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COST CLAIM ACCRUAL

Recent decisions provide guidance to contractors and agencies regarding the timely submission of cost claims under the Contract Dispute Act's statute of limitations.

BY STEPHEN L. BACON

The statute of limitations under the Contract Disputes Act (CDA) provides that each claim "shall be submitted within 6 years after the accrual of the claim."[1] A contractor's claim against the government must be submitted to the relevant contracting officer for a final decision. An affirmative government claim against a contractor is typically set forth in a contracting officer's final decision.

Analyzing "whether and when a CDA claim accrued is determined in accordance with the *Federal Acquisition Regulation (FAR),* the conditions of the contract, and the facts of the particular case."[2] The definition of "accrual" under the *FAR* states:

> Accrual of a claim means 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.[3]

The CDA's six-year "limitations period does not begin to run if a claim cannot be filed because mandatory pre-claim procedures have not been completed."[4] This means that a claim does not "accrue" if the contract requires the claimant to follow a mandatory process before a formal "claim" may be submitted.

In 2014, the U.S. Court of Appeals for the Federal Circuit's decision in *Sikorsky Aircraft Corp. v. United States* held that the CDA's statute of limitations is an affirmative defense that should not be treated as a "jurisdictional" prerequisite to maintaining an action.[5] As a result, whether a claim was timely submitted "need not be addressed before deciding the merits" of the claim.[6]

The *Sikorsky* decision has had a significant practical impact on litigation involving the CDA's statute of limitations, particularly in the

context of cost claims. Because the statute of limitations is an affirmative defense, the defendant has the burden to prove that the claim in question accrued outside the limitations period.

It is possible in some cases to meet this burden at the outset of litigation if the relevant "material" facts are not disputed. More frequently, however, the parties must engage in expensive and time-consuming discovery into the facts that bear on the timing of claim accrual.

The Court of Federal Claims (COFC) and Board of Contract Appeals (Board) conduct a "fact-specific inquiry" to determine "whether the government had sufficient information to know of the claim" outside the limitations period.[7] With respect to cost claims specifically, it has been noted that accrual of a claim "is not suspended to allow the government time to perform an audit or to appreciate the significance of the information it already has."[8]

As the cases discussed below illustrate, the timing of accrual for a cost claim depends on what the government "knew or should have known" based on the information available to it. These cases offer practical guidance to contractors and agencies regarding how the principles of accrual will be applied in the context of cost disputes that often take many years to develop through the audit and claims process.

It is critically important for contractors and agencies to understand how the sharing of information may trigger accrual of a cost claim. A failure to appreciate the implications of accrual can render a claim untimely or impact the viability of a statute of limitations defense that could otherwise be available.

Appeal of Strategic Technology Institute, Inc.

This case involved a cost-type contract to provide engineering, logistics and planning, training, and program management support services for U.S. Navy mission systems and aircraft. The contract was administered by the Defense Contract Management Agency (DCMA). In accordance with the Allowable Cost and Payment Clause, FAR 52.216-7, the contractor was required to submit an Incurred Cost Proposal (ICP) within six months of the end of its fiscal year (FY).

In 2014 and 2015, the Defense Contract Audit Agency (DCAA) audited the contractor's ICPs for FY2008 and FY2009 and ultimately questioned the allowability of various direct and indirect costs incurred by the contractor. On November 30, 2018, DCMA issued a final decision demanding payment for over $1 million in unallowable costs, penalties, and interest.

The contractor argued that DCMA's claim was untimely because it was based on ICPs for FY2008 and FY2009 that had been submitted to the government in July 2009 and July 2010, respectively. But the Board rejected this argument because the contractor failed to meet its burden to prove that the ICPs were, in fact, submitted in July 2009 and July 2010.

Although the contractor did establish that it *prepared* its FY2008 and FY2009 ICPs in a timely manner, it failed to establish that the ICPs were actually submitted to DCAA in 2009 and 2010. The contractor's president and office manager "thought" that the ICPs had been submitted during that timeframe, but the contractor "did not maintain an outgoing mail log, and did not present a shipping receipt, waybill, or other evidence that the ICPs were sent to the DCAA auditor."[9]

The government showed that it did not receive the ICPs until 2014

when DCAA requested them from the contractor after discovering that there was no record of them being submitted. DCMA's cost disallowance claim was timely because it was submitted within six years of when the government received the relevant ICPs.

The Board denied the contractor's argument that the government's claim should be barred because it had a duty to request the ICPs from the contractor when they became overdue. In the Board's view, the contractor could not "shift its responsibility to submit an ICP to government" as a way to establish an earlier accrual date.[10]

Takeaways: It is critical for the contractor and agencies to maintain adequate records that show when information is exchanged that could trigger claim accrual. The contractor in this case could have defeated the government's claim if it had simply kept records to show the timing of its ICP submissions.

Appeal of Beechcraft Defense Co., LLC, et al.

In May 2018, DCMA asserted three separate claims for cost impacts associated with the contractor's alleged noncompliance with various Cost Accounting Standards.[11] In a motion for summary judgment, the contractor argued that DCMA's claims were untimely because they accrued in June 2011 when DCAA issued audit reports with respect to the noncompliance.

DCMA contended that the claims did not accrue until 2015 and 2016 when the contractor provided "general dollar magnitude" (GDM) proposals regarding the cost impact of the noncompliance. The CAS Administration Clause, FAR 52.230-6, requires the contractor to submit a GDM proposal "when requested" that provides a "reasonable approximation of the total increase or decrease" due to the CAS noncompliance.

The Board ultimately denied the contractor's motion because the record contained disputed facts that were material to determining when the claims accrued. As an initial matter, the Board rejected DCMA's assertion that claim accrual was automatically suspended until the GDM proposals were submitted.

The Board concluded that the submission of a GDM proposal is not a mandatory pre-claim requirement. Instead, the Board determined that "[t]here may be instances where the government knew or should have known of injury based on the information already provided and actively reviewed by the government" prior to the submission of a GDM proposal.[12]

In this case, the question was whether the government "should have known" of the cost impact associated with the noncompliance based on the information available to DCAA at the time of the 2011 audit. The record before the Board indicated that DCAA had access to the contractor's historical accounting data, but the data itself was not in the evidentiary record.

Thus, the Board denied the contractor's motion because the record lacked evidence of what the government "knew or should have known" for purposes of claim accrual. The Board noted that it may "revisit" the question of claim accrual after the parties "more fully develop the record" of evidence related to the contractor's statute of limitations defense.[13]

Takeaways: A CAS noncompliance claim may accrue even prior to a GDM proposal if the government "knew or should have known" of the cost impact based on the information available to it. The party asserting the statute of limitations as a defense to a claim must provide all factual evidence necessary to show when the claimant knew or should have known of the basis for its claim.

Appeal of AAI Corp., d/b/a Textron Systems, Unmanned Systems

This case involved a defective pricing claim under the Truth in Negotiations Act (TINA) brought by the U.S. Army in connection with a contractor's proposal for Tactical Unmanned Aircraft Vehicle Systems.[14] Under TINA, when a contract exceeds certain thresholds, contractors must submit cost or pricing data and certify that the data is accurate, complete, and current.[15] The government is entitled to a price adjustment if it proves that the contractor submitted defective cost or pricing data.[16]

The contractor submitted its proposal in January 2006 and a Certificate of Current Cost or Pricing in April 2006. In March 2017, more than a decade after the relevant proposal was submitted, the Army's contracting officer asserted a defective pricing claim against the contractor in excess of $7 million. The claim was based on the findings of an audit report dated January 8, 2014.

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The contractor argued that the claim was untimely because it accrued in 2006 when the Army received its proposal and cost or pricing data. The Board separately addressed claim accrual for each of the three pricing adjustments encompassed within the Army's defective pricing claim. The three pricing adjustments related to (1) an undisclosed subcontract price; (2) a duplication in costs for shelters in the proposal; and (3) an undisclosed analysis of actual labor hours per system for prior production lots.

First, regarding the undisclosed subcontract price, the Board denied the contractor's motion for summary judgment because the record did not support a finding that the Army knew or should have of the actual price. The contractor failed to disclose the price to the contracting officer as part of its submission and the Board concluded that "he had no apparent way to learn of it on his own."[17]

Second, the Board granted summary judgment to the contractor with respect to the shelter cost duplication claim. The duplicative costs were included in different sections of the proposal.

The Army argued that its claim did not accrue until DCAA's 2014 audit uncovered the issue. But the Board rejected this contention because the government had "six years to scrutinize" the proposal and the duplicative costs at issue could have been discovered by "simple long division."[18] The Board emphasized that "claim accrual is not suspended because the government has not placed information already in its possession before an auditor."[19]

Finally, the Board denied the contractor's motion concerning the labor costs. Although the historical labor data was available to the Army, the Board concluded that it was not reasonable to expect the Army to analyze years of labor data at the time of proposal submission to uncover a defective pricing claim. According to the Board, the Army was entitled to rely on the contractor's TINA certification and was not obligated to "conduct a forensic examination of years of data at the time of bid notwithstanding the certification."[20]

Takeaways: The contractor's obligation to certify cost or pricing data under TINA is relevant to whether the government "knew or should have known" of a defective pricing claim. While agencies may be charged with knowledge of information that could be discovered from a contractor's proposal, it is less likely that they will be deemed to have knowledge of facts that require detailed financial analysis of the underlying cost or pricing data submitted.

Conclusion

Although the CDA's six-year limitations period is relatively generous by comparison to the statutes of limitations in many states, government contract claims are notorious for having a lengthy gestation period. This is especially true for cost claims that often require the completion of government audits that may take years to initiate and complete.

For that reason, it is critically important for contractors and agencies to understand how the sharing of information may trigger accrual of a cost claim. A failure to appreciate the implications of accrual can render a claim untimely or impact the viability of a statute of limitations defense that could otherwise be available. CM

The views expressed in this article are those of the authors and do not necessarily reflect the views of Rogers Joseph O'Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.

Stephen L. Bacon is a shareholder in the Washington, D.C. office of the law firm Rogers Joseph O'Donnell, where he represents government contractors in bid protests, claims, investigations, and suspension and debarment proceedings. He frequently litigates cases at the Court of Federal Claims, the Government Accountability Office, the Boards of Contract Appeals, and the Small Business Administration's Office of Hearings and Appeals. He also provides advice and counseling to clients on a broad range of contractual and regulatory compliance issues that confront government contractors.

ENDNOTES

1 41 U.S.C. § 7103(a)(4)(A).
2 Kellogg Brown & Root Servs., Inc. v. Murphy, 823 F.3d 622, 626 (Fed. Cir. 2016) ("KBR").
3 FAR 33.201.
4 KBR, 823 F.3d at 628.
5 Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315, 1321–22 (Fed. Cir. 2014).
6 Id. at 1322.
7 Appeal of Strategic Technology Institute, Inc., ASBCA No. 61911, 22-1 BCA ¶ 38,027, at 184,680–81.
8 Raytheon Missiles Sys., ASBCA No. 58011, 13 BCA ¶ 35,241 at 173,018.
9 Strategic Technology Institute, 22-1 BCA ¶ 38,027, at 184,681.
10 Id.
11 Appeals of Beechcraft Defense Co., LLC, et al., ABCA Nos. 61743, 61744, 61745, 23-1 BCA ¶ 38,283.
12 Id. at 185,885.
13 Id. at 185,888.
14 Appeal of AAI Corp., d/b/a Textron Systems, Unmanned Systems, ASBCA Nos. 61195, 61356, 22-1 BCA ¶ 38,094.
15 Wynne v. United Technologies Corp., 463 F.3d 1261, 1262 (Fed. Cir. 2006).
16 Id.
17 AAI Corp., 22-1 BCA ¶ 38,094 at 184,992.
18 Id. at 184,993–94.
19 Id. at 184, 993.
20 Id. at 184,994.