

Government Contracts Group Of The Year: Vorys Sater

By **Bibeka Shrestha**

Law360, New York (January 30, 2012, 7:17 PM ET) -- Vorys Sater Seymour and Pease LLP's government contracts group ensured that Lockheed Martin Corp. exited a qui tam suit over an \$87 billion military contract without paying a cent of the billions of dollars sought in damages, making it one of Law360's Government Contracts Groups of 2011.

The Vorys Sater group also squashed the U.S. government's attempt to score a quick victory in a False Claims Act suit against Lockheed over a \$20 million fraud scheme carried out by Lockheed's vendor Tools and Metals Inc., whose CEO was sent to jail for 87 months.

In the same suit, Vorys Sater attorneys persuaded both a magistrate judge and a district court judge that the government should hand over testimony and documents tied to its criminal investigation of Tools and Metals, successfully arguing they were relevant to Lockheed's defense.

Behind this series of recent victories was a team of 25 attorneys who are based exclusively in Cincinnati, a rarity among firms that routinely focus on big-name, big-dollar FCA litigation.

"People don't usually say London, Paris, Cincinnati," Victor Walton, a partner in Vorys Sater's FCA practice, readily admits. "[But] we have recruited outstanding young lawyers who could practice in D.C., New York and Chicago."

According to Glenn Whitaker, head of the firm's FCA practice, counting Cincinnati as a base for the group has both promoted a collegial environment among the firm's government contracts attorneys and made it possible for Vorys Sater to offer competitive rates.

"We operate on hourly billing rates and arrangements that are far more attractive than you find in the District of Columbia or New York or wherever else our competition exists," Whitaker said.

Aiding the firm's success is that junior level attorneys are handed a great deal of responsibility, according to Vorys Sater attorneys.

Those who are assigned to a case are expected to follow through all the way to the end, and not just review documents, but also organize the defense, Walton said.

Vorys Sater attorneys are as well pushed to quickly uncover the underlying facts in a case and speak directly to witnesses, according to Walton.

"We're not desk-bound lawyers," Walton said. "I want to be able to judge the credibility of the witness. I don't want to rely on some investigator to do some of the work we should be doing."

The firm's impressive track record in FCA litigation — which includes obtaining rare jury verdicts for government contractors — has kept Lockheed, one of the world's largest defense contractors, coming back.

In June, Vorys Sater attorneys persuaded the Eleventh Circuit to uphold the contractor's victory in a FCA suit brought by Darrol Olsen, a former Lockheed engineer who claimed the company hid problems with the coating on F-22 fighter jets that undermined their stealth capability.

A Georgia federal court had thrown out Olsen's suit after concluding he did not meet Rule 9(b) pleading requirements. Olsen had not provided enough details to back up his allegations that Lockheed provided the government with false statements or false claims, the court found.

Olsen also failed to persuade the district court to forgive his obligation to identify specific claims for payment by taking judicial notice of the fact that the government paid Lockheed to manufacture F-22 fighter jets.

In affirming the lower court's ruling, the Eleventh Circuit noted that Olsen had not included a copy of the government contract or copies of Lockheed's claims for payment, and that he had not alleged personal knowledge of Lockheed's payment terms or billing practices.

Moreover, Olsen had failed to assert any specific false statements Lockheed allegedly made after he left the company in 1999, even though he claimed the contractor's alleged misconduct continued through 2004, the appeals court said.

According to Vorys Sater, the June ruling marked the first time that the Eleventh Circuit held that Rule 9(b) requirements cannot be satisfied through judicial notice of the types of general information about a procurement program that are often reported in the press.

The appeals court also ruled that the Fraud Enforcement and Recovery Act does not apply retroactively to FCA cases like Olsen's that were pending in June 2008, an issue that could wind up in the U.S. Supreme Court due to a split among federal circuits, according to Vorys Sater.

As lead counsel on the case, Vorys Sater's work was crucial to helping Lockheed avoid the enormous costs of meeting discovery obligations when facing a complaint with little specificity as well as the massive amount of money sought in damages.

"The demand in the complaint was into the billions of dollars," Michael Bronson, a partner at Vorys Sater, said. "To be able to dispose of that case without discovery and without paying a nickel to the relator obviously demonstrates the significance of the outcome."

In another major win last year, Vorys Sater crushed the government's bid for summary judgment in an FCA suit accusing Lockheed of illegal pricing and reckless oversight of its supplier Tools and Metals.

According to the government, Tools and Metals scored \$20 million in illegal profits after marking up costs reported to Lockheed, which passed on the costs to the U.S. Department of Defense.

The U.S. argued that Lockheed had violated a prohibition in government contracting against cost-plus-a-percentage-of-cost agreements, an arrangement that allowed Tools and Metals to inflate the costs it reported.

But Vorys Sater attorneys persuaded a Texas federal judge that the government had produced no evidence that Lockheed actually engaged in cost-plus-a-percentage-of-cost pricing, irrespective of the language of the agreement.

The court also declined to reach the issue of whether indirect cost supplier agreements are subject to statutory prohibitions against cost-plus-a-percentage-of-cost pricing, agreeing it was a "novel and unsettled question of law" that was inappropriate for summary judgment, just as Vorys Sater had argued.

The U.S. had claimed that it had been settled since World War II that the prohibition applied to indirect agreements, according to Vorys Sater.

"The government was hoping for a quick in and out in the case, and it just absolutely failed," Whitaker said. "It was a significant turning point in the case."

Vorys Sater attorneys likewise succeeded in a fight for documents tied to the government's criminal investigation of Tools and Metals.

The group sought to persuade the court that the U.S. was not unable to uncover the vendor's bad behavior without grants of immunity and grand jury subpoenas.

"If the government couldn't figure this out with all of these many unique weapons, then there was no way that a contractor had any chance to figure out this very sophisticated fraud that was going on," Bronson said.

The Texas federal court refused to hold that the information was privileged, pointing out that the criminal investigation was now closed and ruling that the data sought did not count as work product.

While Vorys Sater regularly handles significant matters for defense contractors, the firm also plays a hand in lawsuits involving contracts with agencies like the U.S. Department of Energy.

According to Whitaker, Vorys Sater has handled FCA cases involving practically every nuclear site in the U.S. over the years and has security clearances to look at documents involving nuclear sites that are difficult to obtain.

But the firm might be best known for representing subcontractor Allison Engine Co. Inc. in a FCA suit claiming that generator sets provided to power the U.S. Navy's Arleigh Burke destroyers were defective.

Vorys Sater took the case to the U.S. Supreme Court, which ruled in Allison Engine's favor in 2008 and sent the suit back to the Sixth Circuit.

With its ruling, the high court established that plaintiffs suing under the FCA must show that government contractors intended to present a false claim to the government.

"It was a case that brought our law firm to a lot of people's attention," Whitaker said.

Congress reacted to the decision by enacting the Fraud Enforcement and Recovery Act of 2009, which holds that recipients of government funding can be held liable under the FCA.

While Vorys successfully moved in 2009 to prevent FERA from applying retroactively to the Allison Engine suit, the relators have taken that ruling to the Sixth Circuit, the firm said.

Methodology: In November, Law360 solicited submissions from over 500 law firms for its practice group of the year series. The more than 550 submissions received were reviewed by a committee of Law360 editors. Winners were selected based on the significance of the litigation wins or deals worked on; the size and complexity of the litigation wins or deals worked on; and the number of significant, large or complex deals the firms worked on or lawsuits the firm had wins in. Only accomplishments from Dec. 1, 2010, to Dec. 1, 2011, were considered.

--Additional reporting by Carolina Bolado. Editing by Sarah Golin.

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