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A New Affirmative Defense - The ASBCA Applies The *Sikorksy* Standard for the Contract Disputes Act's Statute of Limitations

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A recent decision by the Armed Services Board of Contract Appeals (ASBCA) has, for what appears to be the first time, treated the Contract Disputes Act's statute of limitations as an affirmative defense as required by the Federal Circuit in *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315 (Fed. Cir. 2014). *See Coherent Logix*, ASBCA No. 59725 (Apr. 2, 2015). In *Coherent Logix*, the contractor, CLX, argued that the government's claim for unallowable costs paid to the contractor was time-barred under the Contract Disputes Act. Relying on the Federal Circuit's decision in *Sikorsky* and noting that the Contract Dispute Act's statute of limitations "is no longer a jurisdictional issue," the ASBCA squarely placed the burden of proof on CLX and ultimately held that CLX failed to prove that the government's claim for overpayment accrued more than six years prior to the contracting officer's final decision. This decision marks the first practical application of the*Sikorsky* decision and reaffirms that the Contract Disputes Act's statute of limitations is now an affirmative defense that must be asserted and proven by the party defending against a claim.

The *Coherent Logix* decision rests on the Federal Circuit's recent ruling that the Contract Disputes Act's six-year statute of limitations is not jurisdictional, a decision which overturned its own prior decisions holding the opposite. Instead, the statute of limitations is now treated as an affirmative defense to be raised by the party opposing the claim for costs. The result is that the burden of proving that the claim accrued within the statute of limitations has shifted from the claimant to the defendant; the defendant now has the burden of

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demonstrating that the claim accrued outside of the statute of limitations. In addition, as an affirmative defense, the statute of limitations must be raised in the defendant's initial pleading or else it will be deemed waived. When the statute of limitations was jurisdictional, it could be raised at any time.

Applying this new framework, the ASBCA found in *Coherent Logix* that the contractor failed to meet its burden of proving that the government's claim accrued outside the statute of limitations. Specifically, CLX submitted a final indirect cost rate proposal on August 13, 2008 for its 2007 fiscal year. Approximately five years later, on June 19, 2013, CLX submitted a revised final indirect rate cost proposal for 2007. On November 21, 2014, the contracting officer issued his final decision that CLX had included expressly unallowable patent legal costs in its 2007 submission that would need to be recovered from CLX. CLX argued the claim was time-barred. In ruling against CLX, the ASBCA found that the government's claim did not accrue when CLX submitted its indirect cost rate proposal in 2008 because the proposal simply included a line item for "Legal Fees" and did not clearly indicate that CLX was claiming patent legal costs. According to the ASBCA, it was not until August 1, 2013, when CLX provided the government with its General Ledger detailing the particular patent legal costs at issue, that the government knew or should have known that the costs had been claimed. CLX also did not assert that facts were peculiarly in the knowledge of the government, which would have shifted the burden to the government to prove those facts under the settled law governing affirmative defenses. As a result, the ASBCA held that CLX failed to meet its burden in proving that the government's claim accrued before the government received the General Ledger on August 1, 2013.

Although the ASBCA ruled against the contractor in *Coherent Logix*, it is important to keep in mind that the burden of proving an affirmative defense applies equally to contractors and to the government, depending on who is asserting the claim and who is defending. When a contractor is suing the government for costs, the government will face the same challenges as CLX did. As litigating under the Contract Disputes Act can be particularly tricky in light of the new *Sikorsky* standard, contractors should consult with outside counsel to ensure they understand the expectations and invoke the affirmative defense to their benefit.