Raytheon Defeats Government Claims Arising from Changes in Cost Accounting Practices as Untimely

The Armed Services Board of Contract Appeals (ASBCA) published yet another decision dismissing government claims as untimely under the statute of limitations. *Raytheon Company, Space & Airborne Systems*, ASBCA No. 57801, *et al.* (Apr. 22, 2013).[1] The ASBCA dismissed three government claims against Raytheon, amounting to over US$7.5 million. The claims arose from changes in Raytheon's cost accounting practices that the company implemented in 2004 and 2005. Raytheon notified the government of the changes in 2004 and, with the notifications, or soon thereafter, notified the government that certain of the changes would result in the government paying increased costs.

Between July and October 2011, the Defense Contract Management Agency (DCMA) issued four Contracting Officer's Final Decisions seeking to recover increased costs that resulted from the changed cost accounting practices. Raytheon appealed the Final Decisions and moved to dismiss the government's claims for lack of jurisdiction, because the claims were untimely.

For the government's claims to be timely under the Contract Disputes Act's (CDA) statute of limitations,[2] the government must have asserted the claims within six years of their accrual. Claims accrue when the government knew, or should have known, of the events that fix the contractor's alleged liability. FAR 33.201.

Raytheon argued that the government's claims accrued when Raytheon notified the government of the changed cost accounting practices and the potential for increased costs before July and October 2005 (i.e., more than six years before DCMA issued the Final Decisions).

The government countered that it could not have known of the increased costs when Raytheon notified it of the changes, because: (i) Raytheon only provided estimates of the potential cost impacts, and not formal "general dollar magnitude" proposals required by the FAR; (ii) Raytheon later updated its estimates within the statute of limitations period; (iii) Raytheon characterized the estimated cost impacts as "immaterial;" and (iv) the Defense Contract Audit Agency (DCAA) did not audit and estimate the cost impacts associated with the changes until May, June, and August 2011.

The ASBCA squarely rejected each of the government's arguments, holding that:

> Raytheon did notify the government of a dollar cost impact from the accounting change[s], which is enough to trigger the statute of limitations. Claim accrual does not depend on the degree of detail provided, whether the contractor revises the calculations later, or whether the contractor characterizes the impact as "immaterial." It is enough that the government 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.

1 The ASBCA originally issued the decision under seal on April 22, 2013.

2 *See* 41 U.S.C. § 7103(a)(4)(A).

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As it did in *Raytheon Missile Systems*, ASBCA No. 58011, 13-1 BCA ¶ 35241, and as the Court of Federal Claims held in *Raytheon v. U.S.*, 104 Fed. Cl. 327, *recon. denied*, 105 Fed. Cl. 351 (2012), the ASBCA held that a government claim can accrue prior to a DCAA audit report; the government's delay in assessing the relevant facts does not serve to delay the accrual of its claim. In effect, the ASBCA affirmed that the purpose of the CDA statute of limitations is to allow the government a reasonable opportunity to perform such an assessment, not to grant the government six years after its investigation is completed to initiate suit.

Show Some Cost Impact

The ASBCA granted Raytheon's motion to dismiss for three of the four claims. The fourth claim related to a change in cost accounting practice about which Raytheon notified the government well outside of the statute of limitations period. Unlike the other changes, however, Raytheon did not include an estimated cost impact with this change notification. Raytheon did not provide an estimate of the cost impact to the government until over a year later, i.e. within the statute of limitations period.

Raytheon argued that, notwithstanding the lack of a cost impact estimate, the government should have known of the events that fixed Raytheon's alleged liability: (i) the government was on notice of a change in cost accounting practices, (ii) the change was implemented (i.e., increased costs were accruing to the government), and (iii) the government had complete access to Raytheon's cost accounting system sufficient to evaluate and verify the impact of the change, all more than six years before DCMA issued its Final Decision.

The ASBCA determined that these factors were insufficient to put the government on actual or constructive notice of its claim: "Although the government knew of the fact of the change, it did not know the consequences (i.e., it did not know if it had a cause of action), nor do we think it reasonable for the government to have to pursue this on its own…"

Implications

This decision is noteworthy because it is the first to specifically set forth the elements that give rise to the accrual of a government claim against a contractor for increased costs associated with changed cost accounting practices. A claim relating to a change in cost accounting practices accrues when the contractor (1) notifies the government of the change; (2) provides the government an estimate of the increased costs that may result from the change; and (3) implements the change.[3]

Contractors should, therefore, notify the government of any increased costs that may result from a change in cost accounting practices as soon as practicable, i.e. as soon as the contractor has reliable information reflecting a cost impact, to start the clock on the CDA's statute of limitations.

Further Reading

"ASBCA Rejects "Gamesmanship" Regarding Accrual of Government Claims Under the Contract Disputes Act"

"ASBCA Identifies Contractor Cost Submissions as Critical to Claim Accrual for Statute of Limitations"

"Recent Court Decisions Provide Insight for Government Contractors into the Contract Disputes Act's Statute-of-Limitations Provision"

"Contractor Success In Asserting The CDA Statute Of Limitations Against Government Claims"

[Note: Arnold & Porter represented Raytheon Company, Space & Airborne Systems in the case discussed above, and represented Raytheon Company in the referenced *Raytheon Missile Systems*, ASBCA No. 58011, 13-1 BCA ¶ 35241, and *Raytheon v. U.S.*, 104 Fed. Cl. 327, *recon. denied*, 105 Fed. Cl. 351 (2012).]

3 That the change must be implemented derives from the FAR's requirement that, for a claim to accrue, some injury must have occurred. The government is not injured until a changed cost accounting practice is implemented and the government pays increased costs as a result.

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or any of the following attorneys:

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