

ASBCA Rejects DCMA Claim That Contractor Received "Windfall" Profits

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In a recent decision concerning measurement of the cost impact of accounting changes, *Raytheon Co.*, ASBCA No. 56701 (March 31, 2011), the Armed Services Board of Contract Appeals (ASBCA) has sided with the contractor and rejected Government arguments that the contractor would receive "windfall" profits.

In 2001, Raytheon recommended certain changes in the way it funded and valued a pension plan for salaried employees called the "Raytheon Salaried Plan" (the RSP accounting change). In 2003, the corporate administrative contracting officer (CACO) approved the RSP accounting change. At the time, the CACO also concluded that there was no increased cost in the aggregate to the Government as a result of the change.

Because of the delay in approval of the RSP accounting change, Raytheon did not implement the change until January 1, 2004, and it subsequently submitted a "general dollar magnitude" (GDM) of the impact of the change for the period 2004–2007. In 2007, the Defense Contract Audit Agency (DCAA) audited the GDM and concluded that the RSP accounting change resulted in a \$57.2 million decrease in costs allocated to flexibly priced contracts and a \$40.7 million decrease in costs allocated to fixed-price contracts—an amount DCAA treated as an increased cost to the Government because of the allegedly "windfall" profits the contractor would receive. Rather than offsetting the cost savings on flexibly priced contracts against the putative increased cost on fixed-price contracts, however, DCAA recommended collecting \$40.7 million from Raytheon. In October 2008, the CACO adopted DCAA's conclusions and demanded payment of \$40.7 million.

On appeal, the ASBCA granted Raytheon's motion for summary judgment. The Board concluded that 48 C.F.R. § 9903.306(e), which states that "the Government will not require price adjustment for any increased costs paid by the United States, so long as the cost decreases under one or more contracts are at least equal to the increased cost under the other affected contracts . . . ," addressed the issue and supported Raytheon's position. The Board also noted that former 41 U.S.C. § 422(h) (recently recodified as 41 U.S.C. § 1503) requires a price adjustment for an accounting change "only when the Government pays increased cost 'in the aggregate' considering all contracts affected by the change." The Board rejected the Government's argument that Raytheon would receive a "windfall" profit if no price adjustment were made, noting that "[i]nsofar as a windfall profit unanticipated at award is concerned, the unanticipated \$40,689,388 windfall profit for Raytheon on fixed-price contracts is substantially exceeded by the \$57,209,821 windfall reduction in cost to

the government, unanticipated at award, on the flexibly priced contracts.”

Recently, the Defense Contract Management Agency (DCMA) has taken increasingly aggressive positions in its calculations of the cost impact of contractor accounting changes and has demanded price adjustments even where the accounting changes unquestionably saved the Government money. The Board's decision in *Raytheon* should give contractors some comfort that the ASBCA will carefully scrutinize these positions to ensure that the Government, too, does not receive a “windfall.”