This is one of those times where we are required to remind our readers that we are NOT attorneys. Our analyses of legal matters are limited to those of laypersons. Any criticisms we level, any fingers we point, at jurists, jurors, or attorneys are likely the result of our limited perspective. Do not rely on our blog articles for legal analysis. (Or much of anything else, really.)

With those caveats in mind, let us now discuss the recent decision by the U.S. Court of Appeals, Federal Circuit, in the appeals of *Sikorsky Aircraft Corporation v. United States*.

You remember the case, don't you? We have blogged about the original case before. In fact, there are at least six articles on the case in our news archive. You can use the site's keyword search feature to find them. To get you started, here's **a link** to one article, in which we discuss Judge Lettow's March, 2013, decision at the U.S. Court of Federal Claims. The title of that article was "Sikorsky Wins CAS 418 Case, But Other Contractors Lose." The Appellate decision continues that trend.

The Appellate decision was authored by Judge Dyk. You remember Judge Dyk, don't you? We've published some **mild criticisms** of his CAS-related decisions before. In fact, we were tempted to title this article "Dyk Strikes Again" but we didn't know how to pronounce the Judge's last name. Does "Dyk" rhyme with "Strike"? We didn't know, so we went with the title we went with.

We are not going to recapitulate the gravamen of the parties' CAS 418-related dispute. A link to our prior article on the dispute is provided above. Sikorsky prevailed at the Court of Federal Claims and the Government appealed to the Federal Circuit. Judge Dyk authored an opinion that affirmed Judge Lettow's original decision.

But there's more to the story.

The Appellate **decision** affirmed several points that are relevant to government contract-related litigation. First, Judge Dyk clearly confirmed that "the government bears the burden of proving Sikorksky's noncompliance." This is important because too often DCAA and

Contracting Officers want the contractor to prove its cost accounting practices are CAS compliant. Not so. The burden is on the government to prove they are not compliant. *That is a critical distinction.*

Second, Judge Dyk dismissed the government's argument that "internal government documents concerning the history of the CAS provisions and other materials which were not published provide support for the government's argument about the rule's meaning." Judge Dyk decided that "those unpublished materials are not relevant to our interpretative task. The CAS standards, like any other regulation, must be interpreted based on public authorities." (We were interested to see Judge Dyk cite to his own opinion in the infamous Rumsfeld/UTC/Pratt decision as support for his finding today. *Stare decisis* in action, we suppose.) Further, the Judge declined "to rely on the ambiguous language from the 'preamble' to contradict the plain language of the rule itself.' As we see it, the Judge was saying that, where helpful in interpretation, text from a Standard's preamble could be used; but in any conflict between a Standard and its preamble, the plain language of the published Standard will control.

A very important aspect of the decision was to better define the nebulous phrase "material amount" with respect to interpreting CAS 418. Sikorsky argued that "material amount" refereed to comparing the costs of supervision or management in the indirect cost pool to the total amount of costs in the cost pool, whereas the government argued that the phrase referred to comparing the amount of the costs of supervision or management to the total amount of supervision or management costs in the entity as a whole. Judge Dyk wrote –

Sikorsky argues … that the relevant inquiry is whether the costs of management or supervision are a material part of the pool as a whole, not whether a given pool contains all of the related management or supervision costs. We agree with Sikorsky that the proper inquiry is whether the costs of supervision and management comprised a material amount of the material overhead pool at issue. …

The next question is whether the costs of management and supervision here were a material amount of Sikorsky's materiel overhead pool. The government argues that 'material' means more than a de minimis amount. We agree with the Claims Court that 'material' refers to a significant amount. Sikorsky argues that, applying the correct standard for materiality, managers and supervisors comprised seven percent of the materiel logistics workforce and fourteen percent of the purchasing group staff, and that the costs of management and supervision were [therefore] not a material amount. The government does not argue that these costs … were a significant portion of Sikorsky's total pool, or that other factors should be used in considering materiality. Therefore, we affirm the finding of the Claims Court that the costs of

management and supervision were not a material amount of the total pool costs.

Based on the foregoing, we have a strong legal decision that costs comprising as much as fourteen percent of a single indirect cost pool are not material in amount. This is a significant finding. (Pun intended.)

Judge Dyk also addressed the CDA Statute of Limitations in his decision, though his discussion might be characterized as *obiter dicta* rather than as being precedential. Readers may recall that we have **pleaded** for a "bright line" regarding when the CDA SoL clock starts to tick. We didn't get that bright line in this decision. Instead, we got a bit of a bombshell, as Judge Dyk found that the six-year limitation period is *not jurisdictional*. Sikorsky argued that the Judge needed to decide on the CDA SoL issue before deciding on the merits of the case; but Judge Dyk disagreed. He wrote –

To be sure, we have previously characterized the six-year limitation in the CDA as jurisdictional … However, our decision … was effectively overruled by the Supreme Court's more recent decision in *Sebelius v. Auburn Regional Medical Center* … the latest in a series of Supreme Court opinions that have articulated a more stringent test for determining when statutory time limits are jurisdictional.

Judge Dyk interpreted the CDA SoL as being a filing deadline, which made it a "claim-processing rule" and not jurisdictional. He wrote, "The context of the [CDA] statute also does not suggest that it is jurisdictional. Insofar as it applies to claims by the government, the statute pertains to the submission of a claim by a contracting officer to a contractor, rather than to a government body." Judge Dyk spent more than 3 pages of the 19 page opinion discussing why his interpretation was correct, but then mooted his discussion by writing "Because we affirm the Claims Court on the merits, we do not address whether § 7103 was satisfied in this case." Thus, in our view, the effect of the dicta is to muddy the waters even further with respect to interpreting the CDA SoL."

Sikorsky won once again and, in doing so, helped us better understand how the concept of "materiality" will be applied in CAS-related litigation. However, Sikorsky's victory did other contractors no favors with respect to better defining and developing a "bright line" for applying the Contract Disputes Act's Statute of Limitations.