Defective Pricing Cases Since the Turn of the Century

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I. Introduction

Defective pricing audits are on the rise. In 2019, the Defense Contract Audit Agency (DCAA) announced, in connection with the reduction of its incurred cost audit backlog, that the agency was going to vigorously turn its attention to post-award audits.[1] Specifically, DCAA announced plans that it would perform up to 60 defective pricing audits in 2020.[2] While DCAA does not publish precise statistics on the number of post-award defective pricing audits it performs annually, it is clear that audit activity in this area has been steadily increasing, with DCAA reporting it has more than doubled its audit activity from 2018 to 2022.[3] Regardless of whether DCAA's new focus has, or will, result in successful price reductions for the government, the uptick in audit scrutiny brings with it increased contractor costs necessary to effectively respond to audit inquiries and requests for access to records. Defective pricing audits also bring the potential for serious disruption in the event of a government defective pricing claim, or, worse, a fraud claim under the civil False Claims Act (FCA).[4]

In light of the increased audit activity focusing on defective pricing issues, this article surveys recent defective pricing cases, specifically those decided since the turn of the century. The case discussions below have been organized generally based on the core issues involved. To set a framework for the survey, we begin with a brief overview of the Truthful Cost or Pricing Data statute (formerly known as the Truth in Negotiation Act or TINA) and the elements of a defective pricing claim.[5] We then turn to the cases. The survey includes cases addressing a critical threshold issue, namely what is and is not cost or pricing data, including cases exploring the line between verifiable facts versus judgments. Next are cases addressing what constitutes meaningful disclosure, whether it matters if the government had actual knowledge of the data at issue, and whether data was reasonably available to be disclosed in the first place. We will also address a few notable cases involving subcontractor defective pricing, the subject of quantum, offsets, the statute of limitations, and more.

Nearly 100 cases that discuss defective pricing in some way have been published over the nearly 25-year period this article covers. While we cannot address them all, we have included citations to notable cases in the endnotes so that practitioners have a ready reference for starting their own defective pricing research should the need arise.

II. General Overview of Defective Pricing

The government bears the burden of proof on any claim for defective pricing. To carry that burden, the government must prove three elements[6] by a preponderance of the evidence: (1) the disputed information in question is "cost or pricing data" as defined in the statute and regulation, (2) the prime contractor failed to meaningfully disclose the data prior to price agreement, and (3) the government relied to its detriment on defective cost or pricing data such that the nondisclosure adversely impacted the negotiated price.[7] With respect to the third element of the test, the government is aided by a rebuttable presumption that the nondisclosure of cost or pricing data has the "natural and probable" consequence of improperly inflating the negotiated price.[8]

For the elements of a defective pricing claim to become relevant to any government contract or subcontract, an obligation to submit current, accurate, and complete cost or pricing data relating to a contract or modification to a contract must exist. Under the Truthful Cost or Pricing Data statute, offerors, contractors, and subcontractors must submit "cost or pricing data" in four distinct circumstances anticipated to result in awards of government contracts or subcontracts above the relevant

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monetary threshold ("pricing actions"), unless such pricing actions are subject to an exception or waiver.[9] Submission of cost or pricing data is not required when the price agreed upon is based on adequate competition or prices set by law or regulation, the procurement is for a commercial product or commercial service, or the head of the procuring agency decides a waiver is justified.[10]

Upon the parties' agreement on price for each relevant pricing action, the contracting officer must require that the relevant offeror, contractor, or subcontractor certify that its cost or pricing data are "accurate, complete, and current."[11] The term "cost or pricing data" means:

> [A]ll facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), or . . . another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.[12]

The Federal Acquisition Regulation (FAR) also defines "cost or pricing data."[13] In many respects, the regulatory definition can be read as adding gloss to the statutory definition and broadening it, particularly when it comes to a frequently litigated issue: the distinction between facts versus judgments. Importantly, the original law enacting what became known as TINA did not define the term "cost or pricing data."[14] Congress did not add a statutory definition until its 1986 amendments to the law.[15] Accordingly, the regulatory definition has frequently served as the basis for court and board decisions exploring this important threshold issue, whether the allegedly nondisclosed information is cost or pricing data in the first place.

Failure to submit accurate, complete, and current cost or pricing data as of the date of price agreement for the relevant pricing action may result in liability for defective pricing. Defective pricing liability arises under certain "Price Reduction" clauses incorporated into government prime contracts under the FAR and under equivalent clauses placed in subcontracts to which TINA applies.[16] The contract clauses permit the government to reduce the price of the relevant contract in an amount determined sufficient to eliminate any increased price caused by the contractor's, or its subcontractor's, submission of the inaccurate, incomplete, or noncurrent cost or pricing data as of the date of price agreement between the parties to the contract or subcontract. A contractor's or subcontractor's delivery of inaccurate, incomplete, or noncurrent cost or pricing data that the government relies upon when reaching agreement on price is what is frequently referred to as "defective pricing."

III. What Is "Cost or Pricing Data"?

For a contractor to be held liable for defective pricing, the government has to prove that the contractor failed to provide information that is actually cost or pricing data. The FAR defines "cost or pricing data," in part, as all facts that "prudent buyers and sellers would reasonably expect to affect price negotiations significantly," as of the date of price agreement.[17] Whether or not a fact is significant is not judged by the contractor; instead, it is evaluated by an objective, reasonable person test.[18]

Whether something is a fact that would constitute cost or pricing data, or whether the information is purely judgmental, and therefore not subject to the truthful cost or pricing data disclosure requirements, has long been a source of contention. Data that is purely judgmental do not constitute cost or pricing data, but data that is a mix of fact and judgment could be determined to be cost or pricing data.[19]

In a 2003 case, Lockheed Martin tried to argue that its preliminary findings on work performance did not need to be disclosed.[20] It argued that the data constituted judgment and were not factual because the data reflected an analysis of work performed to predict future costs. Lockheed also argued the data was irrelevant because it was for a different type of work being performed. The court disagreed with this position and stated that it was the contractor's "duty to disclose all data which might affect the contract price. It cannot unilaterally decide what can be disclosed and what cannot."[21]

There have been a few beneficial cases for contractors since 2000. For example, in a 2020 Armed Services Board of Contract Appeals (ASBCA) case, *Alloy Surfaces Co., Inc.*, the Board evaluated whether the contractor was required to submit Work in Progress (WIP) reports created during the production of a delivery order.[22] The Board found that the WIP reports were management decisions that contained both fact and judgment but that the reports did not "possess the requisite degree of certainty necessary for providing certified cost data to the government."[23] Other cases decided since 2020 have found that estimates do not constitute cost or pricing data.[24]

If contractors fail to disclose cost or pricing data, they often make the argument that the undisclosed data could not have had a "significant" impact on price negotiations. Because considering whether the data would have significantly affected price negotiations requires a hypothetical analysis, this is often a difficult argument to make. One contractor was successful, however, when it demonstrated that if the government had relied on the allegedly undisclosed cost or pricing data, it would have actually resulted in a higher price.[25]

There are two other specific types of cost or pricing data that often cause problems for contractors: (1) management decisions[26]; and (2) vendor quotes. There have not been many important decisions about the former category since 2000, but the latter category—vendor quotes—had a very important decision issued in 2002.[27] The general presumption is that vendor quotes for the same or similar items to those included in a price proposal are likely cost or pricing data subject to TINA disclosure rules,

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but in its 2002 decision, the Federal Circuit found that it did not matter that the contractor itself did not actually open the vendor proposals; the contractor ran afoul of the truthful cost or pricing statute when it did not provide the government with those unopened quotes.[28] The court reasoned that knowledge of the received quotes may have put the contractor in a better negotiating position than the government.[29] The Board determined that even if the contractor's negotiators did not actually consider the quotes, that "cost or pricing data simply is not any less cost or pricing data because it has been selectively disseminated or not actually used."[30]

IV. Was Required Cost or Pricing Data Disclosed?

The main objective under the Truthful Cost or Pricing Data statute is to put the government and contractors on roughly equal footing during contract negotiations.[31] This is accomplished through the adequate and meaningful disclosure of cost or pricing data that existed as of the date of price agreement. Because the Truthful Cost or Pricing Data statute mandates disclosure, board and judicial authority require the contractor to make the government aware of the cost or pricing data but does not require the contractor to use the data in its proposal in any particular way.[32] In instances where a contractor fails to make the government aware of the required cost or pricing data, the contractor may overcome the government's allegations of defective cost or pricing data by showing the government had actual knowledge of the cost or pricing data.

A. Meaningful Disclosure

There is no bright-line rule as to what is considered an adequate and meaningful disclosure of cost or pricing data.[33] In *McDonnell Douglas Helicopter Systems*, the contractor moved for summary judgment arguing that it provided adequate cost or pricing data because it provided the government access to all data electronically, on magnetic tape, and in paper binders.[34] But, according to the government, the data was only provided in "raw" form, and the contractor failed to provide certain vendor quotes, price histories, and a cost/price analysis that the contractor had in its possession.[35] The Board denied the motion for summary judgment and found that merely making the raw data available to the government did not mean there was a meaningful disclosure, and that "adequate disclosure of cost or pricing data occurs when a contractor clearly advises appropriate Government personnel of the relevant data."[36]

The meaningful disclosure of cost or pricing data is intended to establish a "level playing field" between the government and the contractor during contract negotiations.[37] In *Lockheed Martin d/b/a Sanders*, the ASBCA held that the contractor did not comply with its disclosure obligation by failing to meaningfully disclose a significant engineering advancement that could alter negotiations.[38] The contractor reasoned that it had not disclosed the advancement because there was uncertainty as to whether the new technology would work. The government argued that the engineering advance was required to be disclosed as cost or pricing data because the new technology had successfully been performing and would reduce the contract price. Because this new technology had been successfully incorporated into the devices used on the contract, and because there was confidence within Lockheed that the new technology could be incorporated into the old devices, the Board determined that the contractor's nondisclosure resulted in an overstatement of the contract price.

Putting some limit on a contractor's meaningful disclosure obligation, the Board in *Symetrics* found that the government could not meet its burden of proof when it alleged that the contractor did not provide cost or pricing data when the contractor failed to give the procuring contracting officer (PCO) or contract specialist the overhead and general and administrative (G&A) rates the contractor had submitted to DCAA in the contractor's forward pricing rate proposal (FPRP).[39] In late January 2008, Symetrics submitted a price proposal to the government utilizing rates from its January 2008 FPRP. Symetrics then subsequently submitted a February 2008 FPRP that had lower rates than the rates used in its price proposal. The price proposal was audited by DCAA, which assumed the rates utilized in Symetrics' price proposal were the same as those included in the February 2008 FPRP. However, neither DCAA nor the PCO actually reviewed the February 2008 FPRP against Symetrics' proposal, and therefore did not realize that the proposal utilized the previously submitted FPRP higher rates. The Board determined that Symetrics did not fail to disclose cost or pricing data merely because it did not identify the FPRP rates as the January 2008 version in its price proposal, and that the PCO knew of the February 2008 FPRP, and the government bore the responsibility for their misunderstanding as to what rates were in the proposal.

B. Failure to Use Data

Because the Truthful Cost or Pricing Data statute is a disclosure statute, contractors are generally not obligated to use the data in any particular way when preparing their proposals.[40] In *United Techs. Corp.*, the government made a series of defective pricing allegations, several of which concerned the contractor's failure to use data in its best and final offer (BAFO).[41] The government alleged that the contractor failed to use material escalation factors in its BAFO, but the Board found that this use or nonuse alone did not constitute cost or pricing data.[42] The Board did, however, find that the failure to accurately delete part prices between multiple design configurations in the contractor's bill of materials was defective data and the failure to disclose a contractor-created pricing sheet ran afoul of the contractor's TINA obligations.[43] Note the distinction: TINA is a disclosure

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statute and does not require the use of data, but the contractor is still required to disclose the data relied upon as represented in negotiations.

C. Government's Knowledge of Data

Even when a contractor has not directly advised the government of cost or pricing data, the contractor will not be held liable for the failure to disclose cost or pricing data if the facts establish the government has actual knowledge of the data.[44]

Whether the government has actual knowledge of required cost or pricing data is a fact-specific inquiry, but there are some bright-line contours that make clear when the government does not have actual knowledge. For example, in *GKS Inc.*, the government alleged that a contractor submitted defective cost or pricing data for a kit, and the contractor in turn argued the government had actual knowledge of the cost or pricing of the specific kit because the government previously awarded a contract to a different contractor for the same kit.[45] The Board quickly dismissed this argument, making clear that a contractor cannot excuse itself from submitting required cost or pricing data based on the government's knowledge of another contractor's contract price.[46]

D. Inadequate Time

Contractors required to make meaningful disclosure generally are not excused from their compliance obligations by claiming to not have had adequate proposal preparation time.[47] Simply put, if a contractor does not feel there is adequate time to collect and meaningfully disclose its required cost or pricing data, the contractor should either decline to meet the proposal deadline or otherwise seek to adjust the date of agreement on price so as to ensure that its certification that it has disclosed cost or pricing data is based on its best knowledge, information, and belief at the time. Typically, even when a contractor has been forced to rush the submission of its proposal, courts and boards are not sympathetic when it comes to assessing whether there has been a TINA violation.[48]

V. What is the Rebuttable Presumption and the Government's Burden to Prove the Causal Connection?

As explained above, one essential element of a defective pricing claim is that the government relied on defective data when negotiating and agreeing on price. Associated with this particular element is another key feature that contractors litigating defective pricing cases must understand: The government is aided by a *rebuttable presumption* that it relied on the contractor's data for contract pricing. The rationale behind this presumption, as explained in *Sylvania*, is the following: "[I]t is reasonable to assume that the government negotiators relied upon the data supplied by the contractor and that this data affected the negotiations."[49] The preeminent case in this regard is the Federal Circuit's decision in *Wynne v. United Technologies Corp.*,[50] which provides relevant statutory history and an illustration of how the rebuttable presumption operates under the law.

In *Wynne*, the government initiated an appeal at the Federal Circuit challenging a prior ASBCA decision denying the Air Force's claim for a contract price reduction of roughly $300 million under a six-year, multibillion-dollar contract. The government's overall position in the case was that the Air Force was entitled to a contract price reduction because the prime contractor, UTech, furnished defective cost or pricing data in connection with its initial price proposal and its BAFO for the contract. UTech's position, on the other hand, was that the government was not entitled to a contract price reduction concerning the alleged violation.

In the underlying action, the Board determined that the Air Force had relied on UTech's defective data to its detriment and, although the defective data had caused an increase in the contract price in some instances, it had caused a decrease in the contract price in other instances. The Board also determined that the contract price reductions to which the Air Force was entitled were exceeded by the offsets to which UTech was entitled. The Board then concluded the Air Force did not prove it was entitled to an affirmative recovery due to the defective cost or pricing data. On reconsideration, the Board corrected its analysis as to certain facts related to UTech's proposals, deciding that the Air Force was entitled to a presumption that the natural and probable consequence of defective cost or pricing data is to cause an overstated price. UTech, however, rebutted this presumption by demonstrating that the Air Force did not accept its initial proposal and did not rely upon the allegedly defective cost or pricing data in agreeing to any contract price. The Board then issued a reconsideration decision holding that the Air Force, as the claimant, failed to meet its burden of proof to show that the defective cost or pricing data caused an increase in the contract price.

The Federal Circuit in *Wynne* affirmed the Board's reconsideration decision that the Air Force did not establish it had relied upon the defective cost or pricing data to its detriment. The Federal Circuit agreed with the Board that although the defective data had caused certain increases in the contract price, it had caused a decrease in the contract price in other instances. While the government was entitled to a rebuttable presumption that any defective cost or pricing data affected its agreement to the contract price and thus actually caused an increase in the contract price, UTech rebutted this presumption of causation by establishing that the government did not rely on the defective data. The government was then required to establish that it actually relied on the defective data to its detriment. The government's inability to produce any additional evidence or arguments establishing such reliance was fatal to its case. Additionally, the contract price reductions to which the Air Force was entitled were impacted by offsets to which UTech

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was entitled. The government's rebuttable presumption, therefore, did not permit the government to succeed on its claims in this case.

The decision in *Wynne* is also significant because it collects and explores important legislative history and the framework on the rebuttable presumption the government enjoys in defective pricing cases. In its decision, the Federal Circuit focused on the year 1986, when Congress considered and rejected amendments to TINA that would have eliminated the reliance requirement. The legislative history of the 1986 amendments recognized that, at that time, the government could not recover on a TINA claim if it did not rely on the allegedly defective cost or pricing data to its detriment. If the changes had gone into effect, the proposed bill would have converted the rebuttable presumption of reliance into a conclusive presumption of reliance. Congress, however, rejected the proposed amendment. Rather than altering TINA to create a conclusive presumption of reliance, Congress codified the reliance requirement as a contractor defense to a TINA claim. Thus, as of 1986, TINA explicitly stated that "[i]n determining for purposes of a contract price adjustment . . . whether, and to what extent, a contract price was increased because the contractor (or a subcontractor) submitted defective cost or pricing data, it shall be a defense that the United States did not rely on the defective data submitted by the contractor or subcontractor."

Another notable illustration of the rebuttable presumption is found in *Black River Limited Partnership*,[51] where the Board concluded, as a result of the contractor's failure to satisfy its disclosure obligations, the government was entitled to a price adjustment. According to the Board, while the government enjoys the rebuttable presumption that the natural and probable consequence of nondisclosure is a price increase, the government still has the ultimate burden of proving the specific amount of that increase. In the earlier related appeal,[52] the Board had decided, among other things, that data submitted by the contractor in support of a tax adjustment request did not satisfy the requirement for current, accurate, and complete data. The Board sustained the appeal and determined that the government was entitled to a price adjustment under the contract. After the parties were unable to agree upon the appropriate increase by application of the earlier decision, the dispute returned to the Board.

In a surprising turn of fortune, the Board determined based on additional evidence adduced by the contractor in the earlier appeal that there was no defective pricing with regard to a tax adjustment request.[53] In reaching that determination, the Board observed that the government's overriding burden requires it demonstrate a causal connection between the undisclosed or defective data and an overstated contract price.[54] The Board then rejected the government's primary argument that the contractor was liable for defective pricing in connection with its tax adjustment request.[55] The Board determined that the document the contractor submitted and on which the government relied properly included the information relevant to the tax adjustment contract clause and pricing action the parties negotiated.[56] After reviewing a relatively large record that developed the issues, the Board concluded that the contractor's omission of another pro forma that showed a net present value calculation was not information relevant to the tax adjustment clause and, therefore, the nondisclosure neither misled the government nor resulted in an increase in the contract price.[57] At bottom, the data submitted to the government by the contractor in support of its tax adjustment request did not violate TINA. The government, therefore, did not establish a prima facie TINA claim and for that reason was not entitled to the rebuttable presumption.

VI. Statute of Limitations

The statute of limitations under the Contract Disputes Act (CDA) extends to defective pricing cases. Pursuant to the CDA, a claim must be submitted within six years from the time the claim accrued.[58] Cases before the federal courts and ASBCA consistently recognize that a defective pricing action is a government claim. Cases have explored when a government claim for defective pricing accrues. While all of the events that fix the alleged liability and cause government injury in a defective pricing case very likely occur as of the date a contract subject to TINA is awarded, there is no bright-line rule in defective pricing cases that the statute begins to run on the date the parties execute the contract.[59] The primary reason is because it is often unclear whether the government knew or should have known of its claim as of that award date.

The Board's decision in *McDonnell Douglas Servs., Inc.*, shows the application of the CDA statute of limitations in the context of defective pricing. The Board began its legal analysis by evaluating when the claimed liability was first fixed.[60] In a defective pricing claim, the government is required to prove that (1) the information in dispute is "cost or pricing data" under TINA, (2) the cost or pricing data was not meaningfully disclosed, and (3) the government relied to its detriment upon the inaccurate, noncurrent, or incomplete data presented by the contractor. "[O]nce nondisclosure is established a rebuttable presumption arises that a contract price increase was a natural and probable consequence of that nondisclosure."[61] In the context of TINA violations, the statute of limitations begins to run once a party is on notice that it has a potential claim.[62]

As established in *McDonnell Douglas Servs., Inc.*, when the government's defective pricing claim accrued more than six years prior to the contracting officer's final decision asserting it, the claim is time-barred under the CDA. Such a claim is not viable and cannot be considered.[63] In other circumstances, however, a contractor will not succeed in establishing the CDA statute of limitations bars a claim if the contractor cannot establish the time at which

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the government knew or should have known of the alleged defective pricing. Notwithstanding the government's audit rights and ready access to information necessary to evaluate any potential post-award defective pricing claim, a contractor is not likely to succeed with a statute of limitations defense absent proof of actual government knowledge of the defective cost or pricing data establishing the accrual date.[64] It is critical to establish what the government knew and when for purposes of applying the statute of limitations. To date, the "should have known" avenue to proving accrual has not been a viable path in the context of a defective pricing defense.

VII. Subcontractor Defective Pricing

In the past two decades, the industry has understood and commented on how TINA impacts a prime contractor through the pricing proposed by subcontractors.[65] A good example of a subcontract defective pricing case is discussed in the Board's decision in *General Dynamics Decision Systems, Inc.*[66] In that case, the prime contractor, General Dynamics, challenged the Board's assessment of the impact of the subcontractor's defective pricing on the prime contract. As demonstrated in the case, defective subcontract pricing is remedied through a reduction to the prime contract's total costs, total final profit, and total final price. The specific focus of the case was the contracting officer's defective pricing claim with respect to a firm, fixed-price subcontract performed by Aydin Computer Systems in support of a government contract performed by Motorola (and novated to General Dynamics Decision Systems, Inc.). Subcontractor Aydin submitted a subcontract proposal to Motorola, a competitor, and refused to share its cost data with Motorola. The undisclosed data included general and administrative (G&A) expenses and a facilities capital charge (FCC), which was described in the original Board decision as a charge between entities within the Aydin corporation for imputed interest or a cost of doing business.[67]

In the underlying case, the Board first decided entitlement by sustaining the defective pricing claim as to the G&A rate and denying the appeal as to the facilities capital charge defective pricing element.[68] On remand, the parties failed to agree on the amount of damages that arose from the defective pricing, and the contracting officer issued a final decision demanding a sum that included a contract adjustment and interest. Then, in the appeal of that final decision (discussed in further detail below under the "Interest" section of this article), the Board granted partial summary judgment to the prime contractor, holding that any interest for overpayment arising from defective cost or pricing data under the contract is to be charged in accordance with the contract's interest clause.[69] As to quantum, the Board subsequently held that Aydin's inclusion of the undisclosed facilities capital charge in its subcontract cost entitled the government to disallow the cost and to recover interest.[70] The remaining issue in the *General Dynamics Decision Systems, Inc.* case concerned the effect of the defective subcontract pricing upon the prime contract's total costs incurred, total final profit, and total final price.[71]

The Board rejected the prime contractor's argument that the government was limited to a reduction of the total target cost due to the defective pricing of the Aydin subcontract and could not reduce the total final cost incurred on the contract.[72] In doing so, the Board decided the case in favor of the government, which was entitled to recover on total costs, total final profit, and total final price due to the defective subcontract pricing.[73] Considering the significant impact of defective subcontract pricing on certain government contracts, as shown in *General Dynamics Decision Systems, Inc.*, prime contractors are well advised to include appropriate indemnities to protect against defective pricing impacts and understand when and how subcontractor pricing may present price reduction risk under the prime contract, depending on the date of price agreement of the prime contract as well as the prime contract's contract type.[74]

VIII. Quantum

Part of the government's burden of proof on a defective pricing claim is to demonstrate how much the government's reliance on defective data caused the price to be increased and, therefore, establish the amount of the price reduction. Cases have explored how a price reduction is measured; also relevant in this context is the issue of offsets and interest. These topics are explored in turn below.

A. Calculating the Impact

Cases have recognized that the Truthful Cost or Pricing Data statute is not self-enforcing with respect to price reductions.[75] Instead, the government's right to a price reduction is a function of the relevant contract clause. The standard FAR clause[76] specifies in part that "[i]f any price, including profit or fee, negotiated in connection with this contract, or any cost reimbursable under this contract, was increased by any significant amount because [of defective pricing] . . . the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction."[77] According to the Federal Circuit, the price reduction is the result of a "critical comparison . . . between the lower cost figures that the contractor failed to disclose and the higher figures upon which the government relied in agreeing to the contract price."[78]

Cases that have discussed price reductions sometimes frame the inquiry in mathematical terms. Part of the government's ultimate burden relating to causation and reliance is proving how the government's detrimental reliance caused the negotiated price to be higher than it should have been. To do this, the government will identify a subtrahend, i.e., the figure that is to be subtracted from some other figure, that reflects the adverse impact of the defective data.[79] The government will next identify the minuend, i.e., the figure from which the subtrahend is subtracted.[80]

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In the context of a negotiation, there typically will be a base set of data the government has used at the conclusion of negotiations for purposes of negotiating and agreeing on price. This final base data set will frequently be looked to as the source of the appropriate minuend to the extent the government can prove it relied upon this data when negotiating price. The subtrahend will come from data learned in the course of the post-award audit that the contracting officer and audit team allege represented reasonably available, more accurate, current, or complete data that were not disclosed.

A number of other decisions highlight the connection between quantum and the government's ultimate causation burden. For example, in *Black River Ltd. Partnership*, the Board had initially concluded that data submitted by the contractor in support of a tax adjustment request had not been current, accurate, and complete.[81] The matter was then remanded to the parties to address quantum, but the parties were unable to agree. In connection with the additional proceedings, the contractor overcame the alleged TINA violation and established that the government did not carry its ultimate burden of proof on the claim. Specifically, based on a more developed record, the Board found that the contractor included certain relevant assumptions and that the contractor's omission of certain calculations neither misled the government nor resulted in an increase in the contract price. In other words, the government did not prove that it relied on defective data when negotiating and reaching agreement on price.

B. Offsets

The topic of offsets is expressly addressed in the FAR price reduction clause.[82] Absent (i) evidence that the contractor was aware of understated data before the date of agreement on price, as specified in the cost or pricing data certificate, or (ii) proof that the understated data, if disclosed, would not have increased the price, the contracting officer is obligated to offset the understatement against the government's price reduction, provided the contractor certifies it is entitled to the offset.[83]

Case law similarly holds that "a contractor may properly offset *unintended errors* in understating the original price against overstatements made in negotiations."[84] This was highlighted by one of the above-mentioned cases, *GKS, Inc.*, where the offset claimed by the contractor failed because the facts established the contractor intentionally understated its G&A costs.[85] Other cases discussing offsets within the sample are collected in the endnotes.[86]

C. Interest

A contractor's obligation to pay interest as part of the remedy for defective pricing is, like offsets, also established in the FAR price reduction clause.[87] When originally enacted, TINA did not contain a provision for paying interest.[88] The requirement to pay interest on overpayments due to defective pricing was first introduced in connection with Department of Defense (DoD) contracts via the Department of Defense Authorization Act of 1986.[89]

Within the cases reviewed for this article, there are a number that touch on defective pricing risks relating to contracts providing health insurance benefits to federal employees and their dependents.[90] But even more relevant to the typical procurement contract subject to the requirement to disclose cost or pricing data is a case involving Motorola, Inc. (previously discussed in the "Subcontract Defective Pricing" section above).[91] The contract at issue, which was awarded in May 1984, incorporated the 1970 version of the defective pricing clause and the 1983 version of the interest clause located in the Defense Acquisition Regulation (DAR). The Board's December 2000 decision followed lengthy prior litigation between the parties in which portions of the government's defective pricing claims had been sustained.[92]

In December 2000, the Board resolved the parties' cross-motions for summary judgment regarding the period for which interest was payable for overpayments due to defective pricing. In the earlier decisions, the Board had concluded that Motorola's subcontractor, Aydin Computer Systems, had submitted a proposal to Motorola using a G&A rate that was defective, in part because it was based on a FCC that was not disclosed. The Board declined to award the government the full amount of interest it sought because the government's argument hinged on the application of an interest provision that was not part of the contract. The Board emphasized that the defective pricing statute is not self-enforcing. Instead, it depends upon contract language incorporated into contracts. Because the TINA interest clause did not exist at the time the contract modification at issue was executed, the government was limited to simple interest. In reaching this conclusion, the Board declined to follow a district court decision that reached a different conclusion on TINA interest primarily because the Board viewed the court's legal analysis to be deficient on the subject of legislative interpretation.[93]

IX. Defective Pricing and the Civil False Claims Act

As discussed above, while the defective pricing requirements and associated remedies provide the government a contractual right to a price reduction upon proof of its claim, the government can also employ the FCA to remedy what the government may perceive in certain cases as windfall profits. There are interesting intersections between defective pricing and fraud claims under the FCA. For example, a contractor that knowingly engages in defective pricing is subject to penalties, in addition to the price reduction and interest.[94] That very same conduct, namely, knowingly falsely certifying cost or pricing data as current, accurate, and complete, is also exceedingly likely to serve as evidence the contractor submitted a false claim for payment when it began to invoice based on prices it knew were inflated.[95]

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Within the time period reviewed for this article, there are a number of FCA cases that involve allegations of defective pricing. In some cases, the contractually based defective pricing litigation ran in parallel to the FCA litigation. The discussion below collects these FCA cases into general categories where the underlying issue, procedural or substantive, had commonality.

A. Parallel Proceedings

Within the time period reviewed for this article, there were two notable situations that involved parallel FCA and defective pricing claims. First is a series of litigations involving United Technologies Corp. and its 1984 pricing action for jet fighter engines.[96] The government had decided to compete requirements for its jet engines for F-15s and F-16s to reduce its reliance on a single-source contractor.[97] The government initially pursued a defective pricing claim of $95 million, plus interest, which the contractor eventually appealed to the ASBCA.[98] That claim amount later increased to $299 million.[99] The parties reached price agreement and signed a contract in 1984. The government started its defective pricing audit in 1989.[100] The contract-based defective pricing claims and the contractor's successful defense against the claims were discussed earlier in this article in the "Rebuttable Presumption" section.

With regard to the parallel FCA action, the government alleged the contractor had intentionally falsely driven up its prices for any split award in an effort to dissuade the Air Force from making awards to General Electric.[101] In 2008, the U.S. District Court for the Southern District of Ohio held that the contractor had violated the FCA but that there were no damages.[102] On appeal, the Sixth Circuit affirmed the district court decision finding liability under the FCA.[103] In reaching that conclusion, the court pointed out that, unlike a defense under TINA where evidence of government nonreliance provides a defense, no such defense exists under the FCA.[104] Additionally, the Sixth Circuit reversed the district court's damages decision, with the circuit court explaining that, on remand, the district court should address errors in the damages calculations identified on appeal.

Finally, the Sixth Circuit reversed the district court's conclusion that certain government common law claims were barred under the theory of claim preclusion. In reaching this result, the Sixth Circuit highlighted the differences between the FCA and common law claims and those claims the government advanced at the ASBCA. These differences meant, in the court's judgment, that the contractor's success at the ASBCA did not necessarily preclude the government's claims in district court. In this regard, the *United Techs.* saga points to the risk contractors face with parallel defective pricing and FCA litigation.

More recently than the *United Techs.* litigation, but with a significantly different outcome, was the parallel activity relating to *United States v. BAE Sys. Tactical Vehicle Systems, LP*.[105] On July 15, 2014, a contracting officer issued a final decision demanding $56 million, plus interest, for alleged defective pricing arising from a 2008 pricing action for the award of 10,000 military trucks and trailers known as the Family of Medium Tactical Vehicles (FMTV).[106] Later, on June 18, 2015, after a tolling agreement between the parties was not further extended, the government filed a complaint in the U.S. District Court for the Eastern District of Michigan alleging BAE violated the FCA, also advancing counts for defective pricing under TINA, breach of contract, unjust enrichment, and payment by mistake. On July 25, 2016, the ASBCA addressed a government motion to stay or suspend proceedings at the ASBCA due to the pendency of the civil fraud action in Michigan District Court. The Board denied the government's motion, finding that the balance of the considerations, including similarity of the underlying facts, balancing of the harm, judicial efficiency, and reasonableness of the duration of the requested stay, all favored BAE. Soon after, on December 5, 2016, because the contracting officer unilaterally rescinded in its entirety her final decision finding defective pricing, the ASBCA dismissed the appeal.[107] Then, on April 25, 2017, the Michigan District Court granted a motion to compel discovery into the documents relating to the contracting officer's decision to rescind her final decision.[108] Shortly after this motion to compel was granted, the government opted to drop its FCA case in a stipulation of dismissal filed June 1, 2017.[109]

B. Motions to Dismiss

Turning from the issue of parallel proceedings is a line of FCA cases where defective pricing claims were raised and the contractor filed a motion to dismiss under Federal Rule of Civil Procedure 9(b).[110] In *Adrian v. Regents of the University of California*, a relator alleged fraud in connection with certain software development being performed for the Department of Energy and DoD.[111] The portion of the complaint that related to defective pricing was determined to have not been sufficiently pled with particularity to survive the dismissal motion. By contrast, in *United States ex rel. Woodlee v. SAIC*, a case involving allegations that SAIC had a scheme to provide false and inaccurate cost or pricing data that inflated its profits, a motion to dismiss was denied.[112] The court determined the government's complaint was adequately pled.

Then come a pair of cases involving the same parties where motions to dismiss for failure to plead with particularity were successful. In *United States ex rel. Sallade v. Orbital Sciences Corp.*, the defendant moved twice for dismissal. In the first decision, the defendant was partially successful. One of the counts asserted Orbital violated TINA by submitting a claim for payment knowing that it had failed to disclose cost or pricing data when the company negotiated the government contract. The court observed that the count may have been sufficient to state a TINA violation but was not sufficient to allege a cause

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of action under the FCA. The plaintiff was required to plead with particularity that Orbital submitted a claim for payment under the contract despite knowing it had failed to disclose the required information during negotiations.[113] In another case, the defendant had the matter entirely dismissed because, despite twice amending the complaint, the plaintiff failed to allege that (i) Orbital failed to disclose the cost underruns during negotiations; (ii) as a result, Orbital obtained an inflated contract price; or (iii) Orbital ultimately submitted claims for payment based upon that fraudulently negotiated price.[114]

C. Differences in the Avenue for Recovery and the Elements of Proof

There are a number of cases that have been decided since the turn of the century where the differences between the government's avenue for recovery and the elements of proof in a defective pricing case and a fraud case were further explored.

United States v. Rachel explored the distinction between a defective pricing claim and an FCA claim in the context of privity and the government's avenues of recovery.[115] The defendant in that case proffered the testimony of an expert witness to establish that in a defective pricing case, the government's right of recovery is against a prime contractor and there is no direct claim against a subcontractor.[116] The court agreed with this general privity construct with regard to defective pricing cases but pointed out that in an FCA action, the government could argue that the evidence of a subcontractor's knowing noncompliance with TINA could be used to prove the defendant's state of mind, which is relevant to elements of an FCA claim.[117] In the same case, the defendant attempted to limit the government's fraud claim by means of expert witness testimony that would prove that its ultimate prices were reasonable and, therefore, any failure to disclose data did not mean the government relied on defective data when reaching agreement on price.[118] The court pointed out that the reliance element of a defective pricing case is not an element of an FCA claim.[119] Nonetheless, the court denied the government's motion to strike the anticipated expert witness testimony because the issue of reasonableness and reliance could go to the defendant's state of mind.[120]

Among the few cases that have made it to the Supreme Court and involve government contracts issues is *Allison Engine Co., Inc. v. United States ex rel. Sanders*.[121] In 2003, the Southern District of Ohio denied the relators' motions for summary judgment, finding the relators had failed to show, among other things, that Allison Engine[122] had a duty to disclose current, accurate, and complete cost or pricing data in connection with an engineering change proposal.[123]

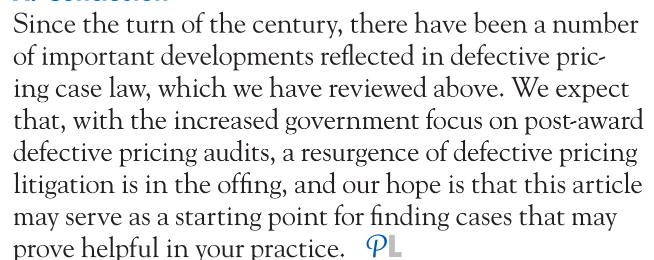
The case then proceeded to trial on other FCA counts, and at the conclusion of the plaintiff's case, the defendants moved for judgment as a matter of law.[124] The plaintiff had not introduced into evidence the actual invoices submitted to the government, and the defendants argued that this precluded the plaintiff from establishing a key fact—namely, that a false claim was knowingly presented to the government for payment. The district court, after carefully reviewing the existing circuit court decisions on the subject of presentment, granted the motion because the plaintiffs had failed to propound evidence from which the jury could infer that either of the prime contractors had submitted false or fraudulent claims to the government.

The Sixth Circuit reversed, finding in part that presentment was not required as a matter of law to establish a violation of the FCA.[125] The Supreme Court later reversed the Sixth Circuit, concluding that under the FCA, as it existed at that time, a plaintiff asserting a claim under 31 U.S.C. § 3729(a)(2) must prove that "the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim."[126] The Court reached this conclusion primarily based on the use of the phrase "to get" in § 3729(a)(2), explaining that ignoring this phrase as a limit on § 3729(a)(2) claims "would expand the FCA well beyond the intended role of combatting 'fraud against the Government.'"[127]

In response to the decision in *Allison Engine* and other cases that had narrowed potential liability under the FCA,[128] on May 20, 2009, the Fraud Enforcement and Recovery Act (FERA)[129] was signed. FERA enhanced protections for whistleblowers and made the FCA a more potent tool to attack perceived windfalls, particularly those predicated on alleged defective pricing at the subcontractor level.

X. Conclusion

Since the turn of the century, there have been a number of important developments reflected in defective pricing case law, which we have reviewed above. We expect that, with the increased government focus on post-award defective pricing audits, a resurgence of defective pricing litigation is in the offing, and our hope is that this article may serve as a starting point for finding cases that may prove helpful in your practice. PL



Endnotes

1. Anthony Capaccio, *Pentagon Plans to Triple Audits Amid Surge in Defense Spending*, Bloomberg (Sept. 13, 2019, 4:00 AM), https://www.bloomberg.com/news/articles/2019-09-13/pentagon-plans-to-triple-audits-amid-surge-in-defense-spending#xj4y7vzkg.
2. *Id.*
3. Comparing DCAA's Annual Reports to Congress for fiscal year 2019 through fiscal year 2022 shows that the number of audits performed per year in the category covering defective pricing audits more than doubled over that period. *See* Def. Cont. Audit Agency, U.S. Dep't of Def., Report to Congress on FY 2019 Activities, at 8 (2020) (showing 299 audits in the "Other" category); Def. Cont. Audit Agency, U.S. Dep't of Def., Report to Congress on FY 2020 Activities, at 8 (2021) (showing 437 audits in the "Systems, CAS (Cost Accounting Standards) and TIN (Truth in Negotiations)" category); Def. Cont. Audit Agency, U.S. Dep't of Def., Report to Congress on

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FY 2021 Activities, at 7 (2022) (showing 592 audits in the "Systems, CAS (Cost Accounting Standards) and TIN (Truth in Negotiations)" category); Def. Cont. Audit Agency, U.S. Dep't of Def., Report to Congress on FY 2022 Activities, at 5 (2023) (showing 650 audits in the "Systems, CAS (Cost Accounting Standards) and TIN (Truth in Negotiations)" category).

4. 31 U.S.C. §§ 3729–3733.

5. Where many of the cases cited in this article refer to the Truthful Cost or Pricing Data statute by its former name (and former acronym), TINA, this article will also refer directly to TINA, even though the statute may have been updated.

6. Some commentators identify five elements of defective pricing. *See* David z. Bodenheimer, Defective Pricing Handbook § 1:2 (Thomson Reuters 2023) (listing the five elements that the government must prove: (i) the data at issue constitute cost or pricing data; (ii) the cost or pricing data was reasonably available prior to price agreement; (iii) the contractor failed to disclose current, accurate, and complete cost or pricing data; (iv) the government detrimentally relied on the defective data; and (v) the government's reliance on the defective cost or pricing data caused an increase in the contract price).

7. Lockheed Martin Corp., ASBCA No. 50464, 02-1 BCA ¶ 31,784.

8. Wynne v. United Techs. Corp., 463 F.3d 1261, 1266–67 (Fed. Cir. 2006) (discussing the legislative history surrounding the 1986 amendments to the statute that rejected the creation of a conclusive presumption of reliance, instead codifying the reliance element as a defense under the law).

9. 10 U.S.C. § 3702(a); 41 U.S.C. § 3502(a).

10. 10 U.S.C. § 3703(a); 41 U.S.C. § 3503(a); FAR 15.403-1.

11. FAR 15.406-2; 10 U.S.C. § 3702(b); 41 U.S.C. § 3502(b).

12. 10 U.S.C. § 3701(1); 41 U.S.C. § 3501(a)(1).

13. FAR 2.101.

14. *See* Pub. L. No. 87-653, § (e), 76 Stat. 528 (1962).

15. *See* National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 952, 100 Stat. 3816 (1986). The 1986 definition was further amended one year later in 1987 to emphasize that cost or pricing data are comprised of "all facts" versus "all information that is verifiable." *See* National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 804, 101 Stat. 1019 (1987).

16. *See, e.g.*, FAR 52.215-10, 52.215-11.

17. FAR 2.101.

18. United Techs. Corp., Pratt & Whitney, ASBCA No. 43645, 94-3 BCA ¶ 27,241.

19. United States *ex rel.* Campbell v. Lockheed Martin Corp., 282 F. Supp. 2d 1324 (M.D. Fla. 2003).

20. *Id.*

21. *Id.*

22. ASBCA No. 59625, 20-1 BCA ¶ 37,574.

23. *Id.*

24. *See, e.g.*, Pangea, Inc. v. GSA, GSBCA No. 16688, 05-2 BCA ¶ 33,096; Lockheed Martin Corp., ASBCA No. 50566, 02-2 BCA ¶ 31,907.

25. Alliant Techsystems, Inc., ASBCA No. 51280, 00-2 BCA ¶ 31,042.

26. According to the Board, to qualify as cost or pricing data, management decisions must (1) bear a substantial relationship to the relevant cost element and (2) be taken at a level of management authorized to approve or disapprove actions affecting that cost element. Lockheed Corp., ASBCA No. 36420, 95-2 BCA ¶ 27,722.

27. Aerojet Solid Propulsion Co. v. White, 291 F.3d 1328 (Fed. Cir. 2002).

28. *Id.* at 1331.

29. *Id.*

30. *Id.*; *but see* United States *ex rel.* Watkins v. KBR, Inc., 106 F. Supp. 3d 946, 961 (C.D. Ill. 2015) (criticizing the Board's decision for its failure to explain how the unopened bids put the government and the contractor in a different bargaining position).

31. Unisys Corp. v. United States, 888 F.2d 841, 844 (Fed. Cir. 1989).

32. While cases establish that TINA mandates that data be meaningfully disclosed, even though it does not mandate that the data be used in any particular way, the government does provide detailed instructions to contractors regarding proposal preparation when cost analysis will be required. *See* FAR 52.215-20(b)(1) (incorporating table 15-2 of FAR 15.408 and imposing it as a "mandatory format . . . unless the Contracting Officer and the Contractor agree to a different format . . .").

33. *See* Sylvania Elec. Pros., Inc. v. United States, 479 F.2d 1342 (Ct. Cl. 1973); M-R-S Mfg. Co. v. United States, 492 F.2d 835 (Ct. Cl. 1974).

34. ASBCA No. 50447 *et al.*, 99-1 BCA ¶ 30,271.

35. *Id.*

36. *Id.*

37. *See M-R-S Mfg.*, 492 F.2d 835.

38. ASBCA No. 50566, 02-2 BCA ¶ 31,907.

39. Symetrics Indus., LLC, ASBCA No. 59297, 15-1 BCA ¶ 36,070.

40. Contractors must still consider table 15-2 of FAR 15.408, however, and consider how or if the mandated format might affect this general rule in a particular case.

41. ASBCA No. 51410, 04-1 BCA ¶ 32,556.

42. *Id.*

43. *Id.*

44. *See* Tex. Instruments, Inc., ASBCA No. 23678, 87-3 BCA ¶ 20,195 ("This disclosure obligation is satisfied if the Government personnel who participated in the proposal evaluation or contract negotiations were clearly advised of the relevant cost or pricing data or, if they were not so advised, nevertheless had actual knowledge thereof.") (citing Muncie Gear Works, Inc., ASBCA No. 18184, 75-1 BCA ¶ 11,380); Boeing Co., ASBCA No. 32753, 90-1 BCA ¶ 22,270. Note that this argument should be understood as distinct from the prohibited defense that "the contracting officer should have known that the cost or pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer." 10 U.S.C. § 3706(c)(2).

45. GKS, Inc., ASBCA No. 49296, 00-1 BCA ¶ 30,914.

46. *Id.*

47. Alliant Techsystems, Inc., ASBCA No. 51280, 00-2 BCA ¶ 31,042.

48. Baldwin Elecs., Inc., ASBCA No. 19683, 76-2 BCA ¶ 12,199.

49. *See* Sylvania Elec. Pros., Inc., v. United States, 479 F.2d 1342, 1349 (Ct. Cl. 1973).

50. 463 F.3d 1261 (Fed. Cir. 2006).

51. ASBCA No. 51754, 02-1 BCA ¶ 31,839.

52. Black River Ltd. P'ship, ASBCA No. 46790, 97-2 BCA ¶ 29,077.

53. *See id.*

54. *Id.* at 157,324.

55. *Id.*

56. *Id.* at 157,326.

57. *Id.*

58. *See* 41 U.S.C. § 7103(a)(4)(A) ("Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract *shall be submitted within 6 years* after the accrual of the claim") (emphasis added). Although the CDA does not define "claim," the FAR defines a "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or

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relating to the contract." FAR 2.101. The FAR also provides that "'[a]ccrual of a claim' means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred." FAR 33.201.

59. AAI Corp., ASBCA No. 61195, 22-1 BCA ¶ 38,094 (citing Lord Corp., ASBCA No. 54940, 06-2 BCA ¶ 33,314).

60. ASBCA No. 56568, 10-1 BCA ¶ 34,325 (citing Gray Pers., Inc., ASBCA No. 54652, 06-2 BCA ¶ 33,378).

61. *Id.* (quoting McDonnell Douglas Helicopter Sys., ASBCA No. 50447 et al., 00-2 BCA ¶ 31,082, at 153,465).

62. *Id.* (citing *Gray Pers.*, 06-2 BCA ¶ 33,378, at 165,476).

63. *Id.* (citing Arctic Slope Native Ass'n v. Sec'y of Health & Human Serv., 583 F.3d 785 (Fed. Cir. 2009); *Gray Pers.*, 06-2 BCA ¶ 33,378) (citation omitted)).

64. *See* Lord Corp., 06-2 BCA ¶ 33,314; *cf.* AAI Corp., 22-1 BCA ¶ 38,094 (finding the government's claim for costs was time barred in light of undisputed facts establishing that the government had all of the information upon which it would base its claim, namely the proposal itself, more than six years prior, and that the government's claim was merely the result of DCAA's subsequent analysis of that proposal).

65. Steven M. Masiello & Phillip R. Seckman, *Managing Subcontract Defective Pricing Liability*, Briefing Papers, 2d Series (Dec. 2004).

66. ASBCA No. 54978, 05-2 BCA ¶ 33,091.

67. Motorola, Inc., ASBCA No. 48841, 96-2 BCA ¶ 28,465, *aff'd*, 125 F.3d 1470 (Fed. Cir. 1997) (*Motorola I*).

68. *Id.*

69. Motorola, Inc., ASBCA No. 51789, 01-1 BCA ¶ 31,233 (*Motorola II*).

70. Motorola, Inc., ASBCA No. 51789, 02-2 BCA ¶ 32,043, *recon. denied*, 03-1 BCA ¶ 32,195, *aff'd*, 82 F. App'x 670 (Fed. Cir. 2003) (*Motorola III*).

71. 05-2 BCA ¶ 33,091.

72. *Id.*

73. *Id.*

74. A prime contractor under a fixed price contract generally has little to no defective pricing risk relating to subcontracts that are priced after the date of prime contract price agreement, absent impacts relating to later pricing actions for modifications. Prime contracts that are flexibly priced, however, can present different risks. For example, a failure to secure certified cost or pricing data when pricing a subcontract (FAR 52.215-12) may result in unreasonable cost under the prime contract, which could be disallowed under FAR 52.216-7.

75. *Motorola II*, ASBCA No. 51789, 01-1 BCA ¶ 31,233.

76. A complication that frequently arises in the context of defective pricing counseling work is that a prime contractor may not flow down FAR 52.215-10 and, instead, will use text in the subcontract that seeks to indemnify the prime contractor in the event of a government claim of defective pricing. This raises a host of interesting questions as to whether or when there would be, or even could be, defective pricing and an overpayment under a subcontract. These topics are outside the scope of this article, and for purposes of discussing quantum, we will focus on cases looking at the issue from the perspective of a government claim against a prime contractor.

77. FAR 52.215-10(a).

78. Unisys Corp. v. United States, 888 F.2d 841, 845 (Fed. Cir. 1989).

79. Sperry Corp. Comput. Sys, Def. Sys. Div., ASBCA No. 29525, 88-3 BCA ¶ 20,975.

80. *Id.*

81. ASBCA No. 46790, 97-2 BCA ¶ 29,077.

82. *See* FAR 52.215-10(c).

83. *Id.*

84. *Motorola II*, ASBCA No. 51789, 01-1 BCA ¶ 31,233 (emphasis added) (citing Cutler-Hammer, Inc. v. United States, 416 F.2d 1306, 1309–13 (Ct. Cl. 1969); TGS Int'l, Inc., ASBCA No. 31120, 87-2 BCA ¶ 19,683, at 99,630).

85. ASBCA No. 49296, 00-1 BCA ¶ 30,914.

86. *Motorola II*, 01-1 BCA ¶ 31,233 (citing United Techs. Corp., Pratt & Whitney, ASBCA No. 43645, 98-1 BCA ¶ 29,577); *see also* Motorola Inc., ASBCA No. 51789, 02-2 BCA ¶ 32,043, at 158,363, 158,365, *recon. denied*, 03-1 BCA ¶ 32,195, *aff'd*, 82 F. App'x 670 (Fed. Cir. 2003) (*Motorola III*); Motorola, Inc., ASBCA No. 51789, 03-1 BCA V 32,195; United Techs. Corp., ASBCA No. 51410, 04-1 BCA ¶ 32,556; United Techs. Corp., ASBCA Nos. 53349 *et al.*, 05-1 BCA ¶ 32,860.

87. *See* FAR 52.215-10(d)(1).

88. Pub. L. No. 87-653, 76 Stat. 528 (1962).

89. Dep't of Def. Authorization Act, Pub. L. No. 99-145, § 934, 99 Stat. 583 (1985).

90. *See* Humana, Inc., ASBCA No. 49951, 00-2 BCA ¶ 31,142; Qualmed Plans for Health of N.M., Inc. v. United States, 267 F.3d 1319 (Fed. Cir. 2001).

91. *Motorola II*, 01-1 BCA ¶ 31,233.

92. Motorola, Inc., ASBCA No. 48841, 96-2 BCA ¶ 28,465 at 142,172, *aff'd*, 125 F.3d 1470 (Fed. Cir. 1997) (*Motorola I*).

93. *Id.* (citing United States v. United Techs. Corp., 51 F. Supp. 2d 167 (D. Conn. 1999)).

94. 10 U.S.C. § 3707(a)(2); 41 U.S.C. § 3507(a)(2).

95. *See* 31 U.S.C. § 3729(a)(1)(A)–(B); Universal Health Servs., Inc. v. United States, 579 U.S. 176, 176 (2016).

96. United Techs. Corp., Pratt & Whitney, ASBCA No. 51410, 99-2 BCA ¶ 30,444; United States v. United Techs. Corp., 255 F. Supp. 2d 787 (S.D. Ohio 2003).

97. Due to this competitive context, the contractor had initially claimed defective pricing could not occur because certified cost or pricing data was not required. The Board ultimately determined that under the earlier version of TINA that applied in 1984, the contracting officer had discretion to require certified cost or pricing data despite any adequate price competition. *United Techs. Corp.*, 99-2 BCA ¶ 30,444.

98. United Techs. Corp., Pratt & Whitney, ASBCA No. 51410, 99-2 BCA ¶ 30,444.

99. United Techs. Corp., ASBCA No. 51410, 04-1 BCA ¶ 32,556.

100. *Id.*

101. *See* United Techs. Corp v. United States, No. 3:99-cv-093, 2008 WL 3007997 (S.D. Ohio Aug. 1, 2008).

102. *Id.*

103. *See* United States v. United Techs. Corp., 626 F.3d 313 (Fed. Cir. 2010).

104. *Id.*

105. Case No. 15-12225, 2017 WL 1457493 (E.D. Mich. Apr. 25, 2017).

106. BAE Sys. Tactical Vehicle Sys. LP, ASBCA No. 59491, 16-1 BCA ¶ 36,450.

107. BAE Sys. Tactical Vehicle Sys. LP, ASBCA No. 59491, 17-1 BCA ¶ 36,585.

108. *BAE Sys. Tactical Vehicle Sys.*, 2017 WL 1457493.

109. Stipulation of Dismissal, United States v. BAE Sys. Tactical Vehicle Sys., LP, No. 2:15-cv-12225 (E.D. Mich. filed June 1, 2017).

110. Under Federal Rule of Civil Procedure 9(b), "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."

111. Civ. Action No. 02-0381, 2002 WL 35646125 (W.D. La. Dec. 3, 2002).

112 No. SA-02-CA-028-WWJ, 2005 WL 729684 (W.D. Tex. Feb. 4, 2005).

113. United States *ex rel.* Sallade v. Orbital Sci. Corp., No. CV-05-0604-PHX-NVW, 2008 WL 2020463 (D. Ariz. May 9, 2008).

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114. For one other case within the last 20 years that touches on the same subject, see also the following: United States *ex rel.* Cafasso v. Gen. Dynamics C4Systems, Inc., No. CV 06-01381 PHX, 2008 WL 11450638 (D. Ariz. Aug. 11, 2008).
115. Civ. No. WMN-02-754, 2007 WL 9780445 (D. Md. Oct. 17, 2007).
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. 553 U.S. 662 (2008).
122. Allison Engine was a subcontractor to Bath Iron Works and Ingalls Shipbuilding, who were the prime contractors working for the U.S. Navy.
123. United States *ex rel.* Sanders v. Allison Engine Co., 364 F. Supp. 2d 699 (S.D. Ohio 2003).
124. United States *ex rel.* Sanders v. Allison Engine Co., No.1-:95-CV-970, 2005 WL 713569 (S.D. Ohio Mar. 11, 2005).
125. United States *ex rel.* Sanders v. Allison Engine Co., 471 F.3d 610, 615 (6th Cir. 2006).
126. Allison Engine Co., Inc. v. United States *ex rel.* Sanders, 553 U.S. 662, 665 (2008).
127. *Id.* at 669.
128. United States *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 492 (D.C. Cir. 2004).
129. Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, 123 Stat. 1617 (2009).

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