As our readers know, the evolving case law on the Contract Disputes Act Statute of Limitations (SoL) may be one of the most significant issues affecting disputes between Government and contractor. We've been commenting on its impact ever since **the first case** that came to our attention, in December, 2009. Almost five years ago, we wrote, "Contracting Officer delays in dispositioning audit findings can lead to a forfeiture of amounts to which the government would have otherwise been entitled in a court of law." Indeed, that assessment has been (generally, with some exceptions) borne out by case after case at both the ASBCA and U.S. Court of Federal Claims.

Although DCAA still pretends its audits of costs aged more than six years actually matter to somebody, DCMA seems to be more realistic about the situation, and has **issued direction** to its Contracting Officers that recognizes the impact of the SoL expiration. (As a side note, DCAA still pretends its audits of contractors' Forward Pricing Rate Proposals will be of interest to Contracting Officers even after a FPRA has been negotiated without an audit report, and has directed its auditors to continue to audit in such circumstances, and to issue a formal audit report to the CO, even though nobody will care. *Sigh*)

The takeaway is that if you are a contractor and DCAA is questioning costs aged more than six years, your auditors will turn a deaf ear to your assertions that the SoL has run. However, your DCMA Contracting Officer is likely to take your assertions much more seriously.

One reason your assertion of SoL expiration is likely to be taken seriously by your CO (or ACO or DACO) is that, by and large, Courts keep tossing out Government claims because they were issued "untimely" and thus contractors, by and large, stand a good chance of seeing a complete victory, should they be willing to litigate.

Note that the litigation is not a trial on the merits of the parties' positions. The litigation need not be expensive (well, not *too* expensive). The litigation is aimed at dismissal based on a lack of jurisdiction. (Or so we are told by attorneys; we are not members of that guild.)

Two recent decisions as the ASBCA illustrate the logic involved.

The first case is that of *Laguna Construction Company* (ASBCA **No. 58569** , issued May 29, 2014). The Government claimed that Laguna awarded two subcontracts without adequate competition and failed to "document that these award prices were reasonable." In addition, other subcontracts were awarded in which Laguna "failed to justify award … to other than the lowest bidder," and similarly failed to document that subcontractor award prices were reasonable.

During 2005, Laguna received progress payments and in its progress payment requests the subcontractors in question were identified and the subcontract prices were identified. In 2006, DCAA issued an audit report that concluded that Laguna's "subcontract management system and related internal control policies and procedures are inadequate and cannot be relied upon to ensure subcontracts are awarded in accordance with [FAR requirements] or [that] subcontract payments made by [Laguna] are in accordance with FAR 52.216-7, Allowable Cost and Payment." The findings were transmitted to the cognizant ACO via Flash Report. (Ah, those were the good ol' days!) DCAA told the ACO "Due to the deficiencies in the internal controls related to [Laguna's] subcontract management system we believe a significant risk is present relative to allocability, allowability and reasonableness of subcontract costs billed to the U.S. Government. We believe this deficiency is serious enough to render the subcontract management system inadequate."

Three years later (March, 2009) the ACO got around to sending that 2006 DCAA audit report to Laguna for comment. Roughly sixty days later, the ACO suspended 30% of interim billing payments in order to protect the Government from "the cost risk ... for the deficiencies reported." Ouch!

DCAA issued another, strikingly similar, audit report in 2009, alleging many of the same issues. In March, 2011, DCAA issued a Form 1, which "disapproved" $2,089,799 of subcontractor costs incurred by Laguna (i.e., payments made by Laguna to its subcontractors) and that amount was subsequently increased to $2,383,370.

The ACO issued a COFD in December, 2012, for the disputed amounts plus G&A allocated to such amounts, for a total of $3,815,233. Laguna appealed, asserting that "the government's monetary claim was filed more than six years from the date the claim accrued, and therefore is barred under the Contract Disputes Act (CDA), 41 U.S.C. § 7103(a)(4)(A)."

Importantly, the Government immediately retreated from a portion of its claim, conceding in its

own pleadings that “its Cost Reasonableness Claim” on one Task Order “was untimely.” Accordingly the Judges immediately pitched that amount of the Government’s claim and then moved on to decide the remainder. Here’s what the decision said:

The legal predicate of the government's claim here is appellant's failure to document the reasonableness of subcontract awards under this contract that were not based upon competition. The DCAA was fully aware of appellant's failure to document the reasonableness of subcontract awards under this contract that were not based upon competition by late 2005, and it documented its findings by audit reports dated 6 December 2005 and 9 February 2006, which latter report was issued to the ACO. That the DCAA did not single out these subcontracts by name in the audit reports is irrelevant. DCAA reviewed 32 subcontracts under the contract totaling $147,701,411 which presumably was a significantly large sample upon which to support its findings. The government was also aware of its ‘injury’ here, i.e., the subcontract prices awarded by appellant and paid by the government, as early as 2005. The ACO did not file this claim until 17 December 2012.

Readers should not be surprised at the final sentence:

Accordingly, the CO's decision dated 17 December 2012 is hereby deemed null and void.

As attorneys from Arnold & Porter **wrote** :

The [Laguna Construction] case is important because it addresses another form of potential liability (reasonableness of subcontractor costs) and continues to cement the construct that the knowledge standard under the statute of limitations is one of objectivity, not absolute, subjective knowledge.

The second case is Kellogg Brown & Root Services (KBRS). There are various joined cases in **the decision**
(issued June 17, 2014) but the relevant one here is ASBCA No. 58559. In that case the Government claimed that KBRS owed it $55,620,592 in allegedly unallowable Private Security Company (PSC) subcontract costs.

Blah, blah, blah. 35 pages of Findings of Fact that summed up a colossal Charlie Foxtrot, wherein the U.S. Military tried to perform its primary mission under difficult circumstances, a mission that (based on testimony and evidence and Findings of Fact) did not necessarily include protecting the civilian contractors, who were thus forced to protect themselves by hiring PSCs, which led to questioned, suspended, and disallowed costs. We have an opinion on the equity of the situation, but that opinion is not relevant to this article.

Let's cut to the chase with respect to the one appeal:

A government claim for recovery of payments made for allegedly unallowable costs of KBRS and its subcontractors using PSCs in connection with their performance of Contract 0007 accrued no later than 10 June 2005 …. Prior to that date, on 29 August 2004, LTC O'Day knew that PSCs were being used instead of military escorts (finding 41). Prior to 10 June 2005, between April and August 2004, the DCMA Commander Iraq and Rock Island PCO Watkins knew that PSCs were being used for movement by KBRS personnel within Iraq (findings 47-48). Prior to 10 June 2005, on 24 March 2004, the KBRS contact at MCB, MAJ Sessoms, was told that PSCs were being used for convoys from Kuwait into Iraq (findings 58-59). Finally, on 10 June 2005, the government was expressly advised that PSCs were being used to transport personnel to their respect[ive] sites in Iraq (finding 60). On these findings, the contracting officer's final decision of 30 January 2013 was untimely and thus invalid and a nullity. We give it no further consideration and dismiss the appeal in ASBCA No. 58559 for lack of jurisdiction.

(Note: KBRS won the rest of its appeals on the merits.)

These two recent cases clearly illustrate, readers, why you need to be aware of the CDA SoL and why you should be prepared to assert it when appropriate, and why your DCMA Contracting Officer is going to take that assertion seriously. Unfortunately, DCAA is likely to be deaf and blind to its SoL situation, and is likely to continue its audit procedures in the vain hope that somebody, somewhere, will think its findings have merit. Unfortunately for DCAA, Courts are ruling (with some consistency) that, once six years is up, the auditors should close their computers and walk away from the audit, because the Government very likely lacks legal standing to pursue any findings.