The decision to allege that a contractor has violated the False Claims Act when it has "defectively priced" its contract proposal (i.e., violated the Truth-in-Negotiations Act or Truthful Pricing Data Act or whatever you want to call it) has long interested and—truthfully—confused us. See, **for example**, this article, originally published in 2013. A couple of years later we referenced it in **another article** discussing a lawsuit filed against BAE Systems Tactical Vehicle Systems (which used to be called Stewart & Stevenson before the acquisition by BAE Systems), in which the government alleged that BAE's defectively priced proposal (submitted in 2008) had led it to submit false claims. In that latter article we summarized the allegations thusly—

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.

Looking back we can now put some (but by no means all) of the pieces together, using ASBCA decisions. Apparently, the cognizant contracting officer had issued a COFD (Contracting Officer Final Decision) and demand for $56 million—in an entirely separate action from the government's False Claims suit filed in a District Court. BAE Systems appealed that COFD at the ASBCA. The appeal proceeded until the government requested an indefinite stay because of the other litigation. Judge O'Sullivan, writing for the Board, denied that stay—and **her decision** provided some clues into what had (allegedly) happened.

According to the Board's decision—

After the May 2008 award of the FMTV contract, the Army and BAE TVS commenced price negotiations, which were concluded on 22 September 2008. On 24 September 2008, BAE TVS executed a Certificate of Current Cost or Pricing Data stating that the cost or pricing data it provided the government during price negotiations were current, accurate, and complete as of 4 September 2008 (the effective certification date). On 15 July 2014, following a post-award audit by the Defense Contract Audit Agency (DCAA), the Army CO issued a final decision finding defective pricing with respect to the FMTV contract and demanding repayment in the amount of $56,386,953 plus interest. …

BAE TVS contests the government's defective pricing allegations in the following major respects: first, it contends that DCAA (and the CO, who adopted DCAA's determinations) used the wrong bill of material (BOM) as the baseline for the defective pricing allegations. While DCAA used a BOM dated 11 September 2008 (which was generated after the effective certification date of 4 September 2008), it should have used the BOM generated when BAE TVS, at the direction of the CO, conducted a 'sweep' of cost or pricing data that concluded on 24 September 2008 and incorporated the data from the sweep into a superseding BOM (hereinafter the 'sweep BOM') that was disclosed to the Army by uploading it on 24 September 2008 to a file transfer protocol (FTP) website used to share data with the Army during price negotiations.

(Internal citations and footnotes omitted.)

BAE provided several other arguments, among them the assertion that cost or pricing data (e.g., vendor quotes) received after the certification date cannot constitute defective pricing, and the assertion that data incorporated into the "sweep" BOM (i.e., the BOM submitted after agreement on price) cannot constitute defective pricing.

Which is all interesting stuff, and got us thinking about the timing of things with respect to compliance with the "truth in negotiation" contract clauses, and those thoughts will likely show up in a future blog article. But in the meantime, we have learned that the COFD led to a payment demand for $56.4 million, that BAE appealed that COFD, that the government filed a parallel suit in District Court under the False Claims Act, and that the government wanted the ASBCA appeal put on hold while it pursued its civil suit in District Court.

(This situation appears to be similar to that faced by United Technologies Corp., where parallel litigation took place before the ASBCA and at a District Court. In that case, the finding by the ASCBA that there was no defective pricing, because the government had not relied on the defectively priced cost or pricing data, conflicted with the District Court's finding that the government had been harmed by a false certification.)

In any case, Judge O'Sullivan, as we noted above, denied the government's request for a stay. So what did the government do in response to that denial?

The contracting officer rescinded the COFD that had alleged defective pricing, the COFD that had led to BAE Systems' appeal. Accordingly, BAE Systems' appeal **was dismissed** by the ASBCA.

As Judge O'Sullivan wrote for the Board—

Where a contracting officer unequivocally rescinds a government claim and the final decision asserting that claim, with no evidence that the action was taken in bad faith, there is no longer any claim before the Board to adjudicate. The government's voluntary action moots the appeal, leaving the Board without jurisdiction to entertain the appeal further.

Thus, the parties will now turn their attention to the District Court, where the trier of fact (and a jury) will attempt to determine whether BAE Systems *knowingly* submitted a false Certificate of Current Cost or Pricing Data, and whether that allegedly false Certificate created a series of false claims predicated on an inflated contract price. In 2008.

And speaking of ancient history, whatever happened to Boeing and the government's **dispute** about EELV pricing? You know, the one where Boeing ended up filing suit against the government? We suspect it's been settled, but who knows?

If you know the latest status of that EELV controversy, send us an email, would you?