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ALERT

Armed Services Board of Contract Appeals Finds Government Claim Relating to Voluntary Change to Accounting Practices Untimely

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In a January 6, 2012 decision, the Armed Services Board of Contract Appeals (ASBCA) held that a claim asserted by the Defense Contract Management Agency (DCMA) relating to the alleged cost impact of a contractor's voluntary change to its accounting practices was untimely under the six-year statute of limitations in the Contract Disputes Act, 41 U.S.C. §§ 7101-7109. Because the claim was untimely, the Board held that it was a "nullity." The decision adds to the relatively sparse body of case law applying the CDA's statute of limitations to Government claims.

In the appeal - *The Boeing Company*, ASBCA No. 57490 - Boeing submitted a Cost Accounting Standards (CAS) Disclosure Statement in October 2000. By June 2002, the Defense Contract Audit Agency (DCAA), had issued its final audit report regarding the alleged cost impact of the changes to accounting practices, and by September 2003, the Divisional Administrative Contracting Officer (DACO) had prepared a prenegotiation memorandum for resolving the claim. The DACO also wrote to Boeing at that time, determining that the changes to accounting practices were not desirable, asserting the amount of the alleged cost impact, and seeking a negotiated resolution. Although the parties met several times thereafter to discuss their disagreement regarding the DACO's determination and the alleged cost impact, they were unable to reach resolution. Nevertheless, the DACO did not issue a final decision until October 2010.

Authors

Kara M. Sacilotto
Partner
202.719.7107
ksacilotto@wiley.law

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Boeing appealed the final decision, asserting, among other things, that the Government's claim, as reflected in the DACO's final decision, was invalid because it was issued more than six years after the claim accrued. *See* 41 U.S.C. § 7103(a)(4)(A) ("[E]ach claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim"). The Board agreed. First, in accordance with the definition of accrual in FAR 33.201, the Board held that "a claim accrues when the events giving rise to liability were known or should have been known." Based upon the events as described in the DACO's final decision, the Board held that the Government knew of the basis of its claim no later than September 2003, when the DACO wrote to Boeing with her determination on the impact of the changes to Boeing's accounting practices.

Second, the Board rejected the Government's argument that the September 2003 determination constituted a final decision asserting a claim within the meaning of the CDA. The Board held that the September 2003 determination failed to demand a sum certain and, instead, simply reflected a desire to engage in negotiations.

Third, the Board rejected the Government's request for equitable tolling of the statute of limitations pursuant to the Federal Circuit decision in *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009). The Board noted that equitable tolling may apply if a party is "induced or tricked by its adversary's misconduct into permitting a filing deadline to pass." Under the facts at issue, however, the Board stated: "We do not perceive any misconduct by Boeing that could have induced or tricked the government into missing the deadline for submitting its claim for the accounting revision costs." Instead, the facts showed that Boeing merely took up the DACO's offer to negotiate resolution of the parties' dispute, and continuation of negotiation is not a ground for equitable tolling of the statute of limitations.

Finally, the Board addressed the disposition of the appeal. Specifically, the Board considered whether the CDA's six-year limitation period is a condition of the Board's jurisdiction, which would mandate dismissing the appeal for lack of jurisdiction, or whether it was a "substantive condition of the Government's claim or an affirmative defense to it" so that Boeing's complaint would be sustained on the merits. After a lengthy discussion of the Federal Circuit's decisions in *Arctic Slope* and *Sys. Dev. Corp. v. McHugh*, 658 F.3d 1341 (Fed. Cir. 2011), which held that a timely CDA claim is a jurisdictional prerequisite, the Supreme Court's recent decision in *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), which held that the Court of Appeals for Veterans Claims' 120-day time limit for appealing decisions of the Board of Veterans Appeals was not jurisdictional, and the Federal Circuit's en banc decision in *Cloer v. Sec'y of Health & Human Servs.*, 654 F.3d 1322 (Fed. Cir. 2011) (en banc), addressing equitable tolling under the National Vaccine Injury Act of 1986, the Board held that none of the intervening precedents abrogate *Arctic Slope's* holding that presentment of a timely CDA claim is a jurisdictional requirement under the CDA.

Accordingly, because the Government's October 2010 final decision asserting its claim for the alleged cost impact of Boeing's voluntary accounting changes was untimely, the Board held that it was not valid. "Given that it is invalid, it is a nullity and we lack jurisdiction to entertain an appeal from it."

In light of the backlog of unresolved DCAA audits and cost accounting issues, it is likely that Government claims will increasingly face statute of limitations hurdles. Contractors should be alert to the assertion of untimely claims and be prepared to determine when any asserted claims "accrued" in order to challenge those that accrued more than six years before their assertion.

Wiley Rein attorneys Martin P. Willard and Kara M. Sacilotto represented The Boeing Company in this appeal.