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False Claims Act

Lockheed, Northrop Grumman Again Thwart F-35 Cost Claims

BY DANIEL SEIDEN

Lockheed Martin and Northrop Grumman defeated a whistle-blower's claims that the contractors concealed cost overruns in building the F-35 fighter, the U.S. Court of Appeals for the Fifth Circuit said.

Whistle-blower Paul Solomon based his claims on publicly available government reports, and therefore the False Claims Act's public disclosure rule barred the case, the court affirmed.

Solomon's reliance on public information also precluded his ability to satisfy the original source exception, which will permit a case to proceed if a whistle-blower has direct and independent knowledge of information underlying the claims, a three-judge panel said.

The U.S. District Court for the Northern District of Texas concluded that Solomon lacked original source status on alternate grounds, the Fifth Circuit said.

Solomon wasn't an original source because his job, which required him to report fraud, precluded him from voluntarily providing information to the government, the lower court ruled.

The court may resolve an appeal on any ground presented to a trial court, Judge Leslie H. Southwick said.

Declawing the FCA? The Fifth Circuit sidestepped the district court's original source ruling concerning the voluntary sharing of information with the government.

Solomon, in a March brief, called the ruling an unprecedented error.

"Hopefully, the Fifth Circuit was influenced by an amicus brief filed by Taxpayers Against Fraud that emphasized that imposing such a 'duty speech' requirement on whistle-blowers would essentially eviscerate the False Claims Act," Steve Kardell of Whistleblower Law for Managers told Bloomberg Government.

Inference of Fraud Suffices Solomon, a compliance monitor for Northrop Grumman, alleged that the contractors mismanaged aspects of the F-35 budget to conceal cost overruns, and misrepresented cost estimates.

The case failed because Solomon based his claims on publicly available information in government reports, including a Defense Contract Management Agency report critiquing Lockheed Martin's performance.

Solomon said the report didn't expressly allege fraud, but it sufficiently indicated misconduct that at least led to an inference of fraud, the appeals court said.

Solomon also lacked the necessary direct and independent knowledge to be an original source because he could only suspect a link between inaccurate cost reporting and government award bonuses to the contractors, the appeals court said.

Solomon made this connection only after examining a contract that was publicly available on a government website, the appeals court said.

Judges Thomas M. Reavley and Jennifer W. Elrod joined in the decision.

The case is *United States ex rel. Solomon v. Lockheed Martin Corp.*, 5th Cir., No. 17-10046, 12/19/17.

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