We have reported before on the ongoing saga of the dispute between Sikorsky Aircraft and the U.S. Government, wherein the Government has alleged that Sikorsky was in noncompliance with the requirements of CAS 418. We found five articles discussing this complex, contentious, and (in some respects) ground-breaking case before Judge Lettow at the Court of Federal Claims. We are not going to repeat the facts of the case here; we suggest you type “Sikorsky” into the site search feature and read them for yourself—particularly if you are dealing with CAS 418 and need to understand some of its intricacies.

On March 27, 2013, Judge Lettow issued his **final decision** .

Sikorsky won.

Judge Lettow found that Sikorsky was permitted, under CAS 418, to use direct labor dollars as the allocation base for its material handling indirect cost pool. He wrote—

The government failed to carry its burden of proof and did not demonstrate that Sikorsky violated CAS 418. The evidence presented at trial established that the management and supervision costs contained within the materiel overhead pool were insignificant relative to the entire pool, and therefore CAS 418–50(d) did not apply to Sikorsky’s allocation of its materiel overhead. Instead, Sikorsky was required to comply with CAS 418–50(e) when choosing an allocation base for its materiel overhead pool. In that respect, Sikorsky reverted to the third alternative base, a surrogate, because the first two bases were impractical. A proper surrogate would ‘var[y] in proportion to the services received.’ CAS 418–50(e)(3). The government did not establish that Sikorsky’s method of allocation, direct labor, was not an appropriate allocation method under CAS 418–50(e). The government did not adequately support its contention that direct materiel should have been used to allocate the materiel overhead pool, nor did it provide any evidence to establish that CAS 418 required the use of an alternate method of allocation involving the segregation of GFM-related costs in a distinct indirect cost pool. In contrast, the evidence presented at trial demonstrated that Sikorsky’s choice of a direct labor base complied with CAS 418–50(e) because direct labor varied in proportion to materiel overhead costs from

1999 through 2005 and thus was an acceptable means of measuring the resources consumed in connection with pool activities.

As may be gleaned from the foregoing, the decision seemed to be largely based on the findings related to a "battle of the statisticians" regarding whose linear regression identified the best allocation base for the material handling pool (or, as Judge Lettow called it for clarity, the "materiel" handling pool). The ironic part of that piece of the litigation is that Judge Lettow dismissed both statisticians' findings, writing—

In this instance, because the dependent variable, materiel overhead costs, did not fluctuate greatly, there was not much variation to explain, and any statistical relationship between materiel overhead costs and direct labor or direct materiel costs was relatively unimportant. In short, the statistical analyses are of little value in determining whether a particular base was an appropriate allocation measure for materiel overhead costs

So while he largely dismissed the findings from the battle of the statisticians, he used those findings to conclude that the Government did not show that Sikorsky's use of a "surrogate" cost allocation base violated CAS.

Which is nice for Sikorsky.

But the decision also contained troubling aspects that may prove problematic for other contractors. Those troubling aspects have to do with Judge Lettow's finding that the Government's claim was filed timely, and did not violate the Contract Disputes Act's Statute of Limitations.

Judge Lettow's conclusion is troubling in several respects. First, he found that Sikorsky's cost impact analysis of its change in cost accounting practice (moving from a direct material dollar base to a direct labor dollar base), which was submitted to the Government in 2000, was insufficient to start the SoL clock running. He wrote—

… although Sikorsky's cost-impact submission in 2000 sufficed to confirm the effect of the accounting change on existing contracts, the run-off of existing contracts *and the advent of new contracts* would provide a more significant test of the change. Through 2003, Sikorsky's cost-impact proposal submitted in September 2000 still showed a net benefit to the government of $2.34 million. … At that point, DCAA's auditor … was seeking further contemporaneous cost information from Sikorsky in 2003 to conduct an audit that would examine actual results in 2003

and look beyond that year to the future.
In these specific circumstances, the government was under a duty to inquire, but it had no actual or constructive knowledge of a potential CAS violation at Sikorsky until the new information was gathered and assimilated.

[Emphasis added.]

The problem with the foregoing is that Judge Lettow elides the definition of "affected contract" and thus ignores the Court of Appeals (Federal Circuit) discussion of what that definition means with respect to cost impact analyses. We wrote about the topic **here** . We summarized the Appellate decision, and wrote—

Once the contract's estimated cost and/or price had been renegotiated to include the cost impact, it was no longer an 'affected contract' and was properly excluded from the various cost impact analyses negotiated between the CFAO and the contractor.

Thus, the cost impact on future contracts *would be irrelevant* to the calculation of the impact to the Government from Sikorsky's change in cost accounting practice, because those future contracts would be priced using the changed practice. Judge Lettow's finding that the Government lacked sufficient information to know it had been injured, because the DCAA auditor did not have information regarding future cost impacts, was misplaced, in our view.

Similarly, the ASBCA held in a Raytheon case (No. 56701) that "the price adjustment for consideration here is limited to the CAS-covered contracts in effect at the time the accounting change was made." Any possible cost impact to future contracts was dismissed by Judge Freeman as being "entirely speculative." Judge Lettow's conclusion seemingly contradicts both the ASBCA (which he was not required to follow) and the Court of Appeals (which he was required to follow). Accordingly, it's a problematic and troubling decision in that respect.

The other troubling aspect of the decision is that Judge Lettow has departed from the ASBCA with respect to which party bears the burden of proof in asserting that a claim is untimely with respect to the CDA SoL. As we **reported** , Judge Melnick of the ASBCA wrote "By advocating in response to Raytheon's motion that its decision is valid the government is effectively the proponent of our jurisdiction and therefore bears the burden of proving it under these circumstances." In contrast, Judge Lettow wrote—

Sikorsky has not met its burden to show that the government had actual or constructive

knowledge of a potential claim under CAS 418 prior to December 2002, and Mr. Colandro's assertion of the government's claim on December 11, 2008, was within the six-year statute of limitations prescribed by the CDA.

[Emphasis added.]

This would seem to be something that the two Contract Disputes Act fora would want to be aligned on. As it stands, ASBCA would now seem to be the forum of choice, since it puts the burden of proof on the party that argues for jurisdiction—which is very likely to be the government in the cases that concern the majority of contractors.

To sum up, this is a good result for Sikorsky, but not so much for other government contractors. We hope it's appealed, because we think there are some potential errors of law that need to be corrected. Of course, Sikorsky will be unlikely to be the party that files the appeal, since it is the victor at the Court of Federal Claims.