Fair warning: This one is going to be fairly long and relatively complex. We've been mulling on it for a while, trying to organize our thoughts in order to present them in a semi-cogent fashion. The only way we can digest this is to break it up into two separate parts. Therefore this is Part 1 of 2.

And as is the case with such articles, we need to include the caveat that we here at Apogee Consulting, Inc. are not attorneys and we are not offering legal advice. Our opinions on legal matters are simply those of laypersons. If you want a legal opinion on the matters we are going to be discussing, please consult an attorney.

All that being said, here we go.

For background, please see our October, 2013, **article** on the same topic. In that article, we reviewed an ASBCA decision regarding concurrent changes in cost accounting practice made by The Boeing Company. That decision addressed Boeing's situation, which took place before the FAR Councils made significant revisions to the cost impact rules in 2005. Left unaddressed was whether the government's approach—which was rejected by Judge Freeman with respect to pre-2005 changes—would be upheld with respect to post-2005 changes, where the rules more clearly supported the government's views.

For additional background, it should be noted that we have in the past proffered criticism of the FAR Councils' 2005 revisions to FAR Part 30 and related contract clauses, asserting that the Councils overstepped their authority by interpreting terms in the CAS Board regulations, since the implementing statute expressly reserved that right to the CAS Board. Unfortunately, as we've **noted** recently, the CAS Board has been inactive—leaving us as a lonely voice pointing out the FAR Councils' usurpation of powers. (According to the White House OMB site, the last time the CAS Board met was in October, 2011. Even if that's not accurate, just the fact that nobody has updated the CAS Board site in four years gives a good sense of the lack of government interest in an active CAS Board.)

With those background thoughts in mind, let's review the recent ASBCA **decision** in the matter of Raytheon Space and Airborne Systems (SAS). (The case is dated May 7, 2015, but the decision was actually published about six weeks after that date, to give the parties an opportunity to redact proprietary information.) Of course, readers of this blog know that The

Raytheon Company is an active litigant at both the ASBCA and U.S. Court of Federal Claims. A keyword search on this site reveals nearly 50 articles in which Raytheon is mentioned—nearly all of which discuss litigation-related matters. It's an open secret in the aerospace/defense industry that, while Boeing, Lockheed Martin, and Northrop Grumman will often settle their disputes with the government, Raytheon is more principled (some might say intransigent or obdurate) and will pursue litigation to its end—especially when the company believes it has strong legal arguments on its side. The fact that Raytheon tends to win more often than not likely creates further incentive for the company to lawyer-up and litigate rather than to settle its disputes.

This particular decision involves three separate appeals (ASBCA Nos. 57801, 57803, and 58068) that were consolidated for judicial efficiency. The cases correspond to different revisions that Raytheon SAS made to its CASB Disclosure Statement (i.e., 57801 = Revision 1, 57803 = Revision 5, and 58068 = Revision 15). ASBCA No. 57801 (Revision 1) was the subject of a **prior decision** in which the Judge declined to dismiss the government's claim solely on the basis that it has been filed after the Contract Disputes Act's Statute of Limitations (CDA SoL) had expired, because Raytheon SAS did not submit its cost impact analysis until two years after it had made its changes to cost accounting practice. (Other government claims were dismissed, because Raytheon SAS had submitted cost impact analyses more timely.) We criticized that decision, noting that the contract clause 52.230-6 did not require submission of a cost impact analysis until the cognizant Federal Agency Official (CFAO) requested it. Thus, we believed that tying notice of harm to a discretionary event gave the government an inequitable ability to toll the CDA SoL. Nonetheless, the legal doctrine that the government did not know it had been harmed until the contractor announced it in writing became somewhat of a bright line in such matters.

Because the Judge at the time declined to dismiss the government claim, the parties proceeded to trial. Two years later, a different judge (Judge O'Connell) ruled on the merits of the parties' dispute. Let's recap the facts, as Judge O'Connell determined them.

Raytheon's Revision 1 contained four (4) changes to cost accounting practice. When SAS submitted its Gross Dollar Magnitude (GDM) cost impact analysis, the calculations showed that one change (property management) "resulted in increased costs of $313,200 to … flexibly-priced contracts and a decrease in costs of $281,100 to its fixed-priced contracts." But the other three changes had the opposite impact. In the aggregate, they "decreased costs to flexibly-priced contracts [by $660,800] and increased costs to fixed-priced contracts [by $518,200]." How those impacts were aggregated and netted against each other to determine if Raytheon SAS' CAS-covered contracts had experienced "increased costs in the aggregate" formed the gravamen of the parties' dispute. As Judge O'Connell wrote—

… the government takes the position that increased costs of $313,200 to Raytheon's flexibly-priced contracts and a decrease in costs of $281,100 to its fixed-price contracts due to the property accounting/property management change each result in a cost increase to the government and, thus combined, result in a total cost increase of $594,300 ($313,200 + $281,100). Conversely, following this same logic, cost decreases to flexibly-priced contracts and cost increases to fixed-price contracts both save the government money, which would mean that there was a cost savings of $1,179,000 from the other three Revision I changes ($660,800 + $518,200). Further, if the cost increase from the property accounting/property management change could be offset by the cost decrease from the other three changes, there would be an overall cost saving to the government of $584,700 ($1,179,000-$594,300) from the Revision I changes. *This question, whether multiple simultaneous accounting changes can be offset against one another, is central to this dispute.*

(Emphasis added. Internal citations omitted.)

But there was more to the dispute. DCAA started its audit of SAS' cost impact analysis nearly five years after Raytheon submitted it. The audit was never finished. Instead, DCAA issued a Rough-Order-of-Magnitude (ROM) to the CFAO. We've bemoaned DCAA's use of Memos and ROMs as poor substitutes for GAGAS-compliant audits **before** . We've also **asserted** that DCAA's streamlined approach to determining government damages is a causal factor in increased litigation between the contracting parties. Thus, our opinion regarding the following paragraph should be no surprise to our readers.

On 25 May 2011, DCAA provided to DCMA a rough order of magnitude (ROM) of $772,590 for the Revision 1 property accounting/property management change. It calculated this amount by taking the sum of Raytheon's numbers from the GDM and adding 30 percent: $313,200 + $281,100 x 1.3= $772,590. By way of explanation, DCAA stated: 'we utilized a 30 percent increment factor for the GDMs based on at least one year of data to determine an estimated cost impact to the government. *The 30 percent factor is an estimate intended to protect the taxpayer's interest for items that could have been found if an audit were to be performed.*
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(Emphasis added. Internal citations omitted.)

DCAA focused solely on the one change where Raytheon SAS' CAS-covered contracts had experienced increased costs in the aggregate, and did not look at the other three changes to cost accounting practice. This was intentional, as DCAA agreed with Raytheon SAS that the other three changes resulted in decreased costs to the government. In other words, DCAA didn't care about cost savings to the government stemming from the three changes, but wanted Raytheon SAS to adjust contract values for the one change where it thought costs had increased. And it wanted Raytheon SAS to pay an extra 30 percent over and above what the calculations showed the cost impact was.

And to make matters worse, the CFAO added compound interest on top of the calculated cost impact value, the value that included the 30 percent adder. The government demanded $404,011 from Raytheon SAS, even though Raytheon SAS believed it had actually saved the government money when all changes were netted together.

Nobody should be surprised that Raytheon SAS felt that the government's position was rapacious, or that its own position was strong, and the matter was worth litigating.

In rendering his decision on Revision 1, Judge O'Connell cited to the Boeing decision that established the legal doctrine of concurrent cost accounting changes for pre-2005 changes to cost accounting practice. The Judge went out of his way to note that the Boeing doctrine was, and remains, fact-specific. However, he applied it to Raytheon SAS' Revision 1, since that Revision had been submitted before the 2005 FAR changes. He wrote, "the government has repeated the same arguments it made in Boeing and has put all of its eggs in the 'Boeing is wrong' basket. Because the government has not identified any material fact in dispute, we enter summary judgment for Raytheon on Revision I."

Victory for Raytheon SAS with respect to Revision 1 changes.

In the next article we will discuss the Judge's view of the Revision 5 and Revision 15 changes. Those changes to cost accounting practice were effected after the FAR Councils' 2005 revisions to FAR Part 30 and related contract clauses … and thus Raytheon SAS did not achieve such a clear-cut victory. And yet the rest of the story is important, because Judge O'Connell charted some new territory and clarified some important aspects of how to calculate "increased costs in the aggregate" when a contractor makes concurrent changes to cost accounting practice.