



# BRIEFING PAPERS<sup>®</sup> SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

## LITIGATION & PROOF IN DEFECTIVE PRICING CASES

By David Z. Bodenheimer

**D**efective pricing cases are often won or lost before the trial attorneys enter the courtroom. Incomplete allegations, missing records, unsupported audit positions, and more have often torpedoed defective pricing claims and defenses, thus predicting the outcome during the audit and rebuttal phase preceding the Government's final decision. Before launching into a full-scale defective pricing litigation, both the Government and contractors need to know the governing rules on who must prove what, when, and how—as well as alternatives for resolving such disputes outside of the courtroom.

This BRIEFING PAPER discusses the elements of the Government's burden of proof in defective pricing cases, the contractor's potential defenses against a defective pricing action, the types of evidences used to prove and disprove defective pricing, the evidentiary requirements and levels of proof needed to support defective pricing claims, and the disputes process for resolving defective pricing cases, including litigation as well as nonlitigation strategies.

### IN BRIEF

Burden Of Proving Defective Pricing	Evidentiary Requirements & Levels Of Proof
Elements Of The Government's Burden Of Proof	■ Failures Of Proof
■ Decisions Defining The Elements Of Defective Pricing	■ Ineffective Proof
■ Audit Guidance On "Five Points" Of Defective Pricing	■ Loss Or Destruction Of Evidence
Summary Of Contractor Defenses	Disputes Process For Defective Pricing
Types Of Evidence In Defective Pricing Cases	■ Postaward Audit Process
■ Documents In Defective Pricing Cases	■ Contracting Officer's Role
■ Testimonial Evidence	■ Litigation
■ Circumstantial Evidence	■ Alternatives To Litigation

### Burden Of Proving Defective Pricing

Only the Government may bring a claim for defective pricing. 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."<sup>1</sup>

The burden of proof serves several key functions in defining who must do what in a defective pricing case. First, it determines who has

---

*David Z. Bodenheimer is a Government Contracts Group partner and litigator in Crowell & Moring's Washington, D.C. office. This BRIEFING PAPER is adapted from materials included in Mr. Bodenheimer's treatise, DEFECTIVE PRICING HANDBOOK (Thomson Reuters 2014–2015 ed.).*

---

the responsibility for initiating the claim. If the Government brings its claim too late (or not at all), no contractor liability ever arises.<sup>2</sup> Second, the burden of proof establishes which party has the duty to show up with evidence. If the Government has no evidence, the case is over and the contractor has no obligation to present any rebuttal evidence.<sup>3</sup> Third, the burden of proof serves as a tie-breaker. In the remote event that the Government and the contractor offered conflicting evidence of equal weight and credibility, the judge could break the tie and reject the defective pricing claim because the Government did not carry its burden. Fourth, the burden of proof organizes the judicial proceedings. As the claimant, the Government ordinarily puts on its defective pricing case first, while the contractor waits for its turn to rebut the Government's evidence.

To carry its burden of proof, the Government must establish its defective pricing claim by "a preponderance of the evidence."<sup>4</sup> In short, such preponderance means that the Government must offer "the stronger evidence, however slight the edge may be."<sup>5</sup> In theoretical terms, the Government could satisfy this standard with 51% of the evidence. However, given the factual complexity of defective pricing cases, the decisions rest upon judicial judgments regarding the weight of the evidence rather than some mathematically based percentage test.

The preponderance standard applies to each element of the Government's defective pricing claim. In other words, having the overall stronger evidence will not suffice if the proof falls short on any one element of the defective pricing claim. For example, the Government fell short in one case where it proved one element (nondisclosure)

but not the other element (cost or pricing data) by a preponderance of the evidence:<sup>6</sup>

We have found that by a preponderance of the evidence the Government has established that appellant failed to disclose the [subcontractor's] quote of 8 February 1966 prior to 5 May 1966, when appellant's Certificate of Current Cost or Pricing Data was executed.

\* \* \*

Our conclusion could be expressed in other terms. That is, that the [subcontractor's] quote, and the shift in appellant's make-buy plans that followed its use by appellant, were not cost or pricing data which appellant was required to disclose by the Truth-in-Negotiations law or the "Price Reduction for Defective Cost or Pricing Data" clause that implemented it.

The Government has the benefit of a presumption on two elements (reliance and causation) but bears the ultimate burden of proving these elements.<sup>7</sup>

Once the Government proves the elements of its defective pricing claim, the contractor may either offer rebuttal evidence on these elements or present affirmative defenses—or both. If the contractor offers no rebuttal, then the Government has sustained its burden of proof on entitlement, subject to any affirmative defenses that the contractor may raise.<sup>8</sup> With regard to affirmative defenses such as offsets, the contractor has the burden of proving its defenses.<sup>9</sup>

Finally, if the Government prevails on liability (and the contractor has not proven its affirmative defenses), the issue comes down to damages. Regarding damages, "the Government must prove by a preponderance of the evidence that the cost...was overstated by the [contractor] in a specific amount."<sup>10</sup>



THOMSON REUTERS

## BRIEFING PAPERS

*This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.*

BRIEFING PAPERS® (ISSN 0007-0025) is published monthly except January (two issues) and copyrighted © 2015 ■ Valerie L. Gross, Editor ■ Periodicals postage paid at St. Paul, MN ■ Published by Thomson Reuters / 610 Opperman Drive, P.O. Box 64526 / St. Paul, MN 55164-0526 ■ <http://www.legalsolutions.thomsonreuters.com> ■ Customer Service: (800) 328-4880 ■ Postmaster: Send address changes to Briefing Papers / PO Box 64526 / St. Paul, MN 55164-0526

BRIEFING PAPERS® is a registered trademark used herein under license. All rights reserved. Reproduction, storage in a retrieval system, or transmission of this publication or any portion of it in any form or by any means, electronic, mechanical, photocopy, xerography, facsimile, recording or otherwise, without the written permission of Thomson Reuters is prohibited. For authorization to photocopy, please contact the Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, (978)750-8400; fax (978)646-8600 or West's Copyright Services at 610 Opperman Drive, Eagan, MN 55123, fax (651)687-7551.

## Elements Of The Government's Burden Of Proof

The Truth in Negotiations Act (TINA) generally requires agencies to incorporate contract clauses stating that:<sup>11</sup>

[T]he price of the contract to the United States, including profit or fee, shall be adjusted to exclude any significant amount by which it may be determined by the head of the agency that such price was increased because the contractor (or any subcontractor required to make available such a certificate [that the cost or pricing data submitted are accurate, complete, and current]) submitted defective cost or pricing data.

However, the statute itself does not define each of the elements of defective pricing but instead leaves the mechanics of that task to the regulations and over a half-century of decisions parsing the specific elements and standards for such claims.

Over the years, the many cases deciding claims under TINA have articulated the elements of defective pricing with slight variations in both the elements and standards for these elements. While the more recent cases offer the more comprehensive statements of these elements, the Defense Contract Audit Agency (DCAA) audit guidance remains a handy source for distilling these essential elements.<sup>12</sup> In short, a defective pricing claim requires proof of five core elements:

- (1) *Cost or pricing data.* The information fits the definition of cost or pricing data.
- (2) *Reasonable availability.* The cost or pricing data were reasonably available prior to price agreement (or an alternate date as agreed by the parties).
- (3) *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.
- (4) *Reliance.* The Government reasonably relied upon the defective cost or pricing data to its detriment.
- (5) *Causation.* The defective cost or pricing data caused an increase in the contract price.

## ■ Decisions Defining The Elements Of Defective Pricing

In some of the earlier cases, the decision might identify just two or three elements of defective pricing, leaving others to be addressed in later cases.<sup>13</sup> The later cases offer a better listing for guiding agency and industry personnel:<sup>14</sup>

In defective pricing cases, the Government bears the burden of proof on three elements—1) that the information in dispute is “cost or pricing data” under the Truth in Negotiations Act, 10 U.S.C.A. § 2306a; 2) that cost or pricing data was not meaningfully disclosed; and 3) that it relied to its detriment on the inaccurate, noncurrent or incomplete data presented by the contractor. As to the third element, once nondisclosure is established a rebuttable presumption arises that a contract price increase was a natural and probable consequence of that nondisclosure. However, “[t]he ultimate burden of showing the causal connection between the incomplete or inaccurate data and an overstated contract price remains with the Government.”

However, while more comprehensive than the earlier cases, this listing still does not capture the full range of elements that must be proven in a defective pricing case.

Consistent with the “five points” of defective pricing distilled by the DCAA audit guidance, the mosaic of cases and regulations requires—at a minimum—proof of the following five elements: (1) cost or pricing data, (2) reasonable availability of data, (3) lack of disclosure or Government knowledge of such data, (4) Government reliance upon such data to its detriment, and (5) causation of an increase in price.

(1) *Cost or pricing data.* First, “the Government has the burden of proof as to whether the data in question are cost or pricing data.”<sup>15</sup> Liability under both the Truth in Negotiations Act and the implementing regulations hinges upon the defective data at issue being “cost or pricing data.”<sup>16</sup>

(2) *Reasonable availability of data.* Second, 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.”<sup>17</sup> The regulations expressly require the agency to

consider the reasonable availability of the data at issue.<sup>18</sup>

(3) *Nondisclosure and lack of Government knowledge.* Third, “the 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.”<sup>19</sup> Both the statute and regulations establish the contractor’s failure to disclose current, accurate, and complete cost or pricing data as a core element of defective pricing.<sup>20</sup>

(4) *Government reliance on data.* Fourth, 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.”<sup>21</sup> For this element, the Government has a rebuttable presumption of reliance but bears the ultimate burden of proof.<sup>22</sup> Both the statute and regulation reflect the requirement for Government reliance upon defective data.<sup>23</sup>

(5) *Causation of increased price.* Fifth, “[t]he Government, nevertheless, retains the ultimate burden of showing a causal connection between the undisclosed or defective data and an overstated contract price.”<sup>24</sup> As with reliance, the Government has a rebuttable presumption of causation but must carry the ultimate burden of proof.<sup>25</sup> 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.”<sup>26</sup>

### ■ Audit Guidance On “Five Points” Of Defective Pricing

Consistent with the development of the law under TINA, the DCAA audit guidance has distilled the elements of proof into “five points” of defective pricing. This guidance can be as informative to Contracting Officers (COs) and industry as it is instructive to DCAA auditors:<sup>27</sup>

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 certified 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 certified 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.

For those fortunate enough to be on the receiving end of DCAA postaward audit reports, these “five points” of defective pricing will be familiar. As standard practice, these audits expressly match the audit findings against each of the “five points” in order to support a recommended price adjustment.

## Summary Of Contractor Defenses

The contractor may defend against a defective pricing action by rebutting one or more of the “five points” of defective pricing. In other words, the contractor may offer proof that the information at issue (1) was not cost or pricing data, (2) was not reasonably available before agreement on price, (3) was disclosed to, or known by, the appropriate Government representatives, (4) was not relied upon by the Government, and/or (5) was not a cause of an increased price. In addition, contractors have advanced a variety of defenses. Some have been proven by the test of time; others have been a waste of time.

(a) *Offsets.* The contractor may show that pricing defects *decreased* the contract price (i.e., caused understatements), which offset any errors that *increased* the contract price (i.e., caused overstatements).<sup>28</sup>

(b) *TINA exceptions.* If an applicable exception to TINA (such as adequate price competition or commercial item acquisition) governs the

procurement, then the agency has no authority to enforce the defective pricing requirements relating to certified cost or pricing data.<sup>29</sup> Regarding the exceptions, the regulations state: “If certified cost or pricing data are requested and submitted by an offeror, but an exception is later found to apply, the data must not be considered certified cost or pricing data as defined in [Federal Acquisition Regulation (FAR)] 2.101 and must not be certified in accordance with [FAR] 15.406-2.”<sup>30</sup>

An improper request for certified cost or pricing data may defeat a defective pricing claim.<sup>31</sup> However, the cases shed little light on this issue because the decisions have construed the old law preexisting the Federal Acquisition Streamlining Act (FASA) of 1994 and Clinger-Cohen Act of 1996 amendments.<sup>32</sup> As a result, the effect of the post-FASA exceptions under TINA has yet to be tested in the courtroom.

(c) *Statute of limitations.* If the Government waits too long to bring its defective pricing claim, the six-year statute of limitations may bar the claim. The Contract Disputes Act (CDA) requires the Government to bring its claims (including defective pricing claims) “within 6 years after the accrual of the claim.”<sup>33</sup>

(d) *Laches.* Laches (an equitable defense that a party waited too long to bring its claim) represents a potential defense, as recognized by the U.S. Court of Appeals for the Federal Circuit and the boards of contract appeals.<sup>34</sup> However, contractors have encountered major hurdles in proving unreasonable delay and prejudice, both of which are essential elements of a laches defense.<sup>35</sup>

(e) *Finality.* If a CO settles, resolves, or abandons a claim, the Government may be bound by that decision “when an authorized contracting officer expresses a definite opinion concerning the merits of a claim with knowledge of the relevant facts, a ‘decision’ has been made.”<sup>36</sup> However, where a CO “did not indicate she was abandoning the defective pricing claim,” such action may not be “barred by finality.”<sup>37</sup>

(f) *Superior bargaining position.* Some contractors have argued that the price would not have been increased simply because the company held a sole-source position or otherwise maintained a

superior bargaining position. This defense proves too much as a contractor would nearly always be able to argue either an exception (adequate price competition) or a superior bargaining position (sole-source). In any event, TINA has expressly barred this defense since it was amended in 1986.<sup>38</sup>

(g) *Lack of a certificate.* In some early decisions, the Armed Services Board of Contract Appeals (ASBCA) denied defective pricing claims if the contractor did not submit a certificate that the cost or pricing data submitted were accurate, complete, and current.<sup>39</sup> However, the 1986 amendments revised TINA to bar the defense that the contractor never executed or submitted a certificate.<sup>40</sup> The Act now states that it is “not a defense to an adjustment of the price of a contract” that “the prime or subcontractor did not submit a certification of cost or pricing data relating to the contract as required.”<sup>41</sup>

(h) *Loss on a contract.* The fact that a contractor suffered a loss on a contract does not represent a defense to defective pricing. As the ASBCA explained: “Where cost changes developed after the agreement on price they could not have affected the parties’ price negotiations and, hence, cannot be retroactively worked into the contract price.”<sup>42</sup> Because defective pricing focuses upon facts existing prior to price agreement, the actual costs of the contractor’s performance are generally not relevant under TINA.

(i) *Urgency.* “As a general rule, inadequate proposal preparation time is not a defense to a defective pricing claim.”<sup>43</sup> However, urgency may sometimes represent a factor in determining the “reasonable availability” of cost or pricing data.<sup>44</sup>

(j) *Entrapment.* While entrapment may spring a criminal defendant free, it does not work as a defense to defective pricing. In one case, the ASBCA rejected a contractor’s assertion of this defense as follows:<sup>45</sup>

We are bemused at an argument of entrapment in a Government contract appeal. Entrapment is a defense available in a criminal proceeding when law enforcement officials have encouraged a miscreant into wrongdoing. A successful showing of entrapment bars prosecution for that offense but, of course, presupposes a course of wrongdoing. This is a novel argument to seek to apply to Government contract appeals and appellant’s

brief does not disclose how this defense would bar invocation of the Government's right to reduce the contract price for defective cost or pricing data. This right is not a criminal sanction such as might be barred by a showing of entrapment.

(k) *Final payment.* Final payment does not offer a viable defense to a defective pricing claim. Neither the regulations nor the "Disputes" clause includes a time limit related to final payment.<sup>46</sup>

## Types Of Evidence In Defective Pricing Cases

With TINA cases spanning over half century, agency and industry litigants have introduced a kaleidoscope of evidence to prove—and disprove—defective pricing. In general, such evidence breaks down into three broad categories: (1) documents, (2) testimony, and (3) circumstantial evidence. For each category, the evidence generally separates into the price negotiations (preaward evidence) and the defective pricing audit (postaward evidence).

### ■ Documents In Defective Pricing Cases

While a defective pricing case may turn upon any type of evidence (or even a lack of evidence), documents nearly always serve as the fundamental building blocks for both offense and defense. Many years often separate the original award from the defective pricing postmortem, during which memories may fade and witnesses disappear. As a result, documents may offer the last remaining trail for reconstructing what happened and mattered during the original price negotiations.

(1) *Price negotiation memorandum (PNM).* For both the auditors and industry, few documents can top the CO's PNM in importance. Indeed, the DCAA audit guidance states: "The PNM is the most important Government document for the successful completion of any postaward audit."<sup>47</sup> The regulatory requirements explain why, as the PNM must cover many of the facts critical to proving defective pricing, including applicable exceptions, extent of reliance on cost or pricing data, preaward knowledge of defective data, summary of negotiation objectives and positions, summary of cost analyses of major cost elements, and more.<sup>48</sup> In some cases, the PNM has proved

decisive, sometimes for the Government<sup>49</sup> and other times for the contractor.<sup>50</sup>

(2) *Preaward audits and technical reviews.* As COs often seek specialized assistance in reviewing proposals, the DCAA preaward audits, agency cost or price analyses, and technical or engineering reviews may serve as a valuable window into what the contractor disclosed and how the CO evaluated the price. For example, DCAA preaward audits have both established—and rebutted—defective pricing.<sup>51</sup>

(3) *Preaward audit workpapers.* Behind every audit report stands a mound of workpapers. In most cases, the audit workpapers contain the most revealing insight into what the contractor disclosed, how the auditors understood the cost data and pricing methodology, and what the Government knew. Sometimes, the workpapers contain audit checklists, such as whether the CO relied upon the cost or pricing data (in a few cases, the checklist indicates "no reliance" by the CO). In other instances, the auditors include correspondence with the CO and the contractor that appeared nowhere else in the record.<sup>52</sup> In several cases, such workpapers have been pivotal to the outcome of the defective pricing case, proving actual Government knowledge of the cost or pricing data at issue.<sup>53</sup>

(4) *Document checklist.* In summary, defective pricing litigation often generates a blizzard of documents. A short checklist includes:

- (a) Government and contractor PNMs;
- (b) Contractor proposals, cost or pricing data, data disclosures and transmittals, and correspondence;
- (c) Government independent estimates, should-cost studies, preaward audits, proposal evaluations, cost/price analyses, and technical or labor-hour reviews (and workpapers for all);
- (d) Contractor vendor cost/technical analyses, subcontractor reviews and audits, and subcontractor correspondence (and related workpapers);
- (e) Government and contractor negotiation records, history, and notes;

- (f) Government postaward audits, workpapers, and correspondence;
- (g) Contractor postaward rebuttals, workpapers, offsets, and correspondence; and
- (h) CO's final decision and related documents.

As this summary checklist suggests, both the Government and contractor should be ready to corral the documents when a postaward audit is underway.

### ■ Testimonial Evidence

While defective pricing cases can hardly be tried without documents, the documents nearly always require explanation by people who know them. Such explanation may come in various forms, including trial testimony for hearings on the merits or affidavits in support of summary judgment motions. Like people, no two testimonies are identical. However, several patterns emerge from the decisions about how judges treat testimony.

(1) *Conflicting testimony.* In many cases, the witnesses of the Government and contractor tell different stories (because otherwise no dispute would exist). Such battles of credibility must then be balanced by the trial judge who decides what weight to give to the witnesses. For example, when all of the Government witnesses denied having seen a subcontractor quote at issue, the judge resolved the conflicting testimony in favor of the Government, finding by a preponderance of the evidence that the contractor had not disclosed the subcontractor quote.<sup>54</sup> Such determinations of witness credibility are “virtually unassailable” on appeal.<sup>55</sup>

(2) *Conclusory testimony.* When parties build their case on the basis of conclusory or unsupported testimony, the courts and boards generally give them little (if any) weight. For example, in one case, the ASBCA was “not persuaded” by “the conclusory, *post litem* statements of [the contractor’s] and [the subcontractor’s] negotiators of their intent and understanding” that the prime and subcontractor had entered into a binding agreement prior to the price agreement for the prime contract.<sup>56</sup> In another case, the board found

that the Government’s “conclusory testimony” about price negotiations “with no specifics” to be insufficient to prove causation.<sup>57</sup> Similarly, testimony lacking “specificity” on reliance has failed to pass muster. For example, in one case, the board found that the testimony of the agency price analyst and the CO on direct examination that they relied on the fact that best and final offer (BAFO) data furnished by the contractor were current, accurate, and complete “given roughly 17 years after the fact...was lacking in specificity and was unpersuasive.”<sup>58</sup>

(3) *Conflicting statements.* When witnesses contradict themselves, the judges often underscore such inconsistencies in their decisions. In one case, for example, the ASBCA noted:<sup>59</sup>

Appellant first denied that the estimate for indirect travel included travel for survey, and stated that a change in contract price should be based upon its actual overhead costs for 1973. It submitted a schedule which proposed 49.56% for [general and administrative (G&A) expenses]. The schedule included in the G&A pool \$7,954.51 for travel other than survey.

Similarly, where an auditor testified contrary to his internal documents about an agreement to accept the contractor’s estimating methodology, the board found him “less than candid with other Government representatives and the Board with respect to his representations and testimony on the subject and meaning” of this agreement.<sup>60</sup>

(4) *Lack of personal knowledge.* When a party brings second-hand witnesses lacking direct personal knowledge of the price negotiations, such testimony typically gets a heavy discount. For example, the board gave little weight to the affidavit of “a Government buyer” who did not attend negotiations, instead holding that the Government failed to prove defective pricing where the principal negotiator failed to testify and “no member of the Government’s negotiation team has vouched for its [defective pricing] theory.”<sup>61</sup> Similarly, in finding insufficient proof of how the “make-buy” data would have influenced price negotiations, the board noted that the agency’s witness “did not have a contracting officer’s warrant and did not deal directly with [the contractor’s] personnel” during the price negotiations.<sup>62</sup>

(5) *Testimony vs. contemporaneous record.* When witnesses reverse course and testify contrary to their own contemporaneous records, the judicial reception is usually chilly. In one case, the CO testified that he relied upon the contractor's cost or pricing data to determine price reasonableness, but his annual option-exercise memoranda uniformly cited the "market test between the competitors" as the basis for finding prices fair and reasonable:<sup>63</sup>

[The CO's] statements of reliance on BAFO cost or pricing data at trial were unsupported by any contemporaneous project records. Those records of the CO that were adduced and that we discussed above show that competitive forces, rather than the defective 1983 BAFO cost or pricing data were relied upon to make the awards and to exercise the options for additional purchases for [Fiscal Years] 86-90. In the face of such credible, contemporaneous evidence, we believe that [the CO's] unsupported trial statements to the contrary were unpersuasive.

In summary, these cases illustrate the importance of vetting witnesses and reviewing documents as early in the postaward process as possible. If the witnesses are strong and the documents are consistent, a party may have good reason to stick to its position. If not, the witnesses may be exposed as being "unpersuasive" or "not credible" at trial, with their testimony recorded forever in published decisions on defective pricing.

### ■ Circumstantial Evidence

At the center of every defective pricing case is a negotiation over a contract price. After the fact, anyone can second-guess the negotiators, arguing that the negotiations could have been driven in a different direction with a more favorable result. However, in a defective pricing case, the conduct of the parties must be assessed based upon the context and circumstances existing at the time of the price negotiations rather than from the perspective of 20-20 hindsight.<sup>64</sup>

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.

One board aptly summed up the importance of this context: "The circumstances surrounding

the negotiations and the negotiation strategies employed by the parties are, after all, at the heart of a defective pricing case."<sup>65</sup> Given this standard, circumstantial evidence may play a central role in defective pricing cases.

In one case, the board found no defective pricing based upon "the circumstances present during the negotiations" where the parties had never looked at the data or performed the analysis during the negotiations that the postaward auditors advocated in the defective pricing audit:<sup>66</sup>

Neither party had ever used [circuit] card specific performance factors in their prior negotiations on the [Navy aircraft] AN/ALQ-126B Countermeasures System and appellant as a matter of practice only measured efficiency at the component not at the specific part level (findings 27, 28).

\* \* \*

We hold that appellant did not submit defective pricing for the circuit card assembly labor in failing to compute and disclose card specific performance factor cost history when it did not know or reasonably should not have known of the significance of that data in light of the circumstances present during the negotiations.

In another case, the postaward audit sought to measure the impact upon the price by applying a learning curve analysis, even though the Government negotiator "was clear in his testimony that he did not like to use formal learning curves."<sup>67</sup> While finding that labor-hour trend data would have affected the negotiations, the board rejected the use of formal learning curves to calculate the impact:<sup>68</sup>

In summary, prior to agreement on price, no one from the Government suggested that the negotiation strategy should be built around the use of formal learning curves, although everyone on the Government side recognized that learning was occurring. Under the circumstances, we conclude that formal learning curves would not have been used and, consequently, measuring the extent of defective pricing with respect to billet and core manufacturing as proposed by the Government is not justified.

In summary, the standard of review for defective pricing cases makes circumstantial evidence particularly relevant to determining not only liability but also damages. Accordingly, the parties must look not only to the documents and direct testimony but also to the context of the

negotiations to determine whether defective pricing has occurred.

## Evidentiary Requirements & Levels Of Proof

As discussed above, the Government must establish the core elements of defective pricing by a preponderance of evidence, while the contractor bears the same burden with respect to its affirmative defenses. The question then arises as to what levels of proof suffice—or do not. The courts and boards have given some examples of evidence that do not pass muster.

### ■ Failures Of Proof

Each party must come forward with evidence to support its affirmative claims—i.e., the Government supports its defective pricing claims, while the contractor proves its affirmative defenses. If the Government offers no proof, the defective pricing claim will fail.<sup>69</sup> For example, where the Government has rested upon its presumption and offered no evidence in response to the contractor's rebuttal, the Federal Circuit has found no reliance or causation due to an absence of proof.<sup>70</sup>

Conversely, a contractor that fails to offer any evidence rebutting the presumption of reliance or causation will lose that issue.<sup>71</sup> For affirmative defenses like offsets, the contractor must present evidence to sustain its defense. As the ASBCA has held, an offset without evidence is ripe for rejection.<sup>72</sup>

### ■ Ineffective Proof

Certain types of proof do not pass muster with the courts and boards. For example, in denying a defective pricing claim, the board explained that the following types of evidence would not suffice:<sup>73</sup>

Where the record before us is “quite limited,” “meager” and contradictory, requiring us to speculate and conjecture as to the key elements of respondent's claims for a price adjustment, the respondent has not met its burden of proof regarding entitlement to and the amount of the price adjustment.

Similarly, speculative assertions and “conclusory” testimony are not reliable evidence for supporting proof of an intentional offset.<sup>74</sup>

In another case, the Government audit report contended that the contractor failed to disclose excess inventory. However, “there was no evidentiary support for the auditor's hypothetical estimate of appellant's inventory.”<sup>75</sup> The board noted that “while there probably was some material on hand in August 1988, the quantity was unknown.” As a result, the defective pricing allegation “fail[ed] for lack of proof.”<sup>76</sup>

### ■ Loss Or Destruction Of Evidence

In some circumstances, the “destruction or nonavailability of relevant contemporaneous documents known to have existed” may support conclusive or dispositive inferences against the party that failed to produce such documents.<sup>77</sup> For such situations, the ASBCA has recognized its “inherent power to impose sanctions for discovery abuses and has barred the introduction of evidence in extreme situations where the circumstances warrant sanctions.”<sup>78</sup> In one case, the Government failed to carry its burden of proving nondisclosure of data in part because it “produced neither the prenegotiation auditor nor the file of that audit to establish that information as to such [allegedly undisclosed] quotation was not conveyed to the auditor.”<sup>79</sup>

However, the ASBCA has been generally been reluctant to impose sanctions in the absence of willful misconduct by one of the parties. For example, the board recognized the availability of sanctions for the Government's loss of workpapers for a Should Cost Team's review, but ultimately declined to levy such sanctions:<sup>80</sup>

Here, the Government made a reasonably comprehensive search for the Should Cost Team workpapers during discovery. The circumstances under which the workpapers came to be lost could not be established. There was no willful conduct or misconduct on the part of the Government to hide or otherwise destroy the workpapers. (Finding 25)

In light of these circumstances, to draw an adverse inference that the Government did not rely on [the subcontractor's] proposal data, which would have the effect of destroying the Government's claim entirely notwithstanding

clear evidence of reliance elsewhere in the record appears to us to be unwarranted. Accordingly, we will not draw the adverse inference of lack of reliance on the defective data.

The defective pricing cases on lost documents do not yet appear to have addressed electronic documents. Given the pervasive nature of electronic records within the Government and business community today, electronic discovery and lost electronic records will likely be the next frontier for sanctions motions in defective pricing litigation.

## Disputes Process For Defective Pricing

As illustrated by the hundreds of reported decisions above, defective pricing audits may end up in litigation. However, the far more typical defective pricing audit concludes well short of the courtroom. As a result, both agencies and contractors need to understand the steps leading up to, and including, litigation of defective pricing claims.

### ■ Postaward Audit Process

For postaward defective pricing audits, the DCAA's *Contract Audit Manual* provides detailed guidance to auditors for conducting such reviews. This guidance includes developing the postaward requirements and program plans, collecting information from the CO and contractor, preparing the audit report, and coordinating with the agency and contractor.

(1) *Overall audit plan.* Given that the DCAA cannot audit every possible pricing action, it uses the DCAA Management Information System (DMIS) and related "Headquarters" guidance to identify a universe of eligible pricing actions and allocate its audit resources accordingly.<sup>81</sup> The DCAA then has the responsibility to communicate its postaward targets to both the contracting office and the contractor, as follows:

- (a) *CO notice.* "Send written notification of programmed postaward audits on prime contracts or modifications to the [Procuring Contracting Officer (PCO)], with a copy to the onsite [liaison auditor]."<sup>82</sup>

- (b) *Contractor notice.* "At those contractors with significant programmed defective pricing activity, discuss the defective pricing program plan with contractor representatives for effective planning and audit coordination. This coordination will include discussions on the contractor risk designation and reasons for such determination, which contracts were selected and how, the timing of the audits, outstanding estimating system deficiencies, and internal control weaknesses."<sup>83</sup>

(2) *Information collection.* Once the postaward targets have been identified, the DCAA auditor establishes an audit program for each postaward audit review and then obtains data from the CO—with the price negotiation memorandum (PNM) being the most important:<sup>84</sup>

The PNM is the most important Government document for the successful completion of any postaward audit.... At the start of the audit, the auditor should confirm with the contracting officer the statement in the PNM that the Government relied on the cost or pricing data. Sole reliance on the PNM without communicating with the contracting officer is not sufficient.

In addition, the DCAA auditor seeks records from the contractor pursuant to the Government's right of access under the "Audit" clause.<sup>85</sup>

(3) *Audit preparation.* Upon obtaining the necessary data for the postaward review, the auditor establishes the audit baseline, determines the potentially defective cost or pricing data, and then calculates the recommended price adjustment (if any) for defective pricing.<sup>86</sup> For this review, the DCAA guidance identifies a number of "Possible Defective Pricing Indicators" for the auditor to review:<sup>87</sup>

Items normally examined for indications of defective pricing are historical unit cost records, vendor quotes, purchase orders, voluntary refunds or credits from suppliers, cost trend records, sales and manufacturing volume projections, profit and loss statements, and product cost and profit analyses. The following examples are possible defective pricing indicators:

- a. Significantly lower actual cost of individual items and cost elements as compared with the amounts included in the audit baseline explained in [DCAA Contract Audit Manual] 14-116.2. When this condition exists, perform additional

tests to determine whether the lower costs reflect defective data.

b. Operations not actually performed or items of cost not incurred, although included in the contractor's proposal. (For example, changes made in the make-or-buy program, a special testing program not performed, or Government-owned equipment rental not paid.) Explore the reasons for not incurring the cost.

c. Items of direct cost included in the contract pricing proposal at prices higher than appropriate based on information available to the contractor (and not disclosed to the Government) at the time of contract price agreement.

(4) *Discussion of audit findings.* The audit process also includes requirements to discuss audit findings with the CO and the contractor to verify facts and resolve audit issues prior to finalizing the defective pricing audit.

- (a) *Agency discussions.* "Significant factual issues should be confirmed with the PCO as early as possible to avoid wasted effort and incorrect conclusions. In addition, request the CO to confirm in writing that the apparent defective pricing was not disclosed to either the contracting officer or his/her representative, that neither the contracting officer nor his/her representative had actual knowledge of the data, and the contracting officer relied on the inaccurate data."<sup>88</sup>
- (b) *Contractor discussions.* "Discuss pertinent factual matters with the contractor throughout and at the conclusion of the audit as suggested by [DCAA Contract Audit Manual] 4-303.1 and 4-304.3. Draft copies of the report exhibits and explanatory notes, along with copies of disputed documents and other significant audit evidence should be provided to the contractor."<sup>89</sup>

In other words, the audit process builds in opportunities for input by both the agency and the contractor to resolve audit issues even before the final audit report. As a practical matter, this process has benefits to both the agency and the contractor, as it provides a means to address audit findings more expeditiously, thus avoiding additional effort by all parties for issues that can be readily resolved.

## ■ Contracting Officer's Role

In defective pricing audits and disputes, the CO plays pivotal roles in serving as the gatekeeper, resolving audit findings, acting as the agency representative for addressing disputes, and finally, making final decisions as a prerequisite to a defective pricing claim against the contractor.

(1) *Government's gatekeeper.* As the gatekeeper, the CO must determine whether the postaward audit recommendations meet the basic test for defective pricing—*i.e.*, whether the Government can carry its burden of proof. For example, the regulations specifically mandate that the CO consider the following prerequisites for defective pricing: "In arriving at a price adjustment, the contracting officer shall consider the time by which the certified cost or pricing data became reasonably available to the contractor, and the extent to which the Government relied upon the defective data."<sup>90</sup> In addition, the CO "shall allow an offset for any understated certified cost or pricing data submitted in support of price negotiations," subject to the conditions that such offsets have been certified and meet the other tests for offsets.<sup>91</sup> Finally, for each postaward audit report, the CO "shall make a determination as to whether or not the data submitted were defective and relied upon."<sup>92</sup>

(2) *Resolution of audit findings.* As the official responsible for resolving audit findings, the CO bears responsibilities for addressing such findings with both the DCAA auditors and the contractor.

- (a) *Contractor due process.* The regulations advise the CO to "give the contractor an opportunity to support the accuracy, completeness, and currency of the data in question."<sup>93</sup>
- (b) *Duty to document.* The CO "shall prepare a memorandum documenting both the determination and any corrective action taken as a result."<sup>94</sup>
- (c) *Notice to auditors.* The CO "shall send one copy of this memorandum to the auditor and, if the contracting has been assigned for administration, one copy to the administrative contracting officer (ACO)."<sup>95</sup>

- (d) *Notice to contractor.* “A copy of the memorandum or other notice of the contracting officer’s determination shall be provided to the contractor.”<sup>96</sup>
- (e) *Reporting duties.* “When the contracting officer determines that the contractor submitted defective cost or pricing data, the contracting officer, in accordance with agency procedures, shall ensure that information relating to the contracting officer’s final determination is reported in accordance with [FAR] 42.1503(f) [which requires final determinations of defective pricing to be reported in the Federal Awardee Performance and Integrity Information System (FAPIIS)].”<sup>97</sup>

(3) *Litigation avoidance.* Resolving disputes short of litigation represents yet another of the CO’s official duties. As a fundamental legislative purpose of the CDA, Congress intended to “help to induce resolution of more contract disputes by negotiation prior to litigation.”<sup>98</sup> Implementing this legislative directive, the regulations state:<sup>99</sup>

The Government’s policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer’s level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim.

Consistent with the Government’s policy, both the agency and the contractor share interests in addressing and resolving defective pricing audit findings earlier—rather than later—in the disputes process.

(4) *Government transparency.* In an effort to encourage expeditious resolution of defective pricing matters, the Office of the Under Secretary of Defense issued guidance for release of the agency’s PNM relevant to such postaward audits:<sup>100</sup>

The information in a Price Negotiation Memorandum (PNM) can be essential in resolving claims for price adjustment based on alleged defective pricing. However, contracting officers are often reluctant to release information contained in the PNM prior to the discovery process of formal litigation.

Our policy on alleged defective pricing is to resolve conflicts over a contracting officer’s final decision and arrive at a price adjustment as

quickly as possible. Therefore, please encourage contracting officers to release relevant portions of PNMs and other relevant documents to the greatest extent possible whenever a contractor requests such information in connection with a defective pricing allegation. I believe the government and contractors will both save considerable effort and expense when defective pricing allegations can be resolved without formal litigation.

The rationale underlying this Department of Defense (DOD) policy draws its force from both the CDA’s legislative purpose and the regulatory direction to resolve disputes without litigation whenever possible. For agencies seeking to resolve disputes outside of the courtroom, this policy of releasing PNMs to contractors remains as a compelling option for promoting expeditious resolution of defective pricing allegations.

(5) *Final decisionmaker.* If the Government and the contractor cannot resolve the audit findings, the CO must then exercise his/her discretion in determining whether to issue a final decision. Prior to reaching this decision, the regulations require the CO to review the pertinent facts, secure assistance from “legal and other advisors,” and coordinate with the contract administration officer.<sup>101</sup> A claim for defective pricing represents a Government claim and can only be initiated by a CO’s final decision. The CDA mandates: “Each claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer.”<sup>102</sup> The implementing regulations confirm that “any Government claim initiated against a contractor” hinges upon a CO’s written decision.<sup>103</sup>

(6) *Requirements for final decision.* While the Government’s final decision need not make specific findings of fact, the CO “shall state the reasons for the decision reached and shall inform the contractor of the contractor’s rights” to appeal the decision.<sup>104</sup> Under the regulations, the final decision must include:<sup>105</sup>

- (i) A description of the claim or dispute;
- (ii) A reference to the pertinent contract terms;
- (iii) A statement of the factual areas of agreement and disagreement;
- (iv) A statement of the contracting officer’s decision, with supporting rationale;

(v) Paragraphs substantially as follows:

“This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board’s—

(1) Small claim procedure for claims of \$50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), \$150,000 or less; or

(2) Accelerated procedure for claims of \$100,000 or less.

Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 7102(d), regarding Maritime Contracts) within 12 months of the date you receive this decision;” and

(vi) Demand for payment prepared in accordance with [FAR] 32.604 and 32.605 in all cases where the decision results in a finding that the contractor is indebted to the Government.

If the CO’s decision fails to include the specific language regarding the contractor’s right of appeal to the agency board of contract appeals or the U.S. Court of Federal Claims, the contractor may not be bound by the time limits for filing an appeal (as long as the contractor relied upon the defect in the final decision).<sup>106</sup>

## ■ Litigation

Once the CO issues a proper written final decision, the contractor must decide how to respond: (a) concede and pay the Government’s claim, (b) seek to negotiate the Government’s claim (subject to the deadlines for filing an appeal), or (c) proceed with litigation through an appeal to the agency board of contract appeals or the Court of Federal Claims.

(1) *Finality of CO’s decision.* The clock begins to run on the contractor’s appeal after receipt of the final decision. If the contractor does nothing,

the final decision truly becomes final: the CO’s decision on a claim “is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by” the CDA.<sup>107</sup> To avoid such finality, the contractor must either appeal to the agency’s board of contract appeals (within 90 days) or to the Court of Federal Claims (within 12 months). As result, the contractor must proceed with diligence if it plans to challenge the Government’s defective pricing claim and final decision.

(2) *Appeal to board of contract appeals.* For Government claims like defective pricing, the contractor has the option of appealing to the agency board of contract appeals “within 90 days from the date of receipt of a CO’s decision.”<sup>108</sup> This 90-day deadline is critical to the authority of a board to hear a contractor’s appeal: “the Board’s jurisdiction is also dependent upon a claimant appealing a contracting officer’s final decision within 90 days of the decision’s receipt.”<sup>109</sup> Historically, the overwhelming majority of defective pricing claims have involved DOD procurements and, as a result, the ASBCA has been the forum of choice for such appeals.<sup>110</sup> Once the board of contract appeals issues its decision, the losing party may file an appeal to the Federal Circuit, which serves as the appellate court for such contract disputes.<sup>111</sup>

(3) *Appeal to the Court of Federal Claims.* As an alternative to the agency board of contract appeals, a contractor may elect to “bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary” within 12 months from the date of receipt of the CO’s final decision.<sup>112</sup> As with appeals to the agency board of contract appeals, a CO’s final decision represents a prerequisite to the court’s jurisdiction over a Government claim.<sup>113</sup> Historically, the Court of Federal Claims has rarely decided defective pricing claims. The Federal Circuit has jurisdiction over appeals from final decisions of the Court of Federal Claims.<sup>114</sup>

## ■ Alternatives To Litigation

Litigants rarely characterize litigation as cheap or expeditious. As a result, parties may seek

alternative means for resolving disputes without litigation.

(1) *Policy for alternative dispute resolution.* By law, agencies and contractors have express authority to pursue alternatives to litigation. For example, the CDA specifically recognizes that parties may engage in “alternative means of dispute resolution” (also known as alternative dispute resolution (ADR)) as an option for resolving contract disputes:<sup>115</sup>

Notwithstanding any other provision of this chapter, a contractor and a contracting officer may use any alternative means of dispute resolution under [5 U.S.C.A. §§ 571–584 (“Alternative Means of Dispute Resolution in the Administrative Process”)], or other mutually agreeable procedures, for resolving claims. All provisions of [5 U.S.C.A. §§ 571–584] apply to alternative means of dispute resolution under this subsection.

The regulations implement this statutory authority: “In accordance with agency policies and [FAR] 33.214, contracting officers are authorized to use ADR procedures to resolve claims.”<sup>116</sup> If a party rejects the other party’s request for ADR, the CDA requires the objecting party to provide a written explanation for refusing ADR.<sup>117</sup>

(2) *ADR procedures.* By definition, ADR depends upon the consent of the parties. As a result, the parties have considerable discretion to strike an agreement upon how the ADR may be structured. For this reason, the ADR process may take many forms, ranging from mediation to informal minitrials. Such procedures share the common goal of increasing “the opportunity for relatively inexpensive and expeditious resolution of issues in controversy.”<sup>118</sup> Furthermore, the regulations identify the following “essential elements” of an ADR process:<sup>119</sup>

- (1) Existence of an issue in controversy;
- (2) A voluntary election by both parties to participate in the ADR process;
- (3) An agreement on alternative procedures and terms to be used in lieu of formal litigation; and
- (4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy

(3) *ADR in practice.* The decision to pursue ADR does not stop the clock from running on the contractor’s appeal to the agency board

of contract appeals or to the Court of Federal Claims. As a result, a common practice has been for the contractor to file an appeal and then for the parties to proceed with structuring an ADR approach to resolve the dispute. For example, the ASBCA’s rules describe common methods of ADR chosen by parties in contract disputes:<sup>120</sup>

(a) Nonbinding—

*Mediations: A Neutral is an Administrative Judge* who will not normally hear or have any formal or informal decision-making authority in the matter and who is appointed for the purpose of facilitating settlement. In many circumstances, settlement can be fostered by a frank, in-depth discussion of the strengths and weaknesses of each party’s position with the Neutral. The agenda for meetings with the Neutral will be flexible to accommodate the requirements of the case. To further the settlement effort, the Neutral may meet with the parties either jointly or individually. A Neutral’s recommendations are not binding on the parties. When this method is selected, the ADR agreement must contain a provision in which the parties and counsel agree not to subpoena the Neutral in any legal action or administrative proceeding of any kind to produce any notes or documents related to the ADR proceeding or to testify concerning any such notes or documents or concerning his/her thoughts or impressions.

(b) Binding—

*Summary Proceeding With Binding Decision:* A summary proceeding with binding decision is a procedure whereby the resolution of the appeal is expedited and the parties try their appeal informally before an Administrative Judge. A binding “bench” decision may be issued upon conclusion of the proceeding, or a binding summary written decision will be issued by the judge no later than ten days following the later of conclusion of the proceeding or receipt of a transcript. The parties must agree in the ADR agreement that all decisions, rulings, and orders by the Board under this method shall be final, conclusive, not appealable, and may not be set aside, except for fraud. All such decisions, rulings, and orders will have no precedential value. Pre-hearing, hearing, and post-hearing procedures and rules applicable to appeals generally will be modified or eliminated to expedite resolution of the appeal.

(c) Other Agreed Methods—

The parties and the Board may agree upon other informal methods, binding or nonbinding that are structured and tailored to suit the requirements of the individual case.

(1) *Settlement Judge:* A “settlement judge” is an administrative or hearing examiner who will not hear or have any formal or informal decision-

making authority in the appeal and who is appointed for the purpose of facilitating settlement. In many circumstances, settlement can be fostered by a frank, in-depth discussion of the strengths and weaknesses of each party's position with the settlement judge. The agenda for meetings with the settlement judge will be flexible to accommodate the requirements of the individual appeal. To further the settlement effort, the settlement judge may meet with the parties either jointly or individually. A settlement judge's recommendations are not binding on the parties.

(2) **Minitrial:** The minitrial is a highly flexible, expedited, but structured, procedure where each party presents an abbreviated version of its position to principals of the parties who have full contractual authority to conclude a settlement and to a Board-appointed neutral advisor. The parties determine the form of presentation without regard to customary judicial proceedings and rules of evidence. Principals and the neutral advisor participate during the presentation of evidence in accordance with their advance agreement on procedure. Upon conclusion of these presentations, settlement negotiations are conducted. The neutral advisor may assist the parties in negotiating a settlement. The procedures for each minitrial will be designed to meet the needs of the individual appeal. The neutral advisor's recommendations are not binding.

(3) **Summary Trial with Binding Decision:** A summary trial with binding decision is a procedure

whereby the scheduling of the appeal is expedited and the parties try their appeal informally before an administrative judge or panel of judges. A summary "bench" decision generally will be issued upon conclusion of the trial or a summary written decision will be issued no later than ten days following the later of the conclusion of the trial or receipt of a trial transcript. The parties must agree that all decisions, rulings, and orders by the Board under this method shall be final, conclusive, not appealable, and may not be set aside, except for fraud. All such decisions, rulings, and orders will have no precedential value. The length of trial and the extent to which scheduling of the appeal is expedited will be tailored to the needs of each particular appeal. Pretrial, trial, and post-trial procedures and rules applicable to appeals generally will be modified or eliminated to expedite resolution of the appeal.

(4) **Other Agreed Methods:** The parties and the Board may agree upon other informal methods which are structured and tailored to suit the requirements of the individual appeal.

For these various ADR options, the ASBCA also provides sample ADR agreements for the parties to consider as templates or models.<sup>121</sup> Given that the bulk of defective pricing litigations have arisen under DOD contracts, the ASBCA has some experience in handling such appeals under its ADR procedures.

## GUIDELINES

These *Guidelines* are intended to assist you in understanding the litigation and proof of defective pricing cases. They are not, however, a substitute for professional representation in any specific situation.

**1.** Recognize that the Government has the burden of proving a defective pricing claim by a preponderance of the evidence.

**2.** Remember that to prevail on a defective pricing claim, the Government must prove that (1) the information fits the definition of cost or pricing data, (2) the data were reasonably available to the contractor prior to price agreement, (3) the contractor did not disclose the cost or pricing data and the Government lacked knowledge of the data, (4) the Government relied on the defective cost or pricing data to its detriment, and (5) the defective cost or pricing data caused an increase in the contract price.

**3.** Be aware that to rebut the Government's defective pricing claim, a contractor may offer

proof that the information at issue (1) was not cost or pricing data, (2) was not reasonably available before agreement on price, (3) was disclosed to, or known by, the appropriate Government representatives, (4) was not relied upon by the Government, and/or (5) was not a cause of an increased price.

**4.** Bear in mind that in addition to offering rebuttal evidence, the contractor may present affirmative defenses, such as that the pricing defects decreased the contract price and offset any errors that increased the contract price, the Government's request for certified cost or pricing data was improper because an exception to TINA applied to the procurement, or the Government's claim was barred by the CDA's six-year statute of limitations.

**5.** Keep in mind that defective pricing cases nearly always turn on documentary evidence. Corral key documents including (a) Government

and contractor PNMs; (b) contractor proposals, cost or pricing data, data disclosures and transmittals, and correspondence; (c) Government independent estimates, should-cost studies, preaward audits, proposal evaluations, cost/price analyses, and technical or labor-hour reviews (and workpapers for all); (d) contractor vendor cost/technical analyses, subcontractor reviews and audits, and subcontractor correspondence (and related workpapers); (e) Government and contractor negotiation records, history, and notes; (f) Government postaward audits, workpapers, and correspondence; (g) Contractor postaward rebuttals, workpapers, offsets, and correspondence; and (h) CO's final decision and related documents.

**6.** Be aware that the courts and boards generally give little (if any) weight to conclusory or unsupported testimony and discount testimony of witnesses who lack direct personal knowledge of the price negotiations or whose testimony conflicts with their own contemporaneous record.

**7.** Be cognizant that circumstantial evidence regarding the context of the price negotiations

and the conduct of the parties may play a key role in determining whether defective pricing has occurred.

**8.** Keep in mind that defective pricing audits typically conclude short of litigation.

**9.** Remember that a claim for defective pricing represents a Government claim and can only be initiated by a CO's final decision. Once the CO issues a proper written final decision, the contractor must (a) concede and pay the Government's claim, (b) seek to negotiate the Government's claim (subject to the deadlines for filing an appeal), or (c) proceed with litigation through an appeal to the agency board of contract appeals (within 90 days) or to the Court of Federal Claims (within 12 months)

**10.** Keep in mind that a decision to pursue ADR to resolve a defective pricing case does not stop the clock running on the contractor's appeal to the board or court. Contractors should file an appeal before proceeding to structure an ADR approach with the Government to resolve the dispute.

## ★ REFERENCES ★

- 1/ Lockheed Aircraft Corp., Lockheed-Ga. Co. Div. v. United States, 202 Ct. Cl. 787, 791, 485 F.2d 584, 586 (1973); see also Aerojet Ordnance Tenn., ASBCA No. 36089, 95-2 BCA ¶ 27922, at 139,436, 1995 WL 547716 ("The Government has the burden of proof in a defective pricing claim."); Kaiser Aerospace & Elecs. Corp., ASBCA No. 32098, 90-1 BCA ¶ 22489, at 112,884, 1989 WL 144974, aff'd on recons., 90-2 BCA ¶ 22695, 1990 WL 16849 ("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 ¶ 18351, at 92,029, 1985 WL 17093 (Government "has burden of proving its entitlement to a price reduction" in a subcontractor defective pricing case).
- 2/ See, e.g., McDonnell Douglas Servs., Inc., ASBCA No. 56568, 10-1 BCA ¶ 34325, at 169,529, 2009 WL 4774620 (holding Government's claim to be "time-barred" as too late).
- 3/ UnitedTechs. Corp., ASBCA No. 51410, 04-1 BCA ¶ 32556, 2004 WL 483216, aff'd on recons., ASBCA No. 51410 et al., 05-1 BCA ¶ 32860, 2005 WL 147601, 47 GC ¶ 86, aff'd, 463 F.3d 1261 (Fed. Cir. 2006), 48 GC ¶ 338 ("The [Government] failed to offer into evidence [the audit report] and failed to offer any evidence in support of its recommended price adjustment, nor did it brief the matter. It appears that the [Government] has abandoned this element of its claim, but if not abandoned we must deny it for lack of proof.").
- 4/ Viacom, Inc. v. General Servs. Admin., GSBCA No. 15871, 05-2 BCA ¶ 33080, at 163,971, 2005 WL 2303674, 47 GC ¶ 457; see also Rosemount, Inc., ASBCA No. 37520, 95-2 BCA ¶ 27770, at 138,454, 1995 WL 373578, 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 ¶ 10165, at 47,860, 1973 WL 1687 (Government's burden to prove claim "by a preponderance of evidence"); LTV Electrosys., Inc., Memcor Div., ASBCA No. 16802, 73-1 BCA ¶ 9957, at 46,708, 1973 WL 1865, aff'd on recons., 74-1 BCA ¶ 10380, 1973 WL 1901 (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").
- 5/ Black's Law Dictionary 1301 (9th ed. 2009).
- 6/ Chu Assocs., Inc., ASBCA No. 15004, 73-1 BCA ¶ 9906, at 46,458, 1973 WL 1503, aff'd on recons., 73-2 BCA ¶ 10120, 1973 WL 1505.
- 7/ Rosemount, Inc., ASBCA No. 37520, 95-2 BCA ¶ 27770, at 138,454-55, 1995 WL 373578, 37 GC ¶ 540.
- 8/ See, e.g., McDonnell Aircraft Co., ASBCA No. 44504, 03-1 BCA ¶ 32154, at 158,960, 2003 WL 221003, 45 GC ¶ 70 ("[The contractor] waives all defenses to the

- Navy's 'defective pricing' claim," except the element of "reasonable availability"); *Martin Marietta Corp.*, ASBCA No. 48223, 98-1 BCA ¶ 29592, at 146,714, 1998 WL 83111, recons. denied, 98-2 BCA ¶ 29741, 1998 WL 228422, 40 GC ¶ 326 (finding reliance where contractor offered no rebuttal).
- 9/ See, e.g., *Aerojet Ordnance Tenn.*, ASBCA No. 36089, 95-2 BCA ¶ 27922, at 139,450, 1995 WL 547716 (holding that contractor "has not carried its overall burden" of proving its offset). For a more detailed discussion of offsets and the burden of proof, see Bodenheimer, *Defective Pricing Handbook* § 12:1 et seq. (Thomson Reuters 2014–2015 ed.).
- 10/ *Am.Mach.&FoundryCo.*, ASBCA No. 15037, 74-1 BCA ¶ 10409, at 49,178, 1973 WL 1508; *Lockheed Martin Aeronautics Co.*, ASBCA No. 56547, 13 BCA ¶ 35,220, at 172,815, 2013 WL 443823, 55 GC ¶ 55. See generally Bodenheimer, "Calculating Defective Pricing Damages," *Briefing Papers* No. 11-7 (June 2011).
- 11/ 10 U.S.C.A. § 2306a(e)(1)(A); see 41 U.S.C.A. § 3506(a)(1).
- 12/ *DCAA Contract Audit Manual* ¶ 14-102b (Feb. 12, 2015).
- 13/ *Am. Bosch Arma Corp.*, ASBCA No. 10305, 65-2 BCA ¶ 5280, at 24,849, 1965 WL 447, corrected, ASBCA No. 10305, 66-2 BCA ¶ 5747, 1966 WL 466, and vacated, ASBCA No. 10305, ASBCA No. 12196, 67-2 BCA ¶ 6564, 1967 WL 590 (identifying issues covering reasonable availability, disclosure, and causation); *Aerojet-General Corp.*, ASBCA No. 12264, 69-1 BCA ¶ 7664, at 35,583–84, 1969 WL 591 (not listing elements but generally addressing cost or pricing data, reasonable availability, and nondisclosure); *Chu Assocs., Inc.*, ASBCA No. 15004, 73-1 BCA ¶ 9906, at 46,458–59, 1973 WL 1503, aff'd on recons., 73-2 BCA ¶ 10120, 1973 WL 1505 (addressing cost or pricing data, reasonable availability, and nondisclosure).
- 14/ *McDonnell Douglas Helicopter Sys.*, ASBCA No. 50447 et al., 00-2 BCA ¶ 31082, at 153,465, 2000 WL 1286267, 42 GC ¶ 406 (citations omitted); accord *Lockheed Martin Corp.*, ASBCA No. 50464, 02-1 BCA ¶ 31784, at 156,943, 2002 WL 234571.
- 15/ *Lockheed Corp.*, ASBCA No. 36420 et al., 95-2 BCA ¶ 27722, 1995 WL 328854, 37 GC ¶ 309; see also *Aerojet Ordnance Tenn.*, ASBCA No. 36089, 95-2 BCA ¶ 27922, at 139,436, 1995 WL 547716 (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 ¶ 24842, at 123,944, 1992 WL 42752, 34 GC ¶ 206 ("Government must establish that the disputed information is 'cost or pricing data' within the meaning of the Truth in Negotiations Act").
- 16/ 10 U.S.C.A. § 2306a(e)(1)(A); 41 U.S.C.A. § 3506(a)(1); FAR 15.407-1(b).
- 17/ *LTV Electrosys., Inc., Memcor Div.*, ASBCA No. 16802, 73-1 BCA ¶ 9957, at 46,708, 1973 WL 1865, aff'd on recons., 74-1 BCA ¶ 10380, 1973 WL 1901; accord *Litton Sys., Inc., Amecom Div.*, ASBCA No. 34435 et al., 93-2 BCA ¶ 25707, at 127,910, 1992 WL 379288; see also *Sperry Rand Corp., Univac Div.*, ASBCA No. 15289, 73-2 BCA ¶ 10165, at 47,860, 1973 WL 1687 ("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").
- 18/ 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").
- 19/ *Conrac Corp.*, ASBCA No. 19507, 78-1 BCA ¶ 12985, at 63,295, 1977 WL 2495; see also *Grumman Aerospace Corp.*, ASBCA No. 27476, 86-3 BCA ¶ 19091, at 96,493, 1986 WL 20110 ("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 ¶ 22426, at 112,642, 1989 WL 130064 ("contractor's obligations are discharged when the Government has actual knowledge of the data").
- 20/ 10 U.S.C.A. § 2306a(a), (e)(1)(A); 41 U.S.C.A. §§ 3502(a), 3506(a)(1); FAR 15.407-1(b), 52.215-10(a), 52.215-11(b).
- 21/ *Aerojet Ordnance Tenn.*, ASBCA No. 36089, 95-2 BCA ¶ 27922, at 139,436, 1995 WL 547716; see also *Wynne v. United*
- Techs. Corp.*, 463 F.3d 1261, 1265 (Fed. Cir. 2006), 48 GC ¶ 338 ("reliance on defective data is a necessary element of a TINA claim"); *Alliant Techsys., Inc.*, ASBCA No. 47626, ASBCA No. 51280, 00-2 BCA ¶ 31042, at 153,297, 2000 WL 1049163, 42 GC ¶ 339 ("Government has the burden of proving...that it relied upon defective data to its detriment").
- 22/ *Wynne v. United Techs. Corp.*, 463 F.3d 1261, 1265 (Fed. Cir. 2006), 48 GC ¶ 338.
- 23/ 10 U.S.C.A. § 2306a(e)(2); 41 U.S.C.A. § 3506(b); FAR 15.407-1(b)(2) (CO "shall consider...the extent to which the Government relied upon the defective data").
- 24/ *Rosemount, Inc.*, ASBCA No. 37520, 95-2 BCA ¶ 27770, at 138,455, 1995 WL 373578, 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 ¶ 24842, at 123,944, 1992 WL 42752, 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").
- 25/ *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).
- 26/ 10 U.S.C.A. § 2306a(e)(1)(A); 41 U.S.C.A. § 3506(a)(1).
- 27/ *DCAA Contract Audit Manual* ¶ 14-102b (Feb. 12, 2015).
- 28/ 10 U.S.C.A. § 2306a(e)(4)(A), (B); 41 U.S.C.A. § 3506(d)(1); FAR 15.407-1(b)(5), (6); *Cutler-Hammer, Inc. v. United States*, 189 Ct. Cl. 76, 85, 416 F.2d 1306 (1969). For a discussion of the requirements and standards for offsets, see Bodenheimer, *Defective Pricing Handbook* § 12:1 et seq. (Thomson Reuters 2014–2015 ed.).
- 29/ 10 U.S.C.A. § 2306a(b)(1); 41 U.S.C.A. § 3503(a).
- 30/ FAR 15.403-4(c).

- 31/ City of Albuquerque, ASBCA No. 49698, 98-2 BCA ¶ 30018, at 148,521, 1998 WL 655470, 42 GC ¶ 20.
- 32/ Forcases construing TINA exceptions under the prior version of the statute and the Defense Acquisition Regulation (DAR), compare United Techs. Corp., Pratt & Whitney, ASBCA No. 51410, 99-2 BCA ¶ 30444, at 150,427, 1999 WL 427889, 41 GC ¶ 338 (recognizing adequate price competition as a potential defense if an abuse of discretion occurred) with United Techs. Corp., ASBCA No. 51410, 04-1 BCA ¶ 32556, at 161,024, 2004 WL 483216, aff'd on recons., ASBCA No. 51410 et al., 05-1 BCA ¶ 32860, 2005 WL 147601, 47 GC ¶ 86, aff'd, 463 F.3d 1261 (Fed. Cir. 2006), 48 GC ¶ 338 (finding that CO "did not abuse his discretion" regarding his determination on adequate price competition). For a detailed discussion of the exceptions to TINA, see Bodenheimer, *Defective Pricing Handbook* § 3:1 et seq. (Thomson Reuters 2014–2015 ed.). See also FASA, Pub. L. No. 103-355, §§ 1202, 1251, 108 Stat. 3243, 3273, 3279 (1994); Clinger-Cohen Act of 1996, Pub. L. No. 104-106, div. D, tit. XLII, § 4201, 110 Stat. 186, 649 (1996).
- 33/ 41 U.S.C.A. § 7103(a)(4); FAR 33.206(b); see, e.g., McDonnell Douglas Servs., Inc., ASBCA No. 56568, 10-1 BCA ¶ 34325, at 169,529, 2009 WL 4774620, 52 GC ¶ 86 (holding defective pricing claim to be time-barred). For a more detailed discussion of the statute of limitations, see Bodenheimer, *Defective Pricing Handbook* § 14:1 et seq. (Thomson Reuters 2014–2015 ed.).
- 34/ See *JANA, Inc. v. United States*, 936 F.2d 1265 (Fed. Cir. 1991); *S.E.R., Jobs For Progress, Inc. v. United States*, 759 F.2d 1 (Fed. Cir. 1985); *Eurasia Heavy Indus., Inc.*, ASBCA No. 52878, 01-2 BCA ¶ 31574, 2001 WL 878417.
- 35/ See *United Techs. Corp.*, ASBCA No. 51410, 04-1 BCA ¶ 32556, at 161,022–23, 2004 WL 483216, aff'd on recons., ASBCA No. 51410 et al., 05-1 BCA ¶ 32860, 2005 WL 147601, 46 GC ¶ 86, aff'd, 463 F.3d 1261 (Fed. Cir. 2006), 48 GC ¶ 338 (denying laches defense after 15-year delay in issuing final decision but denying defective pricing on other grounds); *McDonnell Douglas Helicopter Sys.*, ASBCA No. 50341, 99-2 BCA ¶ 30546, at 150,828, 1999 WL 669549, 41 GC ¶ 442.
- 36/ *General Elec. Co. v. United States*, 188 Ct. Cl. 620, 412 F.2d 1215, 1221 (1969) (enforcing CO's decision on funding a "Limitation of Cost" clause overrun); see also *Honeywell Fed. Sys., Inc.*, ASBCA No. 39974, 92-2 BCA ¶ 24966, at 124,409, 1992 WL 71538, 34 GC ¶ 269 (barring successor CO from reversing prior CO's decision).
- 37/ See *McDonnell Douglas Helicopter Sys.*, ASBCA No. 50341, 99-2 BCA ¶ 30546, at 150,831, 1999 WL 669549, 41 GC ¶ 442.
- 38/ 10 U.S.C.A. § 2306a(e)(3)(A); 41 U.S.C.A. § 3506(c)(1); see also FAR 15.407-1(b)(3)(i) (barring defense that the "contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position").
- 39/ See, e.g., *Sanders Assocs., Inc.*, ASBCA No. 23251, 79-2 BCA ¶ 14159, at 69,716, 1979 WL 2573; *Lockheed Shipbldg. & Constr. Co.*, ASBCA No. 16494, 73-2 BCA ¶ 10157, at 47,769, 1973 WL 1884.
- 40/ *National Defense Authorization Act for Fiscal Year 1987*, Pub. L. No. 99-661, tit. IX, § 952, 100 Stat. 3947 (1986).
- 41/ 10 U.S.C.A. § 2306a(e)(3)(D); 41 U.S.C.A. § 3506(c)(4); see also FAR 15.407-1(b)(3)(iv) (stating that the lack of a certificate is not a defense, but the agency must still establish that "[c]ertified cost or pricing data were required"). For a detailed discussion of the requirements related to TINA certification, see Bodenheimer, *Defective Pricing Handbook* § 9:1 et seq. (Thomson Reuters 2014–2015 ed.).
- 42/ *Libby Welding Co.*, ASBCA No. 15084, 73-1 BCA ¶ 9859, at 46,090, 1972 WL 1278.
- 43/ *GKS, Inc.*, ASBCA No. 47692 et al., 00-1 BCA ¶ 30914, at 152,557, 2000 WL 558100, 42 GC ¶ 223; see also *Baldwin Elecs., Inc.*, ASBCA No. 19683, 76-2 BCA ¶ 12199, 1976 WL 2367.
- 44/ See, e.g., *Central Nav. & Trading Co., S.A.*, ASBCA No. 23946, 82-2 BCA ¶ 16074, 1982 WL 7818 (excusing contractor's failure to submit more current cost breakdown because it had only days over a weekend in a war zone to retrieve data); *LTV Electrosys., Inc., Memcor Div.*, ASBCA No. 16802, 73-1 BCA ¶ 9957, at 46,709, 1973 WL 1865, aff'd on recons., 74-1 BCA ¶ 10380, 1973 WL 1901 (holding cost or pricing data not to be reasonably available under exigent circumstances). For a discussion of cases construing urgency in the context of "reasonable availability," see Bodenheimer, *Defective Pricing Handbook* § 5:1 et seq. (Thomson Reuters 2014–2015 ed.).
- 45/ *Singer-General Precision, Inc. Librascope Div.*, ASBCA No. 17604, 76-1 BCA ¶ 11819, at 56,438–39, 1976 WL 2083.
- 46/ *Baifield Indus., Div. of A-T-O, Inc.*, ASBCA No. 19025, 75-1 BCA ¶ 11245, 1975 WL 1864; *Dell Indus.*, ASBCA No. 19028, 77-1 BCA ¶ 12297, 1976 WL 1997; see FAR 52.233-1.
- 47/ *DCAA Contract Audit Manual* ¶ 14-115a (Feb. 12, 2015).
- 48/ FAR 15.406-3(a).
- 49/ *Martin Marietta Corp.*, ASBCA No. 48223, 98-1 BCA ¶ 29592, at 146,714, 1998 WL 83111, recons. denied, 98-2 BCA ¶ 29741, 1998 WL 228422, 40 GC ¶ 326 (finding that CO's PNM established Government's reliance).
- 50/ *United Techs. Corp.*, ASBCA No. 51410 et al., 05-1 BCA ¶ 32860, at 162,812, 2005 WL 147601, 47 GC ¶ 86, aff'd, 463 F.3d 1261 (Fed. Cir. 2006), 48 GC ¶ 338 (where agency used Record of Acquisition Action (RAA) in lieu of PNM, the RAA showed lack of Government reliance).
- 51/ *Lockheed Aircraft Corp., Lockheed-Ga. Co. Div. v. United States*, 193 Ct. Cl. 86, 95, 432 F.2d 801 (1970) (upholding defective pricing where audit relied upon subcontractor's defective pricing); *Defense Elecs., Inc.*, ASBCA No. 11127, 66-1 BCA ¶ 5604, at 26,204–05, 1966 WL 425 (finding no reliance where the CO "paid no attention to the advice and recommendation of the audit agency that the subcontract price had not been substantiated").
- 52/ *United Techs. Corp.*, ASBCA No. 51410, 04-1 BCA ¶ 32556, at 161,013, 2004 WL 483216, aff'd on recons., ASBCA No. 51410 et al., 05-1 BCA ¶ 32860, 2005 WL 147601, 47 GC ¶ 86, aff'd, 463 F.3d 1261 (Fed. Cir. 2006), 48 GC ¶ 338 (where audit workpapers disclosed letter from Air Force CO acknowledging that the "contracts were awarded solely on a competitive basis").

- 53/ Motorola, Inc., ASBCA No. 48841, 96-2 BCA ¶ 28465, at 142,171, 1996 WL 434008, 38 GC ¶ 533 (finding that the auditor's workpapers proved actual Government knowledge of the allegedly defective data); Texas Instruments Inc., ASBCA No. 30836, 89-1 BCA ¶ 21489, at 108,261, 1988 WL 134394 (finding that preaward audit workpapers showed Government knowledge of error in contractor's G&A rate).
- 54/ Chu Assocs., Inc., ASBCA No. 15004, 73-1 BCA ¶ 9906, at 46,456-57, 1973 WL 1503, aff'd on recons., 73-2 BCA ¶ 10120, 1973 WL 1505.
- 55/ T. Brown Constructors, Inc. v. Pena, 132 F.3d 724, 735 (Fed. Cir. 1997).
- 56/ Martin Marietta Corp., ASBCA No. 48223, 96-2 BCA ¶ 28270, at 141,160, 1996 WL 159053.
- 57/ McDonnell Douglas Helicopter Sys., ASBCA No. 50447 et al., 00-2 BCA ¶ 31082, at 153,465, 2000 WL 1286267, 42 GC ¶ 406.
- 58/ United Techs. Corp., ASBCA No. 51410 et al., 05-1 BCA ¶ 32860, at 162,812, 2005 WL 147601, 47 GC ¶ 86, aff'd, 463 F.3d 1261 (Fed. Cir. 2006), 48 GC ¶ 338.
- 59/ PAE Int'l, ASBCA No. 20595, 76-2 BCA ¶ 12044, at 57,807, 1976 WL 2157 (sustaining the Government's defective pricing claim).
- 60/ Texas Instruments Inc., ASBCA No. 30836, 89-1 BCA ¶ 21489, at 108,265, 1988 WL 134394 (holding that the agreement rebutted Government reliance on the cost data at issue because the defective pricing audit used data outside of the scope of the parties' agreement).
- 61/ Rosemount, Inc., ASBCA No. 37520, 95-2 BCA ¶ 27770, at 138,452-53, 138,455, 1995 WL 373578, 37 GC ¶ 540.
- 62/ McDonnell Douglas Helicopter Sys., ASBCA No. 50447 et al., 00-2 BCA ¶ 31082, at 153,465, 2000 WL 1286267, 42 GC ¶ 406.
- 63/ United Techs. Corp., ASBCA No. 51410 et al., 05-1 BCA ¶ 32860, at 162,813, 2005 WL 147601, 47 GC ¶ 86, aff'd, 463 F.3d 1261 (Fed. Cir. 2006), 48 GC ¶ 338.
- 64/ Aerojet Ordnance Tenn., ASBCA No. 36089, 95-2 BCA ¶ 27922, at 139,442, 1995 WL 547716.
- 65/ Rosemount, Inc., ASBCA No. 37520, 95-2 BCA ¶ 27770, at 138,456, 1995 WL 373578, 37 GC ¶ 540.
- 66/ Lockheed Martin Corp., ASBCA No. 50464, 02-1 BCA ¶ 31784, at 156,944, 2002 WL 234571.
- 67/ Aerojet Ordnance Tenn., ASBCA No. 36089, 95-2 BCA ¶ 27922, at 139,442, 1995 WL 547716.
- 68/ Aerojet Ordnance Tenn., ASBCA No. 36089, 95-2 BCA ¶ 27922, at 139,443, 1995 WL 547716 (while recognizing some impact from nondisclosure of labor-hour data, the Board concluded that "we are unable to draw a firm conclusion as to the appropriate rate to be used to measure" the impact).
- 69/ United Techs. Corp., ASBCA No. 51410, 04-1 BCA ¶ 32556, at 161,029 n.5, 2004 WL 483216, aff'd on recons., ASBCA No. 51410 et al., 05-1 BCA ¶ 32860, 2005 WL 147601, 47 GC ¶ 86, aff'd, 463 F.3d 1261 (Fed. Cir. 2006), 48 GC ¶ 338 (denying one of the defective pricing claims where agency failed to offer any audit report or other evidence).
- 70/ Universal Restoration, Inc. v. United States, 798 F.2d 1400, 1406 (Fed. Cir. 1986) ("Because the government relied solely on the presumption that nondisclosure resulted in an overstated contract price, our holding that [the contractor] rebutted the presumption ends our inquiry."); Wynne v. United Techs. Corp., 463 F.3d 1261, 1267 (Fed. Cir. 2006), 48 GC ¶ 338 ("The Air Force did not assert any additional evidence or arguments establishing such reliance before either the Board or this court.").
- 71/ Sylvania Elec. Prods., Inc. v. United States, 202 Ct. Cl. 16, 28, 479 F.2d 1342, 1349 (1973) (holding that "the presumption stands" where the contractor failed to offer any rebuttal evidence).
- 72/ Hardie-Tynes Mfg. Co., ASBCA No. 20717, 76-2 BCA ¶ 12121, at 58,229, 1976 WL 2029 ("No support for the alleged value of those items has been furnished and no mention is made in appellant's subsequent brief.").
- 73/ Boeing Co., ASBCA No. 20875, 85-3 BCA ¶ 18351, at 92,029-30, 1985 WL 17093; accord TGS Int'l, Inc., ASBCA No. 31120, 87-2 BCA ¶ 19683, at 99,630, 1987 WL 40718 (quoting Boeing and rejecting defective pricing relating to "Stanley-Vidmar purchase order" because "the record is extremely thin").
- 74/ See Lockheed Aircraft Corp., Lockheed-Ga. Co. Div. v. United States, 202 Ct. Cl. 787, 485 F.2d 584 (1973) (rejecting "speculation" and "conjecture" as proof for a Government defense asserting an offset to be intentional).
- 75/ Alliant Techsys., Inc., ASBCA No. 47626 et al., 00-2 BCA ¶ 31042, at 153,299, 2000 WL 1049163, 42 GC ¶ 339.
- 76/ Alliant Techsys., Inc., ASBCA No. 47626 et al., 00-2 BCA ¶ 31042, at 153,299, 2000 WL 1049163, 42 GC ¶ 339.
- 77/ Delco Sys. Operations, ASBCA No. 37097, 90-3 BCA ¶ 23245, 1990 WL 224035 (denying such inferences in summary judgment context but noting that such inferences may be appropriate in a decision on merits).
- 78/ Hughes Aircraft Co., ASBCA No. 46321, 97-1 BCA ¶ 28972, at 14,272, 1997 WL 233993, 39 GC ¶ 441 (while recognizing its power to impose sanctions, the board declined to bar evidence relating to whether "cost ledger summaries" had been disclosed).
- 79/ Whittaker Corp., ASBCA No. 17267, 74-2 BCA ¶ 10938, at 52,078, 1974 WL 1661.
- 80/ McDonnell Douglas Helicopter Sys., ASBCA No. 50341, 99-2 BCA ¶ 30546, at 150,834, 1999 WL 669549, 41 GC ¶ 442.
- 81/ DCAA Contract Audit Manual ¶ 14-113.1 (Feb. 12, 2015).

- 82/ DCAA Contract Audit Manual ¶ 14-113.2 (Feb. 12, 2015).
- 83/ DCAA Contract Audit Manual ¶ 14-113.2 (Feb. 12, 2015).
- 84/ DCAA Contract Audit Manual ¶ 14-115a (Feb. 12, 2015).
- 85/ 10 U.S.C.A. § 2313(a)(2); 41 U.S.C.A. § 4706(b)(2); DCAA Contract Audit Manual ¶ 14-113.3b (Feb. 12, 2015); see FAR 52.215-2. See generally Bodenheimer, *Defective Pricing Handbook* § 15:1 et seq. (Thomson Reuters 2014–2015 ed.).
- 86/ DCAA Contract Audit Manual ¶¶ 14-116.2, 14-116.3 & 14-116.4 (Feb. 12, 2015).
- 87/ DCAA Contract Audit Manual ¶ 14-117 (Feb. 12, 2015).
- 88/ DCAA Contract Audit Manual ¶ 14-122a (Feb. 12, 2015).
- 89/ DCAA Contract Audit Manual ¶ 14-122b (Feb. 12, 2015).
- 90/ FAR 15.407-1(b)(2).
- 91/ FAR 15.407-1(b)(4).
- 92/ FAR 15.407-1(d).
- 93/ FAR 15.407-1(d).
- 94/ FAR 15.407-1(d).
- 95/ FAR 15.407-1(d).
- 96/ FAR 15.407-1(d).
- 97/ FAR 15.407-1(d).
- 98/ S. Rep. No. 95-1118 (1978), reprinted in 1978 U.S.C.C.A.N. 5235; see *Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1578 (Fed. Cir. 1987) (same).
- 99/ FAR 33.204.
- 100/ Memorandum from Eleanor R. Spector, Dir., Defense Procurement, Office of Under Secretary of Defense, “Release of Price Negotiation Memorandum Upon an Allegation of Defective Pricing” (June 14, 1993).
- 101/ FAR 33.211(a).
- 102/ 41 U.S.C.A. § 7103(a)(3).
- 103/ FAR 33.206(b).
- 104/ 41 U.S.C.A. § 7103(e).
- 105/ FAR 33.211(a)(4).
- 106/ See *Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1578 (Fed. Cir. 1987) (holding that the deadline for appeal did not commence until receipt of a written decision with the proper notice of appeal rights); *Decker & Co. v. West*, 76 F.3d 1573 (Fed. Cir. 1996) (holding that a defective notification of appeal rights could not excuse an untimely appeal unless the contractor could demonstrate detrimental reliance upon that defect).
- 107/ 41 U.S.C.A. § 7103(g).
- 108/ 41 U.S.C.A. § 7104(a); see 41 U.S.C.A. § 7105.
- 109/ *Boeing Co.*, ASBCA No. 57490, 12-1 BCA ¶ 34,916, at 171,672 (citing 41 U.S.C.A. § 7104(a)).
- 110/ See <http://www.asbca.mil/>.
- 111/ 41 U.S.C.A. § 7107(a); 28 U.S.C.A. § 1295(a)(10); see, e.g., *Wynne v. United Techs. Corp.*, 463 F.3d 1261 (Fed. Cir. 2006), 48 GC ¶ 338 (denying Government defective pricing decision rendered by ASBCA).
- 112/ 41 U.S.C.A. § 7104(b)(1), (3); see *Boeing Co.*, ASBCA No. 57490, 12-1 BCA ¶ 34,916, at 171,672 (“Alternatively, a claimant may challenge the [CO’s final] decision by bringing an action in the United States Court of Federal Claims within 12 months of its receipt.”).
- 113/ See, e.g., *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1279–81 (Fed. Cir. 1985) (Government counterclaims on a contract subject to the CDA must be the subject of a CO’s final decision before Court of Federal Claims has jurisdiction).
- 114/ 28 U.S.C.A. § 1295(a)(3).
- 115/ 41 U.S.C.A. § 7103(h)(1).
- 116/ FAR 33.210.
- 117/ 41 U.S.C.A. § 7103(h)(3); see also FAR 33.214(b).
- 118/ FAR 33.214(a).
- 119/ FAR 33.214(a).
- 120/ Rules of the ASBCA, Addendum II: Alternative Methods of Dispute Resolution (revised July 21, 2014), available at [http://www.asbca.mil/Rules/forms/AddendumII\\_Final%20Rule%20Formatting%20pgl.pdf](http://www.asbca.mil/Rules/forms/AddendumII_Final%20Rule%20Formatting%20pgl.pdf).
- 121/ ASBCA, Alternative Dispute Resolution (ADR), Sample Agreement To Utilize the Mediation Procedure (Oct. 20, 2014), available at <http://www.asbca.mil/ADR/ADR%20sample.pdf>; ASBCA, Alternative Dispute Resolution (ADR), Sample Agreement To Utilize the Summary Proceeding With Binding Decision Procedure (Oct. 20, 2014), available at <http://www.asbca.mil/ADR/ADR%20utilize.pdf>.