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Defective Pricing & The False Claims Act

By David Z. Bodenheimer, Brian Tully McLaughlin, and Jason M. Crawford[*]

The Truth in Negotiations Act (TINA) establishes a contractual remedy via a price reduction clause.[1] The False Claims Act (FCA) deters fraud with treble damages and statutory penalties.[2] These Acts arose out of different laws and histories separated by nearly 100 years, yet they bear some striking parallels:

- *Legislative History*. Both TINA and the FCA trace their roots to common concerns that military contractors reaped windfall profits by overcharging the Government under contracts let without competition.
- *DOD Policy*. Both the Defense Contract Audit Agency (DCAA) and the Department of Defense (DOD) Inspector General include fraud on their checklists when conducting defective pricing audits or investigations.
- *Litigation & Investigations*. In many cases, defective pricing audits have metastasized into FCA investigations or litigations—or even worse, parallel TINA and FCA litigations.

This BRIEFING PAPER discusses: (1) the historical factors and practical warning signs linking defective pricing and fraud and why garden-variety defective pricing may grow into an FCA investigation and/or litigation; (2) the burdens and elements of proof in TINA and FCA litigations and how certain elements may overlap and even bolster defenses to both defective pricing and fraud actions; and (3) the procedural elements of TINA and FCA actions—such as stays of proceedings, evidentiary standards, and statutes of limitation—and where these factors may determine the outcomes in both defective pricing and fraud proceedings.

Links Between Defective Pricing & FCA Actions

Sometimes, defective pricing cases turn into fraud actions. Both contrac-

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tors and agencies need to understand what may cause an ordinary contract dispute to expand into an FCA battle.

At first blush, TINA and FCA actions might seem like unlikely companions. Under TINA, the contractor must submit certified cost or pricing data prior to price agreement (assuming no exceptions apply) and the agency has a contractual remedy to reduce the contract price if the agency can prove the five points of defective pricing.[3] In contrast, a contractor (or other person) that knowingly submits a false claim may be subject to treble damages and statutory penalties if the Government can prove the elements of an FCA action.[4]

Despite such differences, both history and policy may explain why the Government could start with a defective pricing audit and end up with a fraud claim. Such factors linking TINA and FCA actions include legislative and executive history concerning inflated prices and windfall profits on wartime contracts, audit and Inspector General guidance to ferret out fraud in defective pricing matters, and FCA precedents based upon TINA certificates.

Wartime Pricing & Legislative Responses

Separated by nearly a 100 years, the Civil War version of the FCA statute hailed from a time of wooden naval vessels and horse-mounted cavalries,[5] while TINA came well after the onset of steel aircraft carriers and tank-driven armies.[6] Yet a common theme runs through both the FCA and TINA legislative histories: sudden military ramp-ups led to noncompetitive contracting and, in turn, sharp allegations that military contractors reaped windfall profits with inflated prices. As a practical pointer, these same factors—military exigencies, sole-source contracts, and high profits—serve as red flags for both Government auditors and investigators and forewarn a company's compliance team that a TINA audit or even an FCA investigation may be just around the corner.

Government charges of war profiteering and windfall profits have been leveled at contractors throughout history:

> Price gouging is not new to the twentieth century and the multinational conglomerates. Farmers during the Revolution did not miss the chance to hike their prices as the law of supply and demand gave them the opportunity.[7]

During the Revolutionary War, the Continental Congress turned to wage-price controls in an attempt to regulate market prices, but found them not only to be "ineffectual," but also "productive of very evil Consequences."[8] Although wage-price controls have been tried a few times since then, history has largely discredited them and Congress has turned to other remedies to deter wartime price gouging.[9] The FCA and TINA statutes represent two such remedies.

FCA Legislative History

Within months, the Civil War's escalating demands for arms and war materials rapidly outstripped the capacity of the public arsenals and private industrial base, thus leading to "speculations and exorbitant prices."[10] In fact, the unprecedented logistical demands proved to be so overwhelming that the U.S. Quartermaster General had to look to Napoleon's experience with his 40,000-soldier French army as a benchmark for military requirements.[11] To meet these bulging military needs, the War Department relied heavily upon military contractors.[12] As Senator Jacob Howard colorfully stated, "it is entirely clear that without the employment of contractors for the purpose of procuring [arms, equipment, and munitions of war], the Army itself would be totally worthless and useless."[13]

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But Government reliance on these Civil War military contractors was followed by allegations of fraud, waste, and abuse, as documented in the FCA legislative history. Three of the predominant themes from these wartime commissions and legislative reports revolved around acquisition shortcuts, noncompetitive contracting, and excessive contractor prices and profits:

- *Cutting Red Tape*. Military officers such as General John Frémont took contracting shortcuts to obtain military supplies, justifying such actions based on military exigency and the need to cut "the red tape of the Washington people."[14]

- *Avoiding Competition*. At the time of the Civil War, the law generally required competition in military procurements,[15] but the FCA legislative history repeatedly cites a lack of competition as a major factor behind the contracting abuses, windfall profits, and excessive prices.[16]

- *Charging Excessive Prices.* A dominant theme running throughout the Civil War legislative history centers upon contractors charging excessive prices and reaping windfall profits, often described in colorful terms: "exorbitant" prices and profits, "licenses to plunder the public treasury" with "extravagant" prices and profits, "the El Dorado of army contractors," and "large gains above the market value."[17]

These same factors often presage defective pricing audits and litigations. First, while urgency is not a defense to a claim of defective pricing, international crises and military ramp-ups often lead to shortcuts by both agencies and contractors, later bringing on the woes of TINA disputes.[18] Second, defective pricing arises out of noncompetitive procurements, given that TINA bars agencies from seeking certified cost or pricing data when adequate competition exists.[19] Third, while TINA is a disclosure statute rather than "an excess-profits law,"[20] both the DOD Inspector General and DCAA have historically viewed high profits as indicators of ordinary or even fraudulent defective pricing.[21] Given these overlaps between the FCA legislative history and actual TINA disputes, neither contractors nor agencies can be surprised if an FCA action trails a defective pricing audit.

TINA Legislative History

Over 90 years after it passed the Civil War version of the FCA legislation, Congress again became perturbed about DOD's trend away from competitive advertising.[22] As its first step, Congress gave the General Accounting Office (GAO) the statutory right to audit negotiated contracts.[23] Based upon its audits of high-dollar military contracts, GAO reported significant overcharges on these contracts, thus triggering a blizzard of congressional hearings.[24] From these audits, GAO found that insufficient cost or pricing data during negotiations resulted in excessive prices:

> The excessive prices disclosed by our audit resulted principally from the contractors' failure to submit, or the military department to obtain, accurate, current, or complete cost data upon which to establish prices.[25]

By 1962, the House of Representatives debated the Truth in Negotiations bill on the floor. In his comments on the legislative proposal, Rep. Carl Vinson (Chair, House Armed Services Committee) summarized the primary thrust of TINA to level the negotiation playing field by assuring that the Government had the same facts as the contractor:

> But I do not believe in the Government having to pay for being outguessed, or perhaps I should say outmaneuvered in negotiations simply by having actual costs known to the contractor at the time of the negotiations, withheld from the Government negotiators.[26]

A number of Rep. Vinson's comments supporting the Truth in Negotiations bill echo themes from the FCA legislative history:

- *Inflated Prices.* Based on the GAO audits, "prices had been artificially boosted by over $60 million, merely by withholding data at the negotiating table."[27]

- *Excessive Profits*. The proposed bill "prevents profits being paid for artificial savings."[28]

- *Deception During Negotiations*. The bill avoids "deception in negotiations" because the contractor "ought not be permitted to pull the wool over the eyes of the Government negotiators by withholding that information."[29]

As discussed below, a contractor that knowingly withholds cost or pricing data during negotiations runs a seri-

ous risk of a defective pricing audit turning into an FCA action.

Policies Linking Defective Pricing & Fraud

In its Contract Audit Manual, DCAA addresses the intersection of defective pricing and fraud. In Chapter 14, the manual specifically warns that defective pricing may result in either a criminal or civil fraud action.[30] Chapter 4 of the manual also includes guidance on the auditor's responsibilities for detection and reporting of suspected fraud, including defective pricing.[31] For many years, Chapter 14 of DCAA's manual listed specific examples that could result in a fraud referral, but the most recent version deletes this list and instead refers auditors to the DoD Inspector General's list of fraud indicators.[32]

In 1993, the DOD Inspector General issued its handbook flagging indicators of fraud for Government auditors.[33] Section IV of this handbook specifically addressed fraud indicators for defective pricing.[34] Nowadays, the DOD Inspector General's fraud indicators for both "Defective Pricing" and "Truth in Negotiations Act" appear on its website.[35] Under the "Defective Pricing" section, examples include the following:

- "Indications of falsification or alteration of supporting data."
- "Failure to update cost or pricing data even though it is known that past activity showed that costs or prices have decreased."
- "Specific knowledge not disclosed to Government regarding significant cost issues that will reduce contractor's proposed costs."
- "Contractor refuses, delays, or is unable to provide supporting documentation for costs."
- "Apparent high prices compared to similar contracts, price lists, or industry averages."
- "Materials, supplies, or components used in production are different than those listed in the proposal or contract."
- "Contractor fails to record rebates, discounts, etc."
- "Unrealistically high profit margins on completed work."
- "Failure to correct known system deficiencies which lead to defective pricing."[36]

For contractors and compliance officers alike, the DOD Inspector General and DCAA guidance on fraud indicators serves as a good starting point for distinguishing ordinary defective pricing from an FCA defective pricing action. By having these red flags on the compliance checklist, contractors may not only avoid FCA investigations and litigation, but may also deter defective pricing in the first instance.

Litigation Involving Defective Pricing & Fraud

In many defective pricing cases, ordinary contract disputes involving proposal negotiations and cost data may cross the line into the realm of fraud and FCA litigation. The examples below illustrate the wide range of facts giving rise to fraudulent defective pricing actions, as well of some of the warning signs that such an action may be on the way.

Pre-TINA Cases. Even before Congress enacted TINA, fraud suits have chased contractors engaging in sharp practices during contract negotiations. *United States v. Foster Wheeler Corp.*[37] is a good example of what contractors should not do when preparing proposals, disclosing cost data, and conducting negotiations. In 1958, after finding the proposed prices for manufacturing and installing ship boilers to be too high, the Navy requested that Foster Wheeler submit a detailed cost breakdown for direct material and purchased parts.[38] In a misguided effort to support its proposed pricing, Foster Wheeler made several serious missteps:

- *False Historical Costs*. During negotiations, Foster Wheeler represented that it lost money on a prior contract, but the GAO auditors found that the company actually realized a 31% profit on that contract.[39]
- *Distorted Cost Data*. Foster Wheeler "juggled the weights of the various components—increasing the weight of more expensive materials and decreasing the weight of less expensive materials" to inflate direct material costs.[40]
- *Phony Cost Accounts*. In its cost breakdown, Foster Wheeler included a "miscellaneous contingency," but "there weren't any purchased parts in the speci-

fications or detailed estimate to cover the $24,472 miscellaneous contingency."[41]

Regardless of whether TINA requirements applied or not, *Foster Wheeler* offers a classic example of how not to do business with the Government.

Successful TINA/FCA Litigations. FCA litigations based upon TINA requirements and/or negotiation fraud span a broad range of facts. The examples below illustrate some cases where the FCA plaintiffs either ultimately prevailed or else survived pretrial motions to dismiss the pending TINA claims:

- *Unsupported Sales Commission*. In its proposal and during negotiations, the contractor represented that it had an agreement to pay a sales commission to a sales agent, but the contractor had no written proof of such an agreement and the court found that "other evidence in the record suggests that the 3% commission itself was a sham."[42]

- *Risk Contingencies & Supporting Data*. In declining to dismiss an FCA defective pricing action, the court relied upon complaints that the contractor "developed data, estimates, and variables from which it assigned specific dollar figures to the risks that it might encounter on each [delivery order] project . . . and thereby sought internally to protect itself from potential cost overruns and to guarantee profitability."[43]

- *Historical Data & Efficiencies*. Where the contractor "had accumulated eight months' worth of actual performance data at its [new] facility and had performed its own analysis of the information," the court found such data to be cost or pricing data under TINA.[44]

- *Inconsistent Negotiation Statements*. Where the contractor claimed during change order negotiations that "actual hours" supported its proposal—and then reversed course, claiming such hours to be estimated after the agency requested the back-up data, the court found the contradiction to be a false statement, stating that "contractors cannot play both sides of the net."[45]

Unsuccessful FCA/TINA Litigations. In other cases, FCA plaintiffs have based fraud claims upon TINA requirements, but failed to establish either FCA or TINA liability:

- *Change Orders & Future Efficiencies*. Where the subcontractor's internal documents anticipated that a change order would result in a price reduction with a sub-tier subcontractor and ultimately reduce the cost (and increase the profit) for a generator set, such data did not fall within the definition of cost or pricing data.[46]

- *Bill of Materials & Contractor Analysis.* Regarding a bill of materials (BOM) and the contractor's analysis of it, the Government's TINA/FCA claim failed for lack of proof of nondisclosure.[47]

- *Internal Analysis & Predicted Savings*. A contractor's failure to disclose "information about [its] decision to reject the projected $75 million in annual cost savings in the June 2006 internal analysis" did not show either a TINA or FCA violation.[48]

- *Expected Cost Underruns*. Where a contractor employee "directed that [the contractor] delay reporting expected cost under-runs in violation of TINA so that it could inflate its expected costs on the CH 1 subcontract," the plaintiff did not show how this allegation affected specific contracts or claim submissions.[49]

As these cases illustrate, both the Government and private-party plaintiffs (referred to as relators under the statute) may bring a wide variety of FCA actions based upon TINA certifications and certified cost or pricing data. Whether the plaintiffs win or lose often depends upon whether defective pricing can be proven as a threshold matter.

Burdens Of Proof & Overlapping Elements In TINA & FCA Litigations

Both TINA and FCA claims require the Government (or relator) to bear the burden of proof. To sustain this burden, the Government must establish specific elements that vary depending upon whether the claim rests upon TINA or FCA authority. This section of the BRIEFING PAPER addresses the following issues: (1) who bears the burden of proof in TINA and FCA actions; (2) what are the elements of a defective pricing claim; (3) what elements

must be proven in an FCA action; (4) how does a failure of proof on a TINA case affect an FCA action; and (5) where do the elements of TINA and FCA actions overlap.

Burden Of Proof In TINA & FCA Litigations

In both TINA and FCA actions, the Government (or relator in an FCA action) bears the burden of proving its claim by a preponderance of evidence.

Defective Pricing Actions. Defective pricing represents a Government claim. As with all Government claims, the burden of proof rests upon the claimant: "The Government has the burden of proving its entitlement to a price reduction under the Defective Pricing Clause."[50] To carry its burden of proof, the Government must establish its defective pricing claim by "a preponderance of the evidence."[51]

TINA Presumptions. Soon after Congress enacted TINA, the Armed Services Board of Contract Appeals (ASBCA) eased the Government's burden of proof by adopting a presumption that the "natural and probable consequence of the nondisclosure" would be to increase the negotiated price.[52] As the U.S. Court of Appeals for the Federal Circuit has held, this rebuttable presumption applies both to the element of reliance (whether the Government detrimentally relied upon cost or pricing data) and causation (whether defective pricing caused an increase in price).[53] In rejecting a Government argument that an irrebuttable presumption existed, the Federal Circuit explained that irrebuttable presumptions violate due process.[54]

FCA Actions. For an FCA suit, the statute expressly requires the plaintiff (whether the Government or the relator) to prove all elements of the cause of action:

> In any action brought under [31 U.S.C.A. §] 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of evidence.[55]

As with defective pricing actions, a failure of proof on any element in an FCA action suffices to defeat the entire claim.[56]

FCA Presumptions. In one case, a court suggested that a rebuttable presumption may apply to damages in an FCA context.[57] However, this case addressed the propriety of a preliminary injunction against a corporate asset sale, not an FCA ruling on the actual damages to be recovered by the Government,[58] thus rendering the assertion of a "presumption" of damages mere *dicta*. Furthermore, courts have held that fraud is not presumed either under the FCA or common law fraud.[59] Similarly, the FCA statute does not include any presumption of fraud or damages, instead stating that the plaintiff must prove all essential elements, including damages, by a "preponderance of the evidence."[60]

Elements Of Proof In Defective Pricing Cases

Neither the TINA statute itself nor the decisions interpreting it provide a handy list of the elements of proof for a defective pricing claim.[61] However, DCAA's Contract Audit Manual has collected these elements of proof into what it calls the "five points" of defective pricing that represent "a necessary prerequisite" to an audit recommending a price adjustment.[62] These five points are summarized below:

- *Cost or Pricing Data*. The information fits the definition of cost or pricing data.
- *Reasonable Availability*. The cost or pricing data are reasonably available prior to the date of price agreement (or an alternate date as agreed by the parties).
- *Nondisclosure of Data*. The contractor did not disclose, and the Government did not know of, the current, accurate, and complete cost or pricing data prior to price agreement.
- *Reliance*. The Government reasonably relied upon the defective cost or pricing data to its detriment.
- *Causation*. The defective cost or pricing data caused an increase in the contract price.

Consistent with these five points of defective pricing, the statute, regulation, and cases all confirm these essential elements of proof in a defective pricing claim. Even if the Government prevails upon most of the elements of defective pricing, the failure of proof on just one element suffices to defeat the Government's claim.[63]

(1) *Cost or Pricing Data*. In a TINA case, "the Government has the burden of proof as to whether the data in question are cost or pricing data."[64] Liability under both

TINA and the regulations hinge upon the defective data at issue being "cost or pricing data."[65]

(2) *Reasonability Availability of Data*. The Government must "show, by a preponderance of the evidence, that more accurate, complete and current cost or pricing data were reasonably available to [the contractor] on the date of certification under the prevailing circumstances."[66] The regulations expressly require the agency to consider the reasonable availability of the data at issue.[67]

(3) *Nondisclosure & Lack of Government Knowledge*. "[T]he Government has the overall burden of persuasion that it was not clearly advised of the relevant data and lacked knowledge of the claimed undisclosed cost or pricing data."[68] Both the statute and regulation establish the contractor's failure to disclose current, accurate, and complete cost or pricing data as a core element of defective pricing.[69]

(4) *Government Reliance on Data*. The Government "must demonstrate detrimental reliance on the defective data and show by some reasonable method the amounts by which the final negotiated price was overstated."[70] For this element, the Government has a rebuttable presumption of reliance, but bears the ultimate burden of proof.[71] Both the statute and regulation reflect the requirement of Government reliance upon defective data.[72]

(5) *Causation of Increased Price*. "The Government, nevertheless, retains the ultimate burden of showing a causal connection between the undisclosed or defective data and an overstated contract price."[73] As with reliance, the Government has a rebuttable presumption of causation, but must carry the ultimate burden of proof.[74] TINA expressly recognizes causation as necessary to the Government's claim of defective pricing by applying a "because" test for recovery: "such price was increased because the contractor (or any subcontractor required to make available such a certificate) submitted defective cost or pricing data."[75]

Elements Of Proof In FCA Suits

The FCA establishes liability for any person who knowingly submits a false claim to the Government or causes another to submit a false claim to the Government (the "false claim" provision)[76] or knowingly makes a false record or statement to get a false claim paid by the Government (the "false record" provision).[77]

False Claims Provision. To establish a *prima facie* cause of action for knowingly submitting a false claim under 31 U.S.C.A. § 3729(a)(1)(A), a plaintiff must prove the following elements by a preponderance of the evidence:

(1) *Claim for payment*. Consistent with the name of the statute (False Claims Act), a plaintiff must establish that the defendant submitted (or caused to be submitted) a claim for payment. The FCA defines a "claim" as any request or demand for money or property made directly to the United States or to a contractor, grantee, or other recipient if the money is to be spent on the Government's behalf.[78] Courts have described the submission of a false claim for payment as the *sine qua non* of an FCA cause of action.[79]

(2) *Falsity*. A plaintiff must also prove that a claim was "false" or "fraudulent." These terms are not expressly defined in the statute, but courts have required proof of an objective falsehood in cases premised on both factual falsity and legal falsity.[80] Absent fraud or some underlying falsity, the statute does not cover ordinary contract disputes and regulatory violations.[81]

(3) *Knowledge*. Under the FCA, specific intent to defraud is not required.[82] However, a plaintiff must show that the defendant acted "knowingly," which the statute defines as acting with actual knowledge, deliberate ignorance, or with reckless disregard of the truth or falsity of the information.[83] Innocent mistakes[84] or mere negligence does not suffice to establish FCA knowledge.[85]

(4) *Materiality*. To prevail under the FCA, the plaintiff must prove materiality, which the statute defines as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money."[86] As set forth in a unanimous decision of the U.S. Supreme Court, to be actionable under the FCA, "[a] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision."[87]

False Record or Statement Provision. To establish a violation of the "false statement" provision (31 U.S.C.A. § 3729(a)(1)(B)), a plaintiff must establish four elements:[88]

(1) *Record or Statement*. Defendant made or used a record or statement—or caused a record or statement to be made or used—in support of a false claim.

(2) *Falsity.* The record or statement was false (*see* falsity standard above).

(3) *Knowledge.* Defendant acted knowing that the record or statement was false (*see* knowledge standard above).

(4) *Materiality.* The false record or statement was material to the false claim (*see* materiality standard above).

The false statement cause of action is complementary to the false claim cause of action under 31 U.S.C.A. § 3729(a)(1)(A)[89] because liability under § 3729(a)(1)(B) can only be triggered upon the submission of a false claim.[90]

Layered Burden Of Proof In TINA/FCA Litigation

As illustrated in *Foster Wheeler* discussed above,[91] the Government or relator may pursue an FCA action involving proposals or negotiations without relying upon TINA as an underlying basis for the alleged fraud. However, if the plaintiff bases its FCA case upon TINA violations, the precedent generally shows that the plaintiff takes on something akin to a double burden. In such cases, the plaintiff must generally prove the elements of a defective pricing claim as a prerequisite to prevailing in the FCA suit. In other words, failing to prove any underlying defective pricing typically dooms the FCA action.

Cost or Pricing Data. In a defective pricing FCA suit based upon an allegedly false "Certificate of Current Cost or Pricing Data," the plaintiff must first prove that the information in question qualifies as certified cost or pricing data:

> In order to prevail on its cause of action under the False Claims Act, the Government has the burden of proving (1) that the subcontractor proposals were "cost or pricing data" within the meaning of the Truth in Negotiations Act. . ..[92]

Where the plaintiff based allegations upon nonfactual information such as judgments or predictions, the FCA suit failed.[93]

Reasonable Availability. For the TINA certificate, the contractor only certifies as to facts reasonably available "as of the date of agreement on the price" or "another date agreed upon between the parties."[94] Where the plaintiff establishes "an accumulation of facts in existence at the time the final contract price was set," this standard has been met.[95] However, if the facts did not become available prior to price agreement, the FCA plaintiff has lost.[96]

Disclosure or Government Knowledge. As one case aptly stated, "TINA is a disclosure statute."[97] In an FCA case based on defective pricing, "the Government has the burden of proving . . . that [the defendant] failed to disclose these data as required by the Act."[98] When such data has been disclosed, the court has denied the FCA suit.[99] Furthermore, the contractor is not required to use the cost or pricing data in its proposal, but must only disclose it to the Government:

> In some places . . ., the complaint seems to allege that [the contractor's] certificates of cost or pricing data were false because the company failed to use historical actual costs during negotiations with the Government. Yet we have found no case or regulation—nor has [the plaintiff] pointed to any—requiring the use of such data *during negotiations*.[100]

Reliance & Causation. Under TINA, the Government must prove that the allegedly defective data caused an overstated or "increased" price. In the FCA context, the plaintiff cannot establish defective pricing without establishing that the Government relied upon the cost or data, causing an increased price:

> "To prevail, [the Government] must establish that [the contractor] failed to disclose accurate, complete and current cost or pricing data; that the data not disclosed involved significant sums; and that [the Government] relied upon the inaccurate, incomplete, or noncurrent data, thus establishing the causal relationship between the incorrect data and the final negotiated price."[101]

Overlapping Elements Of Proof In FCA Defective Pricing Litigations

As illustrated by the cases discussed above, a TINA violation does not automatically prove fraud, nor does an FCA case (*e.g., Foster Wheeler*) necessarily depend upon proof of defective pricing. Furthermore, defective pricing and FCA actions have different elements of proof. Nonetheless, some facts that would defeat a claim of defective

pricing may also refute FCA allegations. The chart below illustrates some of the types of facts that may bear upon different elements of proof, but can affect the outcome of both TINA and FCA actions.

TINA	FCA
Cost or Pricing Data. The definition of cost or pricing data only covers verifiable facts,[102] not judgments like future escalation, engineering labor hour estimates, and discretionary pricing decisions.[103]	*Objective Falsity*. The FCA requires proof of an objective falsehood,[104] meaning that liability does not attach to disputed legal questions,[105] scientific judgments, or statements as to which reasonable minds could differ.[106]
Government Knowledge. A TINA claim fails not only where the contractor disclosed the data, but also when the Government had actual knowledge of the information, such as where the Government's records show that it reviewed, analyzed, or audited the data at issue.[107]	*Scienter*. To establish liability, a plaintiff must show that the contractor's failure to disclose cost or pricing data was done with actual knowledge or in reckless disregard.[108] Moreover, several circuits have recognized that Government knowledge of the relevant facts can negate the scienter element[109] such as when a contractor disclosed the calculations it used in support of its projected savings.[110]
Reliance. No governmental reliance on defective data exists if the Government negotiators failed to review the data at issue or actually relied upon independent and unrelated data to validate prices, such as Government independent estimates, price analysis, or technical evaluations.[111]	*Materiality*. In cases premised on defective pricing, plaintiffs must show that the incomplete data was material to the Government's decision to enter into certain contract terms, such as whether incomplete data about prior sales induced the Government to enter into a contract at an inflated price.[112]
Causation. The Government fails to show a causal connection between the undisclosed data and the overstated contract price where unsuitable or superseded data would not have affected the price or the data had no impact on the price.[113]	*Causation*. FCA damages are limited to those sustained by the Government "because of" the contractor's actions.[114]

Procedural Issues In TINA & FCA Actions

When defective pricing cases take the plunge into the FCA realm, a variety of procedural conundrums may arise. These questions include: (1) can the Government seek to stay a defective pricing litigation when TINA and FCA actions are proceeding in parallel, and if so, when; (2) how may facts from a TINA action affect the outcome of an FCA litigation; and (3) what statutes of limitations govern TINA and FCA actions.

Stay Of Defective Pricing Proceedings

The similar legislative histories, the DCAA and DOD Inspector General fraud indicators, and prior litigations all forewarn of the possibility that the Government may elect to proceed in parallel with separate, but indisputably related, TINA and FCA actions. In other words, a contractor could end up litigating a defective pricing case before the ASBCA while simultaneously defending against an FCA action in federal district court.

In such circumstances involving parallel litigations in two distinct forums, the Government sometimes may seek to stay a contract appeal proceeding before the ASBCA under the Contract Disputes Act (CDA) until a related FCA matter can be resolved in federal court. For a party seeking to stay any judicial proceeding, the Supreme Court has held that a stay would be granted "[o]nly in rare circumstances" and upon proof of "a clear case of hardship or inequity."[115]

In assessing a request to stay a CDA proceeding, the ASBCA has generally applied a four-prong test:

> (1) whether the facts, issues, and witnesses in both proceedings are substantially similar; (2) whether the ongoing investigations or litigation would be compromised by going forward with the case before us; (3) the extent to which the proposed stay would harm the nonmoving party; and (4) whether the duration of the requested stay is reasonable.[116]

The many factual and legal complexities of these precedents on stays of CDA proceedings could readily fill another Briefing Paper. Here, this discussion focuses upon two factors that are relatively unique to complex cost accounting and defective pricing cases where the Government bears the burden of proving its claims.

First, no forum in the world has more experience with TINA litigations than the ASBCA.[117] In both the CDA statute itself and the legislative history, Congress emphasized the importance of establishing a forum with specialized expertise in resolving Government contract claims.[118] Similarly, the ASBCA has highlighted its purpose to provide for the "inexpensive determination of appeals without unnecessary delay."[119] In deciding motions for a stay, the board has recognized the importance of this specialized and expeditious remedy for contractors: "Pursuant to the CDA, a contractor is entitled to have a properly asserted appeal litigated before, and decided by, the Board."[120]

Second, resolution of a defective pricing issue by the ASBCA may eliminate the need for an FCA proceeding. In a cost accounting dispute, the ASBCA cited this factor in denying a stay requested by the Government:

> Significantly, this appeal presents issues of contract interpretation that are *foundational* to the government's affirmative defense and *should be decided first, lest the cart go before the horse*. In that respect, this case is similar to *TRW,* where we found the underlying issues regarding the correctness of TRW's accounting for indirect costs to be within our statutory mandate to determine. *TRW,* [*Inc.*, ASBCA 51172,] 99-2 BCA ¶ 30,407 at 150,332. We said that if TRW's treatment of costs was found to be incorrect, the district court had jurisdiction to decide whether TRW's actions were fraudulent. *Id.*[121]

Given that proof of a TINA violation may serve as a threshold issue for an FCA defective pricing case as discussed above, a stay may in fact be contrary to *both* parties' interests where an ASBCA decision on the Government's defective pricing claim may effectively resolve both the TINA and FCA proceedings.

In a recent defective pricing matter involving parallel proceedings before the ASBCA and a federal district court involving defective pricing, the ASBCA declined the Government's request to stay the contractor's appeal until the district court decided the FCA case.[122] In reaching this decision, the ASBCA cited factors bearing upon multiple prongs of the test for granting or denying a stay of the board's proceedings, including the ASBCA's expertise with TINA litigations and the potential for efficiencies in the FCA case based on earlier resolution of the TINA case by the board:

- *ASBCA Expertise*. "In these appeals, we are presented with the issue of whether the government has correctly claimed that [the contractor] did not meet its contractual duty to disclose current, accurate, and complete cost or pricing data. This is an issue that is within our expertise and statutory mandate and we think that [the contractor] is entitled to our decision on the matter."[123]

- *Harm to Contractor*. "The risk of loss of witnesses and evidence, in addition to the deprivation of its right to an expeditious and inexpensive adjudication of a contract dispute by the Board, is sufficient to constitute a 'fair possibility that the stay' will harm [the contractor]."[124]

- *Judicial Efficiency*. "We think on balance that proceeding with the litigation before us is likely to lead to an earlier resolution of the contract claims which, in turn, may have the effect of simplifying and streamlining the issues to be decided in the FCA action."[125]

- *Unreasonable Delay*. '' '[A] stay of indefinite duration in the absence of a pressing need' is an abuse of discretion. We have not found a pressing need, and thus the length of the requested stay is unreasonable."[126]

Given these factors, this case illustrates the challenges that the Government may face in attempting to stay an ASBCA proceeding pending resolution of an FCA defective pricing suit in federal district court.

Evidentiary Implications Of TINA Disputes On FCA Actions

TINA litigations may affect the outcome of FCA defective pricing cases in multiple ways. At the most extreme level, findings in an administrative proceeding may collaterally estop the Government or the contractor in a subsequent FCA action. Even if not rising to the level of collateral estoppel, the findings in a CDA proceeding may ultimately serve as evidence tipping the decision in the FCA case. Finally, if the Government never proceeds with a CDA claim (or subsequently withdraws it), the Government or a relator may hit stiff headwinds in its FCA suit.

Collateral Estoppel. Issue preclusion (also referred to as collateral estoppel) prevents litigants, including the Federal Government, from relitigating an issue previously decided by another court or administrative forum.[127] If a CDA dispute and an FCA action involve the same or similar facts, a finding by a board of contract appeals may preclude the Government from seeking a contrary result in an FCA dispute, or vice versa.[128] The same can be said for a contractor seeking to defend itself against an FCA claim where the Government has successfully proven the five points of defective pricing in a CDA claim. However, if the FCA suit does not present the same or similar issues, then the court may find no collateral estoppel or issue preclusion.[129]

TINA Findings as Evidence. Even if a court stops short of finding issue preclusion, a prior decision in a related case at the board may still carry persuasive weight in the FCA action. For example, in denying a $299 million defective pricing claim, the Federal Circuit upheld an

ASBCA decision's finding that the Government did not review (much less rely upon) the allegedly defective cost data, but instead validated the prices based upon "competitive forces" and "market test[s] between the competitors."[130] While not finding issue preclusion, the Sixth Circuit found, when considering the related FCA claim, that the ASBCA findings and Federal Circuit ruling on competition and "market test between the competitors" to be both relevant and sufficient to reject the FCA damages claims.[131]

Withdrawal of Final Decision. An administrative claim for defective pricing can only be initiated by a Contracting Officer's (CO's) final decision. Accordingly, when a CO rescinds a final decision that claimed defective pricing, the board is left without a claim to adjudicate, thus mooting the contractor's appeal.[132] Moreover, a COs merit-based rescission of a final decision of defective pricing can mark the beginning of the end for the FCA action when the parallel litigation is based on the same underlying facts. For example, the CO's rescission of the final decision in an appeal before the ASBCA led to the federal district court in the related FCA case permitting discovery into the CO's decision to rescind; shortly thereafter, a settlement followed and the FCA case was voluntarily dismissed.[133] Indeed, a CO's decision to withdraw a final decision would seemingly be strong evidence of a lack of materiality, if not a lack of a false claim, too, in the parallel FCA action, given that it would indicate that the Government had continued to pay in spite of an underlying audit finding of defective pricing.[134]

No Administrative Proceedings. By definition, the Government bringing an FCA defective pricing case also has a contractual remedy under the CDA for a TINA claim. Similar to the CO later withdrawing a final decision of defective pricing, if the Government elects in the first instance not to pursue its CDA contractual remedy for defective pricing, however, that omission may undermine any related FCA action. While not a defective pricing case, one court denied the plaintiff's FCA claim where the Government had failed to take action to enforce its administrative remedies.[135] Thus, while it is not strictly required that the Government pursue an administrative remedy in order to bring an FCA suit based on defective pricing, the Government's failure to do so (or action to rescind a final decision of defective pricing) could be fatal to the ability of the Government or a relator to prosecute an FCA action.

Statute Of Limitations In TINA & FCA Disputes

The FCA has a two-tier statute of limitations.[136] The first tier sets the limitations period at six years from the date of violation (*i.e.*, the date of the claim for payment) regardless of the knowledge of the Government.[137] The second-tier extends the limitation period for three years from the date that the facts material to the action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances,[138] but in no event can an action be brought more than 10 years after the date on which the violation is committed.[139]

The CDA governs defective pricing claims under TINA.[140] The six-year statute of limitations begins to run from the date of a claim's "accrual."[141] As a general rule, a claim has accrued when all events have occurred necessary to fix liability and entitle the claimant to institute an action.[142] In a defective pricing case, the ASBCA will examine when the Government knew or should have known information relating to the formal elements of a defective pricing claim.[143] An exception to the six-year statute of limitations is carved out for claims by the Government against contractors for claims involving fraud.[144] Thus, both TINA and FCA actions provide for tolling of the statute of limitations where the Government did not know of the pertinent facts supporting the action, although the FCA bars any claim (whether the Government knew or not) after 10 years as noted above.

Guidelines

These *Guidelines* are intended to help you navigate the interplay between TINA and the FCA when litigating defective pricing and fraud proceedings. They are not, however, a substitute for professional representation in any specific situation.

1. A TINA violation, standing alone, does not constitute fraud unless, at a minimum, the Government or relator can prove that the defendant possessed the requisite scienter under the FCA—*i.e.*, the failure to disclose cost or pricing data must have been done with actual knowledge, deliberate ignorance, or with reckless disregard.

2. Both agencies and contractors must apply the five points of defective pricing to FCA defective pricing suits because a failure to prove one of the elements of defec-

tive pricing may also decide the outcome of the FCA litigation.

3. Agencies should remember that contractors have discretion in choosing the estimating techniques used in developing proposals such that estimates are generally not an appropriate basis for proceeding with FCA cases where the Government or relator must prove objective falsity.

4. Given that TINA cases often arise years after the negotiations concluded, both agencies and contractors should take steps to preserve the record of negotiations and disclosures, because the contemporaneous negotiation documents often determine the outcome in defective pricing cases as well as FCA actions based on TINA violations.

5. The DOD Inspector General list of fraud indicators may provide a useful guide for distinguishing ordinary defective pricing audits from FCA risks, thus helping contractors in designing effective compliance programs and internal controls.

6. The boards and the parties should be wary about staying defective pricing appeals pending resolution of a parallel FCA defective pricing suit, given that the boards have unmatched experience in deciding TINA cases and such resolutions may effectively moot or at least help streamline a parallel FCA defective pricing suit in federal district court.

ENDNOTES:

[1]10 U.S.C.A. § 2306a (applicable to the DOD, National Aeronautics and Space Administration (NASA), and Coast Guard); 41 U.S.C.A. §§ 3501 to 3509 (generally applicable to civilian agencies). The civilian version of the statute now carries the label of "Truthful Cost or Pricing Data," but this Briefing Paper will refer to TINA, which continues to be the title of the military version of the statute and the source of nearly all of the cases on defective pricing.

[2]31 U.S.C.A. §§ 3729 to 3733.

[3]10 U.S.C.A. § 2306a; 41 U.S.C.A. § § 3501 to 3509; Federal Acquisition Regulation (FAR) 15.407-1; see clauses at FAR 52.215-10 (for prime contracts), 52.215-11 (for prime contract modifications), 52.215-12 (for subcontracts), and 52.215-13 (for subcontract modifications); David Z. Bodenheimer, "Litigation & Proof in Defective Pricing Cases," 15-5 Briefing Papers 1 (Apr.2015).

[4]31 U.S.C.A. §§ 3729 to 3733.

[5]Act of Mar. 2, 1863, 12 Stat. 696 (1863).

[6]Pub. L. No. 87-653, 76 Stat. 528 (1962).

[7]James. F. Nagle, A History of Government Contracting 6 (1992).

[8]Bernard D. Reams, Jr., "Federal Economic Regulation Through Wage and Price Control Programs: 1917–1980 A Selected Bibliography," 74 Law Libr. J. 1, 3 (1981) (quoting 11 J. Continental Congress 1774–1789, at 569 (W.C. Ford ed. 1908)).

[9]James. F. Nagle, A History of Government Contracting 296–98 (1992); Bernard D. Reams, Jr., "Federal Economic Regulation Through Wage and Price Control Programs: 1917–1980 A Selected Bibliography," 74 Law Libr. J. 1, 4 (1981) (citing Hearings Before the Committee on Military Affairs on H.R. 3 and 5293, 74 Cong., 1st Sess. (1935)); Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23.

[10]Message of the President, H.R. Exec. Doc. No. 1, 37th Cong., 3d Sess., Vol. IV, at 13–14 (1862) (report of the Secretary of War); see also H.R. Rep. No. 37-2, at 34 (1861) (describing an "extraordinary demand for arms," extraordinary expenditures, and "a system of unprecedented speculation").

[11]Message of the President, H.R. Exec. Doc. No. 1, 37th Cong., 3d Sess., Vol. IV, Exhibits at 71, 77 (1862) (Report of the Quartermaster General).

[12]Id. at 69–70, 75–76.

[13]Cong. Globe, 37th Cong. 953 (1863) (statement of Sen. Howard).

[14]Letter from the Secretary of War: War Claims at St. Louis, H.R. Exec. Doc. 94, 37th Cong., 2d Sess. 30–31 (1862) (testimony of Lt. Col. Andrews); see id. at 32 ("without reference to law or regulations, [Gen. Frémont] intended to cut red tape and arrive at the end without reference to order or system") (testimony of Mr. Johnson); see also H.R. Rep. No. 37-2, at 38–40 (1861) (describing purchases of Austrian muskets and Hall carbines authorized by Gen. Frémont).

[15]H.R. Rep. No. 37-2, at 53 (1861) (congressional requirement for competitive advertising except for public exigency, but "Immense supplies, both in the Navy as well as the War Department . . . have been purchased privately, under contracts express or implied, without any competition being invited"); Letter from the Secretary of War: War Claims at St. Louis, H.R. Exec. Doc. 94, 37th Cong., 2d Sess. 6 (1862) ("Competition is invited, through public advertisements, that are never dispensed with, except under the pressure of emergencies which is not pretended existed in the cases now under consideration.").

[16]Message of the President, H.R. Exec. Doc. No. 1, 37th Cong., 3d Sess., Vol. IV, Exhibits at 70 (1862)

(Report of the Quartermaster General) ("Time has not been allowed for public competition . . .."); Letter from the Secretary of War: War Claims at St. Louis, H.R. Exec. Doc. 94, 37th Cong., 2d Sess. 8, 12, 17, 23 (1862) (no competition for many supplies and services, including horses, railroads, and vessels); H.R. Rep. No. 37-49, at 6, 7, 14, 15–17, 19 (1863) (no competitive advertising for cavalry horses, mules, mess-pans, camp kettles, tin plates, overcoats, pants, jackets, and canteens).

[17]H.R. Rep. No. 37-2, at 37, 52 (1861) ("price paid for arms was inexcusably exorbitant"; profits were "enormous" and "exorbitant"); Letter from the Secretary of War: War Claims at St. Louis, H.R. Exec. Doc. 94, 37th Cong., 2d Sess. 8, 9, 15, 17, 18, 23, 25 (1862) ("licenses to plunder the public treasury," "high profit, beyond market rates," "extravagant" prices and profits, "exorbitant" prices and profits, and "the El Dorado of army contractors"); H.R. Rep. No. 37-49, at 9, 11, 14–15, 19–21 (1863) ("large gains above the market value," "prices being exorbitant and above the market values," and "exorbitant price"); Message of the President, H.R. Exec. Doc. No. 1, 37th Cong., 3d Sess., Vol. IV, at 14 (1862) (report of the Secretary of War) ("The vast demand suddenly springboarding up, without any immediate increase of the supply, led to speculations and exorbitant prices."); United States ex rel. Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 (N.D. Cal. 1989) ("The abuses and damage done to the federal treasury and war effort was, for defense contractors, an opportunity for windfall profit. The contractors were fast becoming 'proverbially and notoriously rich.' " [citations omitted]).

[18]International crises and military emergencies ranging from the Berlin Wall crises and the Vietnam War and the Gulf Wars gave birth to many of the defective pricing actions. See, e.g., Sparton Corp., ASBCA No. 11363, 67-2 BCA ¶ 6539, at 30,376 and 30,382 (urgent sonabuoy procurement during Berlin Wall crisis, but defective pricing denied on other grounds); LTV Electrosystems, Inc., Memcor Div., ASBCA No. 16802, 73-1 BCA ¶ 9957, at 46,709, aff'd on recons., 74-1 BCA ¶ 10,380 (urgent procurement during Vietnam War not a defense); GKS, Inc., ASBCA Nos. 47692, 49296, 00-1 BCA ¶ 30,914, at 152,557, 42 GC ¶ 223 (urgency not a defense during Desert Shield). But see Central Navigation & Trading Co., S.A., ASBCA No. 23,946, 82-2 BCA ¶ 16,074, at 79,746 (finding data not reasonably available during fall of Saigon).

[19]10 U.S.C.A. § 2306a(b)(1)(A)(i) (exception for "adequate competition"); 41 U.S.C.A. § 3503(a)(1)(A); see Wynne v. United Techs. Corp., 463 F.3d 1261, 1264 (Fed. Cir. 2006), 48 GC ¶ 338; (denying $299 million defective pricing claim where agency relied upon competition and price analysis, not cost or pricing data).

[20]Sparton Corp., ASBCA No. 11363, 67-2 BCA ¶ 6539, at 30,382.

[21]DOD Inspector General, Fraud Detection Resources for Auditors, "Defective Pricing" and "Truth in Negotiations Act," https://www.dodig.mil/Resources/Fraud-Detection-Resources/Fraud-Red-Flags/ ("Unrealistically high profit margins on completed work"); see prior version of DCAA Contract Audit Manual (DCAM) § 14-117 (Dec. 2017) (directing auditors to examine the contractor's profit and loss statements as an indicator of defective pricing).

[22]For more extensive discussions of TINA's history, see, e.g., David Z. Bodenheimer, The Defective Pricing Handbook §§ 2.2–2.3 (Thomson Reuters ed. 2018); Herbert Roback, "Truth in Negotiating: The Legislative Background of P.L. 87-653," 1 Pub. Cont. L. J. 6 (1968).

[23]Act of Oct. 31, 1951, Pub. L. No. 82-245, 65 Stat. 700 (now codified at 10 U.S.C.A. § 2313(c) and 41 U.S.C.A. § 4706(d)). GAO is now known as the Government Accountability Office.

[24]Hearings on Air Force Contract AF 33 (038)-18503 Before House Subcomm. for Special Investigations of Comm. on Armed Services, 85th Cong., 1st Sess. 2566–67 (1957); Hearings on Weapons System Management Before House Subcomm. for Special Investigations of Comm. on Armed Services, 86th Cong., 1st Sess. 346, 375, 621 (1959); Consideration of H.R. 5532 by House Subcomm. for Special Investigations of Comm. on Armed Services, 87th Cong., 1st Sess. 619 (1961); Hearings on Relations of Cost Data to Military Procurement Before House Subcomm. for Special Investigations of Comm. on Armed Services, 88th Cong., 1st Sess. 6 (1963).

[25]Hearings on Relations of Cost Data to Military Procurement Before House Subcomm. for Special Investigations of Comm. on Armed Services, 88th Cong., 1st Sess. 6 (1963).

[26]108 Cong. Rec. 9973 (1962) (statement of Rep. Vinson).

[27]Id.

[28]Id. at 9972.

[29]Id. at 9973.

[30]DCAM § 14-118 (Mar. 2019).

[31]DCAM § 4-702.3 (Dec. 2017) (current on DCAA website as of May 1, 2019).

[32]DCAM § 14-121.2 (Dec. 2017) ((listing examples like "High incidence of persistent defective pricing," "Continued failure to correct known system deficiencies," and "Repeated use of unqualified personnel to develop certified cost or pricing data used in the estimating process"). While Chapter 14 deletes this list in the most recent version (DCAM § 14-118 (Mar. 2019)), other parts of the manual continue to refer to the now deleted list of fraud indicators. See DCAM Figure 4-7-3 (Dec. 2017) in latest version of Chapter 4.

[33]DOD Inspector General, Handbook on Fraud Indicators for Contract Auditors (IGDH 7600.3) (Mar. 31, 1993).

[34]Id. at IV-1–9.

[35]DOD Inspector General, Fraud Detection Resources for Auditors, "Defective Pricing" and "Truth in Negotiations Act," https://www.dodig.mil/Resources/Fraud-Detection-Resources/Fraud-Red-Flags/.

[36]Id.

[37]United States v. Foster Wheeler Corp., 316 F. Supp. 963 (S.D.N.Y. 1970).

[38]316 F. Supp. at 965.

[39]316 F. Supp. at 966.

[40]316 F. Supp. at 969.

[41]316 F. Supp. at 970.

[42]Communication Equip. & Contracting Co., Inc. v. United States, No. 72–88C, 1991 WL 288912, at *5 (Cl. Ct. Aug. 23, 1991) (The court also questioned the veracity of the contractor's primary witness testifying about the 10% sales commission because, in a separate state court litigation, the company had "denied that sales related to the NASA project were covered by the October 15, 1982 sales agreement").

[43]United States v. Sci. Applications Int'l Corp., No. SA-02-CA-028-WWJ, 2005 WL 729684, at *3 (W.D. Tex. Feb. 4, 2005).

[44]United States ex rel. Campbell v. Lockheed Martin Corp., 282 F. Supp. 2d 1324, 1332, 1335 (M.D. Fla. 2003) (granting and denying United States' summary judgment motion in part and denying contractor's motion for summary judgment).

[45]United States v. White, 765 F.2d 1469, 1482 (10th Cir. 1985) (upholding trial court finding of criminal false statements). While this case did not expressly cite TINA, it does underscore the risks of making contradictory statements to federal agencies during negotiations. In some cases, judges have found inaccurate statements during negotiations to be defective pricing under TINA. See, e.g., Am. Mach. & Foundry Co., ASBCA No. 15037, 74-1 BCA ¶ 10,409, at 49,173 (finding statement to be defective pricing, but ultimately denying the agency's claim due to failure to prove causation).

[46]United States ex rel. Thacker v. Allison Engine Co., 471 F.3d 610, 626 (6th Cir. 2006), rev'd on other grounds, 553 U.S. 662 (2008), 50 GC ¶ 251.

[47]United States v. United Techs. Corp., Sikorsky Aircraft Div., 51 F. Supp. 2d 167, 182 (D. Conn. 1999) (finding no fraud or defective pricing where court found that the Government failed to show that the "cost or pricing data contained within the Norden Update was not disclosed" to the Navy and that the Navy "could have performed the same mathematical exercise and was not significantly disadvantaged by the fact that Sikorsky did not provide [the Navy] with its analysis of the previously disclosed data").

[48]United States ex rel. Watkins v. KBR, Inc., 106 F. Supp. 3d 946, 954, 959 (C.D. Ill. 2015) (finding that the relator failed to show that "a conclusory estimate of saving $75 million under the Frankfurt Plan" constituted cost or pricing data).

[49]U.S. ex rel. Sallade v. Orbital Scis. Corp., No. SC05–00604–PHX–NVW, 2008 WL 114888, at *6 (D. Ariz. Jan. 4, 2008) (dismissing TINA counts for failure to establish claims based upon the undisclosed data and failure to "adequately identify the contracts that Orbital negotiated with the government without disclosing the required information").

[50]See David Z. Bodenheimer, "Litigation & Proof in Defective Pricing Cases," 15-5 Briefing Papers 1 (Apr. 2015) (citing Lockheed Aircraft Corp., Lockheed-Georgia Co. Div., v. United States, 485 F.2d 584, 586, 202 Ct. Cl. 787, 791 (1973)); see also Aerojet Ordnance Tenn., ASBCA No. 36089, 95-2 BCA ¶ 27,922, at 139,436 ("The Government has the burden of proof in a defective pricing claim."); Kaiser Aerospace & Elecs. Corp., ASBCA No. 32098, 90-1 BCA ¶ 22,489, at 112,884 ("Both parties recognize the basic principle that the Government bears the overall burden of proving those contentions [of defective pricing]."); Boeing Co., ASBCA No. 20875, 85-3 BCA ¶ 18,351, at 92,029 (Government "has burden of proving its entitlement to a price reduction" in a subcontractor defective pricing case).

[51]See David Z. Bodenheimer, "Litigation & Proof in Defective Pricing Cases," 15-5 Briefing Papers 1, at *2 (Apr. 2015) (citing Viacom, Inc.—Successor in Interest to Westinghouse Furniture Sys. v. Gen. Servs. Admin., GSBCA No. 15871, 05-2 BCA ¶ 33,080, at 163,971, 47 GC ¶ 457); see also Rosemount, Inc., ASBCA No. 37520, 95-2 BCA ¶ 27,770, at 138,454, 37 GC ¶ 540 (Government burden "entails proving three elements by a preponderance of the evidence"); Sperry Rand Corp., Univac Div., ASBCA No. 15289, 73-2 BCA ¶ 10,165, at 47,860 (Government's burden to prove claim "by a preponderance of evidence"); LTV Electrosystems, Inc., Memcor Div., ASBCA No. 16802, 73-1 BCA ¶ 9957, at 46,708 (Government must "show, by a preponderance of evidence, that more accurate, complete, and current cost or pricing data were reasonably available to appellant on the date of certification under the prevailing circumstances").

[52]Am. Bosch Arma Corp., ASBCA No. 10305, 65-2 BCA ¶ 5280, at 24,853.

[53]Wynne v. United Techs. Corp., 463 F.3d 1261, 1263 (Fed. Cir. 2006), 48 GC ¶ 338; Universal Restoration, Inc. v. United States, 798 F.2d 1400, 1406 (Fed. Cir. 1986).

[54]Universal Restoration, Inc. v. United States, 798 F.2d 1400, 1406 (Fed. Cir. 1986).

[55]31 U.S.C.A. § 3731(d). See also Federal Jury Practice and Instructions § 178:20 (6th ed.) ("In order to sustain plaintiff's burden of proof for the charge of knowingly submitting a false or fraudulent claim to the United States, plaintiff [name] must prove . . . the elements by a preponderance of the evidence.").

[56]United States ex rel. Purcell v. MWI Corp., 807 F.3d

281 (D.C. Cir. 2015), 57 GC ¶ 393, reh'g en banc denied (June 21, 2016), cert denied, 137 S. Ct. 625 (2017).

[57]United States ex rel. Taxpayers Against Fraud v. Singer Co., 889 F.2d 1327, 1333 (4th Cir. 1989).

[58]889 F.2d at 1330–31.

[59]United States v. Ueber, 299 F.2d 310, 314–15 (6th Cir. 1962) (applying rule to FCA suit); Equitable Life Assurance Soc'y of U.S. v. Johnson, 81 F.2d 543 (6th Cir. 1936) (applying rule to common law fraud).

[60]31 U.S.C.A. § 3731(d).

[61]This section draws heavily upon prior publications. See David Z. Bodenheimer, The Defective Pricing Handbook §§ 13.2–13.4 (Thomson Reuters ed. 2018); David Z. Bodenheimer, "Litigation & Proof in Defective Pricing Cases," 15-5 Briefing Papers 1, at *3–4 (Apr. 2015).

[62]DCAM § 14-102(b) (Mar. 2019).

[63]See, e.g., Chu Assocs., Inc., ASBCA No. 15004, 73-1 BCA ¶ 9906, at 46,456–57 (finding proof of nondisclosure, but denying claim due to lack of reasonable availability of cost data).

[64]Lockheed Corp., ASBCA Nos. 36420, 37495, 39195, 95-2 BCA ¶ 27,722, at 138,177, 37 GC ¶ 309; see also Aerojet Ordnance Tenn., ASBCA No. 36089, 95-2 BCA ¶ 27,922, at 139,436 (Government "must establish that the information at issue is 'cost or pricing data' within the meaning of the Truth in Negotiations Act"); Litton Sys., Inc., Amecom Div., ASBCA No. 36509, 92-2 BCA ¶ 24,842, at 123,944, 34 GC ¶ 206 ("Government must establish that the disputed information is 'cost or pricing data' within the meaning of the Truth in Negotiations Act").

[65]10 U.S.C.A. § 2306a(e)(1)(A); 41 U.S.C.A. § 3506(a)(1); FAR 15.407-1(b).

[66]LTV Electrosystems, Inc., Memcor Div., ASBCA No. 16802, 73-1 BCA ¶ 9957, at 46,708, aff'd on recons., 74-1 BCA ¶ 10,380; accord Litton Sys., Inc., Amecom Div., ASBCA Nos. 37616, 34435, 37615, 93-2 BCA ¶ 25,707, at 127,910; see also Sperry Rand Corp., Univac Div., ASBCA No. 15289, 73-2 BCA ¶ 10,165, at 47,860 ("Government had the burden of showing by a preponderance of evidence that appellant failed to furnish complete, accurate, and current cost or pricing data reasonably available to it up to the time of agreement on the price").

[67]FAR 15.408, Table 15-2, Note 1; see also FAR 15.406-2(b) ("the contractor had information reasonably available at the time of agreement").

[68]Conrac Corp., ASBCA No. 19507, 78-1 BCA ¶ 12,985, at 63,295; see also Grumman Aerospace Corp., ASBCA No. 27476, 86-3 BCA ¶ 19,091, at 96,493 ("Government bears the burden of proving that the contractor failed to disclose accurate, complete and current pricing data"); Boeing Co., ASBCA No. 32753, 90-1 BCA ¶ 22,426, at 112,642 ("contractor's obligations are discharged when the Government has actual knowledge of the data").

[69]10 U.S.C.A. § 2306a(a), (e)(1)(A); 41 U.S.C.A. §§ 3502, 3506(a)(1); FAR 15.407-1(b); FAR 52.215-10(a); FAR 52.215-11(b).

[70]Aerojet Ordnance Tenn., ASBCA No. 36089, 95-2 BCA ¶ 27,922, at 139,436; see also Wynne v. United Techs. Corp., 463 F.3d 1261, 1265 (Fed. Cir. 2006), 48 GC ¶ 338 ("reliance on defective pricing is a necessary element of a TINA claim"); Alliant Techsystems, Inc., ASBCA Nos. 47626, 51280, 00-2 BCA ¶ 31,042, at 153,297, 42 GC ¶ 339 ("Government has the burden of proving . . . that it relied upon defective data to its detriment").

[71]Wynne v. United Techs. Corp., 463 F.3d 1261, 1265 (Fed. Cir. 2006), 48 GC ¶ 338.

[72]10 U.S.C.A. § 2306a(e)(2); 41 U.S.C.A. § 3506(b); FAR 15.407-1(b)(2) ("contracting officer shall consider . . . the extent to which the Government relied upon the defective data").

[73]Rosemount, Inc., ASBCA No. 37520, 95-2 BCA ¶ 27,770, at 138,455, 37 GC ¶ 540; see also Universal Restoration, Inc. v. United States, 798 F.2d 1400, 1406 (Fed. Cir. 1986) (holding that Government failed to prove causation); Litton Sys., Inc., Amecom Div., ASBCA No. 36509, 92-2 BCA ¶ 24,842, at 123,944, 34 GC ¶ 206 ("Government must show detrimental reliance on the defective data and show by some reasonable method the amounts by which the final negotiated price was overstated").

[74]Wynne v. United Techs. Corp., 463 F.3d 1261, 1267 (Fed. Cir. 2006), 48 GC ¶ 338; Universal Restoration, Inc. v. United States, 798 F.2d 1400, 1406 (Fed. Cir. 1986).

[75]10 U.S.C.A. § 2306a(e)(1)(A); 41 U.S.C.A. § 3506(a)(1).

[76]31 U.S.C.A. § 3729(a)(1)(A).

[77]31 U.S.C.A. § 3729(a)(1)(B).

[78]31 U.S.C.A. § 3729(b)(2).

[79]"Evidence of an actual false claim is the 'sine qua non of a False Claims Act violation.' " United States ex rel. Aflatooni v. Kitsap Physicians Serv., 314 F.3d 995, 1002 (9th Cir. 2002) (citations omitted); see also United States ex rel. Snapp, Inc. v. Ford Motor Co., 532 F.3d 496, 505 (6th Cir. 2008), 50 GC ¶ 311 (false claim required for liability); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999), 41 GC ¶ 317 (stating that liability can only attach when there is a "call on the U.S. fisc"); United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995) (explaining that liability attaches to the "claim for payment").

[80]See, e.g., United States ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1018 (7th Cir. 1999) (finding that differences in interpretation growing out of a disputed legal question are not false under the FCA) (quoting Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1477–78 (9th Cir. 1996)); United States ex rel.

Parato v. Unadilla Health Care Ctr., Inc., 787 F. Supp. 2d 1329, 1339 (M.D. Ga. 2011) ("At a minimum, the FCA requires proof of an objective falsehood") (quoting United States ex rel. Roby v. Boeing, 100 F. Supp. 2d 619, 625 (S.D. Ohio 2000)).

[81]See, e.g., United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co., 612 F.3d 724, 726 (4th Circ. 2010), 52 GC ¶ 351 ("Congress crafted the FCA to deal with fraud, not ordinary contractual disputes."); United States ex rel. Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 373 (4th Cir. 2008) (plaintiff's attempt to "shoehorn what is, in essence, a breach of contract action into a claim that is cognizable under the False Claims Act" represented a "misguided journey [that] must come to an end"); United States ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1019 (7th Cir. 1999) ("Such minor technical violations, however, seem normal for a new bus program, and they do not give rise to an FCA claim.").

[82]31 U.S.C.A. § 3729(b)(1)(B).

[83]31 U.S.C.A. § 3729(b)(1)(A); United States v. Krizek, 111 F.3d 934, 941 (D.C. Cir. 1997) (equating reckless disregard to a standard of "gross negligence-plus."); Wang ex rel. United States v. FMC Corp., 975 F.2d 1412, 1420–21 (9th Cir. 1992), 34 GC ¶ 732 (no reckless disregard where the conduct at issue was the result of negligence or honest mistakes).

[84]Hindo v. Univ. of Health Scis./The Chicago Med. Sch., 65 F.3d 608, 613 (7th Cir. 1995) ("Innocent mistakes are not actionable under this section.").

[85]"Congress, however, has made plain" " 'its intention that the [FCA] not punish honest mistakes or incorrect claims submitted through mere negligence.' " United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co., 612 F.3d 724, 728 (4th Circ. 2010), 52 GC ¶ 351 (citing United States ex rel. Hochman v. Nackman, 145 F.3d 1069, 1073 (9th Cir. 1998) (quoting S. Rep. No. 99-345, at 7 (1986), 1986 U.S.C.C.A.N. 5266, 5272)); see also United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1267 (9th Cir. 1996) ("Innocent mistakes, mere negligent misrepresentations and differences in interpretation are not false certifications under the Act.").

[86]31 U.S.C.A. § 3729(b)(4).

[87]Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 1996 (2016), 58 GC ¶ 219.

[88]31 U.S.C.A. § 3729(a)(1)(B).

[89]See, e.g., Pencheng Si v. Laogai Research Found., 71 F. Supp. 3d 73, 87 (D.D.C. 2014).

[90]See, e.g., United States ex rel. DeCesare v. Americare In Home Nursing, 757 F. Supp. 2d 573, 585 (E.D. Va. 2010) (observing that a claim brought under the false statement provision must allege both that "(1) a false record or statement was used to obtain (2) a false claim paid by the government").

[91]United States v. Foster Wheeler Corp., 316 F. Supp.963 (S.D.N.Y. 1970).

[92]United States v. JT Const. Co., Inc., 668 F. Supp. 592, 593 (W.D. Tex. 1987); see also United States ex rel. Campbell v. Lockheed Martin Corp., 282 F. Supp. 2d 1324, 1332, (M.D. Fla. 2003) (making findings on whether "work performance information" constituted "cost or pricing data" under TINA).

[93]United States ex rel. Thacker v. Allison Engine Co., 471 F.3d 610, 626 (6th Cir. 2006), rev'd on other grounds, 553 U.S. 662 (2008), 50 GC ¶ 251 (contractor's expectations did not qualify as cost or pricing data where the "only thing that [the contractor] knew as a fact prior to November 1993 was that it wanted to negotiate a lower price"); United States ex rel. Watkins v. KBR, Inc., 106 F. Supp. 3d 946 (C.D. Ill. 2015) (finding that the relator failed to show that "a conclusory estimate of saving $75 million under the Frankfurt Plan" constituted cost or pricing data); United States v. United Techs. Corp., Sikorsky Aircraft Div., 51 F. Supp. 2d 167, 192 (D. Conn. 1999) ("By definition, judgments are not cost or pricing data.").

[94]10 U.S.C.A. § 2306a(h)(1); 41 U.S.C.A. § 3501(a)(2); FAR 15.408, Table 15-2, Note 1; FAR 15.406-2(b) ("the contractor had information reasonably available at the time of agreement").

[95]United States ex rel. Campbell v. Lockheed Martin Corp., 282 F. Supp. 2d 1324, 1332 (M.D. Fla. 2003).

[96]United States ex rel. Watkins v. KBR, Inc., 106 F. Supp. 3d 946 (C.D. Ill. 2015) (raising question of how a 2006 bid analysis could have affected a contract and orders awarded prior to that time); United States v. United Techs. Corp., Sikorsky Aircraft Div., 51 F. Supp. 2d 167, 189–90 (D. Conn. 1999) (rejecting claims based upon a bill of material (BOM) that did not exist until after price agreement).

[97]United Techs. Corp., ASBCA Nos. 51410, 53089, 53349, 04-1 BCA ¶ 32,556, at 161,024, aff'd on recons., 05-1 BCA ¶ 32,860, 47 GC ¶ 86, aff'd, 463 F.3d 1264 (Fed. Cir. 2006).

[98]United States v. JT Constr. Co., 668 F. Supp. 592, 593 (W.D. Tex. 1987); United States ex rel. Campbell v. Lockheed Martin Corp., 282 F. Supp. 2d 1324, 1335, (M.D. Fla. 2003) (denying Government's motion for partial summary judgment where factual issues remained about "what information was otherwise disclosed and when information was provided to or otherwise known by the Air Force").

[99]United States v. United Techs. Corp., Sikorsky Aircraft Div., 51 F. Supp. 2d 167, 190–92 (D. Conn. 1999).

[100]United States ex rel. Williams v. Martin-Baker Aircraft Co., 389 F.3d 1251, 1257 (D.C. Cir. 2004) (emphasis in original); see also Luzon Stevedoring Corp., ASBCA No. 14851, 71-1 BCA ¶ 8745, at 40,604 (in TINA case, board explained that it could not find "in the contract, or anywhere in the [regulations], a requirement that a contractor's proposal for a firm fixed price contract

must be structured on historical cost data, even if such data is available").

[101]United States v. United Techs. Corp., Sikorsky Aircraft Div., 51 F. Supp. 2d 167, 189 (D. Conn. 1999) (quoting Texas Instruments, Inc., ASBCA No. 23678, 87-3 BCA ¶ 20,195).

[102]10 U.S.C.A. § 2306a(h)(1); 41 U.S.C.A. § 3501(a)(2); FAR 2.101.

[103]United States v. United Techs. Corp., Sikorsky Aircraft Div., 51 F. Supp. 2d 167, 192 (D. Conn. 1999) (pricing decision about "no charge" item in proposal represented judgment, not cost or pricing data); Litton Sys., Inc., Amecom Div., ASBCA No. 36509, 92-2 BCA ¶ 24,842, at 123,944–45, 34 GC ¶ 206 (engineering estimates of labor hours were judgments, not verifiable facts); United Techs. Corp., ASBCA Nos. 51410, 53089, 53349, 04-1 BCA ¶ 32,556, at 161,019, aff'd on recons., 05-1 BCA ¶ 32,860, 47 GC ¶ 86, aff'd, 463 F.3d 1261 (Fed. Cir. 2006).

[104]United States ex rel. Roby v. Boeing, 100 F. Supp. 2d 619, 625 (S.D. Ohio 2000); Boisjoly v. Morton Thiokol, Inc., 706 F.Supp. 795, 808 (D. Utah 1988) (finding that the FCA requires a statement of fact that can be said to be either true or false).

[105]Hagood v. Sonoma Cty. Water Agency, 81 F.3d 1465, 1477 (9th Cir. 1996) (disputed legal question could not support inference that cost allocation was false for purposes of FCA).

[106]See United States ex rel. Hill v. Univ. of Med. & Dentistry, 448 Fed. Appx. 314, 316 (3d Cir. 2011) (FCA liability does not attach to "[e]xpressions of opinion, scientific judgments or statements as to conclusions which reasonable minds may differ" because they "cannot be false"); United States ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1018 (7th Cir. 1999) ("[D]ifferences in interpretation growing out of a disputed legal question are similarly not false under the FCA.").

[107]Boeing Co., ASBCA No. 32753, 90-1 BCA ¶ 22,426, at 112,642 (Government's own pricing analysis examined "wrap-around" rates at issue); Alliant Techsystems, Inc., ASBCA No. 47626, 00-2 BCA ¶ 31,042, at 153,298, 42 GC ¶ 339 (audit working papers revealed that auditor used allegedly undisclosed data in comparing pricing).

[108]A contractor can violate TINA by failing to disclose cost or pricing data, but the contractor would not violate the FCA if the scienter element was not met. See United States v. United Techs. Corp., Sikorsky Aircraft Div., 51 F. Supp. 2d 167, 196 (D. Conn. 1999) (contractor admitted to TINA violation but court found no fraud because the failure to disclose was not intentional or reckless).

[109]See Hooper v. Lockheed Martin Corp., 688 F.3d 1037, 1051 (9th Cir. 2012) ("[T]he extent and the nature of government knowledge may show that the defendant did not 'knowingly' submit a false claim and so did not have the intent required by the . . . FCA."); United States ex rel. Becker v. Westinghouse Savannah River Co., 305 F.3d 284 (4th Cir. 2002); United States ex rel. Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1157 (2d Cir. 1993), 35 GC ¶ 258; Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 534 (10th Cir. 2000),) 42 GC ¶ 238; see also United States v. Southland Mgmt. Corp., 288 F.3d 665, 686 (5th Cir. 2002) (rejecting Government knowledge defense but noting that such a defense would be viable "where the falsity of the claim is unclear and the evidence suggests that the defendant actually believed his claim was not false because the government approved and paid the claim with full knowledge of the relevant facts").

[110]United States ex rel. Berg v. Honeywell Int'l, Inc., 226 F. Supp. 3d 962, 977 (D. Alaska 2016) (granting summary judgment for defendant after finding no evidence that the contractor had any knowledge that its baseline savings projection was inaccurate and finding that contractor provided extensive calculations to the Government to support projected savings), aff'd, 740 F. App'x 535 (9th Cir. 2018).

[111]Wynne v. United Techs. Corp., 463 F.3d 1261, 1265 (Fed. Cir. 2006), 48 GC ¶ 338 (Government did not review cost or pricing data at issue, but instead relied upon competition and market forces to validate prices); General Dynamics Corp., ASBCA Nos. 32660, 32661, 93-1 BCA ¶ 25,378, at 126,396 (no reliance where the CO's technical and audit team prepared its own estimate based upon an independent review of the contractor's records).

[112]United States ex rel. Marsteller v. Tilton, 880 F.3d 1302 (11th Cir. 2018) (remanding to district court for review of TINA allegations in light of Escobar and observing that the allegations supported the view that the contractor provided incomplete pricing data to the Government and this incomplete data may have induced the Government to enter contracts on terms more favorable to the contractor than it would have had the pricing data been complete).

[113]Norris Indus., Inc., ASBCA No. 15442, 74-1 BCA ¶ 10,482, at 49,572 (rejecting defective pricing claim based upon prior purchase history where such history had been superseded because "low cost Japanese seamless tubing could no longer be ordered in substantial quantities"); Paceco, Inc., ASBCA No. 16458, 73-2 BCA ¶ 10,119, at 47,559 (denying defective pricing claim based on data "not suitable for the intended application").

[114]31 U.S.C.A. § 3729(a)(1) (establishing liability for "3 times the amount of damages which the Government sustains because of the act . . . of that person"). All of the Circuits that have addressed the standard for causation of damages apply a proximate cause standard, which requires a showing that specific misrepresentations made to the Government were the direct and proximate cause of the Government's damages. See, e.g., United States v. Luce, 873 F.3d 999 (7th Cir. 2017), 59 GC ¶ 333; United

States ex rel. Sikkenga v. Regence BlueCross BlueShield, 472 F.3d 703 (10th Cir. 2006); United States ex rel. Schwedt v. Planning Research Corp., 59 F.3d 196 (D.C. Cir. 1995).

[115]Landis v. N. Am. Co., 299 U.S. 248, 255 (1936). The ASBCA applies the same standard for a request to stay a CDA proceeding. See, e.g., Kellogg Brown & Root Servs., Inc., ASBCA No. 56358, 11-1 BCA ¶ 34614, at 170,603 (citing TRW, Inc., ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407, at 150,332, 41 GC ¶ 309).

[116]Suh'dutsing Techs., LLC, ASBCA No. 58760, 15-1 BCA ¶ 36,058, at 176,081 (citations omitted).

[117]See generally David Z. Bodenheimer, The Defective Pricing Handbook (Thomson Reuters ed. 2018).

[118]See S. Rep. No. 95-1118, at 1 (1978), as reprinted in 1978 U.S.C.C.A.N. 5235 ("a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims"). The Act expressly states that the "agency board shall—(1) to the fullest extent practicable provide informal, expeditious, and inexpensive resolution of disputes." 41 U.S.C.A. § 7105(g)(1).

[119]Ingalls Shipbldg. Div., Litton Sys., Inc., ASBCA No. 22645, 78-2 BCA ¶ 13,350. See 41 U.S.C.A. § 7105(g)(1) (board's mandate is to provide "informal, expeditious, and inexpensive resolution" of contract disputes).

[120]TRW, Inc., ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407, at 150,332, 41 GC ¶ 309; accord Suh'dutsing Techs., LLC, ASBCA No. 58760, 15-1 BCA ¶ 36,058, at 176,081, 57 GC ¶ 251; Kellogg Brown & Root Servs., Inc., ASBCA No. 56358, 11-1 BCA ¶ 34614, at 170,603.

[121]Suh'dutsing Techs., LLC, ASBCA No. 58760, 15-1 BCA ¶ 36,058, at 176,082, 57 GC ¶ 251 (emphasis added).

[122]BAE Sys. Tactical Vehicle Sys. LP, ASBCA Nos. 59491, 60433, 16-1 BCA ¶ 36,450.

[123]16-1 BCA ¶ 36,450, at 177,644.

[124]16-1 BCA ¶ 36,450, at 177,644.

[125]16-1 BCA ¶ 36,450, at 177,644.

[126]16-1 BCA ¶ 36,450, at 177,644 (internal citations omitted).

[127]See, e.g., Montana v. United States, 440 U.S. 147, 152–53 (1979) (barring the United States from relitigating an issue previously decided by state court); see United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422–23 (1966) (recognizing finality of ASBCA's factual findings).

[128]See United States v. TDC Mgmt. Corp., 24 F.3d 292, 296 (D.C. Cir. 1994), 36 GC ¶ 537 (holding that "the government is collaterally estopped from relitigating the accuracy of these reports in its False Claims Act claim").

[129]See, e.g., United States v. United Techs. Corp., 782 F3d 718, 728–29 (6th Cir. 2015), 57 GC ¶ 115 (stating that "the Board's competition finding with respect to the last five years of the contract looks like an eminently appropriate setting for the application of issue preclusion," but ultimately holding that the Board's ruling was not sufficiently clear for applying issue preclusion).

[130]Wynne v. United Techs. Corp., 463 F.3d 1261, 1264 (Fed. Cir. 2006), 48 GC ¶ 338.

[131]United States v. United Techs. Corp., 782 F.3d 718, 730–34 (6th Cir. 2015), 57 GC ¶ 115.

[132]Lockheed Martin Aeronautics Co., ASBCA No. 61480, 2018 WL 3387713 (June 25, 2018); Combat Support Assocs., ASBCA Nos. 58945, 58946, 16-1 BCA ¶ 36,288, at 176,973.

[133]See BAE Sys. Tactical Vehicle Sys. LP, ASBCA Nos. 59491, 60433, 17-1 BCA ¶ 36,585 (finding appeal moot in light of CO's rescission of final decision); United States v. BAE Sys. Tactical Vehicle Sys. LP, No. 2:15-cv-12225, (E.D. Mich. Jun. 1, 2017) (stipulation of dismissal of FCA action filed after district court ordered the Government to respond to defendant's requests for discovery in connection with CO's rescinded $56 million defective pricing decision).

[134]See, e.g., United States ex rel. McBride v. Halliburton Co., 848 F.3d 1027 (D.C. Cir. 2017), 59 GC ¶ 56 (finding materiality lacking where Government did not seek repayments despite knowledge of alleged misconduct); United States v. Sanford-Brown, Ltd., 840 F.3d 445, 447–48 (7th Cir. 2016) (same).

[135]See United States v. Southland Mgmt. Corp., 326 F.3d 669, 676–76 (5th Cir. 2003) (finding that where an agency's agreement provided for a specific remedy for noncompliance but the agency did not exercise that remedy, the Government could not prevail in a civil FCA case).

[136]31 U.S.C.A. § 3731(b).

[137]31 U.S.C.A. § 3731(b)(1); United States ex rel. Shemesh v. CA, Inc., 89 F. Supp. 3d 36, 53 (D.D.C. 2015).

[138]31 U.S.C.A. § 3731(b)(2).

[139]31 U.S.C.A. § 3731(b)(2); United States v. United Techs. Corp., 626 F.3d 313, 318–19 (6th Cir. 2010), as amended (Jan. 24, 2011), 53 GC ¶ 7 ("Because the False Claims Act has a 10–year statute of limitations, 31 U.S.C. § 3731(b)(2), the United States sought to recover only for False Claims Act violations after March 1989, which included the last three years of the contract.").

[140]41 U.S.C.A. § 7103.

[141]41 U.S.C.A. § 7103(a)(4)(A).

[142]See FAR 33.201 (defining "accrual of a claim").

[143]McDonnell Douglas Servs., Inc., ASBCA No. 56568, 10-1 BCA ¶ 34,325, at 169,528, 52 GC ¶ 86.

[144]41 U.S.C.A. § 7103(a)(4)(B).

NOTES:

BRIEFING PAPERS