

Sikorsky Beats DOD's \$34M Alternative Overbilling Claim

By **Bryan Koenig**

Law360, New York (August 21, 2015, 1:05 PM ET) -- A Federal Claims judge sided with Sikorsky Aircraft Corp. Thursday when he knocked down the U.S. government's "alternative" \$34 million overbilling claim against it, finding that the claim was properly precluded by the helicopter manufacturer's successful challenge of a related \$80 million claim.

The facts behind the new, \$34 million claim are virtually identical to the \$80 million claim struck down first in Federal Claims court and again in December by the Federal Circuit, Judge Charles F. Lettow said, making them precluded.

"While the government's theory of recovery in this action is distinct from its earlier, litigated claim for noncompliance, the factual overlap between the two claims readily satisfies the transactional test explicated in *Bowers*," Judge Lettow said. "The contracting officer himself emphasized the virtual identity of the factual premises for both claims in stating that the claim made in December 2011 was an 'alternative' to the claim raised in December 2008."

In both cases, Sikorsky was challenging separate Defense Contract Management Agency decisions that said that it owed money because of changes in its billing practices for various aircraft and spare parts contracts, according to the decision.

In the first, the government had hit Sikorsky with an \$80 million charge for overbilling by allegedly violating federal Cost Accounting Standards through new billing practices it adopted in 1999 and continued through 2005.

The government alleged Sikorsky improperly allocated its material overhead costs using a direct labor base, which Sikorsky had said was justified because its costs were distorted by government-furnished material like engines the U.S. bought elsewhere and provided to Sikorsky. Sikorsky sued in 2009 and the Federal Circuit ultimately decided that the government hadn't shown enough evidence that the contractor violated federal Cost Accounting Standards.

During that first litigation however, a government contracting officer in 2011 issued an "alternative" decision against new billing practices Sikorsky switched to in 2006.

"Specifically, the contracting officer claimed that even if Sikorsky's accounting practices from 1999 through 2005 were deemed compliant with [Cost Accounting Standards Regulation 418], a change adopted in 2006 to its accounting for materiel overhead should have been processed as a unilateral

change, and demanded that Sikorsky pay approximately \$34 million,” Judge Lettow said.

Judge Lettow rejected the government's arguments that the two claims were based on different transactional facts, different regulations and different calculations for compensation, since one was for an alleged unilateral change and the other was for noncompliant practice.

“The second claim does not have to be the same claim, i.e., based upon the same theory, as the first claim to be precluded,” Judge Lettow said instead.

Nor do exceptions to preclusion apply in this case, according to the ruling. Judge Lettow found no temporal limitation as the government had claimed, having argued that it couldn't have asserted the second claim at the time of the first. The government had all the facts of the second claim at the time it asserted the first, he said.

In addition, Judge Lettow rejected the government's argument that it couldn't have brought the alternative claims in Federal Claims court at the same time as Sikorsky's original suit, since the government could have brought both claims before Sikorsky made the first legal challenge.

The U.S. Department of Justice declined to comment Friday.

An attorney for Sikorsky, Jeffrey A. Hall of Bartlit Beck Herman Palenchar & Scott LLP, told Law360 Friday that the contractor is pleased with the decision.

Sikorsky is represented by Jeffrey A. Hall and Katherine M. Swift of Bartlit Beck Herman Palenchar & Scott LLP and Karen L. Manos of Gibson Dunn & Crutcher LLP.

The government is represented by James W. Poirier and Steven J. Gillingham of the U.S Department of Justice.

The case is Sikorsky Aircraft Corp. v. U.S., case number 1:12-cv-00898, in the U.S. Court of Federal Claims.

--Additional reporting by Daniel Wilson, Brandon Lowrey, Brian Mahoney and Eric Hornbeck. Editing by Rebecca Flanagan.