Acquaintances who are attorneys assure me that the current state of judicial interpretation of the Contract Disputes Act (CDA) Statute of Limitations (SoL) rules make sense and can be consistently enforced. *Okay.* We're not attorneys so we'll have to take their word for it, even though we can't figure the logic out for ourselves.

Some things we think we know:

1.

Unallowable direct costs: The CDA SoL starts running when the customer pays the invoice. (See: Sparton de Leon Springs)

2.

CAS noncompliances: The CDA SoL starts running when the customer pays an invoice that included the noncompliant costs. (See: Fluor) Or when the customer knows it has been harmed through overbillings resulting from noncompliant costs. (See: Lockheed Martin)

But with respect to unallowable indirect costs, the judicial record seems a bit more muddied to us. (Again, perhaps that's just us!)

There is a Raytheon decision that states the CDA SoL clock starts running when the contractor submits its final billing rate proposal, because (essentially) the government had the ability to start the audit at that time. However, there are other decisions that state that the CDA SoL clock starts running (with respect to indirect costs) when the audit starts (or perhaps concludes), because only then has the government looked at individual indirect cost transactions and had the ability to know whether claimed costs were allowable or unallowable.

Because of those latter decisions, we have recommended that contractors submit their general ledgers showing all indirect cost transactions along with their final billing rate proposals, when feasible to do so. (We get that it rarely is feasible to do so.)

In addition, we strongly suspect that the CDA SoL issue(s) are going to go away soon—at least with respect to unallowable costs—because DCAA is now operating under a public law that requires the auditors to complete their audit within one year of contractor submission. This means that contractor final billing rate proposals won't lie fallow for years, as was the case up until the statute was amended by an Act of Congress.

Still, contractors who submitted their proposals (and/or who were audited) prior to the change are still dealing with CDA SoL issues, as we will now discuss.

In a **recent decision** on competing motions for summary judgment, Judge Hartman of the ASBCA gives some hope that the CDA SoL rules on unallowable indirect costs may be clarified in the near future. To be clear, Judge Hartman, writing for the Board, denied *both* motions. It was the reasoning used that we found to be of interest.

Advanced Technologies Group, Inc. (ATGI) appealed two Contracting Officer Final Decisions (COFDs) in which certain indirect costs questioned by DCAA during audit were found to be expressly unallowable and penalties were assessed. The years in question were ATGI's FY 2007 and FY 2009. Apparently ATGI is one of those contractors where only some final billing rate proposals are audited in full. (The decision noted that "DCAA advised [ATGI that] full, detailed reviews would occur only every three to five years, with less-detailed reviews occurring the other years.") This may have been because ATGI was a small business with only few cost-type contracts—primarily those issued under the Small Business Innovation Research (SBIR) program.

(Interestingly, DCAA had classified ATGI as "low risk" until it filed its appeals at the ASBCA, whereupon ATGI suddenly became a "high risk" contractor whose annual final billing rate proposals would receive very thorough audits. We note the only thing that seemed to have changed was ATGI's willingness to challenge DCAA audit findings in court.)

Many small businesses stumble when they receive their cost-type SBIR contracts. We've written before about the challenges associated with making the transition from receiving grants or fixed-price contracts to receiving cost-type contracts. However, in this case, ATGI made efforts to do the right thing. The decision notes that "ATGI consulted with DCAA regarding its

accounting practices, direct and indirect rates and the methods to establish those rates from the first cost-plus contract it performed. ATGI used the incurred costs electronically (ICE) Excel spreadsheet model furnished by DCAA to submit its incurred cost proposals." (Citations omitted.) It took ATGI four tries to get an adequate final billing proposal with respect to its FY 2006 claimed costs; presumably, by FY 2007 and FY 2009 it had learned what DCAA needed to see and was able to submit adequate proposals the first time.

During its audits of FY 2007 and FY 2009, DCAA questioned two types of claimed indirect costs: marketing expenses and legal expenses associated with patents. (Travel costs were also questioned, but did not seem to be a part of the dispute.) The Judge stated that, with respect to FY 2006 costs, a final rate agreement was negotiated and executed; in that agreement "Legal and patent costs for FY 2006 were deemed acceptable as part of the G&A indirect rate." That fact became part of ATGI's motion for summary judgment.

The chronology of the audits is interesting and may shed some light on the eventual decision on the merits. Apparently, DCAA started and stopped and restarted its FY 2007 audit (as was common at the time). Further, DCAA apparently *withdrew* from the FY 2009 audit because it was "unable to complete the audit due to time constraints." The FY 2009 audit thus was completed by the DCMA Contracting Officer, who subsequently claimed that he was unaware of the potentially unallowable nature of ATGI's indirect costs before ATGI provided support for its claimed costs directly to him.

As noted above, Judge Hartman had competing motions for summary judgment.

ATGI argued that the government's claims were time-barred by the CDA SoL. Its position was based on the theory that the SoL clock started to run when it submitted its final billing rate proposals to the government for audit.

The government argued that the SoL clock started to run when it learned of the nature of the transactions at issue. Judge Hartman wrote—

In submitting its FY 2007 and 2009 ICPs, ATGI did not provide DCAA any financial, accounting or other records or documents with specific information regarding the marketing, legal fees or travel expenses included in the G&A Schedules. For example, DCAA did not obtain data

showing or from which it could have known of the unallowability of the patent costs identified as expressly unallowable in the FY 2007 COFD until after May 10, 2011.

(Citations omitted.)

Thus, according to the government, the COFDs (issued April 13, 2015 and January, 2018, respectively) were timely based on when it received information from ATGI showing the nature of the claimed indirect costs.

ATGI disputed the government's position, arguing that "DCAA knew at the time it accepted the ICPs what types of costs were incurred 'based on all previous incurred cost proposals submitted, accepted and audited by DCAA for the full history of ATGI'." The following paragraph from Judge Hartman concisely summarizes ATGI's and the government's arguments—

ATGI essentially asserts here that, at time of receipt of its ICPs, the government had access to its accounting system and could verify it was billing the government for the costs billed. ATGI therefore concludes the government 'should have known' the material facts of the claims it asserts against ATGI. The government denies that it knew or should have known at time of its receipt of the ICPs information necessary for assertion of its ACO's claims. The government presents affidavits of its officials testifying the ICPs did not identify the specific cost transactions forming the basis for its claims. According to the government, while it knew ATGI was billing costs to the government, it did not know facts sufficient to conclude that some of those costs were expressly unallowable and created a cause of action.

The Board was unable to grant either party's motion for summary judgment. With respect to ATGI's arguments, "ATGI … has not met its burden of establishing the requisite factual predicate for invoking the statute of limitations as a bar to the government's claims."

With respect to the government's arguments, the Board found that the government had not met its burden of proving that ATGI's claimed costs were, in fact, unallowable—let alone expressly unallowable. (We've written about the difference between the two types of unallowable costs on this blog.) In particular, Judge Hartman wrote—

The government also has not shown that the patent legal costs claimed are not required by the contracts at issue. SBIR contracts, such as the four here, generally contain a patent rights clause specifying the rights retained by the contractor and the rights granted the government in inventions developed under the SBIR contract. E.g., FAR 27.303(b), 52.227-11. …

The patent rights clause in ATGI's SBIR contracts expressly requires it to protect the government's interests. Specifically, the contractor is to have executed and delivered to the government all instruments necessary to establish or confirm the rights throughout the world that the government has in an SBIR funded invention for which ATGI possesses title, including notifying the CO of any decisions not to file a nonprovisional patent application, continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding upon the patent in any country before expiration of the response or filing period required by the relevant patent office. …

While we do not decide the issue today, it appears the requirements of FAR 52.227-11(c) place a contractual obligation upon a contactor to perform the effort described in FAR 31.205-30(a)(1), (a)(2), and (a)(3). If that is so, it appears that related patent legal costs would be allowable. See FAR 31.205-30(c).

Thus, the government had the burden of showing that ATGI's legal expenses related to patents were not required by its SBIR contracts, a burden it could not meet in its motion for summary judgment. Judge Hartman concluded—

Because the record before us primarily contains terse legal bills specifying money due for patent legal work without a detailed description of the legal work actually performed and the government has not presented evidence regarding the disputed costs showing that they are expressly unallowable, we currently do not have a factual basis to grant summary judgment to the government that ATGI's patent legal costs are 'expressly unallowable.' Because the government has not developed the facts sufficiently here, the issue of allowability of the disputed costs cannot now be resolved by summary judgment. Simply put, there are genuine issues of material fact that bar us from granting the government's cross-motion.

(Citations omitted.)

While neither motion for summary judgment prevailed, this seems to be an interesting case with facts that may lead to a further clarification of the muddled rules on interpretation of the CDA SoL when the case goes to a trial on the merits. So stay tuned for more on this matter.