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Fed. Circ. Further Dulls CDA's Statute Of Limitations

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A few years back, a string of decisions at the Armed Services Board of Contract Appeals and the Court of Federal Claims invoked the Contract Disputes Act’s six-year statute of limitations to dispose of several long-pending contractor and government claims. Under the case precedent then in force, the CDA’s statute of limitations was considered “unequivocally jurisdictional,” and a party bringing a claim bore the burden of demonstrating it presented its claim to a contracting officer within six years of the claim’s accrual. This made the statute of limitations a potent tool for cutting litigation short early in an appeal. The Court of Appeals for the Federal Circuit overturned that precedent two years ago in Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315 (Fed. Cir. 2014), which transformed the six-year statute of limitations from a jurisdictional prerequisite (which could be invoked at the outset of an appeal to gain a dismissal) into a plain-vanilla affirmative defense, which the opposing party bears the burden of proving (and which seldom will support a dismissal at the outset of an appeal). In Kellogg Brown & Root Services Inc. v. Murphy, No. 2015-1148 (KBR), the Federal Circuit recently dulled the edge of the CDA’s statute of limitations further still.

Facts of the Case and Board Decision

KBR involved a contractor’s 2012 CDA claim for settlement costs for a subcontract it terminated for default in July 2003 and for which all performance had ceased by September 2003. The two primary components of the claim were the subcontractor’s construction costs for dining facilities in Iraq (completed prior to termination) and compensation for meals it served to U.S. troops after termination pending onboarding of the replacement subcontractor. For several years after performance ended, the contractor and subcontractor engaged in discussions and litigation over the amount due the subcontractor. In 2005, pursuant to a settlement agreement, the contractor converted the subcontractor’s default termination into a termination for convenience. Over a year and a half later, in August 2006, the subcontractor submitted its claim for costs to the prime contractor. Two months later, the contractor submitted the subcontractor’s request for payment to the government, but expressly declined to certify it or comment on its validity. The government declined to pay the bill until the prime contractor had settled the claim with the subcontractor. In 2008, the contractor submitted a certified claim to the contracting officer on behalf of the subcontractor, but withdrew the claim in 2010 before the contracting officer had issued a final decision. In 2012 (after a second lawsuit by the subcontractor), the prime submitted to the contracting officer a new certified claim, which eventually was deemed denied.

On appeal before the ASBCA, the government moved for dismissal, arguing that the claim accrued more

than six years prior to the 2012 submittal date and, under precedent then in force, the board lacked jurisdiction to consider the appeal. The contractor countered with a number of arguments, including that the claim did not accrue until the government refused to pay the uncertified request for subcontractor costs. It also argued the claim could not have accrued in 2003, because it took several years for the contractor and subcontractor to agree on the amount for which the prime contractor was liable, which was not fixed until receipt of the August 2006 subcontractor claim.

The board agreed with the government, finding the claim accrued in September 2003, when the subcontractor completed performance under the terminated subcontract. Noting the long delay in settling the subcontractor claim, the board reasoned that the prime contractor knew it was liable for some termination costs no later than the end of subcontract performance in 2003, although the quantum of the claim was not settled at that time. For this principle, the board cited Raytheon Co., Space & Airborne Systems, ASBCA No. 57801 et al., 13 BCA ¶ 35,319, where it held: "It is enough that the government [or contractor] knows, or has reason to know, that some costs have been incurred, even if the amount is not finalized or a fuller analysis will follow." Alternatively, the board held the claim accrued no later than the 2005 settlement agreement, which also fell outside the six-year period in which to bring the claim. Accordingly, the board dismissed the appeal for lack of jurisdiction.

Federal Circuit Reversal

The contractor appealed to the Federal Circuit, which reversed the board's decision and remanded for consideration on the merits. The court observed that claim accrual is defined as "the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known." FAR 2.101 Because the CDA does not permit assertion of a money claim unless a sum certain is stated, the court held that a claim for money cannot accrue until the claimant can state a sum certain. The court appears to have accepted the contractor's undisputed assertion that "it did not have sufficient information to request a sum certain" until the subcontractor first presented its claim to the prime in August 2006 — less than six years before the prime's submission of the 2012 certified claim.

The court expressly rejected the government's argument that, because this case involved a sponsored subcontractor claim, the prime contractor's claim against the government accrued at the same time the subcontractor's claim accrued against the prime — the date subcontract performance ceased following termination by the prime. To hold otherwise, the court reasoned, improperly would "require the filing of protective claims related to subcontractors while those claims are being resolved between the prime and sub."

The court also suggested the contracting officer's direction that the contractor submit a request for payment to the government only after the prime and subcontractor had settled on an amount was similar to "mandatory pre-claim procedures" that prevent claim accrual in "other, related situations." The court implied that any claim filed before the imposed procedures were complete would be premature.

Because the board dismissed the case on jurisdictional grounds, the Federal Circuit remanded the case for further proceedings on the merits.

Unresolved Questions

KBR raises more questions than it answers.

First, it calls into question the continued validity of board precedent that held a claim accrued when liability was fixed and some injury had been sustained, even if the injury could not be quantified precisely or might be revised in the future. See, e.g., Raytheon Co., Space & Airborne Systems, ASBCA No. 57801 et al., 13 BCA ¶ 35,319. The KBR outcome hinged on the contractor's undisputed assertion that it could not submit a claim in a sum certain until the subcontractor provided it with its termination claim. On the one hand, this is a step in the direction of fairness: Because a contractor must certify a sum certain, statute of limitation concerns should not require it to certify a sum in which it lacks sufficient confidence.

On the other hand, this case introduces new uncertainty. At what point is quantum sufficiently clear to trigger claim accrual? The court provided no clear answer. Presumably, it is still good law that, once a party possesses all information necessary to assert a claim, failure to analyze that information and recognize the claim will not toll the statute of limitations. See Raytheon Co. v. United States, 104 Fed.Cl. 327 (2012) (holding that the statute of limitations for government claim began to run when the contractor provided all financial information necessary to assess cost allowability, not the date five years later when the Government completed its initial audit of the costs in question); Raytheon Missile Sys., ASBCA No. 58011, 13 BCA ¶ 35,241 ("Accrual of a contracting party's claim is not suspended until it performs an audit or other financial analysis to determine the amount of its damages."). Alternatively, KBR may force a rethinking of the old rule that the statute of limitations is not tolled while the claimant analyzes information in its possession — a timeframe that may be substantial, depending on the complexity of a claim.

Second, it is not clear to what extent KBR will be applied outside the context of subcontract disputes and sponsored claims. A crucial aspect of this case was the distinction between the subcontractor's claim against the prime contractor and the prime's claim against the government, with accrual of the latter claim conditioned upon settlement of the former. It is possible, where there is no claim except a direct claim of a prime against the government (or vice versa), KBR may not apply at all.

Third, it is not clear what practical effect, if any, KBR will have on government claims. Government CDA claims generally do not involve requests for payment from a prime contractor to satisfy government liability to third parties. If the KBR holding is confined to the limited factual scenario of liability to third parties such as subcontractors, KBR may apply little if at all to government claims. On the other hand, the KBR holding may stand for the broader principle that claim accrual is delayed until a sum certain can be calculated with reasonable accuracy, even if the claimant already knows or should know of all events "that fix the alleged liability." This may allow the government to resurrect an old argument that a government claim does not accrue until completion of Defense Contract Audit Agency audits or other efforts that permit assertion of a reasonably accurate sum certain — an argument the Court of Federal Claims and the ASBCA previously have rejected.

Fourth, although the court "[took] note of the Board's concern for the lengthy pendency of this claim, and the Board's suggestion that a contractor could indefinitely delay the accrual of its claim," it did not squarely address this concern. The court accepted the contractor's argument that the allowable cost and payment clause imposes some limit on a contractor's ability to seek reimbursement after a contract has been closed out. So, although a contractor may not be able to drag out claim accrual "indefinitely," it may be able to do so well beyond six years, at least when third-party settlements are at issue.

Fifth, the court suggested the date of claim accrual was affected by the contracting officer's refusal to consider the claim until the prime and subcontractor had reached a settlement, or perhaps at least until

the prime was willing to certify the claim. The court did not explain how unilateral direction by a contracting officer can prevent claim accrual or render a claim "premature" because pre-claim procedures had not yet taken place. This is different from equitable tolling (which the court did not find here), as the court suggested that a pre-settlement claim would be premature, not that the contracting officer's direction tolled the statute for a ripe claim. This raises the possibility that, when a claim might otherwise be untimely, a contractor may be able to argue claim accrual was delayed by a contracting officer's insistence that certain steps be taken before the claim would be considered.

Finally, the Sikorsky court's 2014 determination that the CDA's six-year statute of limitations will no longer be treated as jurisdictional means the statute of limitations no longer stops litigation in its tracks. The six-year limitation period thus is a much less potent tool for defeating a claim than it once was. In the post-Sikorsky world, it is very unlikely that the statute of limitations will be given much attention until after a case is more fully developed and the merits are addressed — development the board did not permit in KBR. Indeed, the ASBCA already has begun declining to consider the statute of limitations until after reaching the merits of an appeal. See, e.g., The Ryan Co., ASBCA No. 58137, 15-1 BCA ¶ 35,998 (denying motion to dismiss on jurisdictional grounds and holding that nonjurisdictional statutes of limitations are treated as affirmative defenses subject to a determination on the merits after adequate discovery and development of the record).

Conclusion

For contractors with drawn-out disputes over costs owed to subcontractors, KBR offers hope that a CDA claim may still be timely even if liability for the costs accrued more than six years in the past, if there is a good-faith argument that a sum certain could not be asserted until later (due, for example, to ongoing negotiations). Given the uncertainties of the breadth of KBR's holding, however, prudent contractors should be diligent in driving negotiations to their conclusion and presenting a claim to the contracting officer as soon as practicable, even if a more liberal reading of KBR might justify taking more time. As to the other questions, only time — and litigation — will tell how broadly courts and boards will read KBR.

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