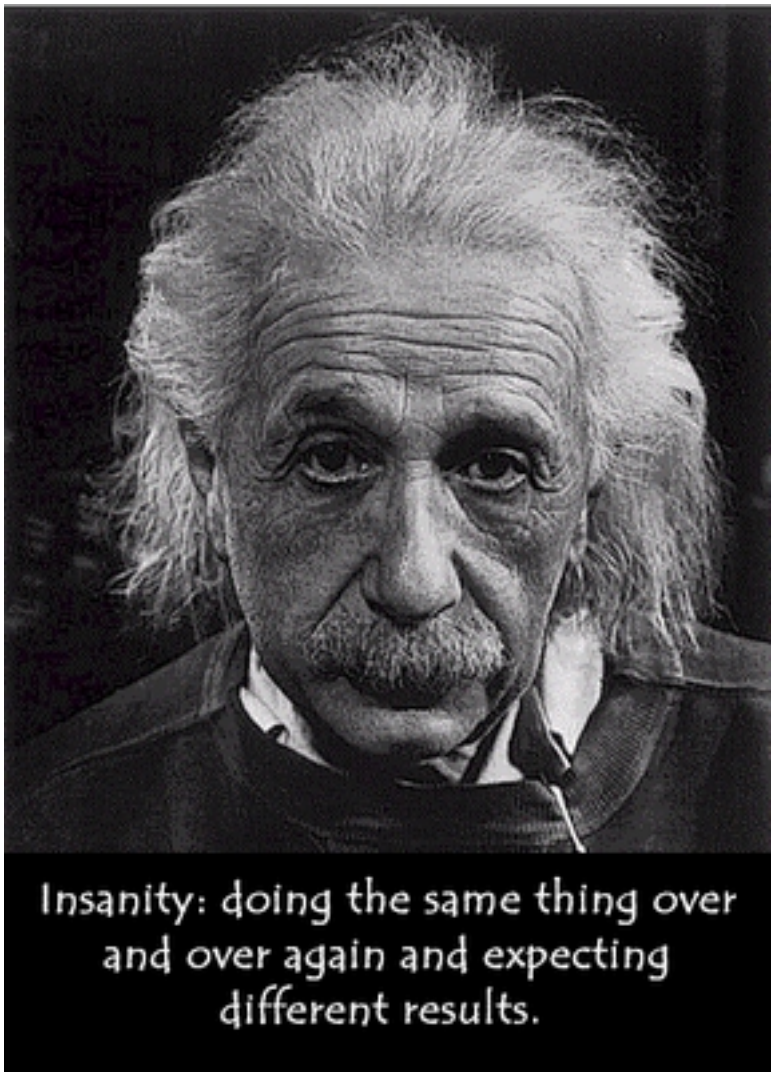
Written by Nick Sanders
Tuesday, 10 April 2012 00:00



In December, 2009, we **reported** to our readers that McDonnell Douglas (Boeing) had won a victory in a defective pricing dispute, because the government failed to assert its claim within the Contract Dispute Act's six-year statute of limitations. In that ASBCA case, it took DCAA more than 3 years to complete its post-award audit of McDonnell Douglas' subcontractor and to issue its draft report to DCMA. It took another fourteen months for DCMA to send a letter to Boeing, "seeking comments" on the matter in order to finalize the audit report. (The final audit report was issued about a month later—nearly 52 months after DCAA commenced its audit.

It took another six years for the cognizant DCMA Contracting Officer to issue a final decision.

The ASBCA was quick to find for Boeing. The Judge wrote—

Because the government's defective pricing claim upon which the COs' decisions were based is time-barred and not cognizable under the CDA, the COs' decisions asserting the claim were not valid. If there is no valid CDA claim, any purported CO's decision on the matter is a nullity and we do not have jurisdiction to entertain an appeal from the purported decision.

In January, 2012, **we reported** to our readers that Boeing had won another victory at the ASBCA. In that dispute, which concerned a disclosed change in cost accounting practice, Boeing submitted a revised Disclosure Statement in October 2000. DCAA issued an audit report concerned the cost impact associated with the change in June 2002. In September, 2003, the cognizant ACO began negotiations with Boeing. Between December 2003 and April 2005, the parties attempted to resolve the dispute through negotiation. The parties continued to discuss the matter "intermittently" until 2010. Ultimately, negotiations proved unsuccessful and, in October, 2010, the ACO issued a Final Decision—and Boeing appealed that Final Decision to the ASBCA.

The Judge wrote—

Because the government's 25 October 2010 final decision claiming the accounting revision costs was untimely, it is not valid. Given that it is invalid, it is a nullity and we lack jurisdiction to entertain an appeal from it. Accordingly, we dismiss the appeal for lack of jurisdiction.

The maxim, "Insanity is doing the same thing over and over again, and expecting different results," is generally attributed to Albert Einstein. A more reasonable litigant (or perhaps one who was spending his own money instead of the taxpayer's money) might give up on the issue and stop litigating disputes that were over six years old. But not the U.S. Government. No, indeed. Instead, they keep litigating the same CDA statute of limitations issue over and over again, expecting different results.

In the latest defeat for the Government, the U.S. Court of Federal Claims **threw out** the case against Raytheon Company. The matter concerned an Advance Agreement between Raytheon and the Department of Defense, covering some retirement obligations the company had inherited in its acquisition of certain parts of Hughes Aircraft Company. The Advance Agreement was executed in 1999, and included a provision that made the allowability of retirement costs subject to DCAA audit. Raytheon claimed $106 million pursuant to that agreement, but in 2003 DCAA asserted that $4.75 million of that amount was unallowable. Raytheon shrugged and credited the Government for the allegedly unallowable amount. And that's where the parties stood until 2007.

In 2007, the DOD Inspector General issued a report that criticized the 2003 DCAA audit. In response, DCAA issued a "supplemental report" in August 2008—asserting in that second report that $25 million of Raytheon's costs were unallowable. In December 2008, the cognizant DCMA Contracting Officer issued a Final Decision. Raytheon filed suit.

Raytheon sued for a "declaratory judgment" that the Contracting Officer's Final Decision was "void and of no effect." The COFC decision was quite short, as these things go. It was eight pages long. Although the Court discussed a number of Government theories, they were not persuasive. The Judges wrote—

Defendant had been aware of all the information on which it based the $25 million government claim for nine years before the contracting officer issued his decision in 2008. The decision conflicted dramatically with results of the first audit, issued in 2004, which used information identical to that employed by the second set of auditors in 2007. The only event occurring after defendant signed the Advance Agreement in 1999, and before the 2008 contracting officer's final decision, was the Inspector General's report criticizing DCAA's $5 million first audit.

The $25 million government claim in this proceeding is barred by the Contract Disputes Act's six-year statute of limitations. Plaintiff's motion for judgment declaring that the contracting officer issued his final decision beyond the statute of limitations of the Contract Disputes Act is GRANTED. All other pending motions are moot and therefore DENIED.

Boeing has won twice at the ASBCA; now Raytheon has won at the Court of Federal Claims. When will the Government get the message that the CDA's statute of limitations will be strictly enforced by the Courts?

Or, perhaps, they will keep litigating the same issue over and over, expecting different results.