In 2020, Triple Canopy appealed several Contracting Officer's Final Decisions (COFDs) to the ASBCA. The dispute involved an interpretation of the contract clause 52.229-6 ("TAXES-FOREIGN FIXED-PRICE CONTRACTS", June 2003) as it applied to Triple Canopy's work in Afghanistan. The ASBCA denied Triple Canopy's appeals, finding them time-barred by the Contract Disputes Act's Statute of Limitations.[1]

We've written a lot about the CDA Statute of Limitations here on this blog. In our layperson's view, the appellate forums (fora?) have applied the rules of claim accrual inconsistently. We've been told that our viewpoint is wrong by people who've been to law school, passed the bar, and get paid tremendously huge hourly rates to help contractors in court. However, we remain convinced that the rules are not clear, not implemented via bright-line standards, and thus remain a source of confusion for the contracting parties.

Our position is: if the rules of CDA claim accrual are so clear and evenly interpreted, then show us the textbook that lays the rules out for all to see. (Note: if you know of such a textbook, please send us an email. We want to buy it.)

Our point of view regarding this issue seemingly was bolstered by a recent decision by the Court of Appeals, Federal Circuit, a decision that **reversed** the ASBCA's Triple Canopy decision, calling it an error "as a matter of law." Which to us, means that the ASBCA Judges didn't interpret the CDA Statute of Limitations correctly.

So what did the ASBA Judges get wrong?

According to the Appellate Court, the matter turned on when Triple Canopy's claim had accrued. The government argued, and the ASBCA found, that the claim accrued when Triple Canopy "was legally obligated to pay the [Afghan government tax] assessment." That was when the company knew, or should have known, that it had suffered an injury. According to the ASBCA, "The fact that the final amount could change does not matter, nor does the fact that actual payment had not yet occurred."

However, Triple Canopy had argued, and the Appellate Court agreed, that the claim accrued

when the company had exhausted its appeal rights (to the Afghan government). In support of its argument, Triple Canopy had pointed to paragraph (i) of the 52.229-6 clause, which states that the contractor must ""take all reasonable action to obtain exemption from or refund of any taxes or duties." In other words, the ASBCA found that clause to give the contractor discretion in pursuing a tax reduction (since the contract was FFP), but the Appellate Court found that there was no discretion involved.

The Appellate Court wrote—

We agree with Triple Canopy that, because it was seeking reimbursement of the GIRA assessment pursuant to the Foreign Tax Clause, it had to comply with paragraph (i)'s requirement that it 'take all reasonable action' to obtain 'exemption' from the assessment. This meant appealing the assessment. In the circumstances of this case, we thus view the appeal to GIRA as a 'mandatory preclaim procedure' that had to be completed in order for Triple Canopy's claims to accrue and the CDA limitations period to begin to run.

To sum this up, we have to say that if the learned Administrative Judges of the ASBCA are getting the CDA Statue of Limitations wrong, then what hope do any of us laypeople have?

[1] Because the ASBCA is now issuing decisions as .pdf files, we have difficulty linking to them. See ASBCA Nos. 61415, 61416, 61417, 61418, 61419, 61420, May 20, 2020.