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Rush To Judgment - FAR Councils Propose Daily Compounding Of Interest For TINA Violations

By: John W. Chierichella and W. Bruce Shirk

We previously noted DCAA's hasty implementation of the Court of Appeals for the Federal Circuit's ("CAFC's") decision in *Gates v. Raytheon Co.*, 584 F.3d 1062 (Fed. Cir. 2009), requiring daily compounding of interest on adjustments made to rectify Cost Accounting Standards ("CAS") noncompliances. *DCAA Implements Federal Circuit Decision Requiring Interest Compounded Daily on Adjustments for CAS Noncompliances (June 14, 2010)*. We say "hasty" because – while noting that its holding was required by *Canadian Fur Trappers v. United States*, 884 F.2d 563 (Fed. Cir. 1989) – the panel expressed reservations regarding that decision's validity, commenting that appellee's (Raytheon's) arguments "may support the proposition that *Canadian Fur Trappers* was erroneously decided." Not surprisingly, Raytheon accepted this implicit invitation to petition for rehearing *en banc*, and that petition is currently pending. Nonetheless, the FAR Councils are now rushing to mimic DCAA by proposing in equally hasty fashion to extend the holding to overpayments under the Truth in Negotiations Act ("TINA"). 75 Fed. Reg. 57719-57721 (Sept. 22, 2010).

The Councils say they are proposing the rule because (a) the CAFC has decided that "the interest on CAS cost impacts is set by reference in the enabling statute to 26 U.S.C. 6621 . . . which led to calculation of the interest using daily compounding [under 26 U.S.C. 6622]," and (b) "TINA also references 26 U.S.C. 6621 for interest calculation," therefore, (c) 26 U.S.C. § 6622 requires that interest on "TINA cost impacts" likewise be compounded daily. The Councils do not identify language in Section 6622 that "leads" to calculation of interest using daily compounding for TINA overpayments, probably because, as the CAFC implicitly acknowledged, there is none.

The CAFC observed that, read literally, the compounding requirement of 26 U.S.C. § 6622 is limited to a small set of specific circumstances, *i.e.*, when an "amount of any interest" is owed under:

(a) Title 26 of the U.S. Code (the Tax Code);

(b) 28 U.S.C. § 1961(c)(1) (interest on money judgment in a civil case in district court);

(c) 28 U.S.C. § 2411 (interest on taxpayer overpayments); or

(d) when "any other amount [is to be] determined by reference to such amount of interest." 26 U.S.C. § 6622.

The plain language of Section 6622 describes a "closed loop" that applies daily compounding to amounts of interest owed in connection with the Tax Code or one of the two referenced sections of Title 28 and to nothing

else. If the plain meaning of the language of a statute is clear, neither courts nor agencies are empowered to stretch the language beyond that meaning. *Connecticut Nat'l Bank v. Germaine*, 503 U.S. 249, 253-54 (1992) ("We have said time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). The plain language of Section 6622 simply does not require the imposition of daily compounding of interest on TINA overpayments and cannot provide a basis for doing so. And plainly, if Raytheon prevails on rehearing, then this proposed rule will prove to be nothing more than a premature waste of everyone's time.

The Councils downplay the potential negative effects of the proposed rule, arguing they "do not expect [it] to have a significant economic impact on small businesses" since "TINA requirements generally do not apply to contracts with small entities" and, after all, "the numbers of contractors found to have submitted defective cost or pricing data are a minute subset of contractors to whom TINA applies...." 75 Fed. Reg. 57719. These unsupported assertions ignore the substantial role small businesses play as subcontractors whose subcontracts exceed the TINA threshold and necessarily incorporate defective pricing clauses via the flowdown mechanism. And they misleadingly draw attention away from the very significant potential impact of compounding on those small and large businesses that would encounter it. For example, the potential cost of compounding would greatly increase the perceived litigation risk for contractors, especially small ones, rendering it less likely they would exercise their right to dispute even clearly questionable audit findings of defective pricing.

We noted in our June 2010 blog article (a) that, prior to *Gates v. Raytheon*, contractors paid simple interest on CAS noncompliance adjustments and (b) that the difference between simple and compounded daily interest is significant, particularly when there is an extended period of time between the date on which the violation is found to have occurred and the date on which the amount owed is paid and rates are relatively high during that period. This difference between simple and compounded daily interest would likewise be significant in the context of defective pricing overpayments. A simple example will suffice.

In *Wynne v. United Technologies Corp*., 463 F.3d 1261 (Fed. Cir. 2006), the CAFC denied an Air Force claim for a contract price reduction of some $300 million for a contract performed during Fiscal Years 1986-1990. Had liability been found, the contractor would have been liable for simple interest on the $300 million, which after some 16 or so years is likely to have been in the neighborhood of $288 million. In contrast, had the proposed rule been in effect requiring compounded daily interest, the contractor would have relocated to a far more expensive neighborhood in which interest would have approximated some $483 million – a difference of some 41%.

The difference between simple interest and interest compounded daily is significant by any measure and in many cases could be sufficient to cause a contractor to think long and hard about disputing any audit finding of defective pricing, no matter how frivolous. Perhaps that is the Councils' motivation in rushing to propose the rule before the law is even settled by the courts. As Mel Brooks put it so bluntly in his *History of the World, Part 1* – "It's good to be the king."

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