ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Raytheon Company,	)	
Space & Airborne Systems	)	ASBCA No. 58068
	)	
Under Contract No. F04701-03-C-0008 *et al.*	)	

APPEARANCES FOR THE APPELLANT:

Paul E. Pompeo, Esq.
Stuart W. Turner, Esq.
Arnold & Porter LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT:

E. Michael Chiaparas, Esq.
DCMA Chief Trial Attorney
Arthur M. Taylor, Esq.
Deputy Chief Trial Attorney
Defense Contract Management Agency
Chantilly, VA

OPINION BY ADMINISTRATIVE JUDGE O'CONNELL
PURSUANT TO BOARD RULE 11

This is the last of several consolidated appeals in which appellant, Raytheon Company, Space & Airborne Systems, challenges government claims seeking to recover increased costs arising from Raytheon's unilateral cost accounting changes. In *Raytheon Company, Space & Airborne Systems*, ASBCA No. 57801 *et al.*, 13 BCA ¶ 35,319 (*Raytheon I*), we dismissed as untimely the government claims docketed as ASBCA Nos. 57802, 57804 and 57833. In *Raytheon Company, Space & Airborne Systems*, ASBCA No. 57801 *et al.*, 15-1 BCA ¶ 36,024 (*Raytheon II*) we granted summary judgment in favor of Raytheon in ASBCA No. 57801. We also granted partial summary judgment to Raytheon and partial summary judgment to the government in ASBCA No. 57803. The parties subsequently settled the remaining issues in that appeal and we dismissed it with prejudice.

In the instant appeal (ASBCA No. 58068), we granted partial summary judgment to Raytheon and partial summary judgment to the government. Specifically, we granted summary judgment in favor of Raytheon with respect to contracts entered into prior to 8 April 2005; we granted summary judgment to the government with respect to the validity of FAR 30.606(a)(3); we granted summary judgment to the government with respect to the desirability of the changes; we granted summary judgment to Raytheon with respect to the "double counting" issue; we denied the

cross-motions with respect to the materiality of the changes; and we granted summary judgment in favor of the government that any interest paid should be compound. *Raytheon II*, 15-1 BCA ¶ 36,024 at 175,962.

The parties have filed cross-motions for summary judgment, requesting that the Board revisit the issue of the materiality of the changes. The parties also agreed that the Board should decide this appeal on the record under Rule 11 if we find that there are material facts in dispute. Because we find that there is a material fact in dispute concerning the contracting officer's consideration of the materiality criteria contained in 48 C.F.R. § 9903.305, we decide this appeal under Rule 11.

FINDINGS OF FACT

1. On 1 November 2007, Raytheon submitted Revision 15 to its Cost Accounting Standards (CAS) Disclosure Statement (*see* FAR 52.230-2) to a divisional administrative contracting officer (contracting officer) at the Defense Contract Management Agency (DCMA) (R4, tab 20). This revision contained three cost accounting practice changes that: 1) [R E D A C T E D R E D A C T E D R E D A C T E D R E D A C T E D]; 2) [R E D A C T E D R E D A C T E D R E D A C T E D R E D A C T E D R E D A C T E D R E D A C T E D R E D A C T E D R E D A C T E D] 3) [R E D A C T E D R E D A C T E D R E D A C T E D R E D A C T E D R E D A C T E D R E D A C T E D R E]. The revision went into effect on 1 January 2008. (*Id.* at 215)

2. Over two years later, on 26 February 2010, Raytheon submitted a general dollar magnitude analysis (*see* FAR 52.230-6) for the three changes for calendar years 2008 to 2011 (R4, tab 27). Raytheon calculated that the [R E D A C T E D] change caused a $251,500 decrease to flexibly-priced contracts and an increase of $195,200 to fixed-price contracts during the four-year period (*id.* at 318). The other two changes had the opposite effect. Raytheon calculated that the [REDACTED] 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 [R E D A C T E D] change caused an increase of $36,000 to flexibly-priced contracts and a decrease of $17,400 to fixed-price contracts (*id.* at 320).

3. On 4 October 2010, the Defense Contract Audit Agency (DCAA) issued a final report (R4, tab 28). DCAA calculated a cost impact of $142,800 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 [R E D A C T E D] and [REDACTED] changes ($47,800 + $41,600 + $36,000 + $17,400 = $142,800) (*id.* at 323); *see Raytheon II*, 15-1 BCA ¶ 36,024 at 175,960-61. 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.*)

4. On 15 March 2012, the contracting officer 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 contracting officer sought to recover the money from Contract No. FA8650-04-C-1706 (the contract), which had an effective date of 30 December 2004 (*id.* at 429). The contract incorporated FAR 52.230-2, COST ACCOUNTING STANDARDS (APR 1998); and FAR 52.230-6, ADMINISTRATION OF COST ACCOUNTING STANDARDS (NOV 1999) (ex. G-9 at 17).

5. In her final decision, the contracting officer noted that Raytheon had requested that she determine that the changes were immaterial (R4, tab 55 at 427). The contracting officer did not specifically state in her decision whether the changes were material, but the parties agree that she determined that the [R E D A C T E D] and [REDACTED] changes were material because they resulted in increased costs to the government (app. mot., SUMF ¶¶ 55-56; gov't resp. to SUMF ¶¶ 55-56).

6. In *Raytheon II*, we declined to enter summary judgment in favor of either party on the materiality issue based on our conclusion that the contracting officer's final decision overstated the impact of the accounting changes. We reserved judgment until we had heard from the pertinent witnesses at trial and had received additional briefing from the parties. *Raytheon II*, 15-1 BCA ¶ 36,024 at 175,960.

7. The parties filed a joint status report on 27 October 2015 in which they informed the Board that they had discussed and reviewed a draft affidavit from the contracting officer, Blanca Jimenez, and had agreed that the affidavit and the existing record provide a sufficient factual basis to allow the parties to present their positions on the materiality issue. The parties proposed a briefing schedule for the following two issues:

> 1. Whether the Contracting Officer erred in determining that the cost impact from Revision 15 is material under 48 CFR 9903.305 when that determination is based solely upon an increased cost to the Government.
>
> 2. If so, whether this error rendered the Government's claim either invalid or improper.

8. In an affidavit dated 24 November 2015, Ms. Jimenez testified that she considered the materiality criteria in 48 C.F.R. § 9903.305 before issuing her final

decision but had based her materiality determination solely upon the increased costs to the government. She testified that, as a result of our decision in *Raytheon II*, the cost impact of the [REDACTED] and [R E D A C T E D] cost accounting practice changes had been reduced from $142,800 to $56,146 (not including interest). The revised total included $32,026 attributable to the [REDACTED] change and $24,120 from the [R E D A C T E D] change. She testified that "[t]he CAS statute requires a contractor to agree to a price adjustment with interest for any increased costs to the Government resulting from a cost accounting practice change. Both the $32,026 and the $24,120 are increased costs to the Government resulting from these two cost accounting practice changes." She stated that "the absolute dollar amount of the cost increases to the Government is relatively small" but these amounts "are still increased costs to the Government." She testified that she had applied the same materiality analysis as at the time of her final decision and had concluded that "[t]he other stated criteria [in 9903.305] are not applicable to this situation." (R4, tab 56, ¶ 8) She did not, however, explain why she considered those criteria to be inapplicable.

9. Raytheon disputes the contracting officer's assertion that she considered the materiality criteria in section 9903.305 (app. resp. at 2-3). It points to its deposition of Ms. Jimenez on 4 December 2013 (app. mot., ex. A). In the testimony that Raytheon cites, Ms. Jimenez appears to indicate that she focused on the mere fact that there was an increased cost:

> Q. Why was it material?
>
> A. Because it is very impossible to make – okay. First of all, it is the taxpayers' money. Any – any cost impact to the government, I will request any company to pay back any cost increase.... It is not my money; it is the taxpayers' money. And my position is to protect the government's interest.

(App. mot., ex. A at 35) In response to a follow-up question, Ms. Jimenez hedged slightly, testifying that it would be "unreasonable" to conclude that a $10 cost increase was material (*id.*).

10. Counsel for Raytheon provided Ms. Jimenez a copy of section 9903.305, and asked whether she considered the materiality criteria in this regulation. She gave a non-responsive answer in which she appeared to challenge section 9903.305(e), which allows a contracting officer to consider the cumulative impact of individually material items:

> Q. ...Did your materiality determination consider these criteria in 9903.305?

A. Well, in here it said cumulative impact, and it should not be cumulative, it should be – like I said, every accounting change should be considered separate and distinctive, and I consider every accounting practice separate....

(App. mot., ex. A at 37-38)

11. Counsel for Raytheon asked essentially the same question again a moment later:

Q. ...And I'm asking whether you considered this criteria or any of these criteria when you determined that ---

A. I read it and I still – I still – my final determination was that it was an increased cost to the government.

Q. And therefore, it was material?

A. Therefore it was material, yes.

(App. mot., ex. A at 38-39)

12. In its motion, the government alleges that Ms. Jimenez considered the criteria in section 9903.305 and relies on her affidavit (gov't mot., ¶¶ 5, 8). Raytheon disputes this assertion, relying on her deposition testimony (app. resp. at 2-3). We find this dispute to be material because, as discussed below, one of the factors we consider in determining whether the contracting officer abused her discretion is compliance with applicable regulations.

13. Based upon our review of the record, including the contracting officer's final decision, and the deposition and affidavit of Ms. Jimenez, we find that Ms. Jimenez determined that the amount at issue was material based solely upon the dollar value, and that she did not properly consider the other factors in section 9903.305. During her deposition, Ms. Jimenez had ample opportunity to explain how she had conducted her analysis and why she had concluded that the amount at issue was material. We conclude from this testimony that her analysis never progressed beyond the dollar amount, because she viewed the recovery of increased costs as necessary to protect the interest of the taxpayers. While we recognize that Ms. Jimenez, when shown a copy of section 9903.305, testified that she had read it, we do not view reading the regulation to be the same thing as a fair consideration of the factors contained in that regulation.

DECISION

I. The Contract(s), Statute, FAR, and CAS Rules

This appeal requires us to once again unravel the complexities presented by the four-headed monster of FAR-mandated contract clauses; the CAS statute, 41 U.S.C. §§ 1501-1506; CAS rules and regulations; and FAR subpart 30.6. We begin with a brief description of each of these.

A. Contract Clauses

The contract incorporated the clauses at FAR 52.230-2 (APR 1998), which, in turn, incorporated by reference the CAS Board Rules and Regulations at 48 C.F.R. part 9903, and FAR 52.230-6 (NOV 1999) (finding 4). These clauses have a number of provisions relevant to this dispute.

FAR 52.230-2(a)(1) requires a contractor to submit a "Disclosure Statement" that identifies the contractor's cost accounting practices as required by 48 C.F.R. § 9903.202-1 through § 9903.202-5. It provides that the practices disclosed for the contract should be the same as the practices currently disclosed and applied on all other contracts being performed by the contractor and that contain a CAS clause. FAR 52.230-2(a)(2) provides that if the contractor changes its cost accounting practices, it must amend its disclosure statement. This provision thus required Raytheon to submit the revision to its disclosure statement that initiated this dispute (finding 1). This subparagraph also provides that "[i]f the contract price or cost allowance of this contract is affected by such changes, adjustment shall be made in accordance with subparagraph (a)(4) or (a)(5) of this clause, as appropriate."

For the voluntary unilateral changes at issue in this appeal, the contract adjustment requirements are contained in FAR 52.230-2(a)(4)(ii). (FAR 52.230-2(a)(4)(i) governs changes required by the government and (a)(5) governs failure to comply with a CAS or accounting practice, and are not applicable to the changes at issue.) FAR 52.230-2(a)(4)(ii) requires the contractor to negotiate with the contracting officer the terms and conditions under which a change may be made to a cost accounting practice but specifies that "no agreement may be made under this provision that will increase costs paid by the United States." FAR 52.230-2(b) provides that if the parties fail to agree on the amount of a cost adjustment, such failure will constitute a dispute under the CDA. (Similarly, the CAS statute provides that a failure to agree on a contract price adjustment is a dispute under the CDA. 41 U.S.C. § 1503(a).)

FAR 52.230-6(a) requires the contractor to submit to the contracting officer a description of any cost accounting practice change, the total potential impact of the change on contracts containing a CAS clause, and a general dollar magnitude of the

change. For voluntary changes such as those at issue here, FAR 52.230-6(a)(2) requires the contractor to submit these materials not less than 60 days before the effective date of the proposed change, or such other date as the parties agree upon. In this appeal, Raytheon did not submit the general dollar magnitude until more than two years after the effective date of the changes (finding 2).

Neither FAR 52.230-2 nor 52.230-6 specifically provides that the contracting officer may only attempt to recover money from the contractor if the amount is "material." However, 52.230-6(b) provides, somewhat obliquely, that after a contracting officer determination of materiality, the contractor must submit a cost impact proposal in sufficient detail to permit evaluation, determination, and negotiation of the cost impact upon each CAS-covered contract and subcontract. No such cost impact proposal appears in the record here. This contract clause does not describe the actions the contracting officer should take if he or she determines that the change is immaterial. Nor does it explain how the materiality provision in 52.230-6(b) should be applied in light of the direction in 52.230-2(a)(ii) that "no agreement may be made under this provision that will increase costs paid by the United States."

B. The CAS Statute

The CAS statute is generally described in our opinion in *Raytheon II*, 15-1 BCA ¶ 36,024 at 175,950, 175,954. This statute authorized the CAS Board to issue regulations and specifically directed the CAS Board to require contractors "as a condition of contracting with the Federal Government to-- ... (2) agree to a contract price adjustment, with interest, for any increased costs paid to the contractor or subcontractor by the Federal Government because of a change in the contractor's or subcontractor's cost accounting practices." 41 U.S.C. § 1502(f). Thus, the statute contains a clear prohibition against the government paying "any increased costs" as a result of the contractor's changes in its cost accounting practices. The direction in FAR 52.230-2(a)(ii) that "no agreement may be made under this provision that will increase costs paid by the United States" is in harmony with the statutory bar.

C. CAS Board Rules and Regulations

The CAS Board followed the congressional direction in 41 U.S.C. § 1502(f) and issued the regulation at 48 C.F.R. § 9903.201-4, Contract Clauses (2007). At section 9903.201-4(a), it requires a contracting officer to insert the Cost Accounting Standards clause specified in 9903.201-4(a)(2), which is the same or very similar to the clause incorporated in the contract through FAR 52.230-2. Like FAR 52.230-2(a)(4)(ii), section 9903.201-4(a)(2)(A)(4)(ii) requires the contractor to negotiate with the contracting officer the terms and conditions under which a change may be made to a cost accounting practice and contains the limitation that "no agreement may be made under this provision that will increase costs paid by the United States."

In addition, the CAS Board has also issued the regulation at 48 C.F.R. § 9903.306, Interpretations (2007). This regulation expands on the contract language specified at FAR 52.230-2(a)(4)(ii) and the CAS regulation at § 9903.201-4(a)(2)(A)(4)(ii). Section 9903.306 provides:

> In determining amounts of increased costs in the clauses at 9903.201–4(a), Cost Accounting Standards...the following considerations apply:
>
> ....
>
> (d) The contractor and the contracting officer may enter into an agreement as contemplated by subdivision (a)(4)(ii) of the Cost Accounting Standards clause at 9903.201–4(a), covering a change in practice proposed by the Government or the contractor for all of the contractor's contracts for which the contracting officer is responsible, provided that the agreement does not permit any increase in the cost paid by the Government. [Emphasis added]

The CAS Board has issued 19 cost accounting standards that are codified at 48 C.F.R. §§ 9904.401 to 9904.420 (2007) (CAS 419 does not exist). Materiality is an important concept in these standards. As the CAS Board has stated, "[m]ateriality must be considered in applying the Cost Accounting Standards because, as a practical matter, the cost of an accounting application should not exceed its benefit." Cost Accounting Standards Board; Statement of Objectives, Policies and Concepts (May 1992), 57 Fed. Reg. 31036-01 (13 July 1992). For example, CAS 404 entitled "Capitalization of Tangible Assets" requires contractors to establish and adhere to policies with respect to capitalization of tangible assets. 48 C.F.R. § 9904.404-10. Among other things, it provides that costs necessary to prepare an asset for use, including initial inspection and testing, must be capitalized when they are material in amount. 48 C.F.R. § 9904.404-50(a)(2). Similarly, in a recent case involving CAS 418, Allocation of Direct and Indirect Costs, the Court of Appeals for the Federal Circuit considered whether a contractor's materiel cost pool was governed by CAS 418-50(d) or (e). The court of appeals held that the test for determining the correct provision was whether the pool includes a material amount of the costs of management or supervision. *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1322 (Fed. Cir. 2014).

Due to the significance that materiality plays in the cost accounting standards, the CAS Board has issued a regulation at 48 C.F.R. § 9903.305 (2007) that identifies the factors that should be considered when determining whether costs are material or immaterial. Because Raytheon relies heavily on this regulation, we quote it at length:

> In determining whether amounts of cost are material or immaterial, the following criteria shall be considered where appropriate; no one criterion is necessarily determinative:
>
> (a) The absolute dollar amount involved. The larger the dollar amount, the more likely that it will be material.
>
> (b) The amount of contract cost compared with the amount under consideration. The larger the proportion of the amount under consideration to contract cost, the more likely it is to be material.
>
> (c) The relationship between a cost item and a cost objective. Direct cost items, especially if the amounts are themselves part of a base for allocation of indirect costs, will normally have more impact than the same amount of indirect costs.
>
> (d) The impact on Government funding. Changes in accounting treatment will have more impact if they influence the distribution of costs between Government and non-Government cost objectives than if all cost objectives have Government financial support.
>
> (e) The cumulative impact of individually immaterial items. It is appropriate to consider whether such impacts:
>
> > (1) Tend to offset one another, or
> >
> > (2) Tend to be in the same direction and hence to accumulate into a material amount.
>
> (f) The cost of administrative processing of the price adjustment modification shall be considered. If the cost to process exceeds the amount to be recovered, it is less likely the amount will be material.

48 C.F.R. § 9903.305.

The phrasing of section 9903.305 indicates that application of the criteria are mandatory ("the following criteria shall be considered"), at least where they are "appropriate." That being said, it is not entirely clear that the CAS Board intended

this regulation be applied to increased costs arising from voluntary cost accounting changes. As we observed above, the CAS Board has issued regulations that govern voluntary accounting changes, 48 C.F.R. § 9903.201-4, Contract Clauses, and § 9903.306, Interpretations. Notably, the CAS Board did not insert a materiality test into these regulations.

D. The FAR

The FAR Councils have issued regulations at FAR Subpart 30.6 governing CAS Administration. These regulations specify the steps that the "cognizant federal agency official" (who, in this case, is the contracting officer (app. mot., ex. A at 59)) must follow when a contractor makes a voluntary change in its cost accounting practices. They require a contracting officer to promptly evaluate a contractor's general dollar magnitude proposal and to conclude the cost impact process with no contract adjustments if he or she determines that the cost impact is immaterial. FAR 30.604(f); FAR 30.602(c)(1).

In addition, FAR 30.602(a) provides that in determining materiality, the contracting officer "shall use the criteria in 48 CFR 9903.305."[1] This section requires the contracting officer to document her rationale if she determines that the cost impact is immaterial. FAR 30.602(c)(2). By contrast, if the contracting officer determines that the impact is material, it merely provides that this determination must "be based on adequate documentation." FAR 30.602(b)(2).

II. Analysis of the Contracting Officer's Actions

The contract provided that Raytheon could "propose[]" changes to its cost accounting practices, FAR 52.230-6, and provided that it must "negotiate" the terms and conditions of the change with the contracting officer, FAR 52.230-2(a)(4)(ii). As part of Raytheon's proposed change, it was supposed to submit, among other things, a general dollar magnitude of the change 60 days before the effective date. FAR 52.230-6(a). Raytheon did not submit the general dollar magnitude for more than two years after the changes went into effect (finding 2). From reviewing the record, rather than a "proposal" followed by a "negotiation", it appears that Raytheon more or less presented the government with a *fait accompli*. The government, however, has not contended that Raytheon's failure to comply with the contract constituted a breach. Rather, counsel for the government stated during oral argument that these events are the norm and that DCMA more or less accepts them (tr. 1/26-27).

[1] Prior to April 2005, this regulation required the contracting officer to use section 9903.305 in determining materiality, but provided that he or she "may forego" adjusting contracts if the amount is immaterial.

One issue that remained open after *Raytheon II* is whether it was proper for the FAR Councils to require a materiality analysis in light of the clear statutory language barring payment of any increased costs. *Raytheon II*, 15-1 BCA ¶ 36,014 at 175,959-60. But the government has not contended that the regulations are inconsistent with the statute and therefore illegal. Accordingly, we will not analyze an argument that the government has not raised and will assume that FAR 30.602 and 30.604 were binding on the contracting officer.

FAR 30.602 provides that the use of the criteria in 48 CFR § 9903.305 is mandatory ("shall use"). Similarly, section 9903.305 is also phrased in mandatory language ("the following criteria shall be considered"). To be sure, the contracting officer possesses a great deal of discretion because the criteria are to be considered "where appropriate" and "no one criterion is necessarily determinative." Because "no one criterion is necessarily determinative" it follows that one criterion could, in fact, be determinative. Thus, a contracting officer presumably could consider all of these factors and determine that the amount of the cost impact so outweighs all the other factors that it alone is determinative. That is not what happened in this appeal, however.

The contracting officer failed to consider the factors in section 9903.305, other than the dollar value of the cost impact (finding 13). We do not agree with the contracting officer that the other criteria are inapplicable. We will discuss two of them to illustrate. First, section 9903.305(b) requires consideration of the "amount of contract cost compared with the amount under consideration." The parties appear to agree that this would require a comparison of the amount that the government is seeking to recover versus the total value of the contracts impacted by the change (app. mot. at 12-13; gov't mot. at 18). While both the original impact amount, $142,800, and even the reduced amount of $56,146 appear to be significant amounts of money, they pale in comparison to the vastness of the relationship between Raytheon and the government.

Both parties have provided us with information that defines this relationship. Raytheon has informed us that its contract base (total contract costs before general and administrative costs are included) for each year from 2004 to 2007 was in excess of $3 billion, meaning that the cost impact will be an increase of less than 0.005% (app. mot. at 13, 15). Similarly, the government has informed us that the accounting changes "impact hundreds if not thousands of contracts" (gov't mot. at 18). Assuming for the moment that the changes impacted 1,000 contracts, the cost impact was an average of about $142 per contract using the base amount in the contracting officer's final decision (*see* finding 4). Further, because this amount was spread over four years, the impact may have been as low as $36 per contract, per year.

In its motion, the government concedes that the value of these contracts is large when compared to the amount of money at issue in this appeal (gov't mot. at 18).

However, it contends that the contracting officer "correctly concluded that this criterion was inapplicable to her materiality analysis since this appeal involves the repayment of a debt to the Government resulting from the increased costs and not the direct impact upon any one particular contract" (*id.*). But the government does not cite to anything in the record in support of this statement. The contracting officer did not state this in her deposition or her affidavit. Moreover, there is nothing in the regulations that indicates that the government should be excused from the obligation to consider materiality if the "debt" is spread out over many contracts as it is here.

Second, section 9903.305(f) requires the contracting officer to consider the cost of administrative processing of the price adjustment modification. There is nothing in the record that identifies the amount of the government's administrative costs, nor is there anything that specifies how such costs are calculated. Because this work involves actions by not only contracting personnel but also attorneys, auditors and their respective supervisors, there is reason to conclude that the costs involved would be substantial. It seems possible to us that a contracting officer who balanced the administrative costs with the small annual cost per contract might conclude that the costs were not material. It is also entirely possible that the contracting officer would have concluded that they were material had she considered this factor.

In reviewing discretionary determinations by a contracting officer, the Federal Circuit has held that it is appropriate to consider: (1) evidence of whether the government official acted with subjective bad faith; (2) whether the official had a reasonable, contract-related basis for her decision; (3) the amount of discretion given to the official; and (4) whether the official violated a statute or regulation. *Campbell Plastics Engineering & Mfg., Inc. v. Brownlee*, 389 F.3d 1243, 1250 (Fed. Cir. 2004) (citing *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999)).

There is no evidence in the record of bad faith by the contracting officer. However, we consider the third and fourth prongs of the test to be the most applicable. The contracting officer violated the requirements of FAR 30.602 by failing to consider the criteria in 48 C.F.R. § 9903.305 in determining whether the amounts at issue were material. While section 9903.305 provides the contracting officer with discretion in determining the criteria that are relevant and the weight to be given to them, this discretion does not extend to simply disregarding them.

Accordingly, we conclude that the contracting officer abused her discretion in failing to analyze the materiality of the cost impacts at issue. Because the government has failed to demonstrate that this error was harmless, the government cannot recover the cost increase.

CONCLUSION

This appeal is sustained.

Dated: 9 August 2016

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

I concur

I concur

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

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 No. 58068, Appeal 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