120 to the Illinois State Toll Highway Authority;
- iii. the Illinois Attorney General shall direct the Illinois State Treasurer to disburse \$596,000 to the Illinois Department of Transportation Road Fund; and

iv. the Illinois Attorney General shall direct the Illinois State Treasurer to disburse \$166,880 to the Regional Transportation Authority.

2. Subject to the exceptions in Paragraph 5 (concerning excluded claims) below, and conditioned upon McHugh's full payment of the Settlement Amount, the United States releases McHugh from any civil or administrative monetary claim the United States has for the Covered Conduct under the federal False Claims Act, 31 U.S.C. §§ 3729-3733, the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812, the Contract Disputes Act, 41 U.S.C. §§ 7101-7109, or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud.

3. Subject to the exceptions in Paragraph 5 (concerning excluded claims) below, and conditioned upon McHugh's full payment of the Settlement Amount, the State of Illinois releases McHugh from any civil or administrative monetary claim the State, as defined in 740 ILCS § 175/2(a), has for the Covered Conduct under the Illinois False Claims Act, 740 ILCS § 175/1 *et seq.*, or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud.

4. Subject to the exceptions in Paragraph 6 below (concerning excluded claims), and conditioned upon McHugh's full payment of the Settlement Amount, Relator, for himself and for his heirs, successors, attorneys, agents, and assigns, releases McHugh from any civil monetary claim the Relator has for the Covered Conduct.

5. Notwithstanding the releases given in paragraphs 2, 3, and 4 of this Agreement, or any other term of this Agreement, the following claims of the United States and Illinois are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any liability arising under Chapter 35 of the Illinois Compiled Statutes (Revenue);
- c. Any criminal liability;
- d. Except as explicitly stated in this Agreement, any administrative liability, including but not limited to the suspension and debarment rights of any federal agency, or state or local agency in Illinois;
- e. Any liability to the United States (or its agencies) or the State of Illinois (or its agencies) for any conduct other than the Covered Conduct;
- f. Any liability based upon obligations created by this Agreement;
- g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- h. Any liability for failure to deliver goods or services due;
- i. Any liability for personal injury or property damage arising from the Covered Conduct; or
- j. Any liability of individuals.



6. Notwithstanding the releases given in paragraphs 2, 3 and 4 of this Agreement, or any other term of this Agreement, the following claims of the Relator are specifically reserved and are not released:

- a. Claims by Relator under 31 U.S.C. § 3730(d) (attorneys' fees and costs) & (h) (retaliatory actions) and 740 ILCS § 175/4(d) (attorneys' fees and costs) & (g) (retaliatory actions) regarding this Civil Action; and
- b. Relator's personal claims in Count III of Relator's complaint.

7. Relator and his heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B) and 740 ILCS § 175/4(c)(2)(B). Conditioned upon Relator's receipt of the payments described in paragraphs 1(c) and (d), Relator and his heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the United States and the State of Illinois, as well as their agencies, officers, agents, employees, and servants, from any claims arising from the filing of the Civil Action or under 31 U.S.C. § 3730 and 740 ILCS § 175/4, and from any claims to a share of the proceeds of this Agreement and/or the Civil Action.

8. McHugh waives and shall not assert any defenses McHugh may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the United States Constitution or in Article 1, Section 10 of the Illinois Constitution, or under the Excessive Fines Clause in the Eighth Amendment

of the United States Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action. Nothing in this paragraph or any other provision of this Agreement constitutes an agreement by the United States or the State of Illinois concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code, or by the State of Illinois concerning the characterization of the Settlement Amount for purposes of its Revenue Laws, Chapter 35, Illinois Compiled Statutes.

9. McHugh fully and finally releases the United States and the State of Illinois, and their agencies, officers, agents, employees, and servants, and the State's political subdivisions from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that McHugh has asserted, could have asserted, or may assert in the future against the United States or the State of Illinois, and their agencies, officers, agents, employees, and servants, related to the Covered Conduct and the investigation and prosecution thereof.

10. a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of McHugh, and its present or former officers, directors, employees, shareholders, and agents in connection with:

- (1) the matters covered by this Agreement;
- (2) the United States' audit(s) civil and criminal investigations of the matters covered by this Agreement;
- (3) McHugh's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and

civil and any criminal investigations in connection with the matters covered by this Agreement (including attorney's fees);

- (4) the negotiation and performance of this Agreement;
- (5) the payments McHugh makes to the United States and the State of Illinois pursuant to this Agreement and any payments that McHugh may make to Relator, including costs and attorney's fees,

are unallowable costs for government contracting purposes (hereinafter referred to as "Unallowable Costs").

b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately determined and accounted for by McHugh, and McHugh shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Agreement, McHugh shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by McHugh or any of its subsidiaries or affiliates from the United States. McHugh agrees that the United States, at a minimum, shall be entitled to recoup from McHugh any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine McHugh's books and records and to disagree with any calculations submitted by McHugh or any of its

subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by McHugh, or the effect of any such Unallowable Costs on the amount of such payments.

11. McHugh agrees to cooperate fully and truthfully with the United States' or Illinois' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, McHugh shall encourage, and agrees not to impair, the cooperation of its directors, officers, and employees, and shall use its best efforts to make available, and encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. McHugh further agrees to furnish to the United States and Illinois, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in its possession, custody, or control concerning any investigation of the Covered Conduct that it has undertaken, or that has been performed by another on its behalf.

12. This Agreement is intended to be for the benefit of the Parties only.

13. Upon receipt of the payments described in Paragraph 1, above, the United States, the State of Illinois and Relator shall promptly sign and file in the Civil Action a Notice of Dismissal of Relator's claims pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure. The Notice shall provide for dismissal with prejudice of the claims on behalf of the United States and the State (as defined in 740 ILCS § 175/2(a)) under the federal and Illinois False Claims Acts regarding the Covered Conduct. The Notice shall also provide for Relator's dismissal with prejudice of the claims on behalf of the City of Chicago under the City's False Claims Ordinance ("FCO"), Municipal Code

of Chicago § 1-22-10 *et seq.* Relator has received written consent from the Corporation Counsel for the City of Chicago to dismiss Relator's claims on behalf of the City of Chicago in compliance with the City's FCO § 1-22-30(b)(1). The Notice shall provide that all remaining claims on behalf of the United States and the State in the Relator's complaint are dismissed without prejudice.

14. Except as provided above with respect to Relator, each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

15. Each party and signatory to this Agreement represents that it freely and voluntarily enters in to this Agreement without any degree of duress or compulsion.

16. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the Northern District of Illinois. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

17. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

18. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

19. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

20. This Agreement is binding on McHugh's successors, transferees, heirs, and assigns.

21. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

22. All parties consent to the United States' and Illinois' disclosure of this Agreement, and information about this Agreement, to the public.

23. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE UNITED STATES OF AMERICA

ZACHARY T. FARDON  
United States Attorney

By: \_\_\_\_\_  
DONALD R. LORENZEN  
Assistant United States Attorney  
219 South Dearborn Street  
Chicago, Illinois 60604  
(312) 353-5330  
donald.lorenzen@usdoj.gov

Dated: \_\_\_\_\_

THE STATE OF ILLINOIS

LISA MADIGAN  
Attorney General for the State of Illinois

By: \_\_\_\_\_  
KATE POMPER COSTELLO  
Assistant Attorney General  
100 West Randolph Street  
Chicago, Illinois 60601  
(312) 814-3000  
kcostello@atg.state.il.us

Dated: \_\_\_\_\_



JAMES MCHUGH CONSTRUCTION CO.

---

BRUCE E. LAKE  
Its President

Dated: \_\_\_\_\_

---

MARK L. ROTERT  
COREY B. RUBENSTEIN  
Its attorneys

Dated: \_\_\_\_\_

RELATOR

---

RYAN KEISER  
For himself

Dated: \_\_\_\_\_

---

MICHAEL KANOVITZ  
Relator's attorney

Dated: \_\_\_\_\_