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Government contract underbidding may lead to False Claims Act liability

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In a case of first impression, the Ninth Circuit has ruled that fraudulent underbidding for a government contract can be a basis for liability under the False Claims Act's (FCA) qui tam provisions.

This is the first time a federal appeals court has addressed contract underbidding as a premise for FCA liability and the first time the Ninth Circuit has ruled on the issue. The decision reinstated and remanded fraud and retaliation claims against Lockheed Martin Corp. to federal district court in California. (U.S. ex rel. Hooper v. Lockheed Martin Corp., 2012 WL3124970 (9th Cir. Aug. 2, 2012).)

Under the FCA, a party can be liable for knowingly submitting a false or fraudulent claim for payment or approval to the government, or causing another to submit such a claim, as well as for knowingly making a false record or statement to get the government to pay or approve a false or fraudulent claim. Lockheed argued that false estimates are predictions or opinions so they cannot be considered false statements within the meaning of the FCA.

The Ninth Circuit disagreed, holding that false estimates, which the court defined to include fraudulent underbidding, can result in liability if the other elements of a qui tam claim are satisfied. Judge Harry Pregerson, writing for the unanimous panel, cited First and Fourth Circuit decisions that concluded FCA liability could be predicated on false statements. (U.S. ex rel. Loughren v. Unum Group, 613 F.3d 300 (1st Cir. 2010) (applicants for social security benefits made false statements, which fell under the FCA); U.S. ex rel. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776 (4th Cir. 1999) (defendant made false statements in connection with claims for payment to a government subcontractor).)

In 2005, Nyle Hooper filed a lawsuit alleging that he was wrongfully terminated in 2002 after threatening to report alleged fraud in Lockheed's underbidding of a contract with the U.S. Air Force. Lockheed's bid was \$432.7 million, but the estimated cost of the contract is up to \$900 million.

Lockheed had the action moved under forum non conveniens from federal district court in Maryland to California and was granted summary judgment in 2011. Hooper appealed, and the Department of Justice (DOJ) filed an amicus brief in support.

U.S. District Court Judge Dale Fischer dismissed the fraud claim, holding that the plaintiff did not prove Lockheed acted with "intent to deceive." The Ninth Circuit held that summary judgment was not warranted because Fischer applied the wrong legal standard, and that the FCA requires the plaintiff to prove the defendant "knowingly" submitted a fraudulent underbid.

Mark Labaton of Los Angeles, one of Hooper's attorneys, believes the decision will act as a deterrent to government contractors. "It makes folks who are thinking about falsifying their numbers think very hard and fast about it because there is now clear precedent that such conduct will have severe consequences," said Labaton. "This decision changes the playing

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field and lets contractors and whistleblowers know that business as usual might not be accepted.”

Although the district court dismissed Hooper’s retaliation claim as barred by California’s two-year statute of limitations, Pregerson wrote that Maryland’s three-year statute should have applied as “the most closely analogous state statute” because the FCA did not contain an express statute of limitations for retaliation claims. The FCA’s retaliation provision has since been amended in 2010 to include a three-year statute of limitations, but it does not apply retroactively.

Despite the decision, qui tam plaintiffs still face large obstacles. “The first [challenge] is trying to get the DOJ to join the case and intervene,” said Paul Lawrence of Middleburg, Va., who represents qui tam plaintiffs. “If the DOJ declines the case, the plaintiff has to move forward and litigate it like any other.”

In fiscal year 2011, the DOJ recovered over \$3 billion as a result of FCA actions. The total recovery since January 2009 is \$8.7 billion, the largest three-year total in DOJ history.

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