This is one of those articles that requires us to let readers know that we are not—repeat: NOT—lawyers or attorneys or barristers or solicitors or legal advocates of any sort, and that we really have little business opining on legal matters.

Yeah. Like *that* ever stops us.

We are curious about the latest fad in Federal legal jurisprudence, wherein an allegation that a contract has been defectively priced in violation of the Truth-in-Negotiations-Act (TINA) somehow leads to allegations that the False Claims Act (FCA) has been violated. 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.

Recently, CyTerra Corporation **settled** a False Claim Act suit for $1.9 million—a relatively minor penalty as such things go. But the FCA suit derived from a defective pricing situation. As the Department of Justice press release stated—

In 2003, the Department of the Army awarded CyTerra a contract for the production and delivery of AN/PSS-14 hand-held mine detection units. The contract was modified several times to provide for the production and delivery of additional mine detection units. The government contended that, in connection with the negotiations concerning three of these contract modifications, CyTerra knowingly failed to provide the Army with the most recent cost or pricing data on the number of labor hours needed to produce a mine detector. Under the

Truth in Negotiations Act, CyTerra was required to provide cost or pricing data that was 'accurate, complete and current.' The government alleged that if the Army had received such information, it would have negotiated a lower price.

So how was that a FCA action instead of a TINA action? We have no idea.

In our **recent article** on SAIC, we noted that SAIC's FCA settlement looked very much like a defective pricing issue. We wrote—

The fact of the matter is that this is not the first time that government attorneys have linked defectively priced contracts to the False Claims Act. In our experience, the contractor's intent is one of the key factors in the government's decision to move beyond TINA and into FCA territory.

But as we ponder the CyTerra and SAIC settlements, we aren't so sure that intent is the factor that swings the litigation from TINA to FCA. One thing that both matters have in common is that they both originated as *qui tam* suits filed by relators under the FCA. In other words, the matters started out as FCA suits that were predicated on defective pricing allegations. It's not that the Federal government prosecutors decided that the cases warranted the heavy bludgeon of FCA; instead, the cases started there because that's the nature of the original suits filed by the "private attorneys general"— *i.e.*, the whistleblowers.

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.

The upshot of our new rule is that, if you are a contractor, you would much rather have DCAA conduct a post-award audit of your contract that results in allegations of defective pricing under TINA, as opposed to having your disgruntled ex-employee file suit under the False Claims Act. The TINA remedies are so much less painful than the FCA remedies.

So what are the chances that DCAA will be conducting a post-award audit of your contract in the near future?

Not good.

According to the latest DOD Inspector General **Semi-Annual Report to Congress**, DCAA issued a grand total of eight (8) post-award audit reports in the six month period between October 1, 2012 and March 31, 2013.

Eight.

Across the entire agency.

Over a six-month period.

Questioning a grand total of $4.1 million.

As you can see, you are much more likely to have your disgruntled ex-employee claim the mantle of private attorney general and file a *qui tam* suit under the FCA than you are to have a by-the-book DCAA auditor assert you defectively priced your contract. Which is not great news if you want to minimize your legal settlement payments.

Think about the probabilities the next time you submit your TINA-certified proposal to the Federal government.