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PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



**EDITOR'S NOTE: THE SUMMER READING ISSUE**

Victoria Prussen Spears

**NOT YOUR AVERAGE LESSOR:  
THE FALSE CLAIMS ACT AND  
TREBLE DAMAGES IN ROYALTY DISPUTES  
WITH THE FEDERAL GOVERNMENT**

Thomas C. Ryan, Jamie Lavergne Bryan,  
Katherine M. Gafner, Jared A. Kephart, and  
Reymond E. Yammine

**FIRST CIRCUIT RESOLVES DISPUTE  
BETWEEN RELATORS UNDER  
FIRST-TO-FILE BAR**

Michael A. Rogoff and David Russell

**GAO ISSUES ITS LATEST DECISION  
INVOLVING PROTESTS OF OTHER  
TRANSACTION AGREEMENTS**

Cameron S. Hamrick

**COURT OF FEDERAL CLAIMS TAKES A  
FRESH LOOK AT THE CDA STATUTE OF  
LIMITATIONS**

Paul E. Pompeo and Amanda J. Sherwood

**IN THE COURTS**

Steven A. Meyerowitz

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<b>Editor's Note: The Summer Reading Issue</b> Victoria Prussen Spears	243
<b>Not Your Average Lessor: The False Claims Act and Treble Damages in Royalty Disputes with the Federal Government</b> Thomas C. Ryan, Jamie Lavergne Bryan, Katherine M. Gafner, Jared A. Kephart, and Reymond E. Yammine	245
<b>First Circuit Resolves Dispute Between Relators Under First-to-File Bar</b> Michael A. Rogoff and David Russell	249
<b>GAO Issues Its Latest Decision Involving Protests of Other Transaction Agreements</b> Cameron S. Hamrick	253
<b>Court of Federal Claims Takes a Fresh Look at the CDA Statute of Limitations</b> Paul E. Pompeo and Amanda J. Sherwood	257
<b>In the Courts</b> Steven A. Meyerowitz	262

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# Court of Federal Claims Takes a Fresh Look at the CDA Statute of Limitations

*By Paul E. Pompeo and Amanda J. Sherwood\**

*The authors of this article discuss a recent Court of Federal Claims decision addressing a critical U.S. Court of Appeals for the Federal Circuit decision interpreting the statute of limitations under the Contract Disputes Act that impacts the time by which contractors must file claims.*

The Court of Federal Claims (“COFC”) recently issued a decision in *Kansas City Power & Light Co. v. United States*,<sup>1</sup> addressing a critical U.S. Court of Appeals for the Federal Circuit decision interpreting the statute of limitations under the Contract Disputes Act (“CDA”) that impacts the time by which contractors must file claims. Simultaneously, the COFC blurred the lines of the continuing claims doctrine, a partial defense to application of the statute of limitations.

## THE CONTRACT DISPUTES ACT

The CDA requires any party seeking relief under a government contract to file a claim within six years of claim accrual.<sup>2</sup> A claim accrues on “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, money damages need not have been incurred.”<sup>3</sup> On the question of injury, the case law had developed that “it is enough that the [party] knows, or has reason to know, that some costs have been incurred, even if the amount is not finalized or a fuller analysis will follow.”<sup>4</sup> In 2016, the Federal Circuit layered the FAR 2.101 definition of a claim, with its requirement of a “sum certain” into the accrual analysis.<sup>5</sup> This presented the prospect of a conflict between the concepts of a “sum certain” and “some injury” in the competing definitions.

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<sup>1</sup> No. 15-348C (May 9, 2019).

<sup>2</sup> 41 U.S.C. 7103(a)(1), (4).

<sup>3</sup> FAR 33.201.

<sup>4</sup> *Raytheon Co., Space & Airborne Sys.*, ASBCA Nos. 57801 *et al.*, 13-1 BCA ¶ 35319.

<sup>5</sup> *Kellogg Brown & Root Serv. v. Murphy*, 823 F.3d 622 (Fed. Cir. 2016).

***KANSAS CITY POWER & LIGHT CO.***

In *Kansas City Power & Light Co.*, the COFC confronted this disconnect, clarifying that the requirement for a “sum certain” does not mean the injury must consist of a fixed and complete dollar amount in order to trigger the CDA’s state of limitations.

Kansas City Power & Light Co. (“KCP&L”) entered into a contract with the General Services Administration (“GSA”) to provide electrical service. Under this contract, GSA agreed to indemnify and defend KCP&L with respect to legal claims related to the provision of electrical service. While KCP&L was providing this electrical service, a GSA employee sustained fatal injuries. The following dates are relevant to the ultimate statute of limitations issue at COFC:

- March 27, 2007: Decedent’s widow filed a wrongful death suit against KCP&L.
- June 12, 2007: KCP&L retained defense counsel and received the first legal invoice.
- March 7, 2008: GSA informed KCP&L in writing that the US would not indemnify or defend KCP&L in the lawsuit.
- May 18, 2010: The court approved a settlement of the wrongful death case.
- June 25, 2014: KCP&L submitted a claim for the expenses it incurred defending and settling the wrongful death case.

The COFC considered the timeliness of KCP&L’s claim from two angles: first, when a claim based on GSA’s failure to defend KCP&L accrued, and second, when KCP&L’s indemnification claim based on that refusal accrued.

**Duty to Defend**

The COFC held that four distinct events fixed GSA’s purported liability on KCP&L’s duty to defend claim:

- (1) KCP&L executed a contract on August 19, 2005;
- (2) That contract obligated GSA to provide KCP&L with a defense when sued on March 27, 2007;
- (3) GSA refused to provide that defense in a written message on March 7, 2008; and
- (4) KCP&L sustained damages resulting from that refusal “as soon as it received” notice of that refusal, because that message “conveyed that KCP&L should continue paying its own costs in the [] action and

would not receive reimbursement for previously incurred attorney's fees."

The COFC accordingly determined KCP&L's duty to defend claim was time barred, because "KCP&L knew all the facts fixing the GSA's purported liability for the breach of its contractual duty to defend by March 7, 2008—more than six years before KCP&L submitted its claim to the CO."

KCP&L argued that it had no "sum certain" until it stopped incurring legal fees on May 18, 2010, when the court approved the settlement. The COFC rejected this contention, citing *Tecom, Inc. v. United States*,<sup>6</sup> for the proposition that "a party can submit a request for a sum certain even if it will incur further damages." Under this rule, the contractor's claim accrued upon learning that the government would not defend the matter, using the legal fees incurred to date as the "sum certain" and understanding that sum would continue to accrue.

### **Continuing Claims**

KCP&L argued in the alternative that its claim based on legal invoices received within the six-year period prior to its claim should be preserved under the continuing claims doctrine. The COFC rejected this interpretation, and concluded that the claim was not susceptible to being broken down into distinct events or wrongs—here, the single event was the failure to defend. This seems to contrast other decisions involving the continuing claims doctrine, such as *Fluor Corp.*,<sup>7</sup> where the ASBCA found that each invoice from Fluor to the government was an independent event of alleged noncompliance with the Cost Accounting Standards, even though the alleged noncompliance was static. Similarly and recently, in *JBG/Federal Center LLC v. GSA*,<sup>8</sup> the CBCA found that GSA had independent claims for each invoice it allegedly overpaid, making any claims based on invoices paid more than six years prior time barred.

### **Duty to Indemnify**

By contrast, the COFC found KCP&L's duty to indemnify claim to accrue on May 18, 2010, when the court approved the wrongful death settlement, rendering that CDA claim timely. The COFC recognized that this decision is in direct conflict with *Kellogg Brown & Root Services, Inc. v. United States* ("KBR"),<sup>9</sup> in which the COFC held a party could submit an indemnification

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<sup>6</sup> 732 F.2d 935, 937 (Fed. Cir. 1984).

<sup>7</sup> ASBCA No. 57852, 14-1 BCA ¶ 35,472.

<sup>8</sup> CBCA 5506, 18-1 BCA ¶ 37,019.

<sup>9</sup> 115 Fed. Cl. 168 (2014).



claim to the CO before the underlying lawsuit is resolved, but found that case unconvincing because it left unanswered “how liability could be fixed before the indemnitor was obligated to provide indemnification.”

### Impact

This case puts a gloss on the Federal Circuit’s 2016 *Kellogg Brown & Root Servs., Inc.*, case wherein the court held that a claim for subcontractor termination costs could not have accrued until a dispute with the subcontractor had settled, as there was no “sum certain” until that time.<sup>10</sup> Although the government argued that the claim in *KBR* accrued as soon as the prime suffered “some injury”—which would have been the day the subcontractor stopped work—the Federal Circuit held that KBR could not have requested a “sum certain” from the government then as the reimbursable costs and profit entitlements were not yet known, pending disputes between KBR and the subcontractor. This seemed to suggest that a claim would not accrue until the full amount is known.

The CBCA addressed *KBR* in 2016, explaining that any interpretation of *KBR* “as holding that a claim does not accrue until the contractor can identify and has incurred all costs resulting from a change or breach would directly conflict with the implementing FAR provision” 33.201, which requires “only ‘some injury’ and not the totality of injury . . . occur before the limitations period on a claim starts to run.”<sup>11</sup> In *KCP&L*, COFC joins the CBCA in this interpretation, determining the “sum certain” requirement is met even when the precise amount claimed continues to increase over the term of the litigation.

### CONCLUSION

*KCP&L* is therefore a mixed bag for contractors. On the one hand, it addresses the impact of the Federal Circuit’s decision in *KBR*; as soon as some injury occurs, the “sum certain” requirement is met and the statute of limitations begins to toll. On the other hand, on the receiving side of a claim, it is not possible to prolong litigation and delay facing liability on the basis that the amount of damages is not fixed. Similarly, contractors seeking to preserve some of a potentially stale claim through the continuing claims doctrine may need to take a harder look at events—it is possible that what one might consider segregable claims won’t be deemed such, and it may present a choice of venue (COFC versus Board) decision.

In sum, this recent line of case law makes clear that contractors must carefully analyze both the date entitlement is set and the date any damages are incurred

<sup>10</sup> 823 F.3d 622 (Fed. Cir. 2016).

<sup>11</sup> *Crane & Co. v. Department of Treasury*, CBCA No. 4965, 16-1 BCA ¶ 36,539.

## CDA STATUTE OF LIMITATIONS

to ensure the timeliness of CDA claims. The statute of limitations will run from the date the first damages are incurred and entitlement is clear; the fact that those damages will continue to accrue does not render them any less a “sum certain.”