

Fed. Circ. Affirms Sikorsky's Win In \$80M Overbilling Suit

By **Brandon Lowrey**

Law360, Los Angeles (December 10, 2014, 4:57 PM ET) -- The Federal Circuit on Wednesday upheld a Federal Claims Court ruling that the U.S. government in its \$80 million overbilling suit failed to establish by a preponderance of the evidence that Sikorsky Aircraft Corp. violated federal Cost Accounting Standards Regulation 418.

The three-judge appellate panel also dismissed Sikorsky's cross-appeal challenging U.S. Court of Federal Claims Judge Charles F. Lettow's ruling that the government's claims were timely. That finding by Judge Lettow alarmed many in the government contracts bar because it found that estimates submitted to the government in 1999 and 2000 regarding the accounting change were not sufficient to start the statute of limitations under the Contract Disputes Act, according to an analysis by Apogee Consulting Inc.

Sikorsky won the underlying case in March 2013, when Judge Lettow found the government hadn't shown the method it used to designate overhead costs on airplane contracts had violated the federal regulation.

In the case, the U.S. alleged it overpaid Sikorsky from 1999 to 2005 on a number of contracts for aircraft and spare parts because of the contractor's noncompliant accounting systems and its accounting method used to allocate indirect costs of buying and handling aircraft parts beginning in 1999.

Sikorsky had used the material-cost base method to allocate indirect overhead costs, by which it portioned out its overhead costs to each of its government and nongovernment contracts based on the material associated with that contract, according to court records.

But in 1999, it switched to a direct-labor-cost method for allocating those costs, because, it said, its costs were distorted by government-furnished material like engines the U.S. bought elsewhere and provided to Sikorsky, according to court documents.

Sikorsky argued its contracting officer around that time approved the change. The officer thought the company's new allocation method to account for the government-furnished material didn't have any significant impact, the company said, but the government said that it was only a temporary approval that was supposed to be monitored and updated.

After an audit five years later found "potential noncompliance" with the accounting standards, Sikorsky maintained it had reached an agreement with a new contracting officer, Edward Weisman, to change its

accounting practices and pass on future savings to the government if the government would consider the potential noncompliance finding resolved.

But in 2007, the contracting officer who took over for Weisman, Frank J. Colandro, used the same audit report to find that the contractor's accounting practices violated regulations and that the violation had resulted in overcharges between 2003 and 2006.

The U.S. eventually sued over the change, only to lose at trial.

On Wednesday, the appellate panel suggested that it did have some unanswered questions about one aspect of the case, but the government never brought it up.

"We have some doubt that an allocation based on direct labor satisfies the proportionality requirement simply because of a year-by-year correlation between labor hours and materiel overhead," the panel wrote. "But despite our invitation to do so at oral argument, the government has been unwilling or unable to argue that Sikorsky's approach is not appropriate. Under the circumstances, we decline to address that argument."

Sikorsky is represented by Bartlit Beck Herman Palenchar & Scott LLP.

The U.S. is represented by government attorney James W. Poirier.

The case is Sikorsky Aircraft Corp. v. U.S., case number 13-5096, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Brian Mahoney and Eric Hornbeck. Editing by Jeremy Barker.
