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We have had quite a bit to say about the Statute of Limitations (SoL) embedded in the Contract Disputes Act (CDA). Why? Because the CDA SoL currently may be the *single most critical area of dispute between the Government and its contractors*
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Perhaps our most comprehensive discussion of the topic is **right here** . In that blog article, we wrote—

… the truth is that not every aspect of the CDA's SoL has been litigated. In particular, nobody knows for sure when the SoL starts running with respect to a contractor's final indirect rate proposals (aka 'incurred cost submissions'). Does the six-year clock start running when the contractor's fiscal year ends, or when it submits its certified proposal roughly six months later? Or does it start running when the proposal is determined to be adequate for audit? Or perhaps when the audit starts? Or maybe when the audit report is drafted? Or maybe when the audit report is issued? Or what about when the cognizant Administrative Contracting Officer receives the audit report? Nobody knows the answer to those questions because the courts haven't squarely addressed the issue and given the contracting parties a 'bright line' answer.

So in the meantime, parties with unresolved disputes file claims with either the ASBCA or the Court of Federal Claims. The lawyers are busy these days; very busy indeed.

In that same blog article, we discussed the application of the CDA SoL to the ginormous backlog of uncompleted final indirect rate proposals created by DCAA's inability to conduct

GAGAS-compliant audits without spending more time on performing “risk assessments” and documenting discussions in the audit working papers than, say, conducting audits of contractors’ costs. (There was a whole ‘nother set of blog article on *that* particular festering sinkhole of malfeasance.) We opined—

… the official DCAA position is that they have not aged the 24,000 unaudited contractor proposals for final indirect cost rates that are in its possession. But nobody should worry, because ‘few’ of them are going to exceed the six-year CDA SoL.

… perhaps one reason that DCAA and DCMA and DOD are not too worried about the SoL is because they think the courts are going to rule that the six-year clock doesn’t start running *until after DCAA issues its audit report*. In that case, why worry? If DCAA takes 70 years to get around to questioning some contractor costs and recommending some final indirect cost rates to be used to close contracts (which will, hypothetically, be disputed by the contractor), then they think the courts will hear the matter. And if they’re wrong, then all the DCAA and DCMA and DOD SES policy-makers will be long, long, long retired by that time. It will be somebody else’s problem to deal with.

(Emphasis in original.)

We are pleased to report that two recent decisions by the U.S. Court of Federal Claims continued the (uneven) trend of whittling away at the Government’s excuses/defenses, and clarified a very critical point that we had listed as unresolved in our articles on the topic. The **first decision**, regarding Sikorsky Aircraft, addressed Government motions for partial summary judgment on two of Sikorsky’s affirmative defenses. The two affirmative defenses regarding the Government’s claim for $80 million in indirect costs that were allocated in a manner alleged to be noncompliant with the requirements of the Cost Accounting Standards (CAS) were: (1) that the Government’s claim was time-barred by the CDA SoL, and (2) that the Government’s claim was barred by the doctrine of “accord and satisfaction”. We are more interested in Judge Lettow’s discussion of Sikorsky’s first affirmative defense (the CDA SoL argument), so that’s what we will focus on.

Sikorsky first notified the Government of its intention to change its cost accounting practices via a revised Disclosure Statement, submitted in August 1998 and timed to take effect on January 1, 1999. The Disclosure Statement was audited by DCAA and determined to be “adequate”.

Sikorsky and Government personnel held continued discussions regarding the cost impact to the Government from Sikorsky's change in cost accounting practice. (It was clear that Sikorsky disclosed a cost impact to future contract costs during those meetings.) In April 1999 (four months after Sikorsky implemented its new cost accounting practice), DCAA asserted that the revised practice was noncompliant with CAS 418 and resulted in the Government paying increased costs on affected contracts. The final audit report was issued in July, 1999. That audit report concluded that there was no noncompliance with CAS 418 based on the immaterial amount of increased costs on Sikorsky's contracts in 1999. However, DCAA advised that this situation should be reassessed in the future.

Sikorsky submitted a formal cost impact proposal in February, 2000, that showed a *net benefit* (i.e., net cost decrease) to the Government between 1999 and 2003. But the cognizant Federal Administrative Officer (CFAO) changed and DCAA started a second audit on Sikorsky's changed cost accounting practices. As Judge Lettow wrote—

A little over a year later, on August 22, 2002, DCAA began preparing a second compliance review of Sikorsky's accounting change. … The second audit took an inordinate two years and two months to complete and was finally issued on October 29, 2004. … The audit found that Sikorsky's changed accounting practice was 'in potential noncompliance' with CAS 418 … noting that a fully compliant accounting practice could 'result[in an] allocation [to government contracts that] may be materially different,' … The audit did not ascertain the materiality of the potential noncompliance because 'it would be difficult or nearly impossible for the auditor to determine' certain aspects of Sikorsky's costs.

In 2006, Sikorsky made several additional changes to cost accounting practice, many related to the implementation of a new accounting system, and it ceased allocating costs in the manner that DCAA had alleged was noncompliant with CAS 418. Sikorsky asserted that it had struck a deal with the Government to resolve the alleged CAS noncompliance by making the change. However, in April, 2007, the CFAO began proceedings to recover costs that Sikorsky allegedly owed the Government, stemming from its 1999 change to cost accounting practice. The CFAO wrote to Sikorsky that, although it had ceased its noncompliant practice, the matter still needed to be resolved in accordance with FAR procedures.

In November 2008, the CFAO issued a final determination "pursuant to FAR 30.605(b)(3)(ii)" that Sikorsky was in noncompliance with CAS 418 for the period 1999 to 2005. A Contracting Officer's Final Decision (and a claim for $80 million) was issued in December, 2008, more than ten years after Sikorsky first notified the Government of its cost accounting practice change and a hair under ten years after Sikorsky had first implemented that changed cost accounting practice.

Sikorsky cried shenanigans and said the Government's claim was time-barred by the CDA SoL. The Government moved to have that affirmative defense stricken because a claim does not accrue until the completion of administrative procedures. In other words, the Government argued that the Statute of Limitations did not start running until the CFAO had issued his final determination of CAS noncompliance. The Government relied on a Supreme Court decision (*C rown Coat*
, 1967) for its position.

However, Judge Lettow found that the Contract Disputes Act of 1978 superseded the administrative procedures regime established by the Supreme Court in 1967. In addition, Judge Lettow wrote—

The rationale behind *Crown Coat* was superseded by the CDA for a second reason: the CDA gives the government complete control over when it may assert a claim. The government, just like a contractor, is not required to wait on a board of contract appeals.
…
And while the government may have its own internal review procedures that it must follow prior to submitting a claim, nothing in the CDA mandates such procedures, nor can such procedures delay accrual of a claim. … Even if
Crown Coat
were to apply to this case, which it does not, there is nothing in the contracts between Sikorsky and the government that would delay the accrual of the government's claim. …

The government misconstrues these provisions. They do not address when a claim accrues. They do not require negotiation before a claim could arise. They only confirm that a failure to agree is a dispute that falls within the ambit of the CDA. As such, the provisions make plain the two alternatives available when a noncompliance occurs: if the contractor agrees with the resulting adjustment, it must pay; if the contractor does not agree, it must defend against a claim.

Turning to the more detailed provisions set out in FAR § 52.230-6, these do not constitute a set of conditions that must be satisfied prior to filing suit. … The contract clauses alone, for example, do not explain when or how the CFAO should issue a determination of noncompliance, *see* FAR § 52.230-6(b)(4), when or under what circumstances the CFAO should request a cost-impact proposal, *see* FAR § 52.230-6(c), or what the CFAO should do if the contractor
does
submit a cost impact showing a loss to the government. Implicitly, a coherent whole could be derived from these contractual provisions — but only by reference to the machinery at FAR Part 30.
Nonetheless, an agency's self-imposed, internal regulations are invisible for claim accrual purposes because they are not part of the contract.
See Commodities Export

, 972 F.2d at 1271. Thus, the clauses at FAR § 52.230, viewed *in vacuo* as they must be, do not serve as a set of preconditions to filing suit that would serve to delay the statute of limitations.

Furthermore, a delayed accrual rule would be incompatible with the intended functioning of CAS administration. … FAR § 52.230-6(b)(4) requires a contractor to submit changes to correct a CAS noncompliance within 60 days of receiving a determination of noncompliance. Likewise, FAR § 52.230-6(c) requires a contractor, if asked, to submit an estimate of the cost impact of a noncompliance within a time set by the CFAO. If the contractor fails to do either within the appropriate time, then FAR § 52.230-6(j) permits the government's contracting officer to issue a final decision. If a government claim were to accrue only at this point, then the CFAO could delay the statute of limitations indefinitely simply by refraining from issuing a determination of noncompliance or from requesting a cost impact. 'This court cannot, however, permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations.' …

Here, the legal basis for the government's claim is Sikorsky's alleged noncompliance with CAS 418. For a CAS 418 noncompliance claim to accrue, two conditions must be met. First, there must be a violation of CAS 418, which requires both that an indirect cost pool of a contractor contain costs that 'do not have the same or a similar beneficial or causal relationship to cost objectives' and that, 'if the costs were allocated separately, the resulting allocation would be materially different.' FAR § 9904.418-50(b)(2); *see Sikorsky*, 102 Fed. Cl. at 59-60. Second, the government must have actual or constructive notice of the CAS 418 violation. …

[However] … genuine disputes of material fact exist related to the accrual of the government's claim. The government's motion to dismiss Sikorsky's affirmative defense based upon the statute of limitations must be denied.

(Emphasis added.)

Okay, the above quote was long and maybe you did a "TL;DR". (We think all that stuff is important, but what do we know?) In that case, readers, we have a happy solution for you. The respected attorneys at Wiley Rein have written a **great summary** of the decision for you! They wrote—

… the Court of Federal Claims (COFC) held that an agency's administrative processes, even those set forth in the Federal Acquisition Regulation (FAR), do not delay accrual of a Government claim. Instead, accrual is governed by the definition in FAR 33.201, which focuses on whether the facts that 'fix the alleged liability' of the contractor or Government 'were known or should have been known,' regardless of agency administrative processes.

They concluded as follows—

Sikorsky adds to the growing body of cases addressing the accrual of Government claims and, in particular, Government claims relating to accounting issues. *In light of the significant backlog in DCAA audits and resulting delays in processing accounting changes and other matters, more Government claims could face timeliness issues.* … Under *Sikorsky*, the fact that the FAR sets out administrative processes for addressing an alleged CAS violation is not, in itself, relevant.

(Emphasis added.)

So maybe, just maybe, DCAA's inability to perform audits in a timely manner is going to result in Government claims for disallowed costs being kicked-out by the Courts, because they are time-barred under the CDA SoL.

But we are not done yet, readers. Remember when we told you there were two recent decisions? Yes, in addition to the helpful *Sikorsky* decision recounted (at length) above, we have another **Raytheon decision** to tell you about.

Readers may recall our recent discussion of the Raytheon's $25 million **CDA SoL victory**. The Government submitted a motion for reconsideration, arguing that "a statute of limitations does not begin to run against the United States until a right granted by FAR to audit plaintiff's claim is completed, citing 48 C.F.R. 31.201-2."

First, the cite to FAR 31.201-2 puzzled the Judge Hodges, who wrote, "This section of FAR cost accounting standards [*sic*] does not mention audits at all, unless defendant meant to suggest that its requirement that a contractor maintain records to support the allowability of its costs requires an audit by implication."

The Judge described the Government's argument as follows—

… the court erred in stating that the Government needed no new information to determine the

nature of its claim after signing a 1999 advance agreement with Raytheon. An audit is necessary for the Government to have "knowledge" of a claim for purposes of the statute of limitations, according to defendant. *See* 48 C.F.R. § 33.201 (defining claim accrual for government contracts as 'the date when all events' fixing liability and permitting assertion of a claim 'were known or should have been known').

Judge Hodges didn't buy the Government's argument, writing—

This court ruled that the statute of limitations begins to run when information that equates to knowledge of a potential claim becomes available to the Government; defendant urges that only completion of an audit of plaintiff's claim can provide it sufficient evidence and proof of facts necessary for a trial of the claim – the statute of limitations begins to run then. In this case, information defendant obtained in 1999 put it on notice of a potential claim against Raytheon. Then, defendant had a basis for seeking more information to support the claim, and it did so.

Defendant also argues that the court erred in disregarding its allegations that the 2004 agreement between the parties was a result of mutual mistake, unilateral mistake, or material misrepresentation. Defendant made these allegations in response to plaintiff's claim of accord and satisfaction arising from the same 2004 agreement. [However] *Having ruled that the court lacked jurisdiction to hear the contracting officer's decision in the form of a counterclaim because the statute of limitations had run, we could not consider issues raised by later pleadings of either party.*

(Emphasis added.)

The Court of Federal Claims has recently issued two decisions that clearly state that the completion (or lack thereof) of administrative procedures and the completion (or lack thereof) of DCAA audits do not operate to toll the CDA SoL. Instead, what matters is when the Government had (or should have had) knowledge that it had a claim to file. The Government cannot delay filing its claim pending completion of paperwork, completion of a DCAA audit, obtaining necessary reviews and approvals, and other similar "self-imposed, internal regulations" that are "invisible" for claim accrual purposes.

DCAA and DCMA: You have been warned.