Recently, we **told readers** about the apparent split in the forums that hear Contract Disputes appeals, with respect to applying the Contract Disputes Act (CDA) Statute of Limitations (SOL).

Over at the Court of Federal Claims, so far Judges appear to be strictly enforcing the six-year SOL invoked by the CDA, and are rejecting appeals (for lack of jurisdiction) that have been found to be untimely. For example, Judge Lettow wrote (in a July 2012 decision regarding CAS 418 litigation between Sikorsky Aircraft and the U.S. Government), that "*an agency's self-imposed, internal regulations are invisible for claim accrual purposes*"—meaning that the Government can't hide behind its own uncompleted bureaucratic processes in order to toll the CDA SOL. If the Government can't complete its processes timely, then Judge Lettow won't hear the case. (We focus on Judge Lettow because there are many COFC Judges, and the decision of one Judge is not binding precedent for another Judge.)

Judge Lettow was speaking about the CAS noncompliance process, and didn't squarely address the question on everybody's mind. That question—which we've covered fairly extensively on this site—is *when does the SOL clock start running with respect to a contractor's submission of its proposal to establish final billing rates?*
Does the Government have six years from the time the contractor submits its proposal to assert a claim for costs that are allegedly unallowable? Does it have six years from the time the DCAA auditor determines that the proposal was adequate for audit? Does the CDA SOL clock start

running from the time that DCAA issues its audit report to the Cognizant Federal Agency Official, no matter how many years that might take? It wasn't squarely addressed.

And thus, even though it was fairly easy to draw an inference that the pendency of a DCAA audit—like other "internal regulations"—cannot overcome the "should have known" aspect of the FAR definition of "claim accrual," nobody was *absolutely certain* that was the case. With respect to DCAA's enormous backlog of uncompleted, pending, "incurred cost" audits, nobody was absolutely certain that DCAA's opinion regarding a decent-sized portion of that pile was now *completely irrelevant*.

While many asserted audits of a chunk of the 25,000 proposals awaiting audit were now mooted (since the Courts would not hear any cases regarding them), nobody at DOD—least of all DCAA leadership—was willing to admit to it. Admitting that was the case would be a more-than-tacit admission that DCAA (and the hierarchy of DOD leadership that oversees DCAA) had mismanaged itself and botched one of its most essential missions: that of auditing contractors' claimed costs to make sure that those costs complied with applicable rules and regulations.

So even though "Easy Ed" thought DCAA should just "write off" all its backlog of audits that were time-barred by the CDA SOL, and even though we agreed with that suggestion, we weren't optimistic that DCAA would consider doing so until the audit agency was absolutely convinced that the Courts had mooted those ancient, uncompleted audits.

We also told readers that, over at the ASBCA, enforcement of a strict SOL timeclock has been—shall we say?—*inconsistent*. In fact, *the ASBCA Judges have gotten it wrong*. (In our layperson's **opinion**, of course.) Although we have no qualifications (in a legal sense) to have an opinion on the matter, we still think Judge Delman authored a decision that added unnecessary confusion to what had been emerging as a relatively bright line with respect to the CDA SOL.

We thought that Judge Delman's Lockheed Martin decision seemed to have ignored the "should have known" prong of the claim accrual definition, finding that the Contracting Officer's Final Decision (COFD) was not time-barred because DCAA hadn't informed the CO that there were "overbillings to, or overpayments made by the government on government contracts." Apparently, DCAA must speak some magic words in the ear of the Contracting Officer in order

for the CDA SOL clock to start running—a position which (in our view) ignores the issue of whether the CO *should have known* the government had been injured, even without the magic audit words.

Regardless of our views, LockMart's Motion was denied and it settled its case (for a *very favorable*
amount, we're told). Consequently, we told our readers that "if you have a CDA SOL issue you want to litigate, we expect your attorneys are directing you to the Court of Federal Claims, and not to the ASBCA, because they don't want to have to deal with this particular decision."

But in the meantime, other appeals were pending before the ASBCA. Two of those appeals involved The Raytheon Company.

On December 17, 2012, Judge Delman **ruled** on Raytheon's Motions for Declaratory Judgment, in ASBCA Nos. 57576 and 57679.

But before we get into that ASBCA ruling, let's set the baseline. Here's how FAR Part 33.201 defines "claim accrual" for purposes of establishing the SOL—

'Accrual of a claim' means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

We are all now on the same page.

Before Judge Delman was Raytheon's Motion that was predicated on an assertion that the Government's claims "were asserted beyond the six-year presentment period and are untimely." Let's look at the two Appeals separately.

In ASBCA No. 57576, Raytheon included allegedly expressly unallowable costs in several years' worth of its proposals to establish final billing rates. Here are some of the key facts recited by Judge Delman—

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Raytheon established a restricted stock plan in 1991 and entered into an Advance Agreement (with the Government) regarding that plan in 1992.

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Raytheon had other incentive compensation plans, which were regularly reviewed with DCAA. In 2000, Raytheon made a complete presentation of its various incentive comp plans to DCAA.

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With respect to Raytheon's CY 2000 indirect costs, DCAA "took no exception" to Raytheon's incentive comp plans. In September 2003, DCAA "took no exception" to Raytheon's incentive comp plans included in its CY 2002 indirect costs. DCAA expressly found that the costs were allowable pursuant to the Cost Principle at 31.205-6(f). Similar findings were issued for Raytheon's CY 2003 indirect costs.

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Regardless of the foregoing, in November 2006 DCAA told Raytheon that its incentive comp costs were "compensation/fringe type costs" and that, to the extent such costs were allocated to unallowable labor, they were also unallowable. Raytheon did not agree.

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On 24 September 2007, DCAA issued an audit report relating to CYs 2002-2005 that stated that Raytheon's failure to withdraw from its "incurred cost submissions" a proportionate share of its costs of bonuses, restricted stock and other incentive compensation costs paid to employees engaged in expressly unallowable activities was a violation of FAR 31.201-6(a) and CAS 405-40(a). Raytheon contested the government's position.

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On 30 May 2008, the government issued to Raytheon an initial determination of noncompliance (IDN) on this matter for CYs 2002-2005. A later DCAA audit report dated 10 June 2008 included CY 2006 costs. The government revised its IDN on 27 June 2008 to include questioned CY 2006 costs.

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On 14 May 2010, the government issued a final determination of noncompliance (FDN) on this matter for CYs 2002-2008, and demanded a general dollar magnitude impact report from Raytheon, who prepared and submitted impact reports under protest, and also updated these reports to include CY 2009 impact.

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On 10 January 2011, the Contracting Officer issued a Final Decision, demanding payment of $14.1 million. The CO also issued a penalty against Raytheon due to its inclusion of alleged expressly unallowable costs in its final indirect cost rate proposals for CYs 2002-2009, in the amount of $5,946,762, including interest, pursuant to the contract clause FAR 52.242-3, Penalties for Unallowable Costs (May 2001). In total, the Government demanded that Raytheon pay $20 million. Raytheon appealed the COFD.

Judge Delman ruled as follows (internal citations omitted)—

With respect to CY 2002, the record shows that on 29 September 2003, DCAA issued a memorandum regarding its audit of appellant's bonus and incentive compensation costs for CY 2002, concluding that these costs were fully allowable. However roughly four years later, by audit report dated 24 September 2007, DCAA determined that portions of these same costs were not allowable for reasons stated herein. It was this audit report that ultimately led to the

government's present claims under this appeal. Based upon the date of the DCAA memorandum, we believe the government should have known - by 29 September 2003 - that the incentive compensation costs in question for CY 2002 were unallowable and should also have known that the government had paid increased costs under government contracts in CY 2002. We also believe that, for purposes of the government's penalty claim for CY 2002, the government should have known by 29 September 2003 that Raytheon had included these expressly unallowable costs in its CY 2002 final indirect cost rate proposal, which had been submitted to the government in or around June 2003.

The government's claim letter is dated 10 January 2011, and the government's claims must have accrued no earlier than 10 January 2005 to be timely. We have concluded that the government's claim to recover increased costs paid under government contracts in CY 2002 and the related penalty claim for CY 2002 accrued no later than 29 September 2003. Accordingly, we must conclude that the government's claims for CY 2002 are untimely.

With respect to the government's claim to recover increased costs paid under government contracts for CY 2003, Raytheon's overhead cost submission for CY 2003 was submitted to the government in or around June 2004. As for CY 2004, Raytheon's Corporate Home Office Allocations proposal for forward pricing rates was submitted to the government in September 2004. We believe the government should have known - prior to 10 January 2005 - of the subject CAS noncompliance and that the government paid increased costs under government contracts as a result in CY 2003 and CY 2004. We are persuaded that the government's claims of 10 January 2011 for these increased costs in CY 2003 and CY 2004 are untimely.

As for CYs 2005-2009, the government could not have been aware, actually or constructively, of any increased costs paid by the government under government contracts in these years until the advent of these years and until payments were made under government contracts in those years. We conclude that the government's claims of 10 January 2011 to recover these increased costs for CYs 2005-2009 are timely.

As for the government's claim for penalties for CY 2003, Raytheon's final indirect cost rate proposal for CY 2003 was submitted to the government in or around June 2004, and we believe that the government should have known - prior to 10 January 2005 – that said final indirect cost rate proposal included these alleged expressly unallowable costs. Hence, the government's claim for penalty for CY 2003 is untimely. As for the government's claim for penalties for CY 2004, Raytheon's final indirect cost rate proposal for CY 2004 was submitted to the government on 2 June 2005, within 6 years of the date of the government's claim letter of 10 January 2011. We are persuaded that the government's claim for penalty for CY 2004 is timely. It follows that the government's claims for penalty for future years, CYs 2005-2009, are also timely.

[Emphasis added.]

In ASBCA No. 57679, Raytheon included allegedly expressly unallowable costs in incentive comp plans, including its “Long-Term Performance Plan” (LTTP). The LTTP payout was based on several factors, including a “Total Shareholder Return” (TSR) metric. Here is a chronology as discussed in Judge Delman’s decision—

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Raytheon briefed the government on its LTTP plan, including the TSR metric, as early as January 2004. In July 2004, DCAA issued an audit report in which it concluded that "the Long-Term Incentive Plan compensation system and related internal control policies and procedures of the contractor are adequate".

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The Judge recited various other DCAA reports, issued throughout 2004 and 2005, in which DCAA examined Raytheon’s LTTP and its TSR factor.

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However, when DCAA audited Raytheon’s CY 2006 “incurred cost proposal” (submitted in June 2007), it took issue with the LTTP. In July 2008, DCAA opined that the LTPP violated CAS 415-50(a)(3) and CAS 415-50(e)(l). With respect to the TSR metric, DCAA stated that the "TSR costs are not allowable per FAR 31.205(6)(i) [sic] because the number of shares awarded is dependent on the change in the price of Raytheon's stock". Raytheon contested the government's position.

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On 4 September 2009, the CO issued a FDN to Raytheon on this matter related to CYs 2004-2006. By letter to Raytheon dated 1 June 2011, the CO stated that the cost impact with respect to the CAS noncompliance was immaterial.

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By letter dated 2 June 2011, the CO issued a final decision, asserting that the costs of the TSR portion of Raytheon's LTPP were expressly unallowable under FAR 31.205-6(i)(l) because the TSR formula "shows that the stock award to a TSR participant is arrived at by determining the change in stock price". The CO asserted a claim under the Allowable Cost clause to recover the expressly unallowable TSR/LTTP costs for CYs 2004-2006 in the amount of $1,316,183. The CO added a claim for penalty under the Penalty clause due to Raytheon's inclusion of these expressly unallowable costs in its final indirect cost rate proposals, in the amount of $1,316,183 plus interest of $360,761, for a total of $2,993,127. Raytheon appealed the COFD.

Judge Delman ruled as follows (internal citations omitted)—

Under this appeal the government seeks recovery of unallowable costs and penalties for CYs 2004-2006. Based upon DCAA's review of the LTPP in 2004 and the information available to DCAA about the program at that time, we agree with Raytheon that the government should have known by 2004 that the TSR formula was based, in part, upon the price of appellant's stock, which in the government's present view makes the related costs unallowable. However, in order for the government's claim to accrue the government also must have known or should have known of some 'injury' to the government by that date. The record fails to show that the government knew or should have known in 2004 or 2005 of any injury to the government based upon Raytheon's application of this metric. Indeed, from the motion papers it appears that appellant did not include the subject TSR/LTPP costs in its CY 2004 overhead cost submission or its CY 2005 overhead cost submission because the subject costs were incurred only after a full three-year cycle. ***To the extent these costs were incurred in CY 2006 and were identified in appellant's CY 2006 overhead cost submission of June 2007, the government's 2 June 2011 claim for these costs is timely. It follows that the government's claim for penalties for including such expressly unallowable costs in its final indirect cost rate proposal for CY 2006 is also timely. We conclude that the government's claims under this appeal are timely.***

[Emphasis added.]

The first thing we have to say is that Judge Delman squarely addressed the issue and found *th at the CDA SOL clock starts running from the time that the contractor submits its annual proposal to establish final billing rates*

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The clock starts running when the proposal ***is submitted***. Not when it's reviewed for adequacy. Not when it's audited. Not when the audit report is issued. Not when the audit report is received by a CFAO. The clock starts running when the proposal is submitted. The Government has six years—*no more*—from that date in order to assert a claim against the contractor. Many of those 25,000 whiskered contractor proposals to establish final billing rates are now mooted, because the Courts won't hear any claims by the Government for allegedly unallowable costs that were included in those proposals. (Well, assuming the ruling is upheld on appeal, of course.)

On the flip side of the coin, the contractor has six years—*no more*—from that date to assert a claim against the Government. If the contractor's submitted rates are higher than its provisional billing rates, then it has six years—*no more*—to file a claim for unbilled indirect costs. If there is fee retention outstanding, the contractor has six years—*no more*—to file a claim for that unpaid fee. Wait one day longer to demand payment, and you risk having your Government customer laugh in your face.

That's the good news. (Well, it's not good news for DCAA, but you get our drift.) That's the news that everybody's talking about.

We don't see anybody talking about the bad news. We don't see or hear anybody saying that the decision also got it wrong in some respects. While the decision is undeniably good news in one respect, it's also bad news in another respect. It's a half-a-loaf, not a full loaf.

What in the world are we talking about?

Well, in our non-attorney, layperson's view, Judge Delman continues to conflate the concepts of "events" and "facts". Looking above at the FAR 33.201 definition of "claim accrual," one can see that it focuses on *events* and not on facts. It is when the events *occur*—all events that fix the alleged liability—that the CDA SOL clock starts running.

Looking at the Raytheon ruling in ASBCA No. 57576, we can see that the events that fixed Raytheon's alleged liability occurred when Raytheon (a) established its incentive comp plans, and (b) DCAA examined those plans. The ruling focuses on when the Government became aware (or should have been aware) that those plans allocated allegedly unallowable costs to government contracts. According to the Statement of Findings, the Government knew it had been injured as early as September 2003—and very likely before that date. That is when the CDA SOL clock started running.

Instead, Judge Delman decided that there was a separate CDA SOL clock for each Raytheon submission of its annual proposal to establish final billing rates. His ruling focused on factual knowledge, not on events. He wrote—

… the government could not have been aware, actually or constructively, of any increased costs paid by the government under government contracts in these years until the advent of these years and until payments were made under government contracts in those years.

We think that's an incorrect view. We believe that the events that cause the Government's alleged injury occurred when Raytheon established its plans and incurred costs. The fact that there was a stream of costs over time associated with the plans should be irrelevant to the situation. Indeed, FAR 33.201 expressly states that it is the *events* that matter—and that "monetary damages need not have been incurred." Judge Delman's ruling focuses on the Government's knowledge of monetary damages for each year in which Raytheon submitted its final billing rates, and elides the fact that those alleged damages continued to stream from an original event that took place more than six years before the Contracting Officer issued the COFD.

Looking at the ruling in ASBCA No. 57679, we see again Judge Delman's focus on factual knowledge of a monetary injury instead of on the events that caused the alleged injury. Even though DCAA (by the Government's own admission) knew of the LTTP and its TSR factor as early as January 2004, Judge Delman ruled that the CDA SOL clock didn't start running until Raytheon included those costs in a proposal to establish final billing rates. According to him, the Government couldn't have known it had been injured until Raytheon submitted a proposal that included them. That's a focus on factual knowledge and not on the underlying events. That's a focus on monetary damages, and not on events. We think Judge Delman missed the mark.

So if we're right and the ASBCA is wrong, what does this mean for DCAA audits? Does it mean that DCAA is forever precluded from asserting costs are noncompliant with CAS or unallowable, once six years have passed from the time the contractor started to incur the

questioned costs? Does this mean that DCAA can never change its mind?

Yes, that's *exactly* the implication of our position. The logical outcome of our interpretation is that the Government has six years from the events that created the costs to assert a claim. *Period.*

Which is perhaps why the ASBCA Judges are shying away from it.

Now, again we are not attorneys and we are not Judges. You must read our opinions of legal matters with a grain of salt the size of the Rock of Gibraltar. If you litigate a position based on our Internet rants, then you're a fool. Instead, obtain the advice and counsel of a licensed attorney with deep expertise in these matters. And then do what he or she advises.

But in the meantime, we expect that your attorney will be advising you to avoid CDA SOL litigation at the ASBCA, and head on over to the Court of Federal Claims. Perhaps—*just perhaps* — they will tell you that the ASBCA interpretation of the Contract Disputes Act's Statute of Limitations is a problem to be avoided.