On June 19, 2015, the Department of Justice **announced** that it had filed suit in the Eastern District of Michigan, in which it alleged that a subsidiary of BAE Systems located in Sealy, Texas, had violated the requirements of the Truth-in-Negotiations Act (TINA) and, as a result, had violated the False Claims Act. Now, readers of this blog know that we've explored the strange relationship between TINA and the FCA before. For example, about a year ago we wrote **this article** , in which we pondered that relationship.

We wrote –

We are interested in how a TINA violation that has the stated legal remedy of a unilateral contract price reduction plus interest on any overpayments that may have resulted leads to a situation in which every invoice submitted for payment in connection with that defectively priced contract has become a false claim, subjecting the contractor to up to $11,000 per invoice, plus up to treble damages, plus interest. … Now we have a new rule: If the Federal government detects the defective pricing, then it's a TINA matter. But if the relator detects the defective pricing, then it's a FCA matter. Which is inconsistent and, on its face, somewhat inequitable. But that's the way we're seeing it these days.

We thought then that we'd figured things out pretty well. Instead of the FCA being used as an additional penalty when the Feds encountered an egregious example of defective pricing, we believed that the FCA allegations were the natural result of a *qui tam* relator (aka "whistleblower") being the source of the allegations. But now we have to rethink that understanding, because the DoJ hit BAE Systems with allegations of both TINA and FCA violations, and there is no relator in the picture.

We're confused. *Again.* Which is probably the natural state of affairs for non-lawyers trying to understand the complex litigation landscape of public contract law.

The factual heart of the allegations is BAE Systems' certified cost and pricing data submitted to the U.S. Army for a contract awarded in 2008 to build 20,000 trucks. Now these trucks were not your commercial Fords or Dodges; instead, these trucks were "Family of Medium Tactical Vehicles" or FMTVs. The FMTV production contract actually goes back to 1996—nearly twenty years ago—when Stewart & Stevenson originally designed and built them at its plant in Sealy, Texas. Stewart & Stevenson held the contract for ten years (between 1996 and 2006, and then the Sealy plant was merged with Armor Holdings, Inc., who held the contract for two years (2006 to 2007). BAE Systems bought Armor Holdings, Inc. in 2007 and merged it into its Land & Armaments Division (which also included the old United Defense manufacturing operations). BAE Systems continued to hold the Army's FMTV contract until 2010, when it lost it to Oshkosh. (We wrote about that competition and its aftermath **here** and **also here** .) In 2011, the final FMTV rolled-off the Sealy production line and the plant was shuttered in mid-2014.

But the fact that the plant was closed and most employees laid-off didn't stop the DCAA auditors and the Defense Criminal Investigative Service and the Army Criminal Investigation Command and the DoJ's Civil Division Commercial Litigation Branch from filing suit against the parent company seven years after the alleged violations took place.

No details were given in the DoJ press release. The only description of the allegations was "The government alleges that BAE knowingly inflated the price of the FMTV contract by concealing cost and pricing data on numerous parts and materials during contract negotiations, despite having certified that the data it had disclosed was accurate, complete and current." In essence, we were told that Stewart & Stevenson and/or Armor Holdings failed to comply with TINA by not making a full disclosure of all relevant facts that might affect price negotiations. BAE Systems inherited that alleged violation when it acquired Armor Holdings and is now left "holding the bag" (so to speak).

The ironic thing here is that BAE Systems lost the 2010 follow-on contract award to Oshkosh because Oshkosh underbid it. So if BAE Systems was inflating its bids, it already paid a substantial price for doing so. Indeed, all of its employees in the Sealy plant already paid a substantial price for any systemic bidding errors.

But we don't know the facts of the allegations. We don't know what cost or pricing data was allegedly intentionally withheld. We don't know whether it was supplier pricing or the fact that a sale was being contemplated or whether it was known improvements or cost reductions to the production process. So it's impossible to evaluate the merits of the case.

But we do know that BAE Systems is going to have a very tough time mounting a defense seven years after the fact, without access to the employees who prepared the cost proposal and negotiated it with the Army.