Recently, the Armed Services Board of Contract Appeals (ASBCA) entertained a motion of summary judgment in a matter involving alleged defective pricing. The Board's discussion is interesting and we thought we'd share with our readers.

First, a couple of level-setting recaps:

1.

Defective pricing occurs whenever a contractor fails to disclose "all facts that, as of the date of agreement on the price of a contract . . . a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived." (Quoting from the decision, which quotes from 10 U.S.C. § 2306a(h)(1).)

As we've posted before, the Truthful Cost or Pricing Data Act, which used to be the Truth in Negotiations Act (TINA), is a *disclosure* requirement, not a use requirement. The contractor's basis of estimate doesn't matter. What matters is that the contractor actually disclosed to the government all relevant facts and circumstances that would reasonably be expected to affect price negotiations significantly.

The contractor is required to certify that all cost or pricing data that was disclosed is "accurate, complete, and current." If the contractor certifies as such, but the government believes the certification was inaccurate (because some or all cost or pricing data was not accurate, complete, or current as disclosed) then the contractor has "defectively priced" its contract.

In a defective pricing claim the government is required to prove that: (1) the information in dispute is 'cost or pricing data'; (2) the cost or pricing data was not meaningfully disclosed; and (3) the government relied to its detriment upon the inaccurate, noncurrent or incomplete data presented by the contractor.

FAR contract clause 52.215-10 provides the remedy for defective pricing. In addition to the

contractual remedy, we've noted in prior articles that the government may elect to pursue an allegation of violation of the False Claims act with respect to invoices submitted for a contract that was defectively priced.

In other words, it's kind of a big deal.

1.

The Contract Disputes Act (CDA) contains a Statute of Limitations that a contractor may raise as an affirmative defense, asserting that a government's claim for damages (related to defective pricing or other issues) is untimely. According to the CDA, claims must be submitted within six years after the accrual of the claim. "Claim accrual" is defined in FAR 33.201 as being "the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known *or should have been known.*
" (Emphasis added.)

We have written quite a bit about the CDA Statute of Limitations on this blog. There does not seem to be a bright line (at least to us, who are not attorneys). Instead, when the Statute of Limitations clock starts to run seems to be dependent on the facts and circumstances of the situation.

Okay. With the foregoing established, let's talk about **the appeal** of AAI Corporation, doing business as Textron Systems, Unmanned Systems (Textron).

Textron sells unmanned aircraft systems (UAS) to the US Army under various contract. At issue here is Full Rate Production (FRP) contract IV. Obviously, there were previous contracts, including FRP I, II, and III. In other words, Textron had a wealth of contractual cost performance history to draw upon—*i.e.,* the company had quite a lot of potential cost or pricing data to disclose.

According to the decision regarding dueling motions for summary judgment, "On January 11, 2006, the Army requested that Textron submit an FRP IV proposal for 11 TUAV systems by

January 31, 2006. Subsequent amendments requested alternate pricing for 10 and 9 systems. Textron submitted a timely proposal." In other words, the Army gave Textron less than a month to prepare and submit a proposal that ended up being worth more than $87 million dollars.

In order to meet that quite challenging deadline, Textron had to cut some corners. In particular, Textron informed its Army customer that—

… it based its labor and material costs on the FRP III Supplemental contract, which it had been awarded seven months earlier. Its FRP IV proposal stated that it had applied a 91.66% adjustment factor to account for the reduction in the number of systems from 12 in the FRP III Supplemental contract to 11 in FRP IV, and additional adjustment factors for 10 and 9 systems. Textron refers to this as its 'parametric' approach. After applying the adjustment factor, Textron then increased its prices to account for cost escalation

(Internal citations omitted, as always.)

In other words, in order to meet the really rather ridiculous timeline, Textron apparently based its FRP IV proposal on the cost or pricing data that it had recently submitted for the FRP III Supplemental contract. We say "apparently" because the wording is less than clear: it seems that Textron based its proposed price on what it had recently bid rather than, say, actual costs incurred under other FRPs or actual costs incurred so far under the FRP III Supplemental contract.

Basing a bid on a previous bid, rather than actual costs of previous work, is always going to be risky.

Anyway, that's what Textron seems to have done. It took its last bid and made some mathematical adjustments and that was what it submitted to the Army that formed the basis of the $87 Million dollar contract award.

Along the way, DCAA took a look at Textron's proposal and determined it to be good enough for negotiations. Negotiations were concluded in April, 2006.

Notably, DCAA did not look at what Textron did *not* submit. (Remember, TINA is a disclosure requirement, not a use requirement.) What Textron did
not
submit became the basis of a future defective pricing assertion.

As the ASBCA decision told us—

Nearly 11 years later, on March 8, 2017, contracting officer (CO) Gregory Wilson issued a final decision in which he determined that the government was entitled to a price adjustment of $7,190,376, plus interest, based on his conclusion that Textron had provided the government defective pricing. The CO based the final decision in large part upon a DCAA audit report dated January 8, 2014

There were three specific allegations of defective pricing, as follows.

1.

The POP payload (quantity 36). Textron proposed, and the government agreed to, a price of $181,558 per unit, which was an escalated price. However, at the time (as the government alleged), Textron had in its possession a subcontract that established a unit price of $165,855. Textron did not disclose its firm subcontractor pricing to the government.

2.

Ground control shelter costs. Textron apparently double-counted the costs of its shelters in the January 2006 cost proposal. As a result, the government agreed to a price that was $415,800 higher than it would have, had the shelter costs not be overstated.

3.

Inflated labor costs. As noted above, Textron used prior bid data, as adjusted. It did not use actual costs. In particular, it did not use historical labor costs. Since it didn't use its actual cost history, it didn't consider that information to be cost or pricing data worth submitting to the Army. Well, it turns out (according to the ASBCA decision) that "prior to submission of its FRP IV proposal, Textron had conducted an analysis of its actual labor hours per system

produced for prior FRP lots, and compared them to its hours bid for the FRP IV system. Textron presented a document containing this information to its upper management on January 24, 2006, one week before submission of its FRP IV proposal." Textron did not disclose the existence of this analysis to the Army negotiators.

Textron moved for summary judgment on the affirmative defense that the CDA Statute of Limitations made the government's claim time-barred. On two of the three allegations, the court did not agree with Textron.

With respect to the POP payload, "[t]he record lacks undisputed facts to support a finding that in 2006 the CO knew or should have known about the actual $165,855 price because Textron failed to disclose it to him and he had no apparent way to learn of it on his own. Textron has not proposed a credible alternate date for the running of the statute prior to DCAA's receipt of the relevant documents in 2013." To Textron's argument that it had disclosed its methodology to the CO, and that was sufficient to comply with TINA requirements, the Board disagreed, writing "The government has made a plausible case that Textron's success in locking in a $165,855 price would have affected negotiations significantly."

With respect to the labor costs, "The parties cannot be in roughly equal positions if one side has an analysis that distills years of data and the other does not."

With respect to the shelter costs, "It is undisputed that in 2006 the government had all of the information upon which it would base its claim, namely the proposal itself. The government's claim was merely the result of DCAA's analysis of that proposal." Further, "Even if the government did not immediately grasp the problem with the numbers in Textron's proposal, it had six years to scrutinize it more closely. Claim accrual is not suspended simply because the government failed to appreciate the significance of what the contractor furnished."

Summary judgment was granted to Textron on the shelter cost issue; it was denied on the other two issues. At this point, either the parties will negotiate a settlement or else they will proceed to a trial on the merits.

The lesson here is that, no matter what proposal methodology a contractor uses, it still must comply with the TINA requirement to *disclose* all relevant cost or pricing data—even if that data is not used in its proposal. Facts deemed relevant to price negotiations that are not provided to the government are going to create problems down the road. In this case, even though the contract was awarded in 2006, the government was not prevented from asserting its claims in 2017.