American Bar Association

Forum on the Construction Industry

The False Claims Act for Construction Contractors in a Post Stimulus World

Tamara M. McNulty
Fox Rothschild LLP
Washington, DC

Presented at the 2012 Fall Meeting

Construction Counseling: Pulling Together for a Winning Strategy

October 18-19, 2012
Sheraton Boston Hotel, Boston, MA

A Introduction

The False Claims Act ("FCA")[1] is the government's primary enforcement tool for combating fraud in connection with alleged false claims made for federal funds. Since the FCA was amended in 1986, more than $30 billion dollars has been recovered in damages, fines and penalties, impacting a wide array of industries including health care, mortgage financing, and government procurement, not to mention construction. In addition to FCA violations being subject to treble damages and penalties of $5,500 to $11,000 per claim, companies face the risk of suspension and debarment, and in some cases, criminal prosecution. Moreover, the sheer volume of claims being brought in just the past 4 years has increased by over 50 %. In 2011 alone, more than 760 new FCA matters were initiated; and the recovery numbers are on pace to be the largest ever in 2012.[2] Understanding the liability risks under the FCA and the current trends in enforcement is essential for ensuring compliance and mitigating exposure risks.

1. A Brief History of the Act

The FCA arose, as is often the case with such fraud prevention statutes, out of wartime contracting issues. In this case, the FCA was enacted in 1863 to address procurement fraud by contractors in the Civil War. In that situation, contractors had been selling sick horses and donkeys to the Union Army. Over time, however, the act has been repeatedly expanded in scope to target nearly every type of fraud against the government and against anyone who receives government money or property.

In 1986 the FCA was amended to substantially empower private attorneys general and to protect and incentivize whistleblowers. Most recently, in 2008, 2009 and 2010, the FCA was

again strengthened. Significant among these changes to the FCA for the construction industry were the 2008 Close the Contractor Fraud Loop Hole Act"[3] and the 2009 Fraud Enforcement and Recovery Act (FERA).[4] In 2010 the FCA was further strengthened by the Patient Protection and Affordable Care Act (PPACA),[5] and while seemingly by the title not applicable to the construction industry, the changes made to the FCA by this law will potentially have some impact.

This paper discusses these recent changes to the FCA and how the law has been applied, particularly in government construction cases since those changes went into effect.

B. Elements of a False Claim

1. Claim

A claim is defined in the FCA as:

> [A]ny request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—
>
> (i) is presented to an officer, employee, or agent of the United States; or
>
> (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded…[6]

2. Knowingly

In light of this definition, the issue then becomes what constitutes "knowledge" under the FCA? Knowledge can mean actual knowledge, deliberate indifference or reckless indifference to the truth or falsity of the claim.[7] In short, one cannot bury one's head in the sand and claim that he/she did not know that the claim was false. In the case of corporations, if any employee of the company has knowledge of the falsity of the claim that knowledge is imputed to the company.

While Congress has expressed that it had no intention of punishing contractors for "honest mistakes or incorrect claims submitted through mere negligence,"[8] courts do impugn knowledge where the contractor makes an unreasonable mistake of contract or statutory interpretation.[9]

It is important to be aware that contractors are not only responsible for their own actions under the FCA, they also bear some responsibility for the actions of subcontractors and suppliers pursuing claims through pass through. Because of this, it is paramount that the contractor takes the time to make a good faith review of any subcontractor claims before passing them up to the government. A contractor is thought to have knowledge of the false claims of its subcontractors when it fails to make "reasonable and prudent inquiries" as to the truth or falsity of the information contained in its subcontractor's claim.[10] The review need not be exhaustive but it

should rise to the level of questioning dollar amounts that appear unreasonable on their face to avoid being pursued by the government itself, or as a co-conspirator under Section 3729(a)(1)(C).[11]

C. The Ways in Which a False Claim Can Arise

There are multiple ways in which a person can violate the FCA which are spelled out in Section 3729(a) of the FCA. The ones that are litigated the most frequently and therefore are most applicable to the construction industry are 1) direct false claims,[12] 2) false statements/records[13], and 3) reverse false claims.[14] A false claim can also arise from the failure to deliver government money or property to the government[15], certifying receipt of government property without actual knowledge that the property is received or used,[16] and conspiring with another to commit any of these violations of the FCA.[17]

1. Direct False Claim

Under Section 3729(a)(1)(A) of the FCA any person who "knowingly presents or causes to be presented, a false or fraudulent claim for payment or approval … is liable to the United States Government." The best example is a contractor's submission of a payment application requesting payment for work that has not been performed. This is the classic false claim, and not surprisingly, the one most litigated.

2. False Statement/Record

Under Section 3729(a)(1)(B) a person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim… is liable to the United States Government." In light of this language, the question then becomes what type of

false record or statement is “material?” Additionally, does the government have to ***actually rely*** upon the statement or record in order for it to count as a false claim?

Note that in this definition stated in the FCA there is no requirement that the statement or record be specifically “certified” in order to constitute a false claim. The FCA merely says that the false statement or record has to be knowingly “made” or “used.”

3. Reverse False Claim

Asking for more money than a contractor is entitled to is not the only way a contractor can run afoul of the FCA. If a contractor “knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly or improperly avoids or decreases an obligation to pay or transmit money or property to the Government” that too is considered a false claim.[18] Stated more simply if a contractor fails to pay back money that is owed or retains an overpayment the contractor has submitted a false claim, otherwise known as a reverse false claim.

D. Recent Amendments to the FCA

1. FERA’s impact on the FCA

a. Intent (Congress' response to the Supreme Court’s 2008 Allison Engine Decision)

As mentioned earlier in this paper, the Fraud Enforcement and Recovery Act (FERA) was signed into law by President Obama on May 20, 2009. FERA sought to "provide the federal government with more tools to investigate and prosecute financial fraud."[19] FERA targets all

kinds of fraudulent activity, from mortgage lending to securities fraud, but, most relevant to this discussion, in the Federal government contracting arena, this law:

- Amended the major fraud statute to protect funds expended under both the Troubled Assets Relief Program (TARP) and the economic stimulus package called the American Recovery and Reinvestment Act of 2009 (ARRA); and

- Authorized funding to hire fraud prosecutors and investigators at the Department of Justice, the FBI, and other law enforcement agencies.

- Extended the coverage of the FCA to any false or fraudulent claim for government money or property, whether or not the claim is presented to a government official or employee, whether or not the government has physical custody of the money, or whether or not the claimant specifically intended to defraud the government.

The latter portion of the law is in direct response to the Supreme Court's decision in the *Allison Engine Co. v. United States ex rel. Sanders*,[20] wherein the Supreme Court held that the mere involvement of the United State's funding was insufficient to bring a matter under the FCA. FERA also makes it clear Congress's intent that a contractor need not take affirmative action to conceal an overpayment (a reverse false claim discussed above) in order to violate the FCA.

Additionally, FERA sought to define the materiality element of the FCA and clear up the question of whether or not the government had to actually rely upon the statement for it to be material. FERA states that a statement is material to payment by the government when the

statement is "ha[s] a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[21]

b. Presentment/Payment

Before the enactment of FERA a claim had to be presented to a government official working in an official capacity.[22] Congress, via FERA, amended the FCA so that now a claim need not be directly presented to the Federal government to give rise to a false claim. This change was also a response to the Supreme Court's decision in *Allison Engine*. FERA amended the FCA to clarify that the government does not have to hold title to, or have physical possession of the money or property. If a contractor submits a false claim to another contractor, a grantee or another recipient of Federal funds, that too is a violation of the FCA.[23]

By this change FERA endorsed the 4th Circuit's opinion in *United States ex rel. DRC , Inc. v. Custer Battles, LLC.* [24] In that case, Custer Battles provided two flatbed trucks for which it paid $18,000, but for which it requested from the Iraq Coalition Authority (IAC) $80,000. It also provided generators costing Custer Battles $74,000 to the IAC for the low, low price of $400,000. The money used to pay Custer Battles was provided from the Development Fund for Iraq. The Development Fund for Iraq contained money from multiple sources, only some of which were U.S. Government-controlled funds. Nevertheless, the Fourth Circuit held that Custer Battles was liable under the FCA and that all $15 million of its claims were qualifying claims under the FCA.

c. Conspiracy

Formerly, the FCA only applied to conspiracy to commit violations of the direct false claims section of the FCA. FERA has expanded the conspiracy clause to include conspiring to commit ***any*** violation of the FCA.

d. Other changes

FERA had several other impacts on the FCA. First, it extended protection for *qui tam* relators beyond employees to include contractors and agents. Second, it provided that the government's compliant, if it joins a relator's earlier filing, will relate back to the date of that filing. Third, it clarified certain service issues for cases involving state and local government co-plaintiffs. Finally, it expanded the U.S. Attorney General's authority to delegate the power to conduct investigations prior to intervening into a relator's FCA suit.

2. The PPACA's impact on the FCA

While the PPACA's main purpose was to implement affordable health care and health insurance protections, it too contained changes to the FCA that are relevant to more than just health care providers. The changes wrought by the PPACA to the FCA also highlighted questions that have been raised about when the FCA applies that are discussed below.

a. Public Disclosure Limitations on Relator-Filed Cases.

Under the previous version of the FCA, cases filed by *qui tam* relators could be barred if it was determined that such cases were based on a public disclosure of information arising from certain proceedings, such as civil, criminal or administrative hearings, or news media reports. As a result, defendants frequently used the public disclosure bar as a defense to a plaintiff's claims

and grounds for dismissal of the same. PPACA amended the language of the FCA to provide that "the court shall dismiss an action unless opposed by the Government, if substantially the same allegations or transaction alleged in the action or claim were publicly disclosed."[25] Thus, the FCA now gives the Justice Department the final say on the issue.[26]

b. Original Source Requirement.

A plaintiff could overcome the public disclosure bar discussed above, however, if they qualified as an "original source." The PPACA revised the definition of who is an original source. Previously, an original source must have had "direct and independent knowledge of the information on which the allegations are based." Under PPACA, an original source is now someone who has "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions."[27]

c. Overpayments

As previously discussed, FERA redefined "obligation" under the FCA to include the "retention of any overpayments" by a government contractor. Accordingly, such language imposed FCA liability on anyone who receives overpayments (accidentally or otherwise) and failed to return the money to the government. This change in the FCA by FERA, however, gave rise to questions regarding what exactly is involved in the "retention of overpayments." For example, how long did a provider have to return monies after discovering an overpayment? PPACA clarified the changes to the FCA made by FERA, *but only with respect to Medicare and Medicaid overpayments*. Under PPACA, providers now have a 60 day limit from the date of discovery, or the date a corresponding hospital report is due. Failure to timely report and return an overpayment exposes a provider to liability under the FCA.

What is still unclear, but is highlighted by the changes made in the PPACA, is the question of how much time would a contractor, not in the health care arena, have to discover an overpayment and then how much time could elapse after such a discovery before failure to return the money constitutes a violation of the FCA? While the answer to this question is unsettled, it is clear that the Department of Justice has the question in its sights.

United States ex rel. Yannacopoulis v. General Dynamics[28] was a *qui tam* FCA case brought by a relator against General Dynamics (and its purchaser, Lockheed Martin). The litigation related to an agreement by General Dynamics to sell Greece forty F-16 fighters, as well as related services and equipment, under a fixed-price contract. Greece, however, was not paying General Dynamics directly but was financing the project through a loan from the United States. General Dynamics would invoice the United States and that amount would be assessed against Greece's trust account with the United States Treasury. After the execution of the contract, Greece and General Dynamics agreed to reductions in scope of the work, but the reductions were unpriced. Among other claims, the relator argued General Dynamics (and Lockheed Martin as a result of its acquisition of General Dynamics) committed "reverse false claims."

The government submitted an amicus brief on the issue of reverse false claims. The Justice Department argued that a government contractor has an extra-contractual duty to return an overpayment when a decision is made to reduce the scope of its work—***even before a binding amendment has been executed modifying the contract***. Thus, in the Justice Department's view, whether the parties to the contract have "agreed among themselves to formally modify their contract . . . is wholly irrelevant." The Justice Department further asserted that "a contractor who has been paid in advance for work it does not perform has an 'obligation' to refund the

overpayment to the government, and a contractor that uses false records or statements to conceal that obligation is liable under the False Claims Act . . . ."

As such the government argued, General Dynamics was guilty of "reverse false claims" when it and Greece "agreed in principle" to reduce the scope of the contract, but General Dynamics nevertheless continued receiving payments for full performance—even though the contract was not amended through an executed modification until roughly four years later. The government further argued that an obligation need not be fixed before statutory liability can arise.

Without addressing the government's amicus arguments, the Seventh Circuit upheld the district court's grant of summary judgment to General Dynamics and Lockheed Martin, finding that the relator failed to provide any evidence showing that General Dynamics' statements were false. Nevertheless, it is clear that the government intends to aggressively argue the issue of what constitutes an overpayment and when the obligation to return the money kicks-in.

E. Recent Cases

The following section discusses examples of FCA cases that have been decided after the recent changes to the FCA wrought by the Close the Contractor Fraud Loophole Act, FERA, and the PPACA. This is by no means an exhaustive study of all cases decided since that time. Rather, these cases give a general flavor of how courts are proceeding under the FCA after these changes.

1. United States v. DRC, Inc.[29]

Disaster Relief Construction, Inc. (DRC) entered into a construction contract with the Honduran Social Investment Fund (FHIS) to help rebuild in Honduras after a hurricane.[30] The contract was financed by the United States Agency for International Development (USAID).[31] The government filed suit against DRC under the FCA, alleging among other things that DRC falsely certified performance of work that had been completed by subcontractors that were not authorized.[32] DRC filed for a motion of partial summary judgment arguing (1) the government could not prove an FCA violation because it was not a direct party to the contract, and (2) the certified invoices were not false because the contract permitted use of the subcontractors.[33] The District Court denied DRC's motion.

a. Presentment

As previously mentioned, USAID was not a direct party to the contract. The contract was between DRC and FHIS.[34] According to the court, however, liability under the FCA is not contingent upon a direct contract between the contractor and the government.[35] In order to meet the FCA's presentment requirement under such circumstances, the government had to show that it provided funds to a grantee upon presentment of the claim or the government provided funds directly to the claimant after the grantee presents the claim.[36] In this case, FHIS was a grantee of the government because the contract was financed by funds from USAID.[37] Further, USAID directly provided funds to DRC upon receiving its certified invoices.[38] Therefore, the FCA requirement that DRC submit claims for payment to the government was fulfilled.[39]

b. Implied False Certification

The crux of the government's FCA claim was that DRC submitted a false claim that it had complied with the contract.[40] The contract between DRC and FHIS explicitly stated that DRC could not subcontract with third parties without written consent from both FHIS and USAID.[41] DRC conceded that it subcontracted work without USAID's approval.[42]

The court held that a false certification, in violation of the FCA, may be implied.[43] To demonstrate that DRC made an implied false certification, the government had to demonstrate that "the contract (1) required DRC to secure USAID's approval for subcontracting, (2) that requirement was material, and (3) DRC withheld information about its non-compliance with that requirement."[44] Further, the government had to show that DRC violated the requirement knowingly, and with knowledge that the requirement was material to the government's decision to pay for the work completed.[45]

The court held that the first and third elements of the implied false certification evaluation were readily met in this case. The court spent the bulk of the opinion discussing the materiality requirement and the scienter component of an FCA violation. The court opined that in this case there was no express link in the contract between approval of subcontractors by USAID and DRC's payment eligibility. Therefore, in order to demonstrate materiality, the government had to establish that both parties knew that payment was conditional upon DRC obtaining USAID approval for subcontractors.[46]

This materiality evaluation is closely related to the FCA scienter standard, which requires the government to prove that the contractor violated a contract provision that it knew was material to payment from the government. After an exhaustive review of the facts, the court

denied summary judgment because there were triable issues regarding whether the pre-approval of subcontracts requirement was material to payment.[47] Thus, stay tuned…

2. U.S. ex rel. Hudalla v. Walsh Construction Company[48]

Walsh Construction Company (Walsh) was a construction management firm that served as a general contractor for a series of Chicago housing projects funded by the federal government.[49] The *qui tam* relator alleged that Walsh used fraudulent billing practices while working on these housing projects, thereby receiving federal government money that it was not entitled to.[50] The relator brought *qui tam* claims under both the direct claims portion of the FCA Section 3729(a)(1) and the false records/statements portion of the FCA Section 3729(a)(2). Walsh moved to dismiss both claims.

The court held that the relator provided sufficient evidence from which a reasonable jury could conclude that Walsh violated (a)(1) where the relator provided evidence demonstrating that "the federal government disbursed funds for construction costs on each of the projects at issue only after HUD had reviewed and approved a budget that included the amount to be paid by Walsh."[51] This amount "was based on the allegedly false submissions that Walsh had made regarding its costs."[52]

The court stated that in order to raise a claim under (a)(1), the relator also had to show that Walsh "knowingly" made false or fraudulent claims; that Walsh's employed certain billing methods to deceive the federal government.[53] Innocent and negligent mistakes were not actionable under the FCA.[54] The relator provided some evidence that HUD officials approved Walsh's contract with the expectation that costs would be billed as "general conditions" and

would not exceed six percent of the total costs.[55] Therefore, the court held that a jury could reasonably find for either party on this issue, and denied summary judgment.[56]

When evaluating the relator's claim under Section 3729(a)(2), the court applied the statute as it read ***prior*** to the Fraud Enforcement and Recovery Act of 2009.[57] In doing so, the court found that a reasonably jury could find in favor of either party.[58] Therefore, the court felt it inappropriate to grant summary judgment, and decided to proceed to trial.[59]

3. U.S. ex rel. Jones v. Collegiate Funding Servs., Inc.[60]

Collegiate Funding Services, LLC ("CFS") was a private commercial lender that makes post-secondary education loans pursuant to a federal program.[61] Two former employees brought a *qui tam* action against CFS, alleging that CFS submitted false certifications to secure federally-guaranteed consolidation loans. CFS argued that the relators failed to plead their claims with sufficient particularity to satisfy FRCP 9(b) because the relators did not provide any evidence of fraud besides a blank certification form.[62] In response, and it seems because the claims at issue predated the FERA changes to the FCA, the relators relied on the Supreme Court's decision in *Allison Engine* to argue that FCA false record/statement claims under Section 3729(a)(2) did not require presentment.[63] Therefore, CFS would be liable under (a)(2) even if it never submitted claims to the government.

The court disagreed with the relators, holding that their analogy to *Allison Engine* was improper. The court pointed out that in *Alison Engine*, the Supreme Court determined a subcontractor-defendant is in violation of (a)(2) even if its false record or statement is not submitted directly to the government, so long as the subcontractor submitted a false statement to the prime contractor, *intending for that statement to be used by the prime to get the government*

to pay its claim.[64] In this case, however, CFS did not submit the allegedly false certifications to another party in anticipation of transmittal to the government. According to the court, "[i]t is illogical that Congress could have intended to impose FCA liability on persons who possess – but never in fact use – a form which could be considered false if submitted under certain circumstances."[65] Therefore, the court held that the relators had failed to plead their FCA claim with sufficient particularity to satisfy FRCP 9(b) and dismissed their claims entirely.

4. *Grand Acadian, Inc. v. U.S.*[66]

In this case, Grand Acadian, Inc. (Grand Acadian) entered into a contract with the Federal Emergency Management Agency (FEMA) to lease its property to the government.[67] The government planned to use Grand Acadian's property to create a recreational vehicle (RV) park for the victims of Hurricane Katrina. When the government encountered difficulties in preparing the land, however, it decided to exercise its right to terminate the lease after one year.[68] Grand Acadian then submitted a claim to the government for payment for the costs to hydro-seed grass and replace cut down trees. The government alleged that Grand Acadian violated the FCA in submitting these claims for payment. Ultimately, the Court of Federal Claims held that the government failed to establish the requisite mental state under the FCA.

In its claim for payment, Grand Acadian demanded the cost of hydro-seeding grass on the leased property.[69] The government claimed that Grand Acadian violated the FCA in making its claim because Grand Acadian never disclosed that there was no grass on the leased property to begin with. Grand Acadian's claim created a misleading impression that the government was responsible for damaging or removing grass that never existed. The Court of Federal Claims disagreed. The cost of hydro-seeding the grass was included in Grand Acadian's claim because

Louisiana law required that there be ground cover on the property.[70] The government conceded having knowledge of this law and Grand Acadian never made a representation regarding ground cover before the lease was signed.[71] Therefore, the court held that the government did not establish the required mental state under the FCA regarding the cost for planting grass.[72]

In Grand Acadian's claim for payment it also demanded payment to replace the cost of 150 trees on the property.[73] Grand Acadian estimated that there were approximately 150 trees on its property at the time it was leased to the government.[74] The government subsequently cut down all of the trees on the property. In response, the government raised an FCA counterclaim based on the testimony of an expert in arboriculture who stated that there were only 110 trees standing on the property, a number of which were in bad health.[75] The court was not persuaded by the government's argument. Grand Acadian had stated explicitly that the 150 tree figure was only an estimate of the number of trees on the property.[76] Furthermore, the court stated that a layperson would not know how to evaluate the health of a tree that may be in the early stage of decline.[77] Therefore, the government did not establish that Grand Acadian had "knowingly" made a false statement under the FCA regarding the number of trees on the property.[78]

5. U.S. v. Kellogg Brown & Root Services, Inc.[79]

Kellogg Brown & Root Services, Inc. (KBR) contracted with the U.S. Army to provide logistical services in support of military operations.[80] KBR's contract with the government was an Indefinite Delivery, Indefinite Quantity (IDIQ) contract known as LOGCAP III. In 2003, after the war in Iraq commenced, the government issued task orders under LOGCAP III for KBR to provide services to deployed troops. According to the government, KBR submitted false claims under task orders between 2003 and 2006 (again pre-dating the various strengthening statutes we

have been discussing), thereby violating the FCA.[81] KBR moved to dismiss the government's claims.

The court pointed out that in order to prevail in its FCA claim the government must demonstrate that (1) KBR submitted a claim to the government; (2) which was false; and (3) which KBR knew was false.[82] KBR had submitted claims to the government, so prong one was satisfied.[83]

Under prong two, the government alleged that KBR's claims were factually false. According to the government, while KBR did perform all the work that it claimed payment for, the expenses were unallowable under the contract.[84] The court was wary about this argument – stating: "[t]o blur the distinction between fraud and breach of contract . . . is to contradict the purpose of the statute."[85]

In the alternative, the government argued that KBR's claims were legally false, meaning that KBR made an implied false certification. The court was more receptive to this argument and found *U.S. v. Sci. Applications Int'l Corp.* (SAIC II),[86] to be controlling.[87] Prior to SAIC II, the government could only prove an implied false certification if the government's payment under the contract was conditioned on the certification.[88] After SAIC II, however, the government only has to show that KBR withheld information about its noncompliance with material contractual requirements.[89] According to the court, the government provided sufficient evidence for a reasonable jury to conclude that the contractual provisions were material to the government's decision to render payment. [90]

With regard to prong three, the government had to prove that KBR knew (1) that it violated a contractual obligation; and (2) that its compliance with the obligation was material to

the government's decision to render payment.[91] Because of the complex factual nature of each party's arguments, the court denied KBR's motion to dismiss on these grounds as well.[92]

6. *Hooper v. Lockheed Martin Corp.*[93]

This case involved a *qui tam* suit by a former employee alleging that Lockheed Martin Corporation (Lockheed) had violated the FCA by underbidding work for the Air Force and giving false estimates. [94] The contract type, in this instance, was a cost reimbursement plus award fee contract, wherein a contractor is paid its actual costs rather than a pre-agreed fixed price.[95]

The Request for Proposal called for a "best value" evaluation and as such, lowest price would not be the only factor considered but it was the second most important.[96] Lockheed submitted a bid of $432.7 million in estimated costs and was chosen as the award winner.[97] At the end of the day, however, Lockheed was paid more than $900 million for its work.

The relator's complaint alleged that Lockheed knowingly underestimated its costs when submitting its bid. Lockheed argued that "an estimate is a type of opinion or prediction, and cannot qualify as a "false statement" necessary for liability under the FCA," and asked the court to dismiss the claim.[98] While not participating directly in the case, the Justice Department filed an amicus brief only on this issue in the case urging the court to reject Lockheed's argument.[99]

In a decision of first impression for that court, the Ninth Circuit disagreed with Lockheed, holding, "we conclude 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, assuming that the other elements of an FCA claim are met."[100] The court held that the lower court had erred by dismissing the relator's complaint because a genuine issue of material

fact existed regarding whether Lockheed had "knowingly" submitted a false claim as that term is defined in the FCA[101], and ruled that his complaint should be decided on its merits.

What is unclear from this decision, however, is whether in a case of a firm fixed price contract, as opposed to a cost-reimbursement contract, the decision would come out differently. Only time and more case law will tell but contractors should think long and hard about what it takes to "buy-in" to the contract on a federal project.

7. Veridyne Corp. v. U.S. [102]

In this case, DOT's Maritime Administration (MARAD) awarded Veridyne an 8(a) sole source IDIQ contract for logistics program support.[103] Although the 8(a) Program places limits on sole source awards to most 8(a) companies (there are exceptions, but Veridyne did not qualify), MARAD ultimately awarded Veridyne more than $20 million over the five-year term of the initial contract, far exceeding the sole source limit.[104]

When the end of Veridyne's initial contract drew near, MARAD was pleased with Veridyne's performance and wanted to continue working with Veridyne on a sole source basis. Both parties knew, however, that if the estimated value of the new award exceeded $3 million, the 8(a) Program regulations in place at the time would require the award to be put out for competition. Moreover, they both knew that based on the more than $20 million expended under the previous contract, it appeared certain that the follow-on would greatly exceed this sole source threshold.[105]

Veridyne submitted a cost proposal to MARAD for a new contract, providing an estimated price of $2,999,949.00 for a five-year term, this despite the fact that it had been billing more than that amount ever year under the incumbent contract. In order to achieve the $3 million

price, Veridyne proposed to phase out approximately 80% of its workforce over the course of the new contract. The "out" for this, conveniently, was subject to any MARAD request that it not do so during the period of performance.[106]

MARAD held internal discussions over the new cost proposal, where the issue of the labor phase-out was raised. MARAD dismissed concerns over the cuts, noting that they were only included in order to bring the proposal under the $3 million threshold. MARAD then forwarded the proposal to the SBA to request the SBA's approval, which was granted. After executing a written justification, MARAD awarded Veridyne a new five-year contract.[107]

As should have been expected the project went well over the $3 million in just the first year of the work. Internal discussions at MARAD began about adjusting Veridyne's estimated price, which MARAD documents acknowledged had been "artificially constructed" to meet the 8(a) Program's sole source limit.

After most of the new contract had been performed and paid, internal funding allocation problems at MARAD put an end to the contract. Although Veridyne continued to perform, it was not paid for some of its work, and the dispute over non-payment ultimately arose. In court, MARAD took the position that because Veridyne had submitted a fraudulent cost proposal the new contract was "*void ab initio.*"[108]

The court rejected this argument, making it clear that MARAD had known from the outset that Veridyne's cost proposal did not reflect an accurate estimate of the cost of its work. The court stated that "[i]n the face of this mountain of record evidence, it is inconceivable that MARAD justifiably relied on Veridyne's $3-million proposal."[109] The court continued, "Absent justifiable reliance—a necessary element of common law fraud—the record cannot support a

finding that [the new contract] was *void ab initio*."[110] The court held, therefore, that Veridyne was entitled to recover for the work invoiced and accepted by the government.

Unfortunately, however, the court also found Veridyne liable under the government's FCA counterclaim for almost $1.4 million,[111] and additional damages of more than half a million dollars under the Contract Disputes Act.[112] Thus, although Veridyne was entitled to almost a million dollars in recovery, ultimately it was required to pay the government nearly $2 million.

D. Conclusion

The Federal government has in the past five years become increasingly aggressive about contractor fraud. Congress has taken multiple measures to strengthen the FCA and the Justice Department has become more aggressive in pursuing enforcement, as well as taking highly aggressive positions about what constitutes a false claim under the FCA. Construction contractors who wish to pursue projects in the U.S. Government arena, therefore, must be extremely diligent in making claims, documenting claims and in monitoring payments from the government so as not to run afoul of the FCA.

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[1] 31 U.S.C. §§ 3729-33.
[2] Press Release, Office of Public Affairs, U.S. DOJ, Acting Assistant Attorney General Stuart F. Delery Speaks at the ABA's 9th National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 7, 2012).
[3] P.L. 110-252.
[4] P.L. 111-21.
[5] P.L. 111-148.
[6] 31 U.S.C. § 3729(b)(2)(A).
[7] 31 U.S.C. § 3729 (b)(1).
[8] S. REP. NO. 99-345 (1986)(discussing the 1986 amendments to the FCA).

[9] *See U.S. v. S.A.I.C.*, 653 F. Supp. 2d 87 (D.D.C. 2009), *reversed on other grounds* (holding that misinterpretation of an unambiguous contract clause or statute is not a defense where contractor's interpretation is unreasonable).
[10] S. REP. NO. 99-345 (1986); *Ervin & Associates, Inc. v. Hamilton Securities Group, Inc.*, 298 F. Supp. 2d 91 (D.D.C. 2004).
[11] *Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662, 128 S. Ct. 2123 (2008), *reversed on other grounds*.
[12] 31 U.S.C. § 3729(a)(1)(A).
[13] § 3729(a)(1)(B).
[14] § 3729(a)(1)(G).
[15] § 3729(a)(1)(D).
[16] § 3729(a)(1)(E).
[17] § 3729(a)(1)(C).
[18] 31 U.S.C. § 3729(a)(1)(G).
[19] *See* Fraud Enforcement and Recovery Act, S.386, 111th Cong. § 2 (2009).
[20] 553 U.S. 662, 128 S. Ct. 2123 (2008).
[21] 31 U.S.C. § 3729 (b)(4).
[22] *See U.S. ex rel. DRC, Inc. v Custer Battles, LLC*, 562 F.3d 295 (4th Cir. 2009).
[23] *See* 31 U.S.C. § 3729(b)(2).
[24] 562 F.3d 295 (4th Cir. 2009).
[25] 31 U.S.C. §3730(e)(4)(A).
[26] Recently there have been a spate of cases which are attempting to define more clearly what is and is not a public disclosure such that the public disclosure bar is in effect. It will be interesting to see how this all shakes down.
[27] 31 U.S.C. §3730(e)(4)(B).
[28] 652 F.3d 818 (7th Cir. 2011).
[29] 2012 WL 1379833 (D.D.C. April 21, 2012).
[30] *Id*. at *1.
[31] *Id*.
[32] *Id*. at *5.
[33] *Id*.
[34] *See id*. at *2.
[35] *Id*. at *7.
[36] *Id*. (*quoting United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 493 (D.C. Cir. 2004).
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id*. at *6.
[41] *Id*. at *8.
[42] *Id*.
[43] *Id*. at *6 (*citing United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010)).
[44] *Id*. at *8.
[45] *Id*.

[46] *Id*. at *9.
[47] *Id*. at *9-11.
[48] 834 F. Supp. 2d 816 (N.D. Ill. 2011).
[49] *Id*. at 818.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*. at 826.
[54] *Id*.
[55] *Id*. at 826-27.
[56] *Id*.
[57] *Id*. at 828-29.
[58] *Id*. at 829.
[59] *Id*. at 829-30.
[60] 2011 WL 129842 (E.D. Va. 2011).
[61] *Id*. at *1.
[62] *Id*. at *4.
[63] *Id*. at *15.
[64] *Id*. at *15-16.
[65] *Id*. at *17.
[66] 2012 WL 1882831 (Fed. Cl. May 23, 2012).
[67] *Id*. at *1.
[68] *Id*. at *1-2.
[69] *Id*. at *63.
[70] *Id*. at *63-64.
[71] *Id*. at *64.
[72] *Id*.
[73] *Id*.
[74] *Id*. at *65-66.
[75] *Id*. at *66.
[76] *Id*. at *65-66.
[77] *Id*. at *66.
[78] *Id*. at *67.
[79] 800 F. Supp. 2d 143 (2012).
[80] *Id*. at 148.
[81] *Id*.
[82] *Id*. at 152-53; *see* 31 U.S.C. § 3729(a)(1).
[83] *Id*. at 153.
[84] *Id*.
[85] *Id*.
[86] 626 F.3d 1257, 1266 (D.C. Cir. 2010).
[87] *Id*. at 158.
[88] *Id*. at 157.
[89] *Id*. at 158.
[90] *Id*.

[91] *Id.* at 159.
[92] *Id.* at 160.
[93] No. 11-55278 (9th Cir. 2012).
[94] *Id*. at 8547.
[95] *Id*. at 8548.
[96] *Id*.
[97] *Id.* at 8549.
[98] *Id*. at 8558.
[99] *Id*.
[100] *Id*. at 8561 (emphasis added).
[101] 31 U.S.C. §2739(b)(1).
[102] No. 06-150C (C.F.C. July 6, 2012).
[103] *Id.* at 9.
[104] *Id.* at 10.
[105] *Id.* at 10-11.
[106] *Id*. at 13-14.
[107] *Id.* at 14-15.
[108] *Id.* at 35.
[109] *Id.* at 38.
[110] *Id.*
[111] *Id.* at 53-64.
[112] *Id.* at 64-67.