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Federal Appeals Court Says Estimates in Government Bids Can Be Actionable As False Claims

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The Ninth Circuit issued an opinion last week in which it held that knowingly making "false estimates" in connection with a bid for a government contract may be actionable under the False Claims Act ("FCA"), 31 U.S.C. §§3729 *et seq*. *United States ex rel. Hooper v. Lockheed Martin Corp.*, No. 11-55278 (9th Cir. Aug. 2, 2012).

The FCA allows private citizen "relators" to file suit on behalf of the government to recover damages from persons who file false claims for government funds. Nyle Hooper worked at Lockheed Martin as the Senior Project Engineer assigned to the U.S. Air Force Range Standardization and Automation ("RSA") IIA program, which managed the hardware and software supporting launch operations at Vandenberg Air Force Base and Cape Kennedy. He alleged that he was terminated by Lockheed Martin because he was investigating fraudulent activity surrounding Lockheed's RSA IIA bid. In particular, Hooper charged that Lockheed violated the FCA by, among other things, purposefully underbidding the contract.

The RSA IIA contract is a cost plus award fee contract, under which the contractor is reimbursed for costs incurred, and paid periodic award fees based on performance. Lockheed bid the effort for $432.7 million, but has since been paid over $900 million for its work.

The contract was awarded on a best value basis, with cost as the second most important factor. In response to Lockheed's motion for summary judgment, Hooper put forward evidence that Lockheed sought to manipulate its cost submission by artificially deflating expected costs in an effort to win the RSA IIA contract. The district court found the evidence insufficient to survive summary judgment. On appeal, the Ninth Circuit reversed on this issue.

FALSE ESTIMATES MAY CREATE LIABILITY UNDER THE FCA

To establish a cause of action under the FCA, a plaintiff must demonstrate the presence of: "(1) a false or fraudulent claim (2) that was material to the decision-making process (3) which defendant presented, or caused to be presented, to the United States for payment or approval (4) with knowledge that the claim was false or fraudulent." On appeal, Lockheed argued that estimates are a type of opinion or prediction and thus cannot be a "false statement" within the meaning of the FCA. The United States filed an amicus brief on this issue alone, seeking a finding that a false estimate and/or fraudulently low bid may be actionable under the FCA.

Agreeing with the government, the Ninth Circuit held that "false estimates," defined to include "fraudulent underbidding in which the bid is not what the defendant actually intends to charge" can be actionable under the FCA as long as the other elements of an FCA claim are met. The Court based its reasoning in part on the Supreme Court decision of *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which the Court found contractors liable under the FCA for claims

submitted by contractors after those contractors obtained government work through collusive bidding. This "fraud-in-the-inducement" theory of FCA liability has been extended by the Fourth Circuit to a case where the defendant made false statements when seeking approval for a government subcontract (*United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999)), and by the First Circuit to a case where applicants for Social Security benefits made false statements of opinion in their applications (*United States ex rel. Loughren v. Unum Group*, 613 F.3d 300 (1st Cir. 2010)). In both these cases, the defendants argued that their statements were mere "opinions," but the opinions were nonetheless found to give rise to FCA liability.

Having determined that FCA liability may be premised on false estimates, the Ninth Circuit in *Hooper* also noted that the district court used the wrong legal standard for the "knowledge" prong of the FCA, by incorrectly stating that Hooper must show Lockheed's "intent to deceive." Rather, a plaintiff can survive summary judgment on an FCA claim if he or she puts forward evidence that the defendant acted *either* knowingly, or in deliberate ignorance of the truth, or in reckless disregard of the truth. The Ninth Circuit thus remanded the *Hooper* case, finding there was a genuine issue of material fact as to whether Lockheed acted knowingly with regard to its bid for the contract under this revised standard.

TRANSFERRING AN FCA CLAIM TO A JURISDICTION WITH A FAVORABLE STATUTE OF LIMITATIONS IS UNLIKELY TO DEFEAT A RETALIATION CLAIM

The provision of the FCA that protects whistleblowers from retaliation by their employers (31 U.S.C. § 3730(h)) does not have an express limitations period. Therefore, most courts borrow the most closely analogous state statute of limitations. Here, Hooper had originally filed suit in Maryland, which had a three-year statute of limitations. Lockheed transferred the case to the Central District of California, and argued that California's two-year statute of limitations should apply, thereby barring plaintiff's retaliation claim.

The Ninth Circuit held that when a case with federal question subject matter jurisdiction is transferred under 28 U.S.C. § 1404(a), the law of the transferor court will be applied to the extent that there is a state law question on issues such as the statute of limitations. In so ruling, the Ninth Circuit joined the Fifth, Seventh, and Tenth Circuits.

The full opinion may be found here.

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