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NEWSLETTER

Late Government Claims: ASBCA Taking a Harder Look at When Government Cost Accounting Claims Accrue

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The Contract Disputes Act (CDA) provides that all claims—whether brought by the government or a contractor—must be asserted within six years after the claim "accrues." Accrual is not defined in the CDA, but FAR 33.201 defines it as "the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred."

To date, there have been relatively few decisions interpreting the CDA's six-year statute of limitations and FAR 33.201, and even fewer decisions applying these provisions to claims by the government. In recent years, however, the body of law has grown, in part because the backlog of Defense Contract Audit Agency (DCAA) audits has led to delayed government claims. In particular, the Armed Services Board of Contract Appeals has issued several decisions applying the CDA's six-year limitation period to government claims, particularly in connection with cost-related cases. For example, in *McDonnell Douglas Services, Inc.*, ASBCA No. 56568, 10-1 BCA ¶ 34,325 (2009), the Board determined that a government claim for defective pricing was a "nullity" because the government delayed for years after receiving DCAA audit reports to assert its defective pricing claim. In *The Boeing Company*, ASBCA No. 57490, 12-1 BCA ¶ 34916 (2012), the Board held that a Defense Contract Management Agency (DCMA) claim relating to voluntary changes to Boeing's cost accounting practices was time-barred because DCMA failed to issue a contracting officer final decision on the claim until October 2010,

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despite having all the available information regarding the alleged impact of the change no later than September 2003. Most recently, in *Raytheon Co.*, ASBCA No. 57576 (Dec. 17, 2012), the Board arguably issued its broadest decision to date on when a government claim relating to a cost accounting matter is foreclosed.

In *Raytheon*, the government brought two claims for certain compensation costs covering multiple years, which the government asserted were expressly unallowable and therefore subject to penalties. In its first claim, in a final decision issued on January 10, 2011, the government sought to recover increased costs for certain purportedly unallowable bonus and restricted stock award costs that Raytheon included in its annual "overhead cost submissions" for calendar years (CY) 2003 through 2009.

In its second claim, asserted through a contracting officer's final decision issued on June 2, 2011, the government sought to recover costs and penalties for allegedly unallowable compensation costs arising from changes Raytheon made in January 2004 to its long-term incentive plan. Raytheon advised the DCAA of these changes in January 2004, and the DCAA evaluated the changes at that time. Although Raytheon revised its long-term incentive plan in 2004, Raytheon did not include any of the challenged costs in its overhead cost submission for CY 2004 or CY 2005, because the costs were not incurred in those years, but rather, were incurred only after a full three-year cycle. Thus, although the plan was changed in 2004, the costs were not incurred until CY 2006. Raytheon's CY 2006 overhead cost submission, which included the allegedly unallowable costs, was submitted in June 2007.

Raytheon argued that the government's claims accrued more than six years before they were asserted and were therefore untimely. The Board agreed in part and dismissed a portion of the government's claims. Because the contracting officer's final decision on the allowability of Raytheon's bonus and incentive compensation costs was issued on January 10, 2011, the Board determined that, to be timely, the government's claim must have accrued ***no earlier than January 10, 2005***. With respect to costs incurred in CY 2002, the record showed that DCAA had issued a memorandum on September 29, 2003, regarding its review of these costs (concluding that they were allowable). Moreover, the costs were included in Raytheon's CY 2002 overhead cost submission, which was submitted to the government "in or around June 2003." Thus, the Board concluded that "the government should have known by 29 September 2003 that Raytheon had included these expressly unallowable costs in its CY2002 final indirect cost rate proposal," and, therefore, the government's "claim for CY 2002 accrued no later than 29 September 2003." Accordingly, the Board held that the government's claim for CY 2002 was untimely.

Similarly, the Board held that the government's claim related to the bonus and incentive compensation costs for CY 2003 and 2004 was untimely because (1) Raytheon's overhead cost submission for CY 2003 was submitted in or around June 2004 and (2) with respect to the CY 2004 costs, Raytheon included these costs in its forward pricing rate proposal submitted to the government in September 2004. Because these submissions were both made prior to January 10, 2005, the Board concluded that the government's claims for increased costs in those years were untimely. Because Raytheon's final indirect cost rate proposal for CY 2004 was submitted to the government on June 2, 2005, however, the Board concluded that the government's claim for penalties for CY 2004 were timely (as were the government's claims for costs and penalties for CY 2005-CY 2009).

As for the government's claim related to Raytheon's 2004 change to its long-term incentive plan, the Board concluded that, because the costs were not incurred until CY 2006 and not identified in Raytheon's overhead cost submissions for the first time until its CY 2006 submission in June 2007—four years prior to the contracting officer's final decision—the government's claim was timely. In other words, the Board held that the government did not know in 2004 or 2005 of "any injury" and, therefore, its claim had not yet accrued. Notably, however, the Board agreed with Raytheon that the government knew or should have known by January 2004—the date of Raytheon's briefing to DCAA—of the basis of its claim. Thus, the decision suggests that DCAA knowledge of the basis of a government claim prior to or separate from a contractor's submission of a final indirect cost rate proposal (or other submission) could be sufficient to trigger the start of the statute of limitations clock for purposes of a government claim, so long as there is some separate contemporaneous evidence of "injury."

Given the significant backlog of DCAA audits—including audits of incurred cost proposals that were submitted more than six years ago—contractors are likely to see more government claims that may be untimely. Contractors should carefully examine any such claims to determine when the government knew or should have known of the facts underlying its claim. For example, when faced with a government claim, contractors should consider the following actions:

- In addition to examining the timing of any relevant incurred cost submissions, contractors should consider whether and to what extent information about the treatment of any costs later challenged as unallowable was communicated to the government in other submissions or exchanges, such as government briefings or forward pricing rate proposals. Even an informal briefing or exchange of information may be sufficient to trigger "accrual" of a government claim.
- Although the case law suggests that DCAA knowledge may be sufficient under the circumstances to impute knowledge to the "government," contractors should copy the contracting officer on substantive submissions, briefings and communications with DCAA to cover both government bases.
- As DCAA scrambles to bring down its audit backlog, particularly with respect to older incurred cost submissions (ICSs), DCAA auditors may attempt to "clear" their individual dockets (at least in the short term) by rejecting a contractor's ICS on the basis that it is "inadequate" for audit, and requesting the contractor to submit a revised ICS. Indeed, anecdotal reports within the contractor community suggest that an increased number of ICSs are being rejected as "inadequate" for reasons that go to the "merits" as opposed to the adequacy of the ICS. Whether or not these adequacy determinations are a delay tactic, contractors confronted with such a determination should proceed with caution. Depending on the nature of any changes the contractor might make, those changes could potentially "restart" the statute of limitations period for purposes of any government claims (at least in the government's eyes).
- To the extent DCAA or contracting officers have questions about ICSs that are older and already subject to audit, it would behoove contractors to respond to information requests with reference to information that has already been provided to the government, as opposed to providing "new facts." For more recent cost submissions, clearing up confusion early might assist with putting the government on "notice" at the earliest possible point regarding any potential claim.

- In negotiations with the government over cost issues, bear in mind the statute of limitations, but also the potential impact of delay of those negotiations. In *Boeing*, for example, the government attempted to argue, unsuccessfully, that negotiations between the parties "tolled" the statute of limitations. The Board found that there was no evidence of misconduct or misleading behavior that justified relieving the government of its obligation to assert its claim on time. Faced with a potentially untimely CO final decision, however, there may be renewed attempts by the government to assert that contractor "conduct" should delay accrual of a claim. Contractors should be careful not to provide evidence, through their conduct, that would support such a claim.
- Contractors should also keep in mind that the statute of limitations works both ways—contractors should diligently keep track of potential claims they may have against the government to ensure that they are timely asserted.

The backlog of DCAA audits persists. Therefore, the Boards and the Court of Federal Claims will continue to make new law in this area and refine their thinking on when a claim related to a contractor cost-related issue accrues. Contractors should continue to monitor these developments to ensure that when a potentially untimely claim is asserted against them, they are armed with the most recent guidance.