

It's Contract Disputes Act Statute Of Limitations Season

--By Paul Pompeo, Arnold & Porter LLP

Law360, New York (June 04, 2014, 10:26 AM ET) -- With another round of incurred cost submissions ("ICSs") due from contractors in June, the Contract Disputes Act ("CDA") statute of limitations will bar government claims for unallowable costs and any penalties associated with expressly unallowable costs. Government claims based on the allowability of costs included in contractor fiscal year 2007 ICSs are at risk.

Most government contractors follow the calendar year as the contractor's fiscal year. Pursuant to Federal Acquisition Regulation 52.216-7(d)(2)(i), Allowable Cost and Payment, contractors must submit a final indirect cost rate proposal (the ICS) within the six-month period following the expiration of each fiscal year. Thus, for most government contractors, the ICS is due by June 30. In accordance with FAR 52.216-7, the proposal "shall be based on the Contractor's actual cost experience for that period," i.e., the fiscal year just ended six months prior. Generally filed electronically, the ICS consists of schedules of spreadsheets providing detail of all of the contractor's expenses and contract actions. The ICS is a statement of the types and amounts of allowable costs incurred and charged to government contracts.

The government has a notorious backlog of outstanding audits on contractors' ICSs.[1] This is widely reported in the press and discussed among industry. It is not unusual to learn of open years dating back to contractor FY 2005. With each passing year, the government's ability to assert claims based on the allowability of costs a contractor includes in its ICS diminishes. Any claims the government has yet to assert based on those ICSs for FY 2005 are long overdue. And, the clock is ticking down to the final minutes for FY 2007 costs.

This is because the CDA statute of limitations provides that the government must assert claims within six years of claim accrual.[2] A claim accrues on "the date when all events, that fix the alleged liability of ... the Government ... and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred." [3] Because the CDA statute of limitations is a jurisdictional statute of limitations, untimely claims are void and invalid. *Raytheon Missile Sys., ASBCA No. 58011, 13-1 BCA ¶ 35241*.

In the seminal case of *Raytheon Co., ASBCA Nos. 57576, 57679, 13-1 BCA ¶ 35209*, the Armed Services Board of Contract Appeals held that Raytheon's submission of its ICS established claim accrual. Hence, the government had six years from submission of the ICS to file a claim asserting, in that case, that costs were expressly unallowable, and seeking penalties under FAR 52.242-3, Penalties for Unallowable Costs. The rationale is that the ICS identifies all elements for accrual of a potential government claim based on unallowable costs: the types of costs the contractor has included as allowable (the liability being cost allowability) and an amount charged to government contracts (an injury).

The board held that the government's claims of unallowable costs for certain years (those where the government claim was more than six years after submission of the ICS)[4] were untimely, and, therefore, barred as void. Accordingly, for the many contractors whose fiscal year is the calendar year, and who filed an ICS in June of 2008, the government will be unable to assert a claim for unallowable costs once the six years passes — that will be July 1.

Importantly, there is no mechanism for the parties to stop the clock from running. Citing FAR 33.206(b), the Court of Federal Claims held that “[c]ontracting parties cannot establish a statute of limitations longer than that set forth in the Contract Disputes Act, where the Government is a party.” *Raytheon Co. v. United States*, 104 Fed. Cl. 327, n.4 (2012).

Specifically, FAR 33.206(b) provides: “The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties agree to a shorter time period.”[5] Thus, although the FAR contemplates the ability to shorten the time for filing a government claim, it imposes an absolute cap of six years. Moreover, because the CDA statute of limitations is a jurisdictional statute of limitations, it cannot be subject to tolling as a matter of law.

Undoubtedly, the Defense Contract Audit Agency will be scrambling to finish audit reports, or may simply abandon the process and hastily prepare nonaudit memoranda, leaving administrative contracting officers (“ACOs”) to their own devices in rushing to settle incurred costs. Although June of 2014 is the second June since the Armed Services Board of Contract Appeals issued its decision in *Raytheon*, there are a surprising number of ACOs who do not have a full appreciation for the meaning and effect of the statute of limitations.

On the other hand, many ACOs are conservative and might issue preemptive claims on the fifth year and 364th day. Indeed, a number of contractors received contracting officer final decisions in late June of 2013; although that presents time to continue discussions, the contractor must file a timely appeal to avoid the final decision becoming binding. Or, ACOs might offer take-it-or-leave-it settlement offers to resolve incurred cost submissions. Contractors should be wary of government strong-arm tactics and should seek out counsel in managing and mitigating pending negotiations and contracting officer final decisions, the latter which will set the wheels of litigation in motion.

[1] See, e.g., US Government Accountability Office, “DOD Initiative to Address Audit Backlog Shows Promise, but Additional Management Attention Needed to Close Aging Contracts,” Rept. No. GAO-13-131 (Dec. 2012)

[2] 41 U.S.C. § 7103(a)(4)(A).

[3] FAR 33.201.

[4] Several years of cost were at issue in the case.

[5] FAR 33.206(a) contains similar language regarding the assertion of a contractor claim.

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For further analysis of the subject of the CDA statute of limitations, see P. Pompeo and W. Speros “[Guidance for Contractors On CDA Statute of Limitations](#)” *Government Contracts Law* 360, January 2013.

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