It may surprise you to learn that this mostly self-taught government cost accountant is a member of the American Bar Association. Well, an Associate Member, to be precise. The ABA has been gracious enough to accept my annual dues for many years, and membership has proven helpful in a number of ways.

Why join the ABA? Because you can't understand what the regulations mean unless you understand how judges have interpreted them. The regulations are just words until a judicial decision gives them meaning. (Even if sometimes those decisions surprise people who think the "plain meaning" of the language ought to be evident.) And what better group of people to hang with in order to learn about recent meaningful judicial decisions that impact government contract compliance than the attorneys of the ABA's **Section of Public Contract Law** ? So, yeah. Membership has proven to be a good investment.

Because of my membership, from time to time I receive emails inviting me to listen in as groups of attorneys (or even Judges) discuss recent cases and their import. (Those panels are ever-so-respectful to the Judges, carefully expressing disagreement in the most courteous terms. I don't have to be so deferential on this blog—and we are not, in case you haven't noticed.)

A recent opportunity to listen to top-notch attorneys discuss impactful cases was provided by the Contract Claims and Disputes Resolution Committee (CCDRC) of the Section of Public Contract Law, as a panel including Paul Pompeo (Arnold & Porter) and Mike Chiaparas (DCMA Chief Trial Attorney) addressed recent cases of cost disallowance and what they might portend for government contractors. The panel discussion was hosted by the attorneys at the firm of Covington & Burling, but the discussion took place as part of the regular CCDRC meeting.

From the discussion we learned of a **recent decision** at the Federal Circuit that discussed application of the Statute of Limitations. The decision, issued May 18, 2016 is captioned " *Kellogg Brown & Root Services, Inc. v. Patrick J. Murphy, Acting Secretary of the Army* " but the panelists referred to it as the "Murphy decision." The dispute involved—once again—KBR's LOGCAP contract. It's not like KBR hasn't been in court many many many times regarding actions taken (or not taken) on that behemoth contract to support the warfighters in many parts of the world, including Southwest Asia. There are plenty of articles on this website that discuss KBR's victories and losses with respect to LOGCAP-related litigation.

To be fair, it's not like the Contract Disputes Act's Statute of Limitations hasn't been discussed on this website many many many times either. It was once a very interesting and important aspect of disputes between Government and contractor, before the Federal Circuit eviscerated it in the ***Sikorsky*** decision. Now it is less important and less interesting, but we still keep following it in the (likely futile) hope that some legal body, somewhere, will reverse *Sikorsky* or take similar action.

Back to *KBR v. Murphy*. (Remember that this is a CDA SoL case, so dates are critical.)

As related in the decision, KBR awarded a subcontract under its LOGCAP prime contract to a joint venture between The Kuwait Company for Process Plant Construction & Contracting K.S.C. and Morris Corporation (AUST) PTY Ltd., which for brevity's sake was called "KCPC/Morris". KCPC/Morris was issued work release orders for construction of dining facilities and provision of food service at two locations in Iraq. On July 31, 2003, KBR terminated the KCPC/Morris subcontract for default. KCPC/Morris disputed its termination but (at KBR's request) continued to perform through September 12, 2003, when a new subcontractor started performance.

In 2003 KCPC/Morris filed suit against KBR. As part of settling the suit, the T4D was converted into a T4C and the amount of money KCPC/Morris sought was divided into two pieces: (1) $17.4 Million for "settlement" and (2) an unquantified amount for costs incurred (and profit applied to those costs) for performance under the subcontract, plus "certain costs incurred in preparing requests for payment to the U.S. Government." The settlement agreement was dated January 24, 2005.

For the second set of (unquantified) costs, the settlement agreement required KBR and KCPC/Morris to cooperate in order "to prepare a well-supported invoice or invoices to the U.S. Government." On August 26, 2006, KCPC/Morris submitted a certified claim to KBR (instead of invoices) for "outstanding payments, costs and lost profit associated with" the subcontract's T4C. Which is kind of puzzling, right? Because what was the $17.4 Million "settlement" for if not for outstanding payments, costs and lost profit associated with the termination? Instead of going "*WTF? Over*" back to KCPC/Morris, KBR simply forwarded its subcontractor's claim to the Army, along with a note that most reasonable people would construe to mean KBR didn't endorse or sponsor the claim of its subcontractor.

Let's pause for a second and note the timeline again. The settlement was negotiated January 24, 2005 and the KCPC/Morris claim was submitted to KBR on August 26, 2006. It took more than 18 months for that claim to be prepared. And then KBR passed it on to the Army on November 3, 2006, more than 60 days after receipt from KCPC/Morris.

Unsurprisingly, the Army told KBR to settle its own subcontractor problems. On May 30, 2007 (more than 6 months after receipt) the Army rejected the claim and "refused to consider the submitted information, and directed KBR to 'settle a claim by its sub with the sub, then bill the government.'"

More months passed, until October 10, 2007, at which point KBR finally sponsored the original claim. A certification followed, on January 10, 2008. However, on September 8, 2010, KBR withdrew the claim, stating "upon further review of the data provided … KBR has determined that this constitutes a business dispute … and should be resolved in accordance with KBR's subcontract with KCPC/Morris." So to be very clear, it took KBR more than 2 years to realize it was responsible for settling its subcontractor payment problems. That took a lot of diligence to reach that intuitively obvious insight, we're quite sure.

Further, at this point nobody at KBR seemed to realize that the dispute had already been settled way back in January 2005. The only "dispute" remaining was to effectuate the settlement agreement by preparing and submitting invoices.

Our viewpoint regarding the ignorance of the parties seems to have been validated by the fact that, on August 4, 2011, KCPC/Morris filed yet *another* lawsuit against KBR, alleging that KBR "allowed" the claim "to languish with the Government … and then inexplicably withdrew the entire claim … without consulting KCPC/Morris…." At this point the Court provides details of this heretofore mysterious claim, which included "construction costs, equipment, expenses such as medical care and travel, meals served, overhead and G&A, profit, and termination settlement costs." Instead of fighting in court, KBR apparently conceded and (once again) submitted the claim to the Army as a certified/sponsored subcontractor claim, on May 2, 2012—almost six years after KCPC/Morris originally submitted it. The Army CO did nothing, and thus the claim was deemed to have been denied. KBR then appealed that deemed denial to the Armed Services Board of Contract Appeals (ASBCA).

With all that in mind, now we get to the Statute of Limitation stuff.

In order for KBR to have filed its appeal within the CDA SoL, the claim had to accrue before May 2, 2006 (six years before the appeal was filed). The Board found that the claim had accrued before that date, and dismissed the appeal. As part of its analysis, the Board found that the claim accrued on September 12, 2003, "the date when KCPC/Morris ended its work under the subcontract" or, alternatively, on "January 24, 2005, "when KBR and KCPC/Morris agreed to cooperate to present an invoice to the Army for costs above the 'Settlement Amount' of $17.4 Million."

The Federal Circuit performed its own CDA SoL analysis and reversed the ASBCA. The Federal Circuit's analysis is the meat of this article. (Our apologies for the long road to get here!)

According to Judge Newman (writing for the Court), the problem with the ASBCA's logic was that it had "adopted the theory, presented by the Army, that the payment of the remaining subcontractor costs was a 'non-routine' request for payment, and thus accrued as of the date the subcontractor ended its work, on September 12, 2003." Judge Newman wrote that "[w]hether a request for payment is deemed routine or non-routine in the context of an accrual of a CDA claim against the government is 'dependent on the circumstances in which the requested costs arose.'" She wrote that "[a]ccrual in accordance with FAR § 33.201 does not occur until KBR requests, or reasonably could have requested, a sum certain from the government."

Judge Newman wrote that—

KBR states that the Board's ruling and the Army's position would require cost-reimbursement contractors to request payment of subcontractor costs while those costs are under dispute, lest the prime contractor lost the right to recover those costs. KBR correctly observes that the CDA does not require the filing of protective claims related to subcontractors while those claims are being resolved between the prime and sub.

Thus, until KBR was able to quantify the costs it was willing to sponsor, it was unable to submit a claim and therefore the CDA SoL did not start running until that time.

The problem with this theory, as some of the ABA attorneys noted, is that it seems to undercut the "should have known" part of the CDA SoI accrual language. Although the precise amount of the claim may not have been known, it seems likely that KBR knew it would be submitting a claim to the government for *some* amount. As we discussed in one of our **previous** CDA SoL articles, prior ASBCA decisions had held that "
Claim accrual does not depend on the degree of detail provided, whether the contractor revises the calculations later, or whether the contractor characterizes the impact as 'immaterial.'
It is enough that the government knows, or has reason to know, that some costs have been incurred, even if the amount is not finalized or a fuller analysis will follow.
" (
Raytheon Space and Airborne Systems
, April, 2013) This recent Federal Circuit opinion seems to call into question whether that prior precedent is still accepted by the Federal Courts.

Certainly, this decision raises questions about claim accrual dates when a subcontractor payment dispute is involved. In some respects, then, it harkens to a 2006 ASBCA decision (International Technology Corp., No. 54136) in which the prime contractor (IT Corp.) was denied reimbursement for a subcontractor's claimed costs in excess of its FFP subcontract. Although the subcontractor told IT Corp. that it intended to submit a Request for Equitable Adjustment (REA), and although the subcontractor did in fact submit an REA to its prime, IT Corp. failed to notify its prime contract CO and IT Corp. never included the additional subcontractor costs in its contract costs for purposes of complying with the Limitation of Cost (LoC) clause in its prime contract (52.232-20). Because the costs weren't included in its LoC calculations, and because IT Corp. had exceeded 75% of estimated costs without providing the required advance notification to the CO, IT Corp's request for reimbursement was denied—as was its appeal of that denial. The ASBCA found that IT's ongoing evaluation of the validity of TK's claimed costs was no excuse for not promptly notifying the Government of possible cost increases. Instead, the Board stated that the LOC clause "does not limit a contractor's notice obligations to those costs proven to be allowable to a certitude."

Thus, the Federal Circuit's use of the term "sum certain" with respect to accrual of a claim under the CDA SoL was troubling—at least to the attorneys discussing the case. As has been the situation with this topic ever since we started following it, Courts have consistently refused to create a bright line for the contracting parties to follow. Indeed, whatever steps toward a bright line seem to be taken by a series of decisions, there then follows steps backward, away from any such bright line, by subsequent decisions. All we can tell you is that if you think you have a claim to file against your government customer, or if you have a dispute between a prime and a subcontractor that might ripen into a claim against your government customer, you would be very well served by consulting a top-notch government contracts attorney and getting some advice on the timing of notifications and submissions.