

# Contract Disputes

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# Overview

- Contract Terminations
- Asserting Defenses to Government Claims:  
Maropakakis and its Progeny
- Government Claims and Abusing Defective Pricing  
Law

# Contract Terminations

# Terminations: Changed Environment

- Budget pressures
- Active and critical oversight
- Threats of termination for default and early notices to cure
- More rapid resort to termination / de-scope options

# Termination for Convenience

- Broad but not unlimited discretion for the Government
  - *Tigerswan, Inc. v. United States*, 118 Fed. Cl. 447 (2014)
    - Alleged abuse of discretion in T4C followed by sole-source procurement from another contractor
  - *Applied Business Mgmt. Solutions v. United States*, 117 Fed. Cl. 589 (2014)
    - Termination and sole-source reprocurement

# Termination for Convenience

- ASBCA reverses course for recoveries under commercial-item procurements
  - *SWR, Inc.* (Dec 2014)
    - FAR 52.212-4(l) “reasonable charges [that] . . . have resulted from the termination” read broadly to provide fair compensation.
    - Abandons prior position that only costs in the nature of “settlement expenses” were recoverable

# Termination for Default

- Increased and earlier use of the threat of termination
  - *New Iraq Ahd Co.*, ASBCA 58768 (Oct. 2014) (threat of termination within government rights and not improperly coercive)
- Response challenges
  - Rapid responses on complex issues
  - The record to date
  - The path forward
  - Managing the relationship
- High stakes
  - *DODS, Inc.*, ASBCA 57746, 58252 (Jul. 2014) (Contractor terminated after proposing delayed schedule in response to cure notice)

# Termination for Default

- Identifying affirmative claims and defenses
  - Government delays and failures to cooperate
  - Constructive and directed changes
  - Waiver of requirements or schedules
  - Waiver / Estoppel by failure to terminate promptly
- Protecting claims and defenses, even before you need them
  - Comply with notice requirements / alert the CO
  - Watch out for inappropriate / overbroad releases

# Asserting Defenses to Government Claims: *Maropakis* and its Progeny

## *Maropakis*

- *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010)
  - Contract completed 467 days late
  - Maropakis requested 447 day extension
    - Letter not certified
    - Did not request final decision by CO
  - CO issues final decision on government’s claim for liquidated damages
  - Federal Circuit
    - Reject Maropakis’ argument that the underlying facts of its time extension request could be presented as a defense to the government’s liquidated damages assessment
    - “[A] contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, whether asserting the claim against the government as an affirmative claim or as a defense to a government action.”

# Developments

- *Sikorsky Aircraft Corp. v. United States*, 102 Fed. Cl. 38 (2011)
  - *Maropakis* involved a defense seeking contract modification and not a “traditional common law defense that [is] independent of the means by which a party seeks equitable adjustment to a government contract.”
- *TPL, Inc. v. United States*, 118 Fed. Cl. 434 (2014)
  - Court ignored “common law” labels Contractor applied to defenses in breach of contract case: impracticability, mutual mistake of fact, and unconscionability.
- *Total Eng'g, Inc. v. United States*, 120 Fed. Cl. 10 (2015)
  - *Maropakis* did not bar contractor's “defective specifications” defense to a government claim.
- *Asfa Int'l.*, ASBCA No. 57880, 14-1 BCA ¶ 35,736 (Sep 2014)
  - *Maropakis* did not bar Contractor’s defense of waiver by forbearance against Government claim for liquidated damages.

# Developments

- *Raytheon Co. v. United States*, 747 F.3d 1341 (Fed. Cir. 2014)
  - The government's failure to obtain a CO's final decision on its equitable adjustment defense prohibited the Court from considering the government's defense.
- *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000 (Fed. Cir. 2015)
  - Contractor sought (1) remission of liquidated damages, asserting the LD clause was unenforceable; (2) remission of LDs, asserting entitlement to time extensions; (3) additional compensation on account of other contract changes.
  - Federal Circuit affirms COFC dismissal of the claim for remission based on entitlement to time extension.
  - Entitlement to an extension had not been properly submitted for the CO's final decision, meaning the COFC had no jurisdiction.

## Where Are We Now?

- “Seeking an adjustment of contract terms”
- “Traditional common law defenses”
- Does the label matter, if the effect is the same?



## Practical Takeaways



- Be mindful of potential impacts
- Identify defenses to government claims early in the claims process
- Recognize this is a developing area of law
- Consider protective claims to the contracting officer

# **Contractor Claims: Bad, Ugly & Never Good**

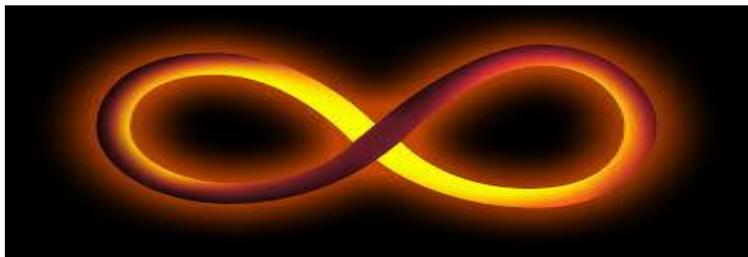
# Welcome to Government Claims



# Government Claims: Good or Bad?

## What's Bad?

- No Accountability
- No Rationality
- No Legality
- No Finality



## What's Good?

**“Absolutely Nothing”**

- Edwin Starr

# Defective Pricing's Back!



## TINA's Ups & Downs

- Boom Years – 1970s & 80s
  - Vietnam & Emergencies
- Lean Years – 2000s
  - FASA, IPTs, & De-emphasis
- TINA Redux – 2014-15
  - Old Awards (2006-2009)
  - Lots of Audit Buzz
  - Multiple ASBCA Appeals



# Proving Defective Pricing



## Remember the 5 "Points"

**Government bears burden of proof for "five points" of defective pricing**

- 1. Cost or Pricing Data**
- 2. Data Reasonably Available**
- 3. Not Disclosed or Known to Government**
- 4. Government Reliance on Data**
- 5. Causation of Increased Price**

## DCAA Audit Manual

### 14-102 The DCAA Postaward Audit Program

a. Defective pricing occurs when a contractor does not submit or disclose to the Government cost or pricing data that is accurate, complete, and current prior to reaching a price agreement. Generally, the auditor establishes the existence of defective pricing in a postaward audit by examining and analyzing the records and data available to the contractor as of the date of prime contract price agreement and comparing them with the submitted cost or pricing data.

b. The objective of a postaward audit is to determine if the negotiated contract price was increased by a significant amount because the contractor did not submit or disclose accurate, complete, and current cost or pricing data. To show that defective pricing exists, the audit must establish each of the following five points:

- (1) The information in question fits the definition of cost or pricing data.
- (2) Accurate, complete, and current data existed and were reasonably available to the contractor before the agreement on price.
- (3) Accurate, complete, and current data were not submitted or disclosed to the contracting officer or one of the authorized representatives of the contracting officer and that these individuals did not have actual knowledge of such data or its significance to the proposal.
- (4) The Government relied on the defective data in negotiating with the contractor.
- (5) The Government's reliance on the defective data caused an increase in the contract price.

Establishing these five points is a necessary prerequisite to support recommended price adjustments and provide the contracting officer with the information to achieve price reductions to contracts.

# Abusing Judgments



## Facts vs. Judgments

- DCAA/DOJ Allegations
  - Estimates & Escalation
- Pricing Realities
  - FAR § 2.101 (judgments)
  - Contract Pricing Ref. Guide
    - “educated guesses”



## Judgments Okay

### ASBCA Precedent

“We find that the subject escalation factor was not cost or pricing data.”  
*UTC*, 04-1 BCA 32,556.

### DCAM Guidance (14-104.7)

14-104). Therefore, errors in estimates (i.e., estimated escalation factors, estimated direct labor rates, etc) generally would not result in defective pricing because these estimates represent judgments rather than factual, verifiable data (i.e., cost or pricing data).

# Demanding Use vs. Disclosure

## Use vs. Disclosure

- DCAA/DOJ Allegations
  - Failed to use cost data
- Audit Realities (DCAM)

### 14-104.7 Errors in Cost or Pricing Data

TINA addresses only the submission of cost or pricing data. It does not require a contractor to use such data in preparing its proposals or for there to be a relationship between the proposals and the conclusions that can be drawn from such data. Furthermore, the certification relates only to the cost or pricing data. The offeror does not certify its proposal. Therefore, under TINA, the proposal does not constitute cost or pricing data and, therefore, does not have to be free from mathematical errors. However, errors can result in in-

## Disclosure Only

### ASBCA Precedent

“The plain language of the Act does **not obligate a contractor to use** any particular cost or pricing data to put together its proposal. Indeed, TINA does not instruct a contractor in any manner regarding the manner or method of proposal preparation.”  
*United Technologies Corp.*, 04-1 BCA 32,556

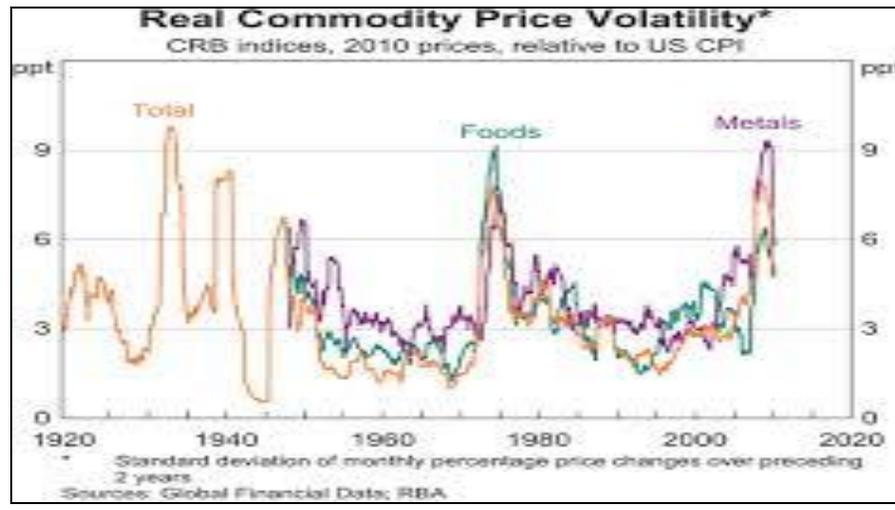
### Federal Precedent

- *Martin-Baker* (D.C. Cir. 2004)
- *UTC* (6<sup>th</sup> Cir. 2015)

# Cherry-picking Volatile Data

## High-Volatility Pricing

- DCAA Allegations
  - Using snapshot of data
- Market Realities



## Volatile Data Not Reliable

“As for the heavy scrap, we have found that scrap prices vary widely over a period of time and for that reason appellant’s proposed credit was based upon an average of \$.01 per pound realized in performing previous contracts for sales of two grades of heavy metal scrap and turnings. On the basis of uncontradicted testimony by Mr. Gaw we have found that **no single selling price can reasonably be considered applicable for any extended period of time.** The evidence does not establish whether the August 1965 selling price for heavy scrap cited in the DCAA post award audit report was in effect the entire month of August, some lesser period, or a greater period, or whether that price was actually an average of various scrap selling prices in effect during part or all of August 1965.” *Norris Industries, Inc.*, ASBCA No. 15442, 74-1 BCA ¶ 10,482

# Battling Forward Pricing Rates

## Forward Pricing Rates

- **DCAA Allegations**
  - **Must tell PCO**
- **Legal Realities**
  - **FAR § 15-407-3 (a) vs. (b)**
  - **DFARS § 215.407-3 (ACO)**
  - **Disclosure & Reliance**
    - *FMC, 87-1 BCA 19,544*
    - *Litton, 93-2 BCA 25,707*
    - *Texas Inst., 89-1 BCA 21,489*

## FAR § 15-407-3 Forward Pricing

(a) When certified cost or pricing data are required, offerors are required to **describe any forward pricing rate agreements (FPRAs)** in each specific pricing proposal to which the rates apply and to **identify the latest cost or pricing data already submitted** in accordance with the FPRA. All data submitted in connection with the FPRA, updated as necessary, form a part of the total data that the offeror certifies to be accurate, complete, and current at the time of agreement on price for an initial contract or for a contract modification. (See the Certificate of Current Cost or Pricing Data at [15.406-2](#).)

(b) Contracting officers will use FPRA rates as bases for pricing all contracts, modifications, and other contractual actions to be performed during the period covered by the agreement. Conditions that may affect the agreement's validity shall be **reported promptly to the ACO**. If the **ACO determines** that a changed condition invalidates the agreement, the **ACO shall notify** all interested parties of the extent of its effect and status of efforts to establish a revised FPRA.

# Flipflopping after Negotiations

## Negotiations vs. TINA Claims

- DCAA Allegations
  - Ignoring Negotiation Facts
- Negotiation Realities
  - Contractor disclosed facts
  - Gov. engineers reported
  - Parties negotiated risks
  - PCO accepted risk impact
  - DCAA 2<sup>nd</sup> Guesses All

## Negotiation Context

“Care must also be taken to try to tie the assessment to a consideration of the parties’ actions at the time and to **avoid imposing an after-the-fact perspective on how the negotiations should have been conducted** to produce improved results from a particular party’s point of view.” *Aerojet Ordnance Tenn.*, 95-2 BCA ¶ 27,922



# Missing Deadlines



## TINA Claims 6 Years Later

- Agency Allegations
  - Final Decisions > 6 Years
- Legal Realities
  - 41 U.S.C. § 7103(a)(1)(4(A))
    - 6 Years after **accrual**
  - FAR § 33.201 (“accrual”)
    - Knew or Should Have Known

## ASBCA Precedent

“[T]he Government had established the basis for its defective pricing claim . . . more than six years before the COs’ June 2008 decisions issued.” *McDonnell Douglas Servs.*, 10-1 BCA ¶ 34,325



# Sandwiching Subcontractors

## TINA vs. Subcontractors

- DCAA Allegations
  - Asserting Prime Reliance
- Strategic Realities
  - No 2-Front Wars
  - 10 Points of Proof



**Prime**

+



**Sub**

## Prime Negotiation Record

“[Boeing] based its negotiation position with Resalab with respect to the estimated labor hours on its own in-house technical evaluation of Resalab’s man-hour estimate which involved a physical survey of Resalab and technical interface with Resalab.” *The Boeing Co.*, ASBCA No. 20875, 85-3 BCA ¶ 18,351



# Screaming Fraud + TINA

## TINA → Fraud

- IG Allegations
  - Alleging falsity
- Legal Realities
  - COPD (*J.T. Construction*)
  - Judgments (*Allison*)
  - Use (*Martin-Baker*)
  - Fair Market Value (*UTC*)
  - Presumptions (*Singer*)



## DCAA Fraud Indicators

### 14-121.2 Examples of Conditions Warranting Consideration of a Fraud Referral

The following are examples of conditions found during defective pricing audits which warrant additional evaluation to determine if there is a reasonable basis for suspecting fraud.

- a. High incidence of persistent defective pricing.
- b. Repeated defective pricing involving similar patterns or conditions.
- c. Continued failure to correct known system deficiencies.
- d. Consistent failure to update cost or pricing data with knowledge that past activity showed that prices have decreased.
- e. Undisclosed specific knowledge regarding significant cost issues that will reduce proposal cost. Two examples are a revision in the price of a major subcontract and settlement of union negotiations resulting in lower increases in labor rates.
- f. Denial by responsible contractor employees of the existence of historical records that are later found.

# Resolving TINA Disputes

## Litigation vs. ADR



- PCO Allegations
  - Rubberstamping DCAA
- Legal Realities
  - Contract Disputes Act
    - Resolution vs. Litigation
  - FAR § 15.407-1(d)
    - Due Process
  - Opportunity to Rebut
    - Sooner = Better

## 3 Party Oversight

- ADR Policy (FAR § 33.204)
  - “Agencies are encouraged to use **ADR** procedures to the **maximum extent practicable.**”
- ADR Procedure (FAR § 33.214)
  - Objective: inexpensive & expeditious
  - Agreement (*e.g.*, ASBCA sample forms)
- Other Ideas
  - Contracting Officer as Neutral
  - Government Counsel as Gatekeeper

# Questions?

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