We've written three articles on the topic of concurrent changes to cost accounting practice; the latest was published in August 2015—five years ago. If you type "concurrent" into the search feature on our home page (at the top on the right) you can find all of them. Those articles focused on litigation at the Armed Services Board of Contract Appeals (ASBCA) involving Boeing and Raytheon.

In the more recent (2015) article, we discussed how the Board was not persuaded by Raytheon's arguments that the rules currently at FAR 30.606—rules that were issued in 2005—were an illegal usurpation of the CAS Board's statutory authority. Judge O'Connell, writing for the Board, stated that "Due to the lack of any guidance from Congress or the CAS Board that addresses offsetting multiple changes, we are unwilling to disturb the actions of the FAR Councils." In other words, the CAS Board's lack of action created a legal vacuum that the FAR Councils used to their advantage. As a result of that interpretation, today the government is able to chose which changes it wants to calculate a cost impact for—resulting in the government recovering more costs than the actual net impact of all the changes taken together as a whole. Or, as we wrote in 2015—

… as DCAA saw things, the FAR rules permitted the government to cherry-pick which changes would result in a contract adjustment and which changes would be ignored. Naturally, any changes that were favorable to the government and resulted in cost savings would be ignored (i.e., the price of FFP contracts would not be increased if the contractor shifted costs to its FFP contracts). In contrast, changes that were unfavorable to the government and resulted in cost increases, no matter how minute, would result in demands for payment with interest calculated from the date of the change (even if the government intentionally delayed its audit so as to increase interest payable).

Indeed, that's exactly how concurrent changes to cost accounting practice are interpreted by DCAA, DCMA, and other Federal agencies today, five years later.

But maybe not.

In 2019, Boeing tried to **litigate** similar arguments at the Court of Federal Claims. They never got the chance to argue their case. The suit was dismissed based on the Government's motions, before it ever got to trial. The court held that Boeing had "waived its breach of contract claim by failing to object to FAR 30.606" before entering into contracts that were subject to the post-2005 rules. In addition, the court also found that it could not hear Boeing's other arguments because it did not have jurisdiction over them.

We were so disappointed at that dismissal that we couldn't bring ourselves to write about it at the time.

But wait.

Boeing appealed and the Court of Appeals, Federal Circuit, **reversed** the dismissal and remanded the suit back to the Court of Federal Claims.

Let's quote some of the Appellate decision, just for the record. As usual, internal footnotes and legal citations are omitted.

Boeing contends that the trial court incorrectly ruled that Boeing waived its challenge to the lawfulness of FAR 30.606. We agree. … A pre-award objection by Boeing to the Defense Department would have been futile, as the government concededly could not lawfully have declared FAR 30.606 inapplicable in entering into the contract…. We therefore reverse the trial court's waiver ruling

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Boeing's challenge appears on its face to involve a matter of contract administration: it objects to the government following FAR 30.606 to determine the amount of a price adjustment when Boeing chose to adopt changes in cost accounting practices during the performance of the contract. The government has not explained why this particular dispute could have been brought to court under the bid protest statute before the contract was formed, rather than under the CDA if and when FAR 30.606 was applied in a way adverse to Boeing during contract performance.

But wait. There's more.

Boeing also contends that the trial court, in ruling that it lacked jurisdiction over the 'illegal exaction' claim, mistakenly required that the asserted basis of illegality be a 'money-mandating' statute. We agree with Boeing.

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… to establish Tucker Act jurisdiction for an illegal exaction claim, a party that has paid money over to the government and seeks its return must make a non-frivolous allegation that the government, in obtaining the money, has violated the Constitution, a statute, or a regulation. Under this standard, Boeing has established jurisdiction for its illegal exaction claim. Boeing alleged that the government 'demanded that Boeing pay it . . . $940,007' to cover the 'increased costs caused by two of the changes,' that the government 'also demanded $124,766 in compound interest,' and that Boeing had already 'paid $71,276 to the Government.' And Boeing alleged that the government's 'demand for payment of $1,064,773 [$940,007 plus $124,766] is in direct violation of 41 U.S.C. § 1503(b), which requires that the Government 'may not recover costs greater than the aggregate increased cost to the Federal Government.'' In short, Boeing alleged that the government has demanded and taken Boeing's money in violation of a statute. Whatever its ultimate merits, this allegation suffices for jurisdiction to adjudicate the illegal exaction claim.

Readers must understand that Boeing did not win a victory for CAS-covered contractors. Instead, the Federal Circuit directed the Court of Federal Claims to hear the case on its merits, to allow Boeing to make its arguments. We don't know whether or not those arguments will be sufficiently persuasive to lead the Court to overturn the allegedly illegal 2005 revisions for FAR 30.606.

Thus, we must stay patient and wait for the case to proceed.

However, this is certainly the best CAS-related news we've had in a long time.

