First, an apology of sorts. It's been a long time since I've posted an article. The truth is, I've been struggling with an article I need to write/post, but it won't come together, at least right now. It's 4,000 words long, and I've discussed my points with a respected colleague and a *very* respected member of the Beltway Legal Bandit bar, and I still don't think it's ready for prime time. While I've been wrestling with it I've not been posting. Sorry about that – to the extent you noticed.

Moving on from that *mea culpa*, here is another article about how defective pricing can become something else, something more fraught with legal peril. When I say "another article" I mean just that – I've posted on this topic before. There are many articles on this blog discussing defective pricing. There are even a couple of articles discussing the interesting intersection between defective pricing and false claims. For example, you can check out **this 2013 article** if you're so inclined.

In today's article, we have another interesting evolution from allegations of defective pricing to allegations of violations of the False Claims Act, with potential allegations of violations of the False Statements Act along the way. (Note: If you want to know more about those two things then feel free to do a keyword search on this site; I've written about them as well.) That being said, as always I have to remind readers that I am not an attorney and you shouldn't think that I am giving out legal advice. I'm just a layperson with, shall we say, some experience in the areas being discussed.

Let's start with the Department of Justice **press release** headline: "Navistar Defense Agrees to Pay $50 Million to Resolve False Claims Act Allegations Involving Submission of Fraudulent Sales Histories." So: $50 million is a rather large legal settlement value. Let's see what caused Navistar—maker of MRAP vehicles—to have to negotiate and agree on such a large settlement.

According to the DoJ, the settlement was made to resolve allegations that the contractor "fraudulently induced the U.S. Marine Corps to enter into a contract modification at inflated prices for a suspension system for armored vehicles known as Mine-Resistant Ambush Protected vehicles." Let's unpack that a bit.

First, this issue had to do with a contract modification. That means that Navistar already had a

contract and was negotiating some type of price adjustment with its customer, the USMC. Apparently, the contract mod had something to do with the MRAP suspension system, but that's not the important part. What's important is that all post-award contract price adjustments valued in excess of $2 million are always subject to TINA (Truth-in-Negotiations Act or what is today called the Truthful Cost or Pricing Data Act). TINA is applicable because there is no competition when a contract mod is being negotiated; such actions are always on a single source basis. Even if there was competition when the contract was originally awarded, there is no competition in a contract modification situation. Consequently, Navistar was required to certify that the cost or pricing data it provided to the USMC negotiators was accurate, complete, and current. A failure to provide accurate, complete, and current cost or pricing data when the contractor certified that it did so is called "defective pricing," and there are contractual remedies associated with that situation. (See, for example, the FAR contract clause 52.215-10.)

But there may be more to this situation than simply a failure to provide accurate, complete, and current certified cost or pricing data. The DoJ added more details, as follows:

The United States alleged that Navistar knowingly created fraudulent commercial sales invoices and submitted those invoices to the government to justify the company's prices. The sales reflected in the commercial sales invoices never occurred. The government relied on the fraudulent sales invoices in agreeing to Navistar's inflated prices.

The foregoing seems to indicate that maybe TINA wasn't involved and maybe this was not a case of relatively simple defective pricing.

Besides the presence of adequate price competition, another exception to the requirement to obtain certified cost or pricing data is when a commercial item is being acquired. When acquiring commercial items, the contracting officer is prohibited from obtaining certified cost or pricing data. (See FAR 15.403-1(b)(3).) The FAR is clear that "Any acquisition of an item that the contracting officer determines meets the commercial item definition in 2.101, or any modification, as defined in paragraph (3)(i) of that definition, that does not change the item from a commercial item to a noncommercial item, is exempt from the requirement for certified cost or pricing data."

Accordingly, it seems that Navistar may have been claiming that the MRAP vehicle suspension system, or a component thereof, was a commercial item. In that case, it would not have been required to provide certified cost or pricing data; in fact, the contracting officer was prohibited

from requesting it.

So what happened? Even though commercial item acquisitions are not subject to TINA and there is no requirement to provide certified cost or pricing data, that doesn't mean that the contractor gets off scot free. Indeed, the contracting officer is directed to obtain sufficient information (other than certified cost or pricing data) to permit a determination that the price being paid is fair and reasonable. This requirement is discussed at FAR 15.403-3.

There is a lot of language in that FAR section discussing the kind of information that might support the determination that the price being paid for a commercial item is fair and reasonable. FAR 15.403-3(c) states (in part)—

(1) At a minimum, the contracting officer must use price analysis to determine whether the price is fair and reasonable whenever the contracting officer acquires a commercial item (see 15.404-1(b)). The fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable. If the contracting officer cannot determine whether an offered price is fair and reasonable, even after obtaining additional data from sources other than the offeror, then the contracting officer shall require the offeror to submit data other than certified cost or pricing data to support further analysis (see 15.404-1). *This data may include history of sales to non-governmental and governmental entities, cost data, or any other information the contracting officer requires to determine the price is fair and reasonable. Unless an exception under 15.403-1(b)(1) or (2) applies, the contracting officer shall require that the data submitted by the offeror include, at a minimum, appropriate data on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price.*

(Emphasis added.)

So that's what I think happened to Navistar. Without knowing anything more than provided by the language in the DoJ press release, I think Navistar claimed that its suspension system was a commercial item. When the contracting officer requested sales history information to support why the price being quoted by Navistar was fair and reasonable, somebody made a bad mistake and (allegedly) created fraudulent sales information, and then provided that information to the contracting officer.

If that was the case—and I think it was—then we are looking at far more than a tawdry defective pricing case. We are looking at a potential violation of the False Statements Act (18 U.S.C. § 1001). If the contract mod was awarded on the basis of one or more false statements, then (potentially) every contract invoice Navistar submitted thereafter was potentially a false claim. Violations of the False Claims Act can get expensive very very quickly.

Thus, a $50 million settlement probably seemed like a very good idea at the time.

Another thought. The majority of False Claims Act cases start out as lawsuits filed by whistleblowers, or *qui tam* relators, as they are called. This case was not an exception. As the DoJ noted in its press release, “The civil settlement includes the resolution of claims brought under the *qui tam* or whistleblower provisions of the False Claims Act by Duquoin Burgess, a former Government Contracts Manager for Navistar. … Burgess will receive $11,060,000 out of today’s settlement.” That turns out to be roughly a 22% bounty.

And now a final thought: I will be speaking on a panel on Tuesday, June 8th, at the American Conference Institute’s 12th Advanced Forum on DCAA & DCMA Cost, Pricing, Compliance & Audits. I will be joined by two others—Phil Seckman (Dentons) and Jamie Sybert (Grant Thornton). Our topic will be “Are You Prepared for Defective Pricing Audits?”

A timely topic, isn’t it?