# ASBCA Issues *Raytheon* Decision on Calculation of Cost Impact for CAS and "Affected Contract" Definition

On March 31, 2011 the Armed Services Board of Contract Appeals (ASBCA) granted summary judgment in favor of Raytheon Company, denying a federal government claim for US$40 million plus continuing interest in the tens of millions. The case addressed a critical issue under the Cost Accounting Standards (CAS): how to calculate the cost impact resulting from a change in accounting practice under the CAS. Additionally, the ASBCA further clarified what constitutes an "affected contract" under the CAS rules.

This case involves a change in the methodology used to calculate the actuarial valuation of assets (AVA) for a pension plan, the costs of which Raytheon charged to both fixed- and flexibly priced CAS-covered contracts. The Defense Contract Management Agency (DCMA) made a claim for over US$40 million plus interest from Raytheon—the amount by which the government calculated that the pension costs, incorporated into Raytheon's existing fixed-price contracts, exceeded the actual costs incurred under the new AVA method. The government excluded from its calculation, however, the over US$57 million by which its pension contribution costs would *decrease* on flexibly priced contracts. The government argued that actual pension costs would be recovered under flexibly priced contracts, thus, there should only be an adjustment to fixed-price contracts. The government further argued that Raytheon would have an opportunity to charge the same pension costs under the current fixed-price contracts on some future contracts.

Citing the statute and regulations, the ASBCA held that "[t]he law requires a price adjustment for an accounting change only when the government pays increased costs 'in the aggregate' considering all contracts affected by the change."[1] Regarding the government's argument about reimbursement of actual costs on flexibly priced contracts versus fixed-price contracts, the ASBCA held that "[t]he fact that the government may not underpay the allocable costs on the flexibly-priced contracts resulting from the accounting change, however, does not change the fact that those allocable costs (as calculated by the government) would have been $57,209,821 higher if the accounting change had not been made."[2] These holdings

1 Slip Op. at 10.

2 *Id.*

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go to the core of the concept of determining whether there are increased costs "in the aggregate" on *all* CAS-covered contracts; the government cannot exclude an entire class of contract types from the aggregation.

Regarding the impact on future contracts, the government insisted that it was entitled to estimate the amount of pension cost on future fixed-price contracts, and recover that amount now, as insurance against alleged double counting. Raytheon argued that such an analysis impermissibly considered non-affected contracts, i.e., contracts priced after the institution of the new method, and was speculative at best regarding future costs. The ASBCA agreed, ruling that:

> [t]he argument of potential double charging is entirely speculative as to future pension fund performance and future contracts. In any event the price adjustment for consideration here is limited to CAS-covered contracts in effect at the time the accounting change was made. There is nothing in the record suggesting any double charging of pension costs to those contracts.[3]

For years, the question of what constitutes "increased costs in the aggregate" under the CAS has escaped precise definition.[4] There has also been uncertainty about what constitutes an "affected contract" for purposes of contract price adjustments under the CAS. In addition, the government has been applying its newly created theory of impact on future fixed-price contracts in the determination of increased costs in the aggregate to other contractors. The ASBCA's holding establishes a straightforward rule that the determination of "increased costs in the aggregate" means all CAS-covered contracts, but only those in existence at the time of the change in cost accounting practice—there cannot be consideration of future contracts that postdate the change.

The ASBCA sustained Raytheon's Motion for Summary Judgement on the merits, and dismissed the entirety of the government's claim (as well as its own motion). The ASBCA did not address Raytheon's alternative argument that the change in accounting practice was a desirable change exempt from the prohibition of increased costs to the government, finding that the issue was moot given the ASBCA's decision on the merits of "increased costs in the aggregate." The case is *Raytheon Co.,* ASBCA No. 56701 (March 31, 2011). The Arnold & Porter team representing Raytheon includes partner Paul E. Pompeo and associates Stuart W. Turner and Bassel C. Korkor.

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*We hope that you have found this Advisory useful. If you have any questions about any of the topics discussed in the Advisory, please contact your Arnold & Porter attorney or any of the following attorneys:*

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3 *Id.*

4 *But see, Lockheed Martin Corp* v. *United States*, 70 Fed. Cl. 745 (2006) (The ASBCA cited the Court of Federal Claim's decision in *Lockheed*, which emphasized that portion of the statute prohibiting the government from recovering costs greater than the increased costs in the aggregate).