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FEATURE COMMENT: Contractor Success In Asserting The CDA Statute Of Limitations Against Government Claims

As originally enacted, the Contract Disputes Act contained no limitations provision that prescribed a time frame for asserting a claim. Congress added a provision to the statute in 1994 as part of the Federal Acquisition Streamlining Act. P.L. 103-355, § 2351, 108 Stat. 3243, 3322 (1994). The CDA now requires both contractors and the Government to assert claims within six years of accrual. 41 USCA § 7103(a)(4)(A). Consistent with FASA, the U.S. Court of Appeals for the Federal Circuit subsequently held that the CDA statute of limitations applies only to contracts awarded on or after Oct. 1, 1995. *Motorola, Inc. v. West*, 125 F.3d 1470, 1473 (Fed. Cir. 1997).

Given the recent genesis of the statute of limitations and that a party may assert a claim up to six years after accrual, contractors have had few opportunities to assert the statute of limitations in litigation with the Government. In fact, 14 years passed between the enactment of the limitations provision and the first reported decision holding a Government claim time-barred under the statute. *Am. Ordnance LLC v. U.S.*, 83 Fed. Cl. 559 (2008); 50 GC ¶ 387. Since then, however, three additional decisions have been issued in which Government claims were held time-barred. Two of these decisions were issued in the last few months. *Raytheon Co. v. U.S.*, --- Fed. Cl. ---, 2012 WL 1072294 (Fed. Cl. April 2, 2012); 54 GC ¶ 127; *Boeing, Inc.*, ASBCA 57490, 12-1 BCA ¶ 34916; 54 GC ¶ 127, note; *McDonnell Douglas Servs., Inc.*, ASBCA 56568, 10-1 BCA ¶ 34325; 52 GC ¶ 86. Each case involved a different type of Government claim: ownership of equipment (*American Ordnance*), defective pricing (*McDonnell Douglas*), voluntary change in cost accounting practices (*Boeing*) and cost allowability (*Raytheon*).

The cases thus demonstrate that contractors are increasingly able to leverage the CDA's statute of limitations as a complete defense to a variety of Government claims. The decisions also help define the body of case law addressing the successful use of the statute of limitations, which is equally sparse involving contractor claims. See, e.g., *Envtl. Safety Consultants, Inc. v. U.S.*, 97 Fed. Cl. 190 (Fed. Cl. 2011); *Robinson Quality Constructors*, ASBCA 55784, 09-1 BCA ¶ 34048; 51 GC ¶ 163; *Gray Personnel, Inc.*, ASBCA 54652, 06-2 BCA ¶ 33378; *Emerson Constr. Co., Inc.*, ASBCA 55165, 06-2 BCA ¶ 33382; 48 GC ¶ 336.

This FEATURE COMMENT describes issues that the emerging body of case law have addressed regarding the CDA's statute of limitations, and comments on issues that are yet to be resolved.

Policy Underlying Statutes of Limitations—Courts have explained the purpose served by statutes of limitations as promoting good faith and as a tool to prevent a party from sitting on its rights. In a 1944 decision, the U.S. Supreme Court explained that

> Statutes of limitation … are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation, and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of R.R. Tels. v. Ry. Express Agency, 321 U.S. 342, 348–349 (1944). Similarly, the Federal Circuit has held that a statute of limitations "insures the claimants' good faith and rewards the diligent

prosecution of grievances." *Creppel v. U.S.*, 41 F.3d 627, 633 (Fed. Cir. 1994) (citing *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)).

The CDA Statute of Limitations is Jurisdictional—In addition to promoting the policy goals of rewarding diligence and preventing surprise, Congress has the authority to use statutes of limitations to define the scope of jurisdiction in federal courts. The Supreme Court has held that Congress can enact a statute of limitations that is jurisdictional, meaning that the federal court's jurisdiction depends on compliance with the statute of limitations. The Supreme Court explained, "Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Bowles v. Russell*, 551 U.S. 205, 212–213 (2007) (citations omitted).

In a case involving a contractor claim against the Government, the Federal Circuit held that compliance with the statute of limitations is a jurisdictional prerequisite. *Arctic Slope Native Assoc., Ltd. v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009), cert. denied 130 S. Ct. 3505, 177 L. Ed. 2d 1091 (2010); 51 GC ¶ 404. This means that the timely assertion of a claim "is a necessary predicate to the exercise of jurisdiction by a court or a board of contract appeals over a contract dispute governed by the CDA." Id. at 793. Stated otherwise, the CDA's statute of limitations "defines the matters that a board or court may adjudicate." Id.

In a case involving a Government claim against a contractor, the Armed Services Board of Contract Appeals revisited the issue of whether the CDA statute of limitations is a jurisdictional prerequisite in light of a Supreme Court analysis of a statute of limitations applicable to claims litigated in the Court of Appeals for Veterans Claims after the *Arctic Slope* decision. *Boeing*, ASBCA 57490, 12-1 BCA ¶ 34916. Consistent with *Arctic Slope*, the ASBCA held that the CDA statute of limitations is a jurisdictional prerequisite. As the ASBCA explained, "an untimely claim is not a valid claim," and therefore the ASBCA "lack[s] jurisdiction over an appeal where there has been no valid claim." Id.

A jurisdictional statute of limitations is different from a statute of limitations that is available to litigants as an affirmative defense. The Supreme Court explained,

> The stakes are high in treating time limits as jurisdictional. While a mandatory but non-jurisdictional time limit is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable discretion. But if a limit is taken to be jurisdictional, waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and sua sponte consideration in the courts of appeal mandatory.

Bowles, 551 U.S. at 216–217. Accordingly, if a contractor or the Government asserts a CDA claim more than six years after the claim accrued, neither the U.S. Court of Federal Claims nor the boards of contract appeals has jurisdiction over the claim.

Defining Claim Accrual—The CDA does not define claim accrual. Therefore, the COFC and the boards apply the definition in the Federal Acquisition Regulation. *Raytheon*, 2012 WL 1072294; *Am. Ordnance*, 83 Fed. Cl. at 574; *McDonnell Douglas*, ASBCA 56568, 10-1 BCA ¶ 34325. That definition provides,

> 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.

FAR 33.201.

To apply the FAR's definition of claim accrual, the COFC and the ASBCA begin by examining the elements of proof associated with the claim at issue. See, e.g., *Gray Personnel*, ASBCA 54652, 06-2 BCA ¶ 33378 ("To determine when liability is fixed, we start by examining the legal basis of the particular claim."). For example, *McDonnell Douglas* involved a Government claim for defective pricing. ASBCA 56568, 10-1 BCA ¶ 34325. The ASBCA commenced its accrual analysis by articulating the elements of a defective pricing claim, and then determining when the Government either knew or should have known of the facts supporting the defective pricing claim. Id. More simply stated, "once a party is on notice that it has a potential claim, the statute of limitations can start to run." Id. If the claim is one for monetary damages, the limitations period begins to run even if a sum certain has not been established. Id. As the ASBCA explained in *Gray Per-*

sonnel, Congress intended that claims be asserted "as soon as they are identified." ASBCA 54652, 06-2 BCA ¶ 33378.

The Statute of Limitations Applies with Equal Rigor to the Government—Another recently settled issue is the equal application of the statute of limitations, regardless of whether the claimant is a contractor or the Government. In *McDonnell Douglas*, the ASBCA expressly rejected the Government's request for a more liberal interpretation of the statute when the Government is the claimant:

> We do not accept the Government's suggestion to the effect that we should interpret the CDA's six-year limitations period more liberally when a government claim is involved than when a contractor's claim is involved. Limitations principles generally apply to the government in the same way that they apply to private parties.

ASBCA 56568, 10-1 BCA ¶ 34325 (citing *Franconia Assocs. v. U.S.*, 536 U.S. 129, 148 (2002); 44 GC ¶ 232). In reaching this holding, the ASBCA explained, "The CDA and its implementing regulations do not distinguish between government claims and contractor claims with respect to the requirement that claims be asserted within six years after accrual." Id.

Tolling Prohibitions—A contractor and the Government can agree to shorten the six-year statute of limitations period. See FAR 33.206(a). The COFC, however, recently held that parties cannot extend the six-year limitations period by agreement, as this would allow parties to enlarge the statutorily defined scope of jurisdiction by the COFC and the boards of contract appeal. In *Raytheon*, the Government argued that the parties had agreed that the Government's claim for unallowable costs would not accrue until after the Defense Contract Audit Agency completed its audit of the costs at issue. The court rejected this argument, citing FAR 33.206(a). 2012 WL 1072294 n. 4.

Equitable Tolling—Although it is now clear that parties cannot agree to toll the CDA's statute of limitations, the six-year period may be equitably tolled if a party's misconduct "induced or tricked" the other party into allowing the filing deadline to pass. See, e.g., *Boeing*, ASBCA 57490, 12-1 BCA ¶ 34916. However, the COFC and the ASBCA have held that equitable tolling is "a narrow doctrine," which requires "compelling justifications." *Envtl. Safety Consultants*, 97 Fed. Cl. at 200; see *Bernard Cap Co., Inc.*, ASBCA 56679, 10-1 BCA ¶ 34387 ("federal courts have extended such disposition only sparingly and under limited circumstances"). Accordingly, without affirmative evidence of misconduct, equitable tolling is unwarranted. *Envtl. Safety Consultants,* 97 Fed. Cl. at 200 ("courts do not grant equitable tolling in circumstances where a plaintiff discovers the existence, or could have discovered the existence of a cause of action. Mere excusable neglect is not enough to establish a basis for equitable tolling.").

Accrual Suspension—The doctrine of accrual suspension allows the assertion of an otherwise time-barred claim if the claimant can demonstrate that "its injury was inherently unknowable at the time the cause of action accrued." *Raytheon*, 2012 WL 1072294 (citing *RAM Energy, Inc. v. U.S.*, 94 Fed. Cl. 406, 411 (Fed. Cir. 2009); 52 GC ¶ 338). As the COFC has articulated the doctrine, "Simply put, there must be 'nothing to alert one to the wrong at the time it occurs.' " *RAM Energy*, 94 Fed. Cl. at 411.

In *Raytheon*, the Government argued that the allegedly unallowable costs at issue were complex, and that its claim could not accrue until DCAA completed its audit of those costs. The court rejected this argument, and held that the Government was aware in 1999 of the nature of the costs and of Raytheon's position that the costs were allowable. 2012 WL 1072294. Thus, because there was nothing "inherently unknowable to the Government" about the potential liability of cost allowability, there was no basis to suspend the accrual of the Government's claim. Id.

Continuing Claims—The continuing claims doctrine can salvage a portion of a claim that is asserted within six years of accrual. In order for the doctrine to apply, a claim must be "inherently susceptible to being broken down into a series of independent and distinct wrongs, each having its own associated damages." *Gray Personnel*, ASBCA 65652, 06-2 BCA ¶ 33378. The doctrine does not apply if a claim is based on a single distinct event that has continued ill effects. *Raytheon*, 2012 WL 1092294 (citing *Gray Personnel*, ASBCA 65652, 06-2 BCA ¶ 33378).

In *Raytheon*, the Government argued that the continuing claims doctrine applied to its claim for $25 million in allegedly unallowable costs, which Raytheon was charging over the course of many years. The Government asserted that the statute of limitations ran separately on each of the annual certified claims that Raytheon had submitted to seek reimbursement of the costs at issue.

The COFC held that the continuing claims doctrine was inapplicable, notwithstanding the fact that Raytheon submitted numerous certified claims for the allegedly unallowable costs, because all of the costs in question arose from the same set of operative facts. Moreover, the court held that the Government was aware of those facts outside of the limitations period: "Defendant knew about plaintiff's claimed costs in 1999; no distinct facts or events distinguished one year from the next." 2012 WL 1092294.

Practice Points—As recent cases demonstrate, contractors can use the CDA statute of limitations to dispose of untimely Government claims on jurisdictional grounds. However, contractors should remain aware of the accrual of their own claims against the Government, as the Government is also developing a track record of success in disposing of contractor claims by asserting the CDA statute of limitations.

One advantage to asserting the CDA's statute of limitations is the potential to dispose of a claim before a trial on the merits. A jurisdictional challenge can generally be raised at any time. Indeed, the ASBCA encourages the prompt filing of a motion challenging jurisdiction. ASBCA Rule 5(a). However, if there are disputed facts regarding when the Government knew or should have known of the factual basis of its claim, a contractor may need to engage in discovery in order to obtain support for its jurisdictional challenge.

None of the decisions discussed above squarely addressed burden of proof and pleading issues. Contractors should remain vigilant against Government attempts to shift the burden of proof. Normally the party raising a statute of limitations argument as an affirmative defense bears the burden of proof on that issue. But in *Axion Corp. v. U.S.*, 68 Fed. Cl. 468 (Fed. Cl. 2005), where the Government asserted in a dispositive motion that the CDA's statute of limitations barred a contractor claim, the court held that the contractor "bears the burden of establishing jurisdiction when the government has raised the issue in a dispositive motion." Id. at 480. Given that the statute of limitations applies equally to the Government and to contractors, contractors raising the statute of limitations in a dispositive motion should continue to demand that the Government prove that it complied with the statute in asserting its claim.

Contractors should be aware that contracting officers may assert time-barred claims even if the undisputed facts demonstrate that the claim accrued outside of the limitations period. If the CO does not voluntarily withdraw such a claim, a contractor may have to incur the expense of appealing the CO's final decision in order to file a dispositive motion requesting that the untimely Government claim be dismissed for lack of jurisdiction.

The body of case law addressing the CDA's statute of limitations will continue to mature as contractors and the Government become more attuned to the impact of the statute of limitations. It is therefore likely that as the six-year limitations period on a potential claim draws to a close, the Government may assert a claim in order to preserve its rights, even if the underlying issue could have been resolved through contract administration.

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