Lessons From CDA Statute Of Limitations Disputes

Law360, New York (July 18, 2012, 1:03 PM ET) -- The Armed Services Board of Contract Appeals' recent decision in Appeal of TMS Envirocon Inc., ASBCA No. 57286, once again put the Contract Disputes Act's six-year statute of limitations into the spotlight. The decision, which held that the contractor had "failed to act diligently in preserving its contract claim rights" by failing to submit a certified claim within six years of accrual, is one of several recent decisions in which the board, and the Court of Federal Claims, have analyzed the timeliness of government and contractor claims. The recurring nature of these statute of limitations disputes provides a reminder to contractors to remain vigilant in protecting their right to assert claims under the CDA — and vigilant in defense of potentially untimely government claims.

Background

The Contract Disputes Act, 41 U.S.C. §§ 7101-7109, sets forth certain prerequisites for the exercise of jurisdiction over claims. Regardless of whether an appeal relates to the contracting officer's denial of a contractor's certified claim, or to a government claim against the contractor, the CDA's six-year statute of limitations applies to the underlying claim. Thus, subject to limited exceptions, claims submitted more than six years after accrual are not valid and cognizable under the CDA.

In addition, the CDA also requires contractors to bring actions challenging a CO's final decision within 90 days at the board (or within 12 months at the court). As discussed in greater detail below, the question of accrual is the key inquiry in determining when the statute of limitations will begin to run on a claim. Accordingly, whether seeking to file claims against the government for money owed under existing contracts, or defending against the government's increasingly ambitious claims agenda, contractors doing business with the federal government must be cognizant of the framework for analyzing claim accrual under the CDA.

Discussion

The CDA does not define the term "accrual." Thus, the board (and the court) rely on the Federal Acquisition Regulation 33.201 definition, which describes accrual as "the date when all events, which fix the alleged liability of either the Government or the contractor and permit the 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."

The critical portion of this definition for contractors is the instruction that claims accrue when the events giving rise to liability were known or should have been known. Several decisions so far this year have hinged on this factual inquiry, and an examination of these cases provides a brief refresher on some of the traps to avoid when conducting claim assessments.

Most significantly, once a contracting party is aware of the basis for its claim, it is "on the clock" and should not rely on discussions or agreements with the other party to resolve a dispute or toll the statute of limitations, at the expense of preserving its claim. As Judge Robert Hodges recently explained, "[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 … [th]us, parties may set a shorter limitations period, but not a longer one."[1]

In January 2012, the board issued a decision in Appeal of The Boeing Company, ASBCA No. 57490, granting the contractor's motion to dismiss the government's claim for $6 million in increased costs allegedly arising out of a voluntary accounting change. In this case, Boeing had notified the government of its accounting change in 2000 and provided the government with a cost impact analysis.

The Defense Contract Audit Agency audited Boeing's cost impact analysis in 2002, and the CO subsequently wrote a letter in 2003 informing Boeing that the accounting change was undesirable, and informed Boeing that it would be liable for the increased costs to the government (under FAR Part 30, the government will not pay the increased costs resulting from a voluntary accounting change unless the change is desirable, and not detrimental to the government's interests). Boeing disputed portions of the CO's letter, and between 2005 and 2010, the parties conducted "intermittent" negotiations to try to come to a resolution. Finally, in 2010, the government issued a final decision demanding approximately $6 million in increased costs.

Boeing moved for summary judgment and/or dismissal on the grounds that the claim was barred by the CDA's statute of limitations. The board agreed that the government's claim had accrued more than six years earlier, stating that the government's claim accrued "at the latest" in 2003 when the CO wrote a letter declaring the accounting change to be undesirable and stating that Boeing would be liable to the government for the resulting costs. By that date, all of the events serving as the basis for Boeing's alleged liability were known to the government, and the government's 2010 final decision itself did not describe any other events occurring after that 2003 letter.

Rather than contesting the accrual date, the government asserted two principal, and somewhat creative, arguments. First, it asserted that the CO's 2003 letter was actually the "final decision" for purposes of the appeal. The board rejected this argument, in part because the letter indicated that if the parties could not reach agreement, then the CO was "prepared to make a unilateral determination subject to appeal," and under the CDA, the expression of intent to submit a claim in the future is not a valid claim. Moreover, the board cited other evidence, such as the fact that Boeing had never appealed the supposed 2003 final decision (a necessary prerequisite to the board's jurisdiction), and the fact that the government had never sought to have the supposed final decision enforced.

In the alternative, the government asserted that the statute of limitations had been "equitably tolled" by Boeing's conduct. Specifically, that Boeing had used unfair negotiating tactics by leading the government to believe that the matter "was on the verge of settling" only to interject "entirely new, overriding issues into discussions." Equitable tolling is a valid doctrine, but applies only in limited circumstances, where a party has been "induced or tricked by its adversary's misconduct" into letting a filing deadline pass.

Here, the board held that very evidence cited by the government to support its argument that it had been tricked — i.e., the fact that Boeing allegedly kept moving the goal posts during negotiations — was evidence that the government should have known better and preserved its claim. Its failure to do so, amid ongoing discussions with the contractor, reflected a lack of diligence, rather than any misconduct on the part of the contractor. Accordingly, the government could not retroactively assert that it had been lulled into a belief that filing a claim would be unnecessary.

The board's June 2012 decision in Appeal of TMS Envirocon Inc., ASBCA No. 57286, echoed Boeing in two respects. In this case, the appellant, TMS Envirocon, alleged that after numerous differing site conditions impacted the performance of an Air Force contract, the government had encouraged TMS to wait until the end of contract performance to submit its claims, "at which point they would be mature and final." According to the contractor, it relied on government representations that it could submit its claims after completion, and only later learned that the government would not honor these alleged assurances. Therefore, the contractor argued that its claims did not accrue until contract completion.

The board rejected this argument, noting that the proper standard for claim accrual is "when TMS knew or should have known of the events giving rise to liability." In this case, TMS' claim accrued, at the latest, when its subcontractor had presented it with a request for equitable adjustment which quantified the claims under the contract, which occurred more than six years before TMS filed its claim.

The board also held that the statute of limitations would not be equitably tolled on the grounds that TMS had been "induced or tricked" by the government into letting the filing deadline pass. Noting that the TMS undertook several other steps, short of submitting a CDA claim (including the submission of a request for equitable adjustment in which it threatened to pursue a contracting officer's final decision in the future), the board held that the contractor's lack of diligence in pursuing its claim, rather than any government misconduct, caused it to miss the statute of limitations.

In addition to Boeing and TMS Enirocon, two other recent decisions centered on the CDA statute of limitations. In Raytheon Co. v. United States, the contractor and the government had entered into an advance agreement in 1999 regarding the allowability of costs associated with Raytheon's acquisition of Hughes Aircraft. The advance agreement tentatively authorized the Raytheon to invoice $105 million for these costs, subject to future government audit. In 2003, the DCAA did conduct an audit, and issued a report finding that $5 million of these costs were unallowable.

Raytheon subsequently reimbursed the government for this amount, which the government acknowledged in a 2004 letter. Then, after a U.S. Department of Defense Office of Inspector General report criticized the DCAA, it issued a second audit report in 2008, this time finding that $25 million of the costs were unallowable. Raytheon argued that the $25 million claim was barred by the statute of limitations.

The Court of Federal Claims agreed with Raytheon, finding that 1999, the year the parties entered into the advance agreement, was the year in which all events had occurred to establish a cause of action against Raytheon, because at that point, the government "had been aware of all the information on which it based the $25 million government claim."

Similar to recent board decisions, the court also rejected the government's argument that the advance agreement contained language delaying the statute of limitations, holding that the statutory six-year limit cannot be enlarged by agreement of the parties.

In contrast to Raytheon, the Board in Appeal of Lockheed Martin Corp., ASBCA No. 57525, declined to bar a government claim where it found that the government had not quantified the impact of an alleged Cost Accounting Standards noncompliance prior to the six-year statutory window. In that case, although the government was in possession of some contractor billing information, its claim did not "accrue" for CDA purposes until the DCAA had drafted a preliminary report alleging that the contractor's CAS noncompliance had actually resulted in overbillings to the government.

Conclusion

With the looming threat of sequestration and other budget cuts on the horizon, claims are likely to become an increasingly important part of contractors' (and the government's) bottom line. As such, there are several important lessons reinforced by the statute of limitations decisions issued so far this year.

First, and most importantly — once a contractor becomes aware of the events that trigger government liability under a contract, it must act within the six-year statute of limitations to file a CDA claim, or face dismissal of the claim on jurisdictional grounds. Equally important, even if the parties are attempting to resolve their dispute informally, outside of the formal claims process, the contractor must preserve its right to assert a CDA claim and be prepared to file before the claim "turns into a pumpkin" at six years.

Moreover, contractors should not rely on "discussions" with the government to toll the statute of limitations. Absent evidence that the contractor was "induced or tricked" into missing the filing date — which the court recently called a "stringent" standard, and which the cases demonstrate must result from some affirmative misconduct by the other side — equitable tolling is an uphill argument.

Finally, when contractors are negotiating with the government and preparing to file a claim, they must also remember that statements declaring their intention to seek a contracting officer's final decision in the future are not sufficient to preserve the underlying claim, which must be filed within six years in accordance with the procedures set forth in the CDA.

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[1] Raytheon Co. v. United States, No. 09-306C (April 2, 2012).