More than a year ago (June 2017) we updated an article on BAE Systems' defective pricing and False Claims Act case, involving facts that happened ten years ago, in 2008. At the end of that article, we wrote: "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?"

Well, nobody sent us any emails but, very recently, the U.S. Court of Federal Claims **discussed** the status of the dispute.

This particular dispute is a well-known issue, with a pedigree rooted in the 2008-2009 oversight wars fought between the DoD OIG, GAO, and DCAA. Original article discussing the issue is **here**. (The next article is in the link in the first paragraph. That second article includes a lot of important details.) The EELV dispute was seen by many commenters at the time as the litmus test of the assertions that DCAA audit reports were unduly influenced by contractors. If the DCAA audit report conclusions (which were changed by a supervisor) were valid, then the assertions were probably true; but if the conclusions were not valid, then the assertions were probably untrue and the DoD OIG and GAO assertions lacked merit—at least with respect to the rationale for why an audit supervisor would change the conclusions reached by the auditors doing the work. So it's kind of a big deal and we've been eager to hear more about it.

Boeing and DCMA had executed two Advance Agreements with respect to treatment of Lot accounting practices and unabsorbed PM&HS costs. (Confused? Go follow the link in the first paragraph to our article that laid out the details.) DCAA was supposed to issue a clean, new, audit report untainted by supervisory auditor meddling. We're not sure if that ever happened. In any case, Boeing filed suit in order to protect its claim from any assertions that the Contract Disputes Act's SoL clock had expired.

As we wrote, "Clearly, Boeing's entitlement to the $271 million depends on its 'Lot Accounting' practices, why the PM&HS costs were not fully absorbed by prior launch contracts, and how Boeing intended to amortize its production costs under future programs (and whether it would be permitted to do so under FAR and CAS parameters)."

And the rest was silence.

Until now.

In a 34-page denial of Boeing's motion for summary judgement, Judge Kaplan reviewed the dispute's history and some of the key issues.

With respect to the history, it turns out that the "silence" comes from an extended discovery period. Judge Kaplan wrote—

Given the case's factual complexity and the parties' interest in exploring settlement, the discovery period lasted several years. In March 2016, the parties informed the Court of their intention to mediate the case, and, at their request, the Court stayed the case in June 2016. But the mediation was unsuccessful, and the Court lifted the stay on March 31, 2017.

(Internal citations omitted.)

The first matter we want to discuss is Boeing's breach of contract claim. Remember, Boeing thought it had settled this issue through execution of Advance Agreements with DCMA. But maybe not. Judge Kaplan reminded the parties that "It is well established that contracting officers lack the authority to bind the government to contractual payment provisions that are contrary to statute or regulation (including the FAR), and that such provisions are therefore not enforceable." Thus, if the Advance Agreements were contrary to FAR or CAS, then they may be void.

Thus, in order for the Advance Agreements to be enforceable, the agreed-upon accounting treatment must comply with FAR and/or CAS. Looking at the regulations and CAS language, Judge Kaplan concluded that, in order to comply with them, Boeing's accounting treatment must comply with GAAP—and there was a question whether the treatment was GAAP-compliant.

Judge Kaplan wrote—

… multiple factual questions exist regarding Boeing's compliance with GAAP between 1998 and 2006, and in particular its compliance with AICPA's Statement of Position (SOP) 81-1. A non-exhaustive list of these disputes, discussed in greater detail below, includes (1) whether, for purposes of deferring costs via average-cost accounting, SOP 81-1 permits the combination of existing and anticipated production-type contracts; (2) if it does, whether Boeing's lot accounting method (which undisputedly combined existing and anticipated contracts) nevertheless constituted program accounting, which is outside the scope of SOP 81-1; and (3) if it did not, whether Boeing otherwise failed to comply with GAAP in the course of holding the deferred costs in inventory.

Boeing is one the few companies that use "program accounting" for determining revenue and profit/loss for multiple contracts associated with a single "program." Judge Kaplan's decision also discusses the propriety of program accounting. She wrote—

The Court notes that AICPA's Guide for Audits of Federal Government Contractors (Audit Guide) states that '[i]n practice, the program method of accounting has had very limited applications, such as in major commercial aircraft production sold to commercial (or, in some cases, commercial and government) customers.' This is so 'because of (a) the significant uncertainties associated with making reasonably dependable estimates of the total number of units to be produced and sold, (b) the length of time to produce and sell them, and (c) the associated production costs and selling prices.' Further, the Audit Guide points out, '[t]he unique aspects of the government procurement process make estimating the market and timing of deliveries extremely difficult' and place other restrictions on the contractor. 'Therefore,' the guide concludes, 'the program method of accounting is not appropriate for government contracts or subcontracts except as provided in paragraph 3.59'—i.e., in the context of major commercial aircraft production. Here, the record is replete with evidence that some individuals involved with Boeing's lot accounting practice either considered it to be program accounting or expressed concern that it deviated from ¶38's prescriptions for combining contracts.

There were also material facts in dispute about whether Boeing could have or should have held its deferred costs in inventory rather than writing them off. Judge Kaplan wrote—

Here, disputes exist regarding whether Boeing's deferral of costs via lot accounting complied with the requirement that costs not be held in inventory if they are not probable of recovery. As

described, the relevant GAAP directives provide that costs may no longer be deferred and held in inventory if they are no longer probable of recovery—that is, once it has become probable that the inventoried costs exceed the future revenues chargeable to the inventory.

The bottom-line is that Judge Kaplan denied Boeing's motion for summary judgment based on the number of disputed facts deemed material to the final decision. Thus, it very much seems as if Boeing and the government are gearing-up for a "battle" of the accounting experts, who will offer expert opinions regarding whether or not Boeing's accounting practices complied with GAAP. If Judge Kaplan finds that they did not comply with GAAP, if it likely that Boeing will lose its claim for nearly $300 million.

That outcome, if it comes to pass, will be seen as validation of the initial DCAA audit findings and corroboration that the DoD OIG and GAO were right about DCAA's culture in the 2008 – 2009 timeframe. Not that it will matter much to anybody but the oldtimers who remember history.