One of the biggest irritants we encounter at the ASBCA website is that decisions are posted in chronological order based on the date the decision was issued. The problem with that approach is that some decisions are delayed after issuance to permit the parties to identify proprietary information and redact that information from the decision. Thus, there may be a 30 day (or longer) delay before a decision gets published, and the decision is slipped into the list without any identifier that it is a delayed publication. If you follow the ASBCA decisions each week (as we do) and you assume that what's past is past, you'll tend to miss a couple of decisions.

That was the case with the November 10, 2015 decision in **the matter** of Alion Science and Technology Corporation. The decision continued an unfortunate trend regarding application of the Contract Disputes Act Statue of Limitations (CDA SoL) to disputes between the government and its contractors. We missed the decision and, if were not for a somewhat **critical article** penned by the government contracts attorneys at Dentons, we might still be unaware of its existence. The Dentons article asserted—

After years of establishing precedent that a government claim begins to accrue when the government *should have known* about the facts underlying a claim, the ASBCA continues to disregard its previous holdings by incorrectly applying what appears to be approaching an *actual knowledge* standard. … The ASBCA held that disputed material facts precluded summary judgment essentially because the contractor could not establish that the government possessed actual knowledge of the specific facts supporting its penalties claim. The ASBCA based its decision on the contractor's inability to demonstrate that the government received from the contractor specific cost transaction data relating to the costs that were the subject of the government's penalties claim more than six years prior to the date that the government issued the final decision.

(Emphasis in original.)

We have noted this troubling trend in other articles on prior ASBCA decisions. Essentially, it seems that the ASBCA Judges are permitting the government to unilaterally toll the statute of limitations by the tactic of delaying the audit of contractors' costs. The delays are often based on thinly veiled pretexts such as a DCAA determination of "submission inadequacy" that, quite frankly, the ASBCA Judges ought not to condone. *Alion* continues this troubling trend where

the government is permitted to claim that it did not know of disputed costs until the contractor provides detailed cost data—a line of argument that blithely ignores the fact that the submission of the final billing rate proposal (also known as “incurred cost submission”) triggers an affirmative duty to investigate and actually, you know,
conduct an audit
to determine whether or not disputed costs were submitted.
Alion
continues the troubling trend at the ASBCA where the DCAA is permitted to avoid indefinitely its affirmative duty through claiming that the contractor’s proposal was inadequate—a charade that is in direct contravention of applicable FAR requirements.
Alion
continues the troubling trend of ASBCA permitting the government to claim it was unaware of any asserted harm even though it waited more than six years to look to see if it was harmed.

We are not fans of this line of decisions at the ASBCA.

That said, what did Alion do wrong, such that DCAA claimed it was unaware of allegedly expressly unallowable costs in the final billing rate proposal?

According to the decision denying Alion’s motion for summary judgment, Judge Melnick found that Alion submitted its FY 2005 incurred cost proposal on March 31, 2006. Alion did not use the DCAA’s “Incurred Cost Electronically” (ICE) model of linked spreadsheets. (Indeed, at that point in time Alion was not required to do so. Today, Alion would be required to use the exact ICE model or an extremely similar series of linked spreadsheets that mimicked the ICE model, pursuant to FAR 52.216-7, Allowable Cost and Payment.) Instead, Alion used its own series of schedules, which generally followed the DCAA ICE model format, but also contained custom formulae and spreadsheet links. For example, “within Schedule 14, the entry for job number 90035003001000000 lists a recorded amount of $718,967 … The corresponding entry in the spreadsheet titled ‘Sch 14 Table’ lists a grand total amount of $718,967.05. Double-clicking this cell opens a new spreadsheet containing approximately 750 individual items of cost with accompanying information, including the amount of the cost, the date incurred, a general description of the cost, and various accounting data.”

To be clear, the then-current FAR did not require a certain exact format or set of schedules to be used. Instead, the FAR stated “The required content of the proposal and supporting data will vary depending on such factors as business type, size, and accounting system capabilities. The contractor, contracting officer, and auditor must work together to make the proposal, audit, and negotiation process as efficient as possible.” [FAR 42.705-1(b)(1)(i)] Regardless of the

lack of any prescription to use specific schedules, and regardless of the clear and express permissiveness found in the FAR (as quoted above), DCAA found Alion's submission to be "inadequate" because it lacked a Schedule H-1 (government participation in indirect expense pools) and a Schedule L (reconciliation of total payroll to total labor distribution).

Those two Schedules have nothing to do with auditing incurred costs. Instead, those two Schedules are simply former DCAA working papers that DCAA now wants contractors to complete for them, so as to make their audits more efficient. Nonetheless, DCAA found Alion's proposal to be inadequate because it failed to include two minimally value-added Schedules.

Alion submitted the two additional Schedules on September 7, 2007—about ten months after DCAA rejected its proposal. DCAA rejected the revised proposal once again, finding it to be inadequate for additional reasons not originally specified. Once again, Alion resubmitted its FY 2005 proposal (on or about February 8, 2008 – approximately two years after its first submission). Along with the submission came a full data-dump from Alion's JAMIS accounting system. As Judge Melnick stated, "The government asserts that it was not until the submission of the JAMIS database that the government was able to identify the Engineering Overhead and G&A costs (other than SRC costs) at issue as expressly unallowable."

Essentially, then, the government's position was that it was not the submission of the proposal to establish final billing rates that triggered the CDA SoL; instead, it was the submission of the contractor's general ledger that started the CDA SoL clock. Judge Melnick agreed with the government and rejected Alion's Motion for Summary Judgment. He wrote "Respecting Alion's other costs, Alion has failed to identify within its 31 March 2006 proposal the specific costs at issue in this appeal. Viewing the record in the light most favorable to the government as the nonmoving party, as we must on summary judgment … there is a genuine issue of material fact as to whether the 31 March 2006 final indirect cost rate proposal included the alleged expressly unallowable costs at issue in this appeal."

We are not attorneys. We are not learned judges. Our opinion about this line of recent ASBCA decisions—and this decision in particular—means nothing.

But still.

The Contract Disputes Act has to mean *something*. The definition of "claim accrual" found FAR 33.201 has to mean *something*. The permissive language of FAR 42.705-1 has to mean *something*. Statutes and regulations don't exist for the purpose of being ignored in judicial proceedings.

It seems that the ASBCA Judges are bound and determined to ignore the plain language of those citations (and others). It seems that the ASBCA Judges are bound and determined to let the government unilaterally toll the CDA SoL through a charade, perpetrated upon the Court by auditors of DCAA, who can seemingly indefinitely refuse to audit a contractor's proposal to establish final billing rates upon the thinnest of rationales—to which the Judges grant great deference.

The lesson here is simple and we've posted it before. When contractors submit their final billing rate proposals they must include their general ledger. Forget the fact that the FAR doesn't require it. Forget the fact that most modern general ledgers are so chock-filled with transaction data that it's almost impossible to make an electronic copy and transmit it. Forget the fact that most DCAA auditors can't access such a file if one manages to create and provide it to them.

Because according to the ASBCA, the only way to start the CDA Statute of Limitations is to provide that general ledger to DCAA.

It's crazy, but that's the lesson to be learned here.