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ALERT

Court of Federal Claims Holds that Agency Administrative Processes Do Not Delay Accrual of Government Claim

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The Contract Disputes Act (CDA), 41 U.S.C. § 7103(a)(4)(A), provides that all claims, whether by a contractor or the Government, must be submitted within six years of the accrual of the claim. In *Sikorsky Aircraft Corp. v. United States*, Nos. 09-844C & 10-741C (Fed. Cl. July 18, 2012) (Lettow, J.), the Court of Federal Claims (COFC) held that an agency's administrative processes, even those set forth in the Federal Acquisition Regulation (FAR), do not delay accrual of a Government claim. Instead, accrual is governed by the definition in FAR 33.201, which focuses on whether the facts that "fix the alleged liability" of the contractor or Government "were known or should have been known," regardless of agency administrative processes.

In *Sikorsky*, the Government alleged that Sikorsky misallocated overhead costs in violation of the Cost Accounting Standards (CAS). Among other things, Sikorsky argued that the Government's claim was barred by the CDA's six-year limitation because the Government knew of the alleged CAS violation by 1999, but did not assert its claim until 2008. The Government countered that its claim did not accrue until either 2004, when Sikorsky's corporate administrative contracting officer (CACO) received an audit report showing the potential CAS violation, or 2008, when the agency completed administrative steps necessary (under FAR Part 30) for assertion of a Government claim for CAS noncompliance. In brief, these steps include the contractor's submission of CAS "Disclosure Statement" (a written description of the contractor's accounting practices), an audit of the Disclosure Statement for adequacy and compliance, and a determination of compliance or noncompliance. If the cognizant agency official

Authors

Kara M. Sacilotto
Partner
202.719.7107
ksacilotto@wiley.law

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identifies a potential noncompliance, the contractor is to provide a response, and the cognizant official makes a determination regarding the noncompliance. In the event of a noncompliance determination, and if the noncompliance is material, the contractor submits a description of any changes to accounting practices to remedy the noncompliance and a "general dollar magnitude" (GDM) or cost impact proposal intended to estimate the cost impact to the Government of the CAS noncompliance. Assuming the contractor submits a GDM, the cognizant agency official then negotiates the cost impact or, if agreement cannot be reached, issues a final decision.

In accordance with these steps, Sikorsky submitted a Disclosure Statement regarding changes to its accounting practices. The Defense Contract Audit Agency (DCAA) found that the Disclosure Statement was adequate but also that there would be a material cost impact to the Government. When Sikorsky, DCAA, and the CACO met in February 1999 regarding the accounting change, the DCAA auditor stated that the cost impact to the Government for 1999-2003 would be $140 million (M) in increased costs. In April 1999, DCAA issued a draft audit report that found that Sikorsky's revised accounting practice was not in compliance with CAS 418, and that the impact to the Government was increased costs of $5M and $32M in 2001 and 2008, respectively. In July 1999, DCAA issued its final audit report. In this report, DCAA stated that it found no instances of noncompliance with CAS 418, primarily because the cost impact on CAS-covered contracts for calendar 1999 was immaterial. DCAA noted, however, that its opinion could change based on the parties' agreement to revisit the potential cost impact in future years.

In 2002, DCAA began an updated audit of the accounting change. This time, DCAA's October 2004 audit report found that Sikorsky was in "potential noncompliance" with CAS 418 and that a compliant practice could result in a materially different allocation of costs to CAS-covered contracts. DCAA could not, however, estimate the cost impact.

Thereafter, the parties discussed the cost impact of the 1999 change as well as Sikorsky's planned implementation of a new accounting system in 2006. In addition, several different CACOs were assigned. Although Sikorsky claimed that it had reached an agreement with one CACO to waive any cost impact for past years in light of the impending 2006 accounting practice changes, the Government disagreed. Nonetheless, no final decision was issued until December 2008.

Sikorsky appealed the final decision and asserted a statute of limitations defense. The Government moved for summary judgment on the affirmative defense. Relying on *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967) and the FAR 52.230 clauses incorporated into CAS-covered contracts, the Government argued that a claim under a government contract does not accrue until "the completion of the administrative proceedings contemplated and required by the provisions of the contract." 386 U.S. at 511. The COFC noted that while "other recent cases have held that a government CAS claim accrues directly and straightforwardly when the government should have known of its potential claim," these cases did not address the argument based on *Crown Coat*. Thus, the court examined whether the CDA "vitiated the precedential viability of the *Crown Coat* line of cases in situations where the CDA applies." Slip op. at 12. The court held that it did.

First, the COFC held that the CDA is markedly different from the statutes at issue in *Crown Coat*. Notably, the CDA includes a six-year limitation period, as well as a 90-day or 12-month appeal period. The court found it would be "most odd" for *Crown Coat* to apply to the six-year period when the CDA includes these other limitations for filing appeals from administrative determinations. *Id*. at 14.

Second, the COFC held that "the CDA gives the government complete control over when it may assert a claim. The government, just like a contractor, is not required to wait on a board of contract appeals . . . And while the government may have its own internal review procedures that it must follow prior to submitting a claim, nothing in the CDA mandates such procedures, nor can such procedures delay accrual of a claim." *Id*. (citations omitted).

Third, the court found that even if *Crown Coat* applied, no contract provision delayed accrual of the Government's claim. The court rejected the argument that FAR 52.230-2 "requires" negotiation before a claim may accrue; it only provides that a failure to agree gives rise to a dispute. *Id*. at 16. Furthermore, the provisions of FAR 52.230-6, according to the court, do not "constitute a set of conditions that must be satisfied prior to filing suit," and "do not comprise the kind of coherent claim resolution process contemplated" by the clauses at issue in *Crown Coat*. *Id.*

Fourth, delayed accrual would be inconsistent with the intended functioning of CAS administration. The court reasoned that if the Government's position were correct, it could delay the accrual of its claims simply by refraining from issuing a final decision. A single party, however, cannot unilaterally or indefinitely delay the running of a statute of limitations. *Id*. (citing cases).

Accordingly, the court held that the "general rule" for accrual applied: a claim accrues when all events necessary to state a claim have occurred. For the CDA, a Government claim accrues when events that fix the alleged liability of the contractor and permit assertion of a claim were known or should have been known. *Id*. at 17. To determine if liability is fixed, the court starts by examining the legal basis of the claim. *Id*. For CAS 418 noncompliance, two conditions must be met: there must be a violation of CAS 418, and the Government must have actual or constructive notice of the violation. *Id*. at 17-18. Because there were genuine disputes of material fact in this case as to whether the Government knew or should have known of these two conditions prior to December 2002, the court denied the Government's motion for summary judgment on Sikorsky's statute of limitations defense. *Id*.

Sikorsky adds to the growing body of cases addressing the accrual of Government claims and, in particular, Government claims relating to accounting issues. In light of the significant backlog in DCAA audits and resulting delays in processing accounting changes and other matters, more Government claims could face timeliness issues. Contractors, therefore, should remain vigilant to claims asserted by the Government that relate to accounting issues about which the Government knew long before it asserted its claim or issued a final decision. Under *Sikorsky*, the fact that the FAR sets out administrative processes for addressing an alleged CAS violation is not, in itself, relevant.

Wiley Rein represents contractors with respect to cost accounting and CAS compliance as well as in connection with Government claims arising from accounting issues.