This is one of those times when several different threads weave together into a story that demands to be written, even though distractions threaten to derail us from this task. Let us begin.

If you've been reading many of the roughly 700 articles on this site, you know several themes have emerged over the course of the past four or so years. One of those themes has been the increase in litigation between the government and its contractors—fueled by adversarial relationships, a general unwillingness to engage in negotiations leading to a compromise, and audit methodologies infused with built-in bias toward generating as much questioned cost dollars as possible. As a result of those factors contractors are too often put into a position where they must choose between acceding to what amounts to government-imposed extortion, or else lawyering-up and litigating the issues before a tribunal.

Another long-running theme has been the failure of the FAR Councils to understand the Cost Accounting Standards (CAS), particularly with respect to quantification of cost impacts related to voluntary ("unilateral") changes in cost accounting practice. When FAR 30.6 and associated CAS contract clauses were revised in 2005, the FAR Councils essentially adopted the DCAA positions over loud objections from affected government contractors. Unfortunately for all concerned, since then those objections have proven to have been well-founded while the DCAA positions have proven to have been ill-founded.

One of the things that the rule-makers got wrong was the treatment of concurrent changes to cost accounting practice—where the contractor makes multiple changes at the same time, whose individual impacts offset each other. This plays into the interpretation of the phrase "in

the aggregate" as it is used in CAS regulations. It also plays into the failure of the FAR Councils, DCMA, and DCAA to understand the difference between the statutory goal of "*protect [ing]* the Government from payment, in the aggregate, of increased costs" stemming from voluntary changes to cost accounting practice, and the current policy goal of *recovering* increased costs stemming from such changes.

With that background in mind, consider the following guidance from the CAS regulations–

A contract price adjustment undertaken under section 1502(f)(2) of this title shall be made, where applicable, on relevant contracts between the Federal Government and the contractor that are subject to the cost accounting standards so as to protect the Federal Government from payment, in the aggregate, of increased costs, as defined by the Cost Accounting Standards Board. The Federal Government may not recover costs greater than the aggregate increased cost to the Federal Government, as defined by the Board, on the relevant contracts subject to the price adjustment unless the contractor made a change in its cost accounting practices of which it was aware or should have been aware at the time of the price negotiation and which it failed to disclose to the Federal Government.

Which brings us to a **recent decision** by the Armed Services Board of Contract Appeals (ASBCA) regarding voluntary changes to cost accounting practice made at two segments of The Boeing Company. The decision came close to being a landmark decision, but missed because it only addressed a part of the controversy. Let's discuss.

On January 1, 2005, Boeing initiated three voluntary ("unilateral") changes in cost accounting practice, moving from one CAS-compliance practice to another at its Philadelphia segment. According to Judge Freeman, the impacts associated with each of those changes were as follows—

Change No. 1	$ (790.000)	Decreased costs to the Government
Change No. 2	$ (289,000)	Decreased costs to the Government
Change No. 3	$1,477,000	Increased costs to the Government
Net impact all changes	$ 398,000	Increased costs to the Government

On the same date, Boeing initiated six voluntary ("unilateral") changes in cost accounting practice at its El Segundo segment. The impacts associated with each of those changes were as follows—

Change No. 1	$(3,724.000)	Decreased costs to the Government
Change No. 2	$(1,916,000)	Decreased costs to the Government
Change No. 3	$(1,293,000)	Decreased costs to the Government
Change No. 4	$ (260,000)	Decreased costs to the Government
Change No. 5	$ 1,136,000	Increased costs to the Government
Change No. 6	$ 206,000	Increased costs to the Government
Net impact all changes	$(5,851,000)	Decreased costs to the Government

A key tactic in the government's (flawed) approach to analyzing cost impacts from concurrent changes is to ignore decreased costs to the government and focus only on changes that lead to increased costs—thus accepting the lower costs that will be passed on to it, while concurrently demanding repayment of the increased costs. (Apparently government policy makers do not regard this approach as generating a windfall. LOL.)

Because of the (flawed) approach, the parties could not resolve Boeing's cost impacts and the dispute was still unresolved more than 5 years later. With literally days to go before the CDA Statute of Limitations was to expire, the cognizant contracting officers issued Final Decisions in which it was determined that Boeing owed the Government $1,477,000 for the single Philadelphia segment change and $1,341,840 for the two El Segundo changes (plus interest). As per policy, changes that led to decreased costs were ignored by the contracting officers. Need we say that Boeing appealed the COFDs?

Since Boeing disclosed and implemented its changes to cost accounting practice prior to the

FAR Councils' (flawed) CAS administration revisions, Judge Freeman decided the dispute based on the pre-2005 CAS and FAR language—which was silent on concurrent changes. For its part, Boeing argued that the phrase "in the aggregate" had to mean that all changes to cost accounting practices made at the same time had to be netted against each other. The Government argued that "FAR 30.606(a)(3) is to the contrary and dispositive of these appeals is without merit." (*Sic.*) The Government argued that the 2005 FAR revisions merely clarified the previous statutory interpretation. The Judge rejected both parties' interpretations.

Judge Freeman found a way to decide the dispute without interpreting the disputed language, which is why the decision falls short of being a landmark decision. In point of fact, many contractors have been subject to the Government's "cherry picking" approach to quantifying cost impacts from concurrent changes to cost accounting practice and everybody desperately needed a bright line decision. Judge Freeman declined to provide that bright line.

Instead, Judge Freeman decided the dispute based on existing government guidance in effect at the time, which included DCMC (Defense Contract Management Command, now Defense Contract Management Agency) guidance to contracting officers and DCAA audit guidance. Judge Freeman wrote—

On this record of the 'guidance' and established practice of the government agencies primarily responsible for enforcing the cost accounting standards statute and regulations, we conclude that Boeing could properly combine the 1 January 2005 cost accounting practice changes at each segment for purposes of computing the aggregate cost impact to the government of the changes at that segment.

So that disposed of concurrent changes prior to the 2005 FAR revisions, but left unanswered the question of how to handle such changes after the revisions—i.e., did the FAR Councils have the authority to interpret CAS and, if they did have that authority, did they do so correctly?

(We note for the record that Judge Freeman declined to take judicial notice of the "interim" **guidance** of the DOD CAS Working Group. This was the body with authority to interpret CAS for the various entities within the Department of Defense, though the body was disbanded long ago. Looking at the guidance of WG 76-8, the Working Group wrote—

The combining, for offset purposes, of several accounting changes within a segment as long as they have the same effective date should also serve to reduce the number of necessary

contract price changes. Although individual treatment of voluntary changes could maximize the potential for downward price adjustments, the government's interests are adequately protected if no overall price increase is paid by the United States.

It's too bad the FAR Councils ignored those words when, in 2005, it decided to adopt DCAA's ill-founded positions without much in the way of critical thought. Now both parties are stuck with those ill-founded positions, which necessitate litigation and an appeal for a judicial interpretation based on equity and common sense.

The Boeing decision addresses and solves one facet of the problem, but other facets remain to be solved in future litigation. In the meantime, we expect the Government to file an appeal of Judge Freeman's decision, because … well, because they can.