

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Raytheon Company,) ASBCA Nos. 57801, 57803, 58068
Space & Airborne Systems)
)
Under Contract Nos. F04701-03-C-0008)
FA8650-09-C-1503)

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OPINION BY ADMINISTRATIVE JUDGE O'CONNELL ON THE
PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

In these appeals, appellant, Raytheon Company, Space & Airborne Systems (Raytheon), challenges government claims seeking to recover purported increased costs resulting from Revisions 1, 5, and 15 to Raytheon's Cost Accounting Standards (CAS) Disclosure Statement. In an earlier decision, we denied Raytheon's motion to dismiss the Revision 1 claim (ASBCA No. 57801) for lack of jurisdiction as untimely, but we granted its motion with respect to other revisions (ASBCA Nos. 57802, 57804, 57833). *Raytheon Company, Space & Airborne Systems*, ASBCA No. 57801 *et al.*, 13 BCA ¶ 35,319. The parties have cross-moved for summary judgment on the remaining claims. For the reasons stated below, Raytheon's motion is granted in part and denied in part. The government's cross-motion is granted in part and denied in part.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

Except as noted, the following material facts are undisputed:

Revision 1 to Raytheon's CAS Disclosure Statement (ASBCA No. 57801)

1. On 10 February 2004, Raytheon submitted to the Defense Contract Management Agency (DCMA) Revision 1 to its CAS Disclosure Statement, which, among other things, made four changes to its cost accounting practices. These changes related to: 1) property accounting/property management; 2) offsite burden center; 3) IT secondary pools; and 4) fringe accommodation/composite rate. All of the changes went into effect on 1 January 2004. (R4, tab 4 at G-77)

2. On 3 April 2006, Raytheon submitted a general dollar magnitude (GDM) analysis of these changes (R4, tab 13). According to the GDM, the property accounting/property management change resulted in increased costs of \$313,200 to Raytheon's flexibly-priced contracts and a decrease in costs of \$281,100 to its fixed-price contracts. The other three changes had the opposite effect: they decreased costs to flexibly-priced contracts and increased costs to fixed-price contracts. Collectively, these three changes resulted in \$660,800 in decreased costs to flexibly-priced contracts and \$518,200 in increased costs to fixed-price contracts. (R4, tab 13 at 159)

3. These distinctions are important because, as we will see, the government takes the position that increased costs of \$313,200 to Raytheon's flexibly-priced contracts and a decrease in costs of \$281,100 to its fixed-price contracts due to the property accounting/property management change each result in a cost increase to the government and, thus combined, result in a total cost increase of \$594,300 ($\$313,200 + \$281,100$) (see R4, tab 41 at 369, tab 45 at 382). Conversely, following this same logic, cost decreases to flexibly-priced contracts and cost increases to fixed-price contracts both save the government money, which would mean that there was a cost savings of \$1,179,000 from the other three Revision 1 changes ($\$660,800 + \$518,200$) (see R4, tab 41 at 370). Further, if the cost increase from the property accounting/property management change could be offset by the cost decrease from the other three changes, there would be an overall cost saving to the government of \$584,700 ($\$1,179,000 - \$594,300$) from the Revision 1 changes. This question, whether multiple simultaneous accounting changes can be offset against one another, is central to this dispute.

4. On 3 March 2011 (nearly five years after Raytheon submitted the GDM), the Defense Contract Audit Agency (DCAA) notified Raytheon that it was auditing Revision 1 (app. br., tab A, ex. 5). It is undisputed that DCAA did not complete the audit (see app. br., statement of undisputed material facts (SUF) ¶ 9; gov't resp. to SUF ¶ 9). The reasons why DCAA did not complete the audit are disputed; the parties blame each other. Raytheon contends that the late start to the audit and the six-year statute of

limitations made timely completion impossible, while the government contends that Raytheon failed to maintain important records in the course of a data migration. (*Id.*)

5. On 25 May 2011, DCAA provided to DCMA a rough order of magnitude (ROM) of \$772,590 for the Revision 1 property accounting/property management change (R4, tab 41). It calculated this amount by taking the sum of Raytheon's numbers from the GDM and adding 30 percent: $\$313,200 + \$281,100 \times 1.3 = \$772,590$ (R4, tab 41 at 369). By way of explanation, DCAA stated: "we utilized a 30 percent increment factor for the GDMs based on at least one year of data to determine an estimated cost impact to the government. The 30 percent factor is an estimate intended to protect the taxpayer's interest for items that could have been found if an audit were to be performed." (*Id.*)

6. DCAA did not complete a ROM for the other three Revision 1 changes because it concluded that these changes resulted in decreased costs to the government (R4, tab 41 at 368).

7. On 7 July 2011, a DCMA divisional administrative contracting officer (DACO) issued a contracting officer's final decision with respect to the Revision 1 property accounting/property management change (R4, tab 45). The DACO demanded payment of \$1,176,600.86 from Raytheon. He calculated this amount by taking DCAA's \$772,590 ROM and adding compound interest (calculated from 1 January 2004 to the date of the decision) of \$404,010.86. (*Id.* at 382) He did not offset the \$1,176,600.86 by the cost savings from the other Revision 1 changes.

8. The DACO stated that FAR 30.606(a)(2) allowed him to resolve the cost impact by, among other things, adjusting the amount due on a single contract. He stated that he would adjust Contract No. F04701-03-C-0008 (Contract I), a CAS-covered contract that had an effective date of 21 February 2003. Contract I incorporated FAR 52.230-2, COST ACCOUNTING STANDARDS (APR 1998), which incorporates or requires the contractor to comply with the CAS Board regulations at 48 C.F.R. Parts 9903 and 9904. (R4, tab 1 at 14)

REVISION 5 (ASBCA No. 57803)

9. On 8 July 2005, Raytheon submitted Revision 5 to its CAS Disclosure Statement to DCMA (R4, tab 10). Revision 5 contained one cost accounting practice change. The change was effective 1 January 2005 (*id.* at 136).

10. In its 3 April 2006 GDM (SOF ¶ 2), Raytheon also provided a GDM for the Revision 5 change (R4, tab 13). Raytheon stated that this change resulted in \$153,000 in increased costs to flexibly-priced contracts and a decrease of \$117,900 to fixed-price contracts (*id.* at 159).

11. DCAA did not complete an audit of Revision 5. Once again the parties disagree as to why, blaming each other, with Raytheon contending that the government's action was driven by the statute of limitations, while the government contends it was due to a failure by Raytheon to maintain the integrity of its data. (*Compare* app. br., SUF ¶ 32 & gov't resp. to SUF ¶ 32 & gov't br., SUF ¶ 11)

12. On 13 June 2011, DCAA issued a ROM for the Revision 5 change (R4, tab 43). As with the Revision 1 property accounting/property management change, DCAA adopted the numbers in Raytheon's GDM and then added 30 percent "to protect the taxpayer's interest." Thus, DCAA calculated a ROM of \$352,170 ($\$117,900 + \$153,000 \times 1.3$). (*Id.* at 375)

13. On 7 July 2011, the DACO issued a final decision demanding payment of \$512,731.97 from Raytheon (R4, tab 47). This amount consisted of the \$352,170 calculated by DCAA, plus compound interest of \$160,561.97 from 1 January 2005 through the date of the decision (*id.* at 390). Once again relying on FAR 30.606(a)(2), the DACO stated that he would adjust Contract I (*id.* at 391).

14. In the final decision, the DACO did not state whether he considered the accounting practice changes to be desirable or material. However, in its discovery responses, the government has indicated that the Revision 5 change was material and not desirable because it resulted in increased cost to the government. (App. br., SUF ¶¶ 42-43; gov't resp. to SUF ¶¶ 42-43)

REVISION 15 (ASBCA No. 55068)

15. On 1 November 2007, Raytheon submitted to DCMA Revision 15 to its CAS Disclosure Statement (R4, tab 20). This revision contained three cost accounting practice changes that: 1) consolidated [REDACTED REDACTED REDACTED]; 2) moved [REDACTED REDACTED REDACTED REDACTED REDACTED REDACTED REDACTED REDACTED]; and 3) changed [REDACTED] [REDACTED REDACTED REDACTED REDACTED REDACTED]. The revision went into effect on 1 January 2008. (*Id.* at 215)

16. On 26 February 2010, Raytheon submitted a GDM analysis for the three changes (R4, tab 27). Raytheon calculated that the [REDACTED] change caused a \$251,500 decrease to flexibly-priced contracts and an increase of \$195,200 to fixed-price contracts (*id.* at 318). The other two changes had the opposite effect. Raytheon calculated that the communications change caused an increase of \$47,800 to flexibly-priced contracts and a decrease of \$41,600 to fixed-price contracts (*id.* at 319). It calculated that the inventory maintenance change caused an increase of \$36,000 to flexibly-priced contracts and a decrease of \$17,400 to fixed-price contracts (*id.* at 320).

17. In a draft audit report from September 2010, DCAA recognized that, considered as a whole, the three Revision 15 cost accounting practice changes resulted in net decreased costs to the government of about \$304,000 (app. br., ex. I at 1347). However, DCAA stated that, under FAR 30.606(a)(3)(ii), the cost impact of unilateral changes could not be combined unless they all resulted in increased costs to the government (*id.*).

18. On 4 October 2010, DCAA issued its final report (R4, tab 28). DCAA calculated a cost impact of \$157,080 to the government by adding the increases on flexibly-priced contracts to the decreases on fixed-price contracts contained in Raytheon's GDM for the [REDACTED REDACTED REDACTED] changes then adding an estimated profit/fee of \$14,280 ($\$47,800 + \$41,600 + \$36,000 + \$17,400 = \$142,800$) ($\$142,800 + \$14,280 = \$157,080$) (*id.* at 323). DCAA recognized that the [REDACTED] change resulted in decreased costs to the government of \$446,700 ($\$251,500 + \$195,200$). However, it stated that "[t]here is no requirement for any adjustment related to this unilateral accounting practice change since adjustments are only made if changes result in increased costs to the Government." (*Id.*)

19. On 15 March 2012, the DACO issued a final decision determining that Raytheon owed the government \$172,362.94 as a result of the Revision 15 changes (R4, tab 55 at 426). This amount consisted of the \$142,800 calculated by DCAA, plus compound interest of \$29,562.94 calculated from 1 January 2008 to the date of the final decision (*id.*). (The DACO did not agree that an estimated profit/fee of \$14,280 should be added to the amount sought (*id.* at 429)). The DACO sought to recover the requested amount from Contract No. FA8650-04-C-1706 (Contract II), which had an effective date of 30 December 2004 (*id.* at 429). Contract II incorporated FAR 52.230-2, COST ACCOUNTING STANDARDS (APR 1998) (ex. G-9 at 17).

20. Although not stated in the final decision, the DACO determined that the [REDACTED REDACTED REDACTED REDACTED] were material and not desirable because they resulted in increased costs to the government (app. br., SUF ¶¶ 55-56; gov't resp. to SUF ¶¶ 55-56).

DECISION

The parties have filed cross-motions for summary judgment that place an array of issues before us. The government seeks the Board's rulings on: 1) whether a cost increase to the government from a contractor's unilateral cost accounting practice change may be offset against simultaneous but unrelated accounting practice changes that save the government money; 2) whether increased costs on flexibly-priced contracts should be combined with decreased costs on fixed-price contracts to calculate a total amount due when an accounting practice change has caused the shift of costs from

fixed-price to flexibly-priced contracts; 3) whether the government properly added a 30 percent increase to Raytheon's GDM for the Revision 1 and 5 changes; 4) whether the government is entitled to interest; and 5) whether the interest should be compound. In addition to seeking summary judgment on these issues, Raytheon requests that the Board rule that: a) FAR 30.606, a regulation that bars offsetting the impact of multiple changes, is invalid to the extent that it defines aggregate increased costs and prohibits the offset of multiple simultaneous changes; b) the DACOs failed to consider whether the accounting changes were desirable; and c) the DACOs failed to consider appropriately whether the accounting changes were material.

I. Standard of Review

Summary Judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When considering a motion for summary judgment, the Board's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Id.* at 249. The fact that both parties have moved for summary judgment does not mean that the Board must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts. Rather, the Board must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987) (citations omitted).

II. Offsetting The Revision 1 and Revision 15 Changes

The current CAS Board dates to the Office of Federal Procurement Policy Amendments Act of 1988. Pub. L. No. 100-679, § 5, 102 Stat. 4055 (1988); *see Boeing North American, Inc. v. Roche*, 298 F.3d 1274, 1282 (Fed. Cir. 2002). The CAS statute was codified at 41 U.S.C. § 422 until January 2011 but now resides at 41 U.S.C. §§ 1506-1506, after Congress recodified much of Title 41 (Public Contracts) of the United States Code. *See* Pub. L. No. 111-350, § 3. Because both the statute and House Report for Pub. L. No. 11-350 emphasized that the legislation was intended to be non-substantive, we will cite to the current statute. *See* Pub. L. No. 111-350, § 2(b); H.R. Rep. No. 111-42, 2-3, 2010 U.S.C.C.A.N. 1468, 1469.

The CAS Board is an independent board in the Office of Federal Procurement Policy (OFPP). 41 U.S.C. § 1501(a). The Board consists of five members: the OFPP Administrator, who is the Chairman; two government appointees, one each by the Secretary of Defense and the Administrator of General Services; and two individuals from the private sector appointed by the Administrator. 41 U.S.C. § 1501(b)(1)(A)-(B).

The CAS Board has exclusive authority to prescribe, amend, and rescind cost accounting standards, and interpretations of those standards. 41 U.S.C. § 1502(a)(1). Subject to certain exceptions and thresholds, the CAS are mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with the pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the Federal Government. 41 U.S.C. § 1502(b)(1)(B).

Congress directed the CAS Board to issue implementing regulations that require contractors to agree to a contract price adjustment for any increased costs paid to the contractor by the government because of a change in the contractor's cost accounting practices or a failure by the contractor to comply with applicable cost accounting standards. 41 U.S.C. § 1502(f)(2). Congress included in the statute protections for both the government and contractors in the event of a § 1502(f)(2) contract price adjustment. On the one hand, it specified that such price adjustments shall be made "so as to protect the Federal Government from payment, in the aggregate, of increased costs, as defined by the" CAS Board. 41 U.S.C. § 1503(b). However, Congress also specified that the government "may not recover costs greater than the aggregate increased cost to the Federal Government, as defined by the [CAS] Board, on the relevant contracts subject to the price adjustment" (subject to an exception not applicable to this case).¹ *Id.*

The CAS Board has promulgated various regulations that implement § 1503(b). For example, 48 C.F.R. § 9903.306 specifies various considerations that apply when determining the amounts of a cost increase. Among other things, it provides that an adjustment to contract prices may not be required when a change in cost accounting practices is estimated to result in increased costs being paid under a particular contract. This is so if the change affects all CAS-covered contracts, and the change increases the cost paid under one or more of the contracts, while decreasing the cost paid under one or more of the contracts. The regulation specifies that in such a case, the government will not require a price adjustment for any increased costs paid by the government, so long as the cost decreases under one or more contracts are at least equal to the increased cost under the other affected contracts, provided that the contractor and the affected

¹ Prior to the January 2011 recodification, this section had somewhat different wording. Notably, the sentence barring excess recovery by the government formerly stated "In no case shall the Government recover costs greater than the increased cost (as defined by the Board) to the Government, in the aggregate." 41 U.S.C. § 422(h)(3). Now it states "The Federal Government may not recover costs greater than the aggregate increased cost to the Federal Government, as defined by the Board." 41 U.S.C. § 1503(b).

contracting officers agree on the method by which the price adjustments are to be made for all affected contracts.² 48 C.F.R. § 9903.306(e).

A. The Revision 1 Changes

As described above, Contract I incorporates by reference FAR 52.230-2, COST ACCOUNTING STANDARDS (APR 1998) (SOF ¶ 8), which, in turn, incorporates the regulations issued by the CAS Board at 48 C.F.R. Part 9903 and requires the contractor to comply with all CAS. As we recently observed in *The Boeing Company*, ASBCA Nos. 57549, 57563, 13 BCA ¶ 35,427 at 173,787, neither Part 9903, nor the CAS statute, specify the procedures that an agency should follow if the contractor makes multiple simultaneous changes to its cost accounting practices. Although both parties contended that the CAS Board regulations, including § 9903.306, supported its position, we held that, for the time period at issue (prior to April 2005), the regulations were silent as to the offset of simultaneous accounting changes. *Boeing*, 13 BCA ¶ 35,427 at 173,787.

Raytheon and DCMA make nearly identical contentions as the parties in *Boeing*, with each pointing to what they believe are clues as to the intent of Congress and the CAS Board. The government points to the repeated use of the term “a change” in the statute and the regulations and infers from this construction that Congress and the CAS Board require that each change be viewed in isolation. See 41 U.S.C. § 1502(f)(2) (the contractor must “agree to a contract price adjustment...for any increased costs paid to the contractor...by the Federal Government because of a change in the contractor’s...cost accounting practices”); 48 C.F.R. § 9903.201-6(b)(2)-(3) (“Unilateral change by a contractor means a change in cost accounting practice”) (“no agreement may be made with regard to a change to a cost accounting practice that will result in the payment of aggregate increased costs by the United States”) (emphasis added). In considering this argument, we note that the Department of Defense (DoD) is not entitled to any deference with respect to its interpretation of the CAS Board regulations. *Perry v. Martin Marietta Corp.*, 47 F.3d 1134, 1137 (Fed. Cir. 1995).

In contrast, Raytheon points to the use of the term “in the aggregate” in the statute, 41 U.S.C. § 1503(b), and similar constructions in the CAS Board regulations. Raytheon derives from that a directive that agencies should determine a final cost impact only once all changes have been taken into account. Neither party has cited any statutory or regulatory history, or any other evidence, that buttresses its interpretation of the statute and regulations. Accordingly, we are bound by our precedent in *Boeing*, in

² Section 9903.306 states that it applies to the contract clauses contained at 48 C.F.R. § 9903.201-4(a), (c), (d) or (e). Section 9903.201-4(a) requires the contracting officer to insert the Cost Accounting Standard clause, FAR 52.230-2 (SOF ¶¶ 8, 19).

which we concluded that neither the CAS statute, nor the CAS Board regulations address the offset of simultaneous changes.³ 13 BCA ¶ 35,427 at 173,787.

1. The Parties Misinterpret the CAS Board Regulations

Although both parties contend that the CAS Board has issued regulations that support its desired result, the CAS Board has repeatedly indicated that neither the statute nor that Board's regulations address the offset of simultaneous accounting practice changes. In the 1990s, the CAS Board attempted to close this gap by proposing detailed regulations governing changes in cost accounting practices. *See, e.g.*, Cost Accounting Standards Board; Changes in Cost Accounting Practices, 61 Fed. Reg. 49196 (18 Sept. 1996). In the course of that proposed rulemaking, the CAS Board recognized that it had "never previously defined [offsets] in a formal rule or regulation" and that the "proper application of offsets has long been a source of confusion and controversy." *Id.* at 49204. The proposed rules addressed this deficiency by including a definition of "offset process," *id.* at 49215, and provisions that, among other things, would have governed the offset of simultaneous accounting practice changes, *id.* at 49219 (proposed 48 C.F.R. § 9903.405-5(b)).

Although the CAS Board ultimately abandoned this rulemaking effort, *see* 65 Fed. Reg. 37470 (14 June 2000), the published meeting minutes of the CAS Board demonstrate that the CAS Board continues to view the offset of accounting practice changes to be an important issue that it needs to resolve. For example, the minutes for the CAS Board meeting on 16 November 2009 state:

There was a brief discussion on the status of other outstanding cases which have been held in abeyance due to

³ Raytheon does bring one new argument to the table: the Dictionary Act, 1 U.S.C. § 1, provides that "In determining the meaning of any Act of Congress, unless the context indicates otherwise-words importing the singular include and apply to several persons, parties, or things." According to Raytheon, this means that when the statute uses the term "a change," it should be interpreted to also mean "changes." Raytheon has raised this argument for the first time in its reply brief. Even if this argument has not been waived, we reject it. The Supreme Court recently explained that it relies upon this rule only when it is necessary to carry out the evident intent of the statute. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2187 (2014) (citing *United States v. Hayes*, 555 U.S. 415, 422 n.5 (2009)). In our view, it is not necessary to interpret "a change" to mean "changes" to carry out the intent of the CAS statute. For one thing, the offset of multiple simultaneous cost accounting changes is a relatively obscure issue when one considers the CAS statute as a whole. As we conclude below, Congress has left a gap in the statute that it has entrusted the agency administering the statute to fill.

the Staff workload. The CASB agreed that the issue of whether the cost impacts arising from multiple accounting changes taking place for the “same event” can be combined into a single cost impact is of the highest priority among the outstanding non-statutory issues. That issue is part of the case on the cost impact of cost accounting changes.... The Staff will work on that issue as the highest priority non-statutory case, subject to the workload.

CAS Board, 58th Meeting, *available* at http://www.whitehouse.gov/omb/casb_58/ (emphasis added).

Similarly, the minutes for the meeting on 13 June 2011 state:

Computing a Cost Impact

The CASB discussed the staffing needs for this potential new Working Group. Mr. Wong informed the CASB that commitments on staffing to support the WG have been received from some of the agencies. The CASB requested that the initial draft of the project plan for the WG include within its scope the definition of “in the aggregate” (i.e., offsets or netting), multiple accounting changes implemented on the same day, and the recommendations of any issues for FAR regulatory consideration.

CAS Board, 67th Meeting, *available* at http://www.whitehouse.gov/sites/default/files/omb/procurement/casb/minutes/casb-67-meeting_minutes.pdf (emphasis added).

In the CAS statute, Congress has left a gap concerning the offset of simultaneous changes. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984) (“The power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Based on: (1) the absence of any language in the CAS Board regulations that address the offset of simultaneous accounting changes; (2) the CAS Board’s abandonment of its rulemaking effort; and (3) the CAS Board’s long-stated desire to address this issue, we conclude that the CAS Board has not yet “filled the gap” in the statute by issuing regulations.⁴

⁴ Raytheon has submitted a document that it obtained from the Office of Management and Budget in a Freedom of Information Act request. The document states at the top of a copy of Working Group Item 76-8 “CASB approved 01/24/08.” (Item

2. The Effect of DoD's Established Practice In Light of the Absence of Regulatory Guidance

As we also held in *Boeing*, at the time that the parties entered into Contract I, there was an “established practice of the government agencies primarily responsible for enforcing the cost accounting standards statutes and regulations” to allow the offset of simultaneous changes. *Boeing*, 13 BCA ¶ 35,427 at 173,787. This established practice is reflected in various documents. First, in 1976, DoD established a CAS Steering Committee to “develop and disseminate” policy and guidance for integration of CAS Board rules and regulations into DoD procurement practices. A CAS Working Group carried out the detailed work of the committee. *See Cost Accounting Standards Guide (CCH)* ¶ 5990 at 6463. On 17 December 1976, the Working Group issued Item 76-8, Interim Guidance on Use of the Offset Principle in Contract Price Adjustment Resulting from Accounting Changes. *Id.* at 6470. With respect to offsetting multiple changes, the Working Group concluded: “CAS publications including the CAS clause shed no light on how the offset technique may be related to...simultaneous accounting changes.” *Id.* The Working Group determined that the offsetting of simultaneous accounting changes within a segment was permissible and would serve to reduce the number of contract price changes. *Id.* at 6471. The Working Group recognized that treating voluntary accounting changes on an individual basis would provide the government with an opportunity to decrease the amount owed on some contracts, but it concluded that the interests of the government were adequately protected if the government paid no overall price increase. *Id.*

Second, as we observed in *Boeing*, audit manuals for DCAA, and the 1990 Contract Administration Manual of the Defense Contract Management Command (DCMC), expressly allowed the offsetting. *Boeing*, 13 BCA ¶ 35,427 at 173,786. For example, the 2002 DCAA contract manual states that Item 76-8 was “still effective and [had] been incorporated into” the manual. DCAA Contract Audit Manual at 8-102.2. The manual later specifically stated “Within a segment, the effect of several changes may be combined in the offset consideration if the changes all take place at the same time.” *Id.* at 8-503.5.

Third, in *Boeing*, the Board relied upon a memorandum prepared by the contracting officer that documented the standard practice. This memorandum stated in relevant part: “Prior to 2005, the impact of all of the accounting changes would be

76-8 is discussed in sub-section II.A.2 below.) Raytheon contends that this document shows that the CAS Board agrees with the Working Group Item and permits the offset of simultaneous changes. But, as described above, the CAS Board has repeatedly stated in its meeting minutes that it has not addressed this issue. Whether the CAS Board regulations permit offsetting is a legal, rather than a factual issue.

considered and netted together in determining if the Government paid increased costs in the aggregate.” *Boeing*, 13 BCA ¶ 35,427 at 173,786.

Fourth, in April 2000, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the FAR Councils) published a proposed rule that would have codified DoD’s longstanding practice of allowing the offset of multiple simultaneous changes. *Federal Acquisition Regulation; Cost Accounting Standards Administration*, 65 Fed. Reg. 20854-01 (18 April 2000). The proposed regulation provided:

(d) Offsets. (1) The CFAO [cognizant federal agency official] may offset increased costs to the Government against decreased costs to the Government for some or all contracts, depending upon the particular facts and circumstances.

....

(3) In determining what contracts should be offset, the CFAO must consider the following:

....

(ii) Within a segment, the CFAO may combine the effect of several changes in accounting practice in the offset consideration if the changes have the same effective date.

Id. at 20859. As we will see, the FAR Councils later changed course dramatically, but not until well after the parties executed Contract I.

We find CAS Working Group Item 76-8, the DCMC and DCAA manuals, and the proposed regulation to be quite informative in identifying the “context and intention” of the parties when they made their bargain. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999). These documents also indicate a clear course of performance between the government and CAS-covered contractors on prior contracts concerning the treatment of simultaneous changes. *See Metro. Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006).

We recognize that this holding is fact specific. Although we are bound by our precedent in *Boeing*, if the government had come forward with affidavits or other non-conclusory evidence that demonstrated that our finding of an “established practice” in *Boeing* was incorrect, the result here might be different. If the government had submitted such evidence, we may have conducted a hearing to allow the government to present any extrinsic evidence it has with respect to the nature of the bargain that the

parties struck. Instead, the government has repeated the same arguments it made in *Boeing* and has put all of its eggs in the “*Boeing* is wrong” basket. Because the government has not identified any material fact in dispute, we enter summary judgment for Raytheon on Revision I.

B. The Revision 15 Changes

1. The Pre-FAR 30.606 Contracts

As described above (SOF ¶ 19), the contract from which the DACO sought to recover the Revision 15 amount (Contract II) is dated 30 December 2004. Roughly three months later, the FAR Councils issued the final rule concerning the resolution of cost impacts that it had proposed in 2000. Federal Acquisition Regulation, Cost Accounting Standards Administration, 70 Fed. Reg. 11743 (9 March 2005). While the proposed rule had expressly allowed the offset of simultaneous changes, the final rule represented a complete turnabout in that it now prohibited such offsetting:

30.606 Resolving cost impacts.

....

(3) In resolving the cost impact, the CFAO—

....

(ii) Shall not combine the cost impacts of any of the following unless all of the cost impacts are increased costs to Government:

(A) One or more unilateral changes.

Id. at 11758 (codified at 30 C.F.R. § 30.606(a)(3)(ii)(A)).

Revision 15 did not go into effect until 1 January 2008 (SOF ¶ 15). This would suggest that, in addition to contracts like Contract II that predate the issuance of FAR 30.606, this revision also applied to some contracts executed after the April 2005 effective date of the regulation. In fact, Raytheon estimates that about two-thirds of the contracts subject to Revision 15 were executed after the regulation went into effect. (App. br. at 22 n.7) Raytheon’s Revision 15 appeal thus raises the issue of how we should analyze the Revision 15 changes when that revision applies to contracts executed both before and after the issuance of FAR 30.606.

As a preliminary matter, Raytheon contends that, because the contracting officer seeks to recover all of the Revision 15 funds from a pre-FAR 30.606 contract, and there was no bar to such offsets at the time of contract execution, then the government's Revision 15 claim fails in its entirety. However, it cites no authority for its position. In fact, it is common for the government to offset money it owes on one contract from money it owes on another contract. As the Federal Circuit has explained, "The set-off right applies to government claims both under other contracts...and under the same contract." *Johnson v. All-State Constr., Inc.*, 329 F.3d 848, 852 (Fed. Cir. 2003) (citing *William Green Constr. Co. v. United States*, 477 F.2d 930, 936 (Ct. Cl. 1973); *Cecile Indus., Inc. v. Cheney*, 995 F.2d 1052, 1055 (Fed. Cir. 1993). Accordingly, the government could use Contract II to offset debts that arose on other contracts, even if Contract II is not subject to FAR 30.606.

With respect to Revision 15 contracts executed prior to the effective date of FAR 30.606, we apply the regulations in effect on the date that the parties signed the contract. *Boeing*, 13 BCA ¶ 35,427 at 173,786. The accounting changes that Raytheon made in 2008 do not change the nature of the bargains that the parties struck pre-FAR 30.606. Accordingly, our decision in *Boeing* means that the contractor can offset the Revision 15 contracts that the parties executed prior to 8 April 2005, the effective date of FAR 30.606. *See* 70 Fed. Reg. at 11743. We grant Raytheon summary judgment on this issue.

2. Post-FAR 30.606 Revision 15 Changes

Raytheon raises a second defense in its motion: whether the FAR Councils in issuing this regulation exceeded their authority by acting in an area that Congress reserved exclusively to the CAS Board. On its face, FAR 30.606(a)(3)(ii)(A) would bar the offsetting that Raytheon seeks to perform in this case – unless it is invalid as Raytheon contends.

a. The CAS Board's Authority to Regulate

There are three provisions in the statute that define the authority of the CAS Board to regulate. First, as we observed above, the CAS Board "has exclusive authority to prescribe, amend, and rescind cost accounting standards, and interpretations of the standards...governing measurement, assignment, and allocation of costs to contracts with the Federal Government." 41 U.S.C. § 1502(a)(1). The statute later re-emphasizes the primacy of the CAS Board when it comes to the measurement, assignment, and allocation of costs: "Costs that are the subject of cost accounting standards...are not subject to regulations established by another executive agency that differ from those standards with respect to the measurement, assignment, and allocation of those costs." 41 U.S.C. § 1504(c). Second, the Board has authority to prescribe regulations for the implementation of cost accounting standards prescribed or interpreted under this section. *Id.* § 1502(f). Third, the Board is empowered to define

“aggregate increased cost to the Federal Government.” *Id.* § 1503(b). Unlike §§ 1502(a)(1) and 1504(c), neither of these latter two sections specifically provide that the CAS Board’s authority is exclusive.

There is also a fourth provision in the statute of interest in defining the CAS Board’s regulatory sphere in relation to other agencies. Section 1504(b) provides that the Administrator of OFPP (who, as noted, is also the CAS Board Chairman) “shall rescind or deny the promulgation” of any regulation or proposed regulation that is inconsistent with a cost accounting standard. 41 U.S.C. § 1504(b). The regulation at issue, FAR 30.606, was issued by the FAR Councils, which have responsibility for issuing revisions to the FAR, (*see* FAR 1.201-1), that is, to Chapter 1 of Title 48 of the Code of Federal Regulations (*see* FAR 1.101). The cost accounting standards are contained in a separate chapter of Title 48, namely, Chapter 99. In the nearly ten years that have elapsed since the effective date of FAR 30.606, the OFPP Administrator has not taken any action under § 1504(b) to rescind this regulation.

The question in this case is whether the FAR Councils, in issuing FAR 30.606, have overstepped their authority. Put another way, we are being asked to invalidate a FAR provision even though a CAS Board regulation on this topic, if ever issued, might state the exact same thing. Or, put yet another way, we are being asked to rule that a regulation is invalid even though the official entrusted with statutory authority to do so, the OFPP Administrator, has not taken any action.

Close scrutiny of the CAS Board’s activity indicates that the OFPP Administrator not only has abstained from rescinding FAR 30.606, he or she actually supported the FAR Council’s rulemaking. A few more words of history are in order to explain why. As described above, in the 1990s the CAS Board proposed regulations that would govern changes in cost accounting practices. This effort included regulations detailing permissible offsets for simultaneous accounting practice changes, that is, the precise issue here. *See, e.g.*, 61 Fed. Reg. 49219. Ultimately, the CAS Board abandoned that effort, at least so far as it is relevant to this case. *See* Cost Accounting Standards Board; Changes in Cost Accounting Practices, 65 Fed. Reg. 37470 (14 June 2000). The CAS Board explained that its abandonment of the rulemaking effort was due, in part, to the FAR Councils’ issuance in April 2000 of the proposed rules that included FAR 30.606. The CAS Board stated that the FAR Councils’ proposal was in response to “an initiative” by the OFPP Administrator. 65 Fed. Reg. at 37470. The CAS Board’s citation to the involvement of the OFPP Administrator is not surprising because, in addition to being the CAS Board Chairman, the OFPP Administrator is also responsible for providing “overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies.” 41 U.S.C. § 1121(a). Congress has empowered the OFPP Administrator to prescribe government-wide procurement policies that are implemented in the FAR. *Id.* § 1121(b).

In its June 2000 public notice, the CAS Board cited an expected decline in the number of CAS-covered contracts and “the expected issuance of more explicit FAR guidance regarding the CAS cost impact process,” and concluded that the issuance of amendments to the CAS were “not presently warranted.” The CAS Board explained that the FAR Councils’ proposal addressed many aspects of the “fundamental CAS administration process” that the Board’s proposed rules had covered. The CAS Board stated that it “encourages the Councils to finalize the proposed rulemaking.” 65 Fed. Reg. at 37470. The FAR Councils responded to this apparent blessing from the CAS Board and the OFPP Administrator by finalizing their proposed rulemaking in 2005, which included FAR 30.606, as we have seen. 70 Fed. Reg. 11743.

b. FAR 30.606 Does Not Infringe on CAS Board Authority

The only sections of the CAS statute that explicitly grant exclusive regulatory authority to the CAS Board are the sections that grant that Board the authority to issue standards governing the measurement, assignment and allocation of costs to contracts with the Federal Government. 41 U.S.C. §§ 1502(a), 1504(c). Although the statute does not define measurement, assignment and allocation of costs, the CAS Board has defined them in its regulations. *See* 48 C.F.R. § 9903.301(a) (identifying sections where terms are defined).

The CAS regulations define measurement of cost in terms of methods and techniques that govern the manner in which a contractor will calculate or compute cost:

(a) Measurement of cost, as used in this part, encompasses accounting methods and techniques used in defining the components of cost, determining the basis for cost measurement, and establishing criteria for use of alternative cost measurement techniques.... Examples of cost accounting practices which involve measurement of costs are—

(1) The use of either historical cost, market value, or present value....

48 C.F.R. § 9904.302-1(a).

For example, CAS 412 is entitled “Cost Accounting Standard for Composition and Measurement of Pension Cost.” 48 C.F.R. § 9904.412. Among other things, it specifies the methods and techniques to be used in calculating pension costs:

(b) Measurement of pension cost.

(1) For defined-benefit pension plans...the amount of pension cost of a cost accounting period shall be determined by use of an immediate-gain actuarial cost method....

48 C.F.R. § 9904.412-40.

With respect to assignment of costs, the CAS Board has defined it in terms of assigning costs to specific periods of time:

(b) Assignment of cost to cost accounting periods, as used in this part, refers to a method or technique used in determining the amount of cost to be assigned to individual cost accounting periods. Examples of cost accounting practices which involve the assignment of cost to cost accounting periods are requirements for the use of specified accrual basis accounting or cash basis accounting for a cost element.

48 C.F.R. § 9903.302-1(b).

Finally, the CAS Board regulations define “allocate” as follows:

(1) Allocate means to assign an item of cost, or a group of items of cost, to one or more cost objectives. This term includes both direct assignment of cost and the reassignment of a share from an indirect cost pool.

48 C.F.R. § 9904.402-30(a)(1). As the Federal Circuit has explained, the allocation of a cost deals with the accounting process of assigning costs to cost objectives. *Rice v. Martin Marietta Corp.*, 13 F.3d 1563, 1565 (Fed. Cir. 1993). Cost objectives include contracts and other work units for which cost data are desired. *Id.* For a cost to be allocable to a cost objective, the cost must have benefited from or have been caused by the cost objective. *Id.* Thus, as the Federal Circuit has succinctly explained, “the concept of allocability is addressed to the question whether a sufficient ‘nexus’ exists between the cost and a government contract.” *Boeing North American*, 298 F.3d at 1281.

Raytheon does not contend that this case involves the measurement, assignment, or allocation of costs. Indeed, it seems to us that the issue here involves an event that is conceptually and temporally distinct from the period in which the contractor is measuring its costs, and assigning and allocating them to accounting periods and cost objectives. The dispute here is further down the road, that is, it occurs after the costs

have already been measured, assigned, and allocated. Conceptually, the decision to bar offsetting is more in the nature of contract administration or a policy determination than an accounting issue. As a number of cases have held, simply because a cost has been properly measured, assigned, and allocated does not mean that an agency is obligated to pay it. *See, e.g., Martin Marietta*, 13 F.3d at 1569 (“The fact that costs have been incurred, measured, and allocated in accordance with the CAS does not prohibit agencies from limiting the allowability of those costs under their own regulations.... Government agencies have the authority to disallow types and amounts of properly allocated costs for various policy reasons. Costs may be assignable and allocable under the CAS, but not allowable....”). We are dealing with the same manner of dispute here; specifically, we are considering whether an agency is obligated to pay for costs that have been measured, assigned and allocated in accordance with CAS.

c. Interpretation of Section 1503(b)

In support of its contention that the FAR Councils exceeded their authority, Raytheon relies upon § 1503(b) of the statute, which provides, in part: “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.” Raytheon contends that this provision should be read as assigning exclusive authority to define aggregate increased costs to the CAS Board, even though, unlike § 1502(b), the statute does not explicitly state that the authority is exclusive. Based on this purported exclusive authority for the CAS Board, Raytheon contends that the FAR Councils lacked the authority to issue the regulation at issue because that regulation effectively defines aggregate increased cost.

If Raytheon’s argument is correct, then FAR 30.606 would have been just as unlawful if it had authorized the offsetting that Raytheon seeks. This is so because the purported grant of exclusive authority to the CAS Board would have prevented the FAR Councils from addressing the issue in any way. Thus, contracting officers would face a legal vacuum in determining whether to offset the cost impact of multiple changes because neither the statute, nor the cost accounting standards, answer this question.⁵

“Questions of statutory construction turn on ‘the language itself, the specific context in which the language is used, and the broader context of the statute as a whole.’” *Bush v. United States*, 655 F.3d 1323, 1329 (Fed. Cir. 2011) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). “It is our duty ‘to give effect, if possible, to every clause and word of a statute.’” *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting

⁵ The CAS Board has defined the term “increased costs” but has done so only in the context of “a change” and has not defined “aggregate increased costs.” *See* 48 C.F.R. § 9903.306(a).

Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)). It is also well settled that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Duncan*, 533 U.S. at 173 (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

We hold that FAR 30.606 does not impermissibly intrude on authority reserved exclusively for the CAS Board. We reach this conclusion because we do not read the grant of authority to the CAS Board in § 1503(b) as being so broad that it prevents the FAR Councils from issuing regulations that provide guidance to contracting officers who may be faced with an accounting change that affects hundreds of contracts. While Congress has granted clear authority to the CAS Board to define aggregate increased costs in § 1503(b), we cannot ignore the fact that the grant of authority is not as strong as the exclusive authority granted in § 1502(a) with respect to the measurement, assignment, and allocation of costs. By including specific language in § 1502(a)(1) that it did not include in § 1503(b), we presume that Congress acted intentionally. *Duncan*, 533 U.S. at 173. The wording of § 1503(b) allows for a coexistence between the CAS Board, whose primary concern is in the measurement, assignment, and allocation of costs, and the executive agencies that must administer highly complex contracting arrangements. See *Kearfott Guidance & Navigation Corp. v. Rumsfeld*, 320 F.3d 1369, 1377 (Fed. Cir. 2003) (noting the canon of construction in favor of finding harmony between the CAS and FAR as two regulations dealing with similar subjects).

A review of the drafting history of FAR 30.606 illustrates some of the policy or administrative decisions that an agency faces when processing the cost impact of accounting changes. In addition to addressing simultaneous unilateral accounting changes within the same business segment (the situation we have here), agencies may also have to address whether the following types of offsets should be allowed: changes that are not simultaneous; changes that are within the same company but for different business segments; changes that are all compliant changes but are for different categories of compliant changes, that is, required, unilateral, and desirable changes; and whether compliant changes may offset non-compliances. Federal Acquisition Regulation: Cost Accounting Standards Administration, 68 Fed. Reg. 40104-01, 40110-11 (3 July 2003). Ultimately, the FAR Councils determined to allow the combination⁶ of some types of changes, but mostly took a hard line against offsetting. 70 Fed. Reg. at 11749. 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.

⁶ When the FAR Councils issued the proposed FAR 30.606 the second time, they eliminated the term “offset” to “avoid potential confusion” and instead used the word “combine.” 68 Fed. Reg. at 40104.

The CAS Board has long since recognized the authority of the FAR Councils to issue regulations that are administrative in nature and encouraged the rulemaking that resulted in FAR 30.606. 65 Fed. Reg. at 37470. While not binding on us, we find this to be meaningful based on the CAS Board's expertise. We also find significance in the role played by the OFPP Administrator who not only prescribes government-wide procurement policies implemented in the FAR, but is also Chairman of the CAS Board. The OFPP Administrator is thus uniquely situated to determine which regulations should be issued in the FAR and those which should be issued in Chapter 99 of Title 48. We believe that the Administrator has sent a clear message by: 1) initiating the rulemaking that resulted in FAR 30.606 (65 Fed. Reg. 37470); 2) acting as Chairman of the CAS Board when it: a) abandoned that Board's proposed regulations that would have addressed offsetting; and b) published a Federal Register notice that characterized the FAR rulemaking as administrative in nature and which endorsed that rulemaking (*id.*); and 3) for nearly 10 years, declining to use his or her authority under 41 U.S.C. § 1504(b) to rescind FAR 30.606. The actions of the CAS Board and the OFPP Administrator demonstrate that FAR 30.606 was a lawful exercise of the authority of the FAR Councils.

Accordingly, we enter summary judgment in favor of the government with respect to the validity of FAR 30.606(g)(3)(ii)(A).

III. The Desirability of The Changes

Raytheon contends that the DACOs erred by basing their determinations that the Revision 1, 5 and 15 changes were not desirable strictly upon the increased costs to the government.⁷ The CAS regulations define a desirable change as one in which the cognizant federal agency official finds that the change "is desirable and not detrimental to the Government and is therefore not subject to the no increased cost prohibition provisions of CAS-covered contracts affected by the change." 48 C.F.R. § 9903.201-6(c)(2). This determination "need not be based solely on the cost impact that a proposed practice change will have on a contractor's or subcontractor's current CAS-covered contracts." *Id.* A change can be deemed desirable "even though existing contract prices and/or cost allowances may increase." The determination that a change is desirable is made on a case by case basis. *Id.*

Raytheon relies upon our decision in *Lockheed Martin Corp.*, ASBCA No. 53822, 07-2 BCA ¶ 33,614, *aff'd*, *Donley v. Lockheed Martin Corp.*, 608 F.3d 1348 (Fed. Cir. 2010). In that case, the Board considered whether a particular contract should be considered in a cost impact proposal and, after deciding that it should, we remanded the quantum determination to the parties. At the conclusion of the opinion, the Board stated that, if material increased costs resulted from the changed practices, then the

⁷ Having resolved the Revision 1 changes and the pre-April 2005 Revision 15 changes, we do not reach the desirability or the materiality of these changes.

contracting officer should consider whether the changes were desirable. *Id.* at 166,469. In *dicta*, the Board stated that an increase in costs alone was not a sufficient basis for determining that the changed practices were not desirable and that the relevant factors for assessing desirability “may include” the extent of active government involvement in, and support for, the decision to institute the changed practices; the degree to which the changed practices increased the accuracy and precision of the cost measurement, assignment, and/or allocation process; the degree to which the changed practices increased the visibility, manageability and/or controllability of the costs in question; and, any other short or long term benefits to the government. *Id.*

The government counters by observing that nothing in § 9903.201-6(c) prevents the contracting officer from considering only cost in determining whether the change is desirable. The government contends that the use of the phrase “need not” in this regulation means that it is “wholly permissive in nature.” Thus, the government concludes that it is entirely within the considerable discretion of the contracting officer to make his or her determination by focusing solely upon the increased cost to the government.

Prior to April 2005, the FAR “[d]id not provide information on how to determine whether a change is desirable.” 70 Fed. Reg. at 11751. Subsequent to the contract at issue in the Board’s decision in *Lockheed Martin*, and as part of the same rulemaking that resulted in FAR 30.606, the FAR Councils amended FAR Subpart 30.6 to add criteria for the contracting officer to consider when determining whether a change is desirable. The new regulation provides:

(b) *Desirable changes....*

....

(3) Some factors to consider in determining if a change is desirable include, but are not limited to, whether—

(i) The contractor must change the cost accounting practices it uses for Government contract and subcontract costing purposes to remain in compliance with the provisions of Part 31;

(ii) The contractor is initiating management actions directly associated with the change that will result in cost savings for segments with CAS-covered contracts and subcontracts over a period for which forward pricing rates are developed or 5 years, whichever is shorter, and the cost savings are reflected in the forward pricing rates; and

(iii) Funds are available if the determination would necessitate an upward adjustment of contract cost or price.

FAR 30.603-2(b).

Resolution of this issue once again requires us to consider the state of the law pre-April 2005, the time period applicable to Revision 5, and post-April 2005, the time period applicable to the Revision 15 contracts not disposed of above. Regardless of the time period at issue, however, the determination as to the desirability of a change is a discretionary determination by the contracting officer. The Federal Circuit has applied the following factors in determining whether a contracting officer has abused his/her discretion: (1) evidence of whether the government official acted with subjective bad faith; (2) whether the official had a reasonable, contract-related basis for his decision; (3) the amount of discretion given to the official; and (4) whether the official violated a statute or regulation. *Campbell Plastics Eng'g & Mfg., Inc. v. Brownlee*, 389 F.3d 1243, 1250 (Fed. Cir. 2004).

With respect to the Revision 5 changes, there is no evidence that the contracting officer acted in subjective bad faith. The contracting officer had a reasonable contract-related basis for his decision because the change resulted in a substantial increase of costs to the government. Further, with respect to the amount of discretion provided to the contracting officer, Contract I incorporated 48 C.F.R. § 9903.201-6(c)(2) (SOF ¶ 8), which, as noted above, merely states that the contracting officer's desirability determination "need not be based solely on the cost impact" of the change. The logical corollary of "need not be based solely on the cost impact" is that the determination may be based solely upon the cost impact. Finally, the contracting officer did not violate any statute or regulation.

When Raytheon issued Revision 5, neither the CAS Board regulations nor the FAR required the contracting officer to consider any particular factors in making this determination. See *Lockheed Martin*, 07-2 BCA ¶ 33,614. While the contracting officer did not consider the factors that we identified in *Lockheed Martin*, under these facts the contracting officer acted within his discretion by not considering factors that were absent from the pertinent regulations.

Raytheon contends that the Revision 5 [REDACTED REDACTED] and, as a result, increased the accuracy and precision [REDACTED REDACTED REDACTED REDACTED] (app. br. at 32). While the result of this accounting change may have been laudable, we conclude that it was not an abuse of discretion for the contracting officer to focus upon the increase in costs rather than these purported benefits.

As for Revision 15, Raytheon contends that the [REDACTED REDACTED] moved [REDACTED REDACTED REDACTED REDACTED REDACTED RE] The change caused costs incurred by [REDACTED REDACTED REDACTED] to be more appropriately allocated [REDACTED REDACTED REDACTED] (app. br. at 33) (citations omitted). It contends that [REDACTED REDACTED] Such a change increases the visibility, manageability, and controllability of those costs.” *Id.* (citations omitted).

There is no evidence that the contracting officer acted in bad faith or violated a law or regulation with respect to the Revision 15 changes. She also had a reasonable contract-related basis for her decision because the change resulted in a substantial increase of costs to the government. However, it appears that, by focusing solely upon costs, she did not consider the factors for assessing desirability listed in FAR 30.603-2(b). Whether this was an error we need not decide because Raytheon has not contended that it had to make the changes to remain in compliance with FAR Part 31, or that any of the other factors contained in FAR 30.603-2(b) weigh in its favor or even apply to this case. Nor did it make any such contention when it communicated with the contracting officer about Revision 15.

In its reply brief, Raytheon contends that it is enough for it to show that the contracting officer failed to consider all of the factors (reply at 18-22), but it fails to cite any precedent. This is incorrect because the Federal Circuit has required contractors to show a prejudicial violation of a regulation in comparable circumstances. In *Todd Construction, L.P. v. United States*, 656 F.3d 1306 (Fed. Cir. 2011), a contractor contended that the contracting officer failed to follow the requirements of a pertinent regulation while issuing a performance evaluation. The court of appeals found, however, that the contractor had “alleged nothing to indicate that the outcome of the performance evaluations would have been any different if the purported procedural errors had not occurred.” *Id.* at 1316. The court of appeals held that “[i]n general, standing requires that the plaintiff show an injury in fact, ‘a casual connection between the injury and the conduct complained of,’ and that his injury would likely be redressable by court action.” *Id.* at 1315 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). As a result, the Federal Circuit held that the contractor lacked standing to sue with respect to these procedural violations. *See id.* (citing *Labatt Food Service, Inc. v. United States*, 577 F.3d 1375, 1378-80 (Fed. Cir. 2009) (bid protestor lacked standing because it could not show that it was prejudiced by a significant error, that is, that but for the error it would have had a substantial chance of receiving the contract)). Accordingly, because Raytheon has not contended that any of the factors for desirability identified in FAR 30.603-2(b) would have made a difference in the outcome, the contracting officer did not abuse her discretion in focusing solely

upon price in determining that the changes were not desirable, and we grant summary judgment to the government.

IV. The Materiality of the Revision 5 & 15 Changes

Raytheon contends that the DACOs improperly failed to consider whether the impacts of the accounting practice changes were material. FAR 30.602(c)(1) (April 2005 – present) provides that the contracting officer “shall” make no contract adjustments if the costs involved are immaterial. (Before April 2005, the regulation was similar, although it used “may” instead of “shall”: “The [administrative contracting officer] may forego action to require that a cost impact proposal be submitted or to adjust contracts, if the ACO determines the amount involved is immaterial.”) This FAR provision has at all relevant times directed the contracting officer, in determining materiality, to use the criteria issued by the CAS Board at 48 C.F.R. § 9903.305.

Section 9903.305 lists several criteria for the cognizant federal agency official to consider “where appropriate” and provides that “no one criterion is necessarily determinative.” The listed criteria include: “[t]he absolute dollar value involved. The larger the dollar amount, the more likely that it will be material”; the amount of contract cost compared with the amount under consideration; and the relationship between a cost item and a cost objective, with direct cost items normally having more impact than the same amount of indirect costs. *See, e.g., Sikorsky Aircraft Corp. v. United States*, 110 Fed. Cl. 210, 223-25 (2013) (applying § 9903.305 to determine whether an overhead pool contained significant costs of management or supervision of direct cost activities), *aff’d*, 773 F.3d. 1315 (Fed. Cir. 2014).

The FAR and CAS Board regulations concerning materiality must be read in light of the clear congressional prohibition on the government paying increased costs as a result of a contractor’s accounting changes. In particular, the CAS statute requires the contractor to agree to a price adjustment “with interest, for any increased costs” paid to the contractor as a result of an accounting change. 41 U.S.C. § 1502(f)(2) (emphasis added); *see also* 41 U.S.C. § 1503(b); FAR 52.230-2(a)(2), (4), (5). While one can imagine a *de minimis* exception to the statute so that the government does not spend thousands of dollars chasing a nickel, the statutory bar against the government paying increased costs is clear. The CAS Board has demonstrated its understanding of this principal, explaining in one of its first statements on materiality that the goal of the cost accounting standards is to be “reasonable and not seek to deal with insignificant amounts of cost.” Cost Accounting Standards Board, Statement of Operating Policies, Procedures, and Objectives, 38 Fed. Reg. 6122 (6 March 1973). This interpretation of materiality is consistent with the everyday definition of material: “being of real importance or great consequence; substantial.” WEBSTER’S THIRD NEW INT’L DICTIONARY (1986).

Based on the clear statutory language barring payment of increased costs, the CAS Board's materiality regulation should be understood as an attempt to identify factors that assist in determining whether the amount of money at issue is significant enough for it to be worthwhile to recover. Indeed, one of the criteria in the regulation is whether the administrative cost of processing the price adjustment exceeds the amount to be recovered. Significantly, the regulation provides that the cost amount may be material even if the administrative costs are greater than the recovery; it simply provides that, in such a circumstance, it is "less likely" to be considered material. 48 C.F.R. § 9903.305(f).

The DACOs determined that the impact of the Revision 5 change and the Revision 15 changes relating to communications and inventory maintenance were material. In reaching this determination, the DACOs relied solely upon the cost impact of the changes. (App. br., SUF ¶¶ 43, 56; gov't resp. to SUF ¶¶ 43, 56) Raytheon contends that the DACOs erred by considering only the amount of the cost increases. Among other things, it contends that the cost increases were immaterial in comparison to Raytheon's annual total overhead base of approximately \$3 billion and that the cost impacts amounted to less than one percent of the total cost of the contracts at issue.

While it appears that Raytheon is correct that the DACOs did not consider any of the § 9903.305 factors beyond the amount of the cost increases, it may have been within their discretion to do so. However, we will not decide this issue on summary judgment due to our holding below in favor of Raytheon with respect to the double counting of costs. Our ruling in favor of Raytheon on double counting means that the amounts considered by the DACOs were, in fact, greatly overstated. The contracting officers apparently relied upon DCAA to calculate the amounts to be recovered but we do not know if that reliance was reasonable at the time. Accordingly, we will reserve judgment on this issue until we have heard from the pertinent witnesses at trial and we have further briefing from the parties as to the standard of review we should apply to a contracting officer's final decision that was based on an overstated amount, and the legal remedies that apply.⁸

V. The Double Counting of Costs

Raytheon contends that the government is seeking a double recovery on all three revisions because it seeks recovery for not only the increase in costs allocated to flexibly-priced contracts but also the corresponding decrease in costs allocated to fixed-price contracts. Using the Revision 1 property accounting/property management change as an example, Raytheon emphasizes that it incurred the same amount of costs after this

⁸ We have considered Raytheon's other arguments but reject them. Neither *Sikorsky Aircraft Corp.*, 110 Fed. Cl. 210 nor the documents that Raytheon cites at pages 38-39 of its opening brief involved a question as to whether an amount of money to be recovered was material.

If the contractor under any fixed-price contract, including a firm fixed-price contract, fails during contract performance to follow its cost accounting practices or to comply with applicable Cost Accounting Standards, increased costs are measured by the difference between the contract price agreed to and the contract price that would have been agreed to had the contractor proposed in accordance with the cost accounting practices used during contract performance.

48 C.F.R. § 9903.306(b).

However, this regulation must be read in light of the statutory prohibition on recovering greater than the aggregate increased cost to the Federal Government. 41 U.S.C. § 1503(b). The statute contains one exception to this bar: if the contractor was aware or should have been aware of the change at the time of the price negotiation and failed to disclose it to the government. The government does not allege that this occurred here.

The government's position runs afoul of the prohibition in § 1503(b). Going back to Raytheon's simple example of a world with one fixed-price and one flexibly-priced contract valued at one million each, the government's position would allow it to recover (or simply not pay) \$300,000 on each contract. Thus, although it originally contracted to pay a total of \$2 million, after the accounting change it would receive the same goods or services for a total of \$1.7 million. This is the very definition of a windfall and is just as inequitable as if no adjustments were made and Raytheon received \$2.3 million for this work.

Accordingly, we hold that under § 1503(b) the government may recover the increased costs allocated to flexibly-priced contracts, but it may not also recover those same costs when they are removed from the allocation to fixed-price contracts, and grant Raytheon summary judgment on this issue.

VI. The 30 Percent Markup

The government has added a markup of 30 percent to the Revision 5 changes (SOF ¶¶ 12, 13). The reasons why the government added this markup and the justification for it are sharply contested. Accordingly, because material facts are in dispute, we deny the cross-motions on this issue.

On a related note, Raytheon has moved to strike the declaration of David Steele, a supervisory auditor at DCAA. Raytheon challenges the declaration as contradictory to his deposition testimony. Specifically, it contends that Mr. Steele's declaration contradicts his

deposition testimony on the reasons why DCAA was unable to complete its audit of Revisions 1 and 5, the basis for the 30-percent markup, and Mr. Steele's previous experience with Raytheon's cost impact proposals. After reviewing the government's response, we are satisfied that the government can identify portions of the deposition testimony that are consistent with the declaration. These issues and Mr. Steele's credibility should be addressed at trial. Accordingly, we deny Raytheon's motion to strike.

VII. Interest

Raytheon challenges the DACOs assessment of compound interest. The CAS statute provides that contractors must "agree to a contract price adjustment, with interest, for any increased costs paid to the contractor...because of a change in the contractor's...cost accounting practices." 41 U.S.C. § 1502(f)(2). The statute further provides that the interest rate applicable to a contract price adjustment is the interest rate established under 26 U.S.C. § 6621. Section 6622(a) of title 26 provides that interest paid under that title shall be compounded daily. As a result, the Federal Circuit "has held that statutes which require interest payments at the rate set out in § 6621 require compound interest." *Gates v. Raytheon Co.*, 584 F.3d 1062, 1070 (Fed. Cir. 2009) (citing *Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 568 (Fed. Cir. 1989) (discussing 19 U.S.C. § 1677(g)).¹⁰ Thus, any amounts that Raytheon is required to pay the government shall include compound interest.

Raytheon also contends that the DACOs erred by calculating interest as if the government incurred all of the costs on the date that the change was implemented. The government appears to agree at least in part because it states in its response brief that "Raytheon should pay the Government compound interest from the time the Government paid Raytheon the increased costs until the time Raytheon fully compensates the Government" (gov't resp. br. at 37-38).

Accordingly, we hold the government shall be entitled to compound interest from the date of the excess payments until the date that the government is repaid in full and enter summary judgment in its favor on this issue.

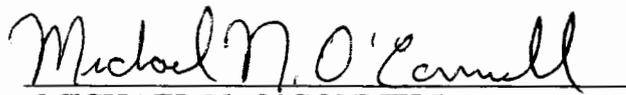
¹⁰ The CAS clause incorporated in Contracts I and II, FAR 52.230-2, implements the statutory interest requirement (SOF ¶¶ 8, 20). This clause provides that if a contractor makes a change in its cost accounting practices and the change affects the contract price or cost allowance, then an adjustment shall be made in accordance with subparagraph (a)(4) or (a)(5) "as appropriate." FAR 52.230-2(a)(2). While hardly a model of clarity, subparagraph (a)(5) does provide for interest pursuant to 26 U.S.C. § 6621, the same statute cited in 41 U.S.C. § 1503(c). Thus, reading the contract in light of the clear mandate for compound interest in the CAS statute, the contracts require payment of compound interest.

CONCLUSION

In summary, we grant summary judgment in favor of Raytheon with respect to Revision 1, ASBCA No. 57801. With respect to Revision 5, ASBCA No. 57803, we grant summary judgment in favor of the government with respect to the desirability of the changes; we deny the cross-motions with respect to the materiality of the changes and with respect to the 30 percent markup; we grant Raytheon summary judgment with respect to the double counting issue; we grant summary judgment in favor of the government that any interest paid should be compound and should be paid from the date that the government made the payment at issue until Raytheon repays the government. As for Revision 15, ASBCA No. 58068, we grant summary judgment in favor of Raytheon with respect to contracts entered into prior to 8 April 2005; we grant summary judgment in favor of the government on the issue of the validity of FAR 30.606; we grant summary judgment in favor of the government with respect to the desirability of the changes; we deny the cross-motions with respect to the materiality of the changes; we grant Raytheon summary judgment with respect to the double counting issue; and we grant summary judgment in favor of the government that any interest paid should be compound and should be paid from the date that the government made the payment at issue until Raytheon repays the government. Finally, we deny Raytheon's motion to strike the declaration of David Steele.

The parties shall confer and submit a proposed schedule for further proceedings within 60 days of the date of this opinion.

Dated: 7 May 2015


MICHAEL N. O'CONNELL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur


MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur


RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 57801, 57803, 58068, Appeals of Raytheon Company, Space & Airborne Systems, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals