We have written and published many an article on this site addressing the “evolution” of the judicial interpretations of the Contract Disputes Act’s Statute of Limitations (SoL).

Let’s quickly set the baseline regarding what the SOL requires: Fundamentally (and in words used by non-lawyers), a claim for damages must be filed within six years from the time the party asserting damages knew, or should have known, that it had damages. The amount of damages need not be known precisely; it simply must be known (or should have been known) that damages of some extent existed, sufficient to assert a “sum certain.” (From one decision: “A claim must accrue, and the statute of limitations starts to run, as soon as a contractor can assert a claim, even if it has not yet incurred all possible costs resulting from the change or breach.”). The date on which damages are known, or should have been known, starts a six-year clock. Claims filed after that clock expires are time-barred. It used to be that time-barred claims could not be heard as a matter of the court’s jurisdiction, but after a Federal Circuit decision, the assertion that a claim was time-barred became an affirmative defense.

Both the Boards of Contract Appeals and the Court of Federal Claims hear cases involving the SoL. Although the forums seemingly agree on what the SoL requires, the decisions issued seem to vary by judge and by forum. It appears that the bases for the various legal decisions regarding whether or not a claim is time-barred are based on the circumstances and facts unique to the case at hand. Thus, it’s difficult to predict how the SoL will be applied.

Those of us who are not lawyers tend to be more than a bit confused by the seemingly inconsistent case law associated with the SoL—though I am assured by Big Law attorneys that all decisions can be reconciled. (We’re still waiting for the article that does such a thing….)

While we wait for clarity, here are two more SoL decisions that impact how one might interpret the SoL.

First, the good news:

Over at the Civilian Board of Contract Appeals (CBCA), Judge Sheridan (writing for the Board) issued a **decision** denying the GSA’s $3.3 million claim for disallowed costs against United

Liquid Gas Company (UPE), finding that about 10 percent of the GSA's claim was time-barred by the SoL. GSA asserted that the contractor had billed it for fuel at rates in excess of the contractually specified rates. Critically, GSA had paid the contractor at the billed rates even though those rates were higher than they should have been. The decision stated that the SoL clock started to run when GSA overpaid the contractor.

Judge Sheridan wrote—

We conclude the claims in issue began to accrue on January 5, 2011, when the Government overpaid the first task order 1 invoice submitted for payment under the MAS contract. At that point in time, the terms of the MAS contract clearly put both Ft. Irwin and GSA on notice that UPE was overbilling the Government and all events that fixed the alleged liability, specifically, in this case, overpayments in a 'sum certain,' were known or should have been known. Government claims continued accruing each time Ft. Irwin overpaid a task order1 invoice under the MAS contract, because every time a payment was made on an invoice, the Government knew or should have known of the overpayment and the 'sum certain' it was overpaying.

Although UPE is still on the hook for roughly 90% of the government's claim against it, it must have felt nice to see the amount of the claim reduced. Judge Sheridan's decision reminds us of a similar finding over at the Armed Services Board of Contract Appeals, in the matter of *Sparton deLeon Springs*
. We wrote about that decision
here
.

And, speaking of the ASBCA, here comes the bad news:

DRS Global Enterprise Solutions, Inc. (DRS) appealed a contracting officer's claim for $8.6 million in various disallowed costs, including both direct and indirect claimed costs included in DRS' FY 2006 proposals to establish final billing rates. (There were actually two proposals: FY 2006 and FY2006A, but that's not relevant here.) The submissions were made in February and March, 2008. A little more than a year later (17 July 2009), DCAA held an entrance conference to begin its audit. Nothing happened for three years—until 3 April 2012—when DCAA informed DRS that its submissions were inadequate. DRS resubmitted certain schedules and, on 22 June 2012, DCAA found the final billing rate proposals to be adequate for audit.

It had taken DCAA literally four years to get to the point where the audit agency was ready to conduct its audit.

Now, readers know that there were a couple of things happening at that time—notably, that DCAA was under fire from several sources for poor audit quality. In a fit of pique, DCAA management made the decision to stop performing audits of contractor final billing rate proposals. Eventually, a sufficient number of people and entities (including Congress) pointed out that the decision was a very bad idea, and DCAA resumed its audits—but that was years later. In the meantime, contractors such as DRS were left hanging in the wind, wondering when their proposals were going to be audited.

And when DCAA got back to performing "incurred cost audits," its procedures had changed. But more than the audit procedures had changed: the agency's *entire audit philosophy* had transformed. No longer would audits be scoped based on prior audit work; now, each audit had to stand on its own. What had been sufficient before 2008 was no longer sufficient. What had been adequate before 2008 was no longer adequate. Contractors were, almost without exception, blindsided by DCAA's seismic shift in how it performed its "incurred cost" audits. DRS was obviously one of those contractors caught by the unexpected changes in audit approach.

Back to the case at hand.

After more than four years, the DCAA "incurred cost audit" started to move forward. As is the process, Requests for Information (RFIs) were exchanged. DRS either couldn't, or wouldn't respond to some of those RFIs. As is the process, DCAA didn't take lack of responsiveness especially well. As Judge O'Connell wrote for the Board: "In September 2013, DCAA requested additional documentation from DRS, which it did not provide. On November 7, 2013, DCAA wrote to DRS to inform it that it had been denied access to data/documentation for labor transactions, direct material transactions and the other direct cost transactions." On December 30, 2013, DCAA issued an audit report in which it questioned more than $54 million in costs for the fiscal years at issue.

Remember, DRS had initially submitted its proposals in early 2008. Now, more than five years later, DCAA had questioned a huge amount of direct and indirect costs because, allegedly, DRS

couldn't provide necessary supporting information.

Still, five years is less than six years. (Remember the SoL?)

And then the cognizant contracting officer waited another three years, until September 11, 2017, to assert the government's claim in the amount of $8.6 million, of which $8.4 million related to other direct costs (ODCs) that the CO found to be unallowable because of "lack of an invoice for the costs, proof of payment, or a signed purchase order." In other words, all the supporting documents that DCAA had requested during the audit, that DRS either couldn't or wouldn't provide.

Open and shut, right? Eight years is more than six years, so the government's claim is time-barred. Obviously.

Not so fast, there.

Judge O'Connell wrote—

These [SoL] decisions demonstrate that determining when the government reasonably should have known of its claim requires consideration of the unique facts in the appeal. This is particularly relevant in this appeal because the final decision identifies 39 discrete direct cost items that the contracting officer found to be unallowable.

The Judge went on to discuss the specific facts of this case. He found that there was no way for the government to reasonably know that DRS lacked adequate support for its costs until the audit report concluded that was the case. For example, the largest single dollar item was questioned because DRS was unable to provide proof of payment. He wrote "… the record as currently developed lacks undisputed facts demonstrating that the government knew or should have known of its claim before September 11, 2011."

In other words, motion for summary judgment denied. A trial on the merits will be needed.

(We hope that in the future trial, somebody asks DCAA to discuss when the audit agency began requesting such supporting documentation, and whether DRS should have reasonably expected that it would need to retain such documentation—pointing to FAR 4.7 as establishing record retention requirements.)

So that's the bad news. On the other hand, the end of the decision offered DRS a ray of hope. Judge O'Connell wrote—

We note that DRS's motion raises only the statute of limitations. Therefore, we need not address whether the more than 10 years that elapsed between payment of the invoices at issue and the issuance of the contracting officer's final decision calls for application of the doctrine of *l aches*
.

Although we are not lawyers, we think *laches* is the legal doctrine that a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right is unreasonable and can be viewed as prejudicing the opposing party in litigation. In other words, it may be possible for DRS to assert that DCAA's intentional deferral of its audit led to a situation where DRS was unable to provide the supporting documentation; whereas, if DCAA had performed its audits more timely then DRS would have been able to support them. We'll have to see how that argument goes in the (future) trial.

So that's the state of the Contract Disputes Act's Statute of Limitations today. Still a mixed bag, in our view.