

ALERT

# Jury Reaches Verdict: Lockheed Did Not Fraudulently Underbid Air Force Contract

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On March 27, 2014, a jury sided with Lockheed Martin ending a long-running False Claims Act (FCA) case that was originally filed nearly a decade ago. At the heart of *Hooper v. Lockheed Martin Corp.*, Case No. 08-00561 (C.D.Cal.), was former Lockheed employee Nyle Hooper's allegations that the company fraudulently underbid an Air Force contract and lowballed cost estimates. The Air Force contract at issue involved the provision of hardware and software for space launch systems at the Cape Kennedy and Vandenberg Air Force bases. Lockheed submitted a bid valued at \$432 million but the contract actually ended up costing the Government \$900 million. Mr. Hooper alleged that Lockheed fraudulently underbid the contract to induce the Government to award the contract to Lockheed.

A threshold question running throughout this case was whether a person could even violate the FCA by submitting an inaccurate cost estimate, such as by underbidding a contract. Lockheed argued that estimates of future costs are "based on inherently judgmental information, and a piece of purely judgmental information is not actionable." The district court agreed and granted summary judgment in favor of Lockheed. The district court held that there was insufficient evidence of fraudulent underbidding and that cost overruns were a predictable occurrence in government contracting.

On appeal, the Ninth Circuit disagreed and reversed the lower court's ruling. 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 a source of liability under the FCA." The Ninth Circuit went on to find that there was a genuine issue of material fact regarding whether Lockheed acted with the requisite scienter when it submitted its bid for the Air Force contract. The Ninth

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## Practice Areas

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Circuit's ruling that FCA liability could be premised on false estimates brought the circuit's jurisprudence on this issue in line with the First and Fourth Circuits.

In the jury trial, Lockheed argued that there was no evidence it illegally suppressed its bid for the Air Force contract. Lockheed reiterated this point in its closing arguments stating that there was no evidence of Lockheed developing a "true estimate" while presenting a "false estimate" to the Government. Lockheed's arguments proved to resonate with the jury as the jury found in favor of Lockheed with regards to the fraudulent underbidding claim as well as Mr. Hooper's retaliatory discharge claim.

While Lockheed was ultimately successful in defending against these FCA claims, government contractors should take note that the Ninth Circuit has now recognized that FCA liability can arise even when the alleged fraud is based on a mere estimate. The Ninth Circuit's decision is discussed in more detail here.