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5th Circ. Urged To Reset FCA Suit Against Lockheed, Northrop

By Natalie Olivo

Law360, New York (March 16, 2017, 2:08 PM EDT) -- A whistleblower asked the Fifth Circuit on Wednesday to revive his False Claims Act suit accusing Lockheed Martin and Northrop Grumman of concealing the true costs of the U.S. military's Joint Strike Fighter F-35 program, arguing that his past employment with Northrop shouldn't cancel out his claims.

A Texas federal judge in December **granted summary judgment** to Northrop Grumman Systems Corp. and Lockheed Martin Corp. in a suit lodged by former Northrop employee Paul J. Solomon, who had alleged that the contractors were mismanaging aspects of the budget for the JSF program to conceal cost overruns. In his order, U.S. District Judge Sidney A. Fitzwater found that Solomon had a duty as a cost-performance analyst to report any fraud that he uncovered, so disclosure was involuntary.

In asking the Fifth Circuit to reverse and remand Judge Fitzwater's decision, Solomon contended that the FCA's voluntary disclosure requirement was meant to deny original source status to two kinds of whistleblowers: government employees who are paid to detect fraud and private employees who make a disclosure only after being questioned or investigated by the government.

"Neither of those circumstances apply to the relator in this case, who discovered and voluntarily disclosed a fraud committed against the government by his own employer," Solomon said. "If the district court's ruling is allowed to stand, it will frustrate the purpose of the False Claims Act by discouraging exactly the kind of 'paradigmatic insider whistleblowers' the False Claims Act seeks to encourage."

The dispute stems from Lockheed's work as a contractor and Northrop's work as a subcontractor on the JSF program, which involves F-35 Joint Strike Fighters designed for the Air Force, Navy and Marines, according to court documents. Solomon worked as a compliance monitor for the Earned Value Management System standard that governed the program.

While conducting audits for Northrop, Solomon discovered that Lockheed was shifting money from its management reserve budget — funds set aside for unanticipated work — to reduce cost overruns, which resulted in misrepresented cost estimates and performance reports filed with the government, according to Judge Fitzwater's summary judgment order.

Solomon reported his findings to the Defense Contract Management Agency, which led to a review of Lockheed's Fort Worth, Texas, facility and eventually a compliance report, published in 2007, which found that Lockheed misapplied reserved funds to cover cost

overruns. The U.S. Government Accountability Office issued a report in March 2008 that reached similar conclusions, the order said.

After retiring from Northrop later that year, Solomon continued to alert government officials about his findings regarding the JSF program, according to the order, before filing his FCA suit in November 2012. The government later declined to intervene.

In siding with the contractors in December, Judge Fitzwater cited the government reports, ruling that Solomon's allegations were based on information that was publicly available and thus blocked by the FCA's pre-2010 public disclosure bar.

"The question is not whether Solomon actually derived his allegations from the public disclosures but whether he 'could have produced the substance of the complaint merely by synthesizing the public disclosures' description of a scheme," Judge Fitzwater said, quoting a Fifth Circuit decision in a separate FCA suit.

In his Wednesday brief, however, Solomon argued that the government reports contain no mention of a fraudulent scheme. They also do not disclose that the contractors knowingly submitted false statements regarding estimates at completion or that the companies knowingly misused the management reserve, Solomon said.

In addition, Solomon said, neither the DCMA nor the GAO had any information concerning a memorandum of agreement he claimed he came across while at Northrop. According to the whistleblower, the memorandum shows that the contractors conspired to misrepresent their cost overruns to the government.

Judge Fitzwater in December found that the memorandum failed to clear the jurisdictional bar, noting that liability for conspiracy cannot exist without a viable underlying claim.

Bruce Howard, a Siprut PC attorney representing Solomon, told Law360 on Thursday that the whistleblower's counsel "has the highest respect for [U.S.] District Court Judge Fitzwater, the chief judge of the district court in Dallas, but we think that he erred on both reasons for granting summary judgment to the defendants."

Counsel and representatives for Northrop and Lockheed did not respond Thursday to a request for comment.

Solomon is represented by David J. Healey of Fish & Richardson PC, Thomas M. Melsheimer of Winston & Strawn LLP, Bruce Howard of Siprut PC, Robert J Hill of Hill & Hill Attorneys and Counselors PLLC, Michael I Behn of Behn & Wyetzner Chartered and Seth Berenzweig of Berenzweig Leonard LLP.

Lockheed Martin is represented by Michael James Bronson and Joseph William Harper of Dinsmore & Shohl LLP, Tony Campiti of Thompson & Knight and Glenn V. Whitaker and Jacob D. Mahle of Vorys Sater Seymour and Pease LLP.

Northrop is represented by C. Scott Jones and George E. Bowles of Locke Lord LLP and Dennis Joseph Callahan III, Neil Hall O'Donnell, Jeffery Mitchell Chiow and Katherine Leigh Pohl of Rogers Joseph O'Donnell.

The case is Paul Solomon v. Lockheed Martin Corporation, et al, case number 17-10046, in the U.S. Court of Appeals for the Fifth Circuit.

--Editing by Kelly Duncan.

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