

Contract Disputes

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Overview

- I. New Case Law on CDA Statute of Limitations and Impacts for Contractors
- II. Asserting Defenses to Government Claims: *Maropakis* and its Progeny
- III. Identifying Claims / REAs and Pursuing Affirmative Recovery Opportunities

New Case Law on CDA Statute of Limitations and Impacts for Contractors

CDA Statute of Limitations

- The Contract Disputes Act, 41 U.S.C. §§ 7101-7109, includes a 6-year SOL
- Claims submitted more than six years after **accrual** are barred by the CDA
- CDA does not define the term “accrual.” The Board (and the Court) rely on the Federal Acquisition Regulation 33.201 definition:
 - ... **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** ...
- Until recently, SOL was held to be “jurisdictional,” which meant that the boards and COFC lacked jurisdiction over claims beyond the 6-year window -- SOL could be raised at any time, by either party, or the court, and it could not be waived or tolled by agreement of the parties
- In *Sikorsky*, the Federal Circuit made a significant change in the SOL landscape

CDA Statute of Limitations

Sikorsky Aircraft Corp. v. United States, 2013-5096, -5099
(December 10, 2014)

- Government alleged that Sikorsky had allocated certain costs in noncompliance with CAS 418 during the 1999 to 2005 period.
- COFC held that the CDA SOL had not run, and concluded that the government had not shown that Sikorsky's allocation practice failed to comply with CAS 418.
- Government appealed the COFC's ruling on the merits, and Sikorsky cross-appealed, arguing that the CDA SOL had run and that the COFC's ruling on SOL had to be addressed before the merits because the CDA SOL is jurisdictional.
- Court held that the statute of limitations is "not jurisdictional" and "need not be addressed before deciding the merits."

Statute of Limitations Case Law

- Discussion – where are we now?
 - ICS Claims
 - CAS Noncompliance Claims
 - Accounting Change Claims
 - TINA

Statute of Limitations

Key considerations:

- Be on the lookout for time-barred claims
- Dealings with CO and DCAA
- SOL works both ways
- Other considerations

Asserting Defenses to Government Claims: *Maropakis* and its Progeny

Maropakis

- *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010)
 - Contract completed 467 days late
 - Maropakis requested 447 day extension
 - Letter not certified
 - Did not request final decision by CO
 - CO issues final decision on government’s claim for liquidated damages
 - Federal Circuit
 - Reject Maropakis’ argument that the underlying facts of its time extension request could be presented as a defense to the government’s liquidated damages assessment
 - “[A] contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, whether asserting the claim against the government as an affirmative claim or as a defense to a government action.”

Developments

- *Sikorsky Aircraft Corp. v. United States*, 102 Fed. Cl. 38 (2011)
 - *Maropakis* involved a defense seeking contract modification and not a “traditional common law defense that [is] independent of the means by which a party seeks equitable adjustment to a government contract.”
- *TPL, Inc. v. United States*, 118 Fed. Cl. 434 (2014)
 - Court ignored “common law” labels Contractor applied to defenses in breach of contract case: impracticability, mutual mistake of fact, and unconscionability.
- *Total Eng'g, Inc. v. United States*, 120 Fed. Cl. 10 (2015)
 - *Maropakis* did not bar contractor's “defective specifications” defense to a government claim.
- *Asfa Int'l.*, ASBCA No. 57880, 14-1 BCA ¶ 35,736 (Sep 2014)
 - *Maropakis* did not bar Contractor’s defense of waiver by forbearance against Government claim for liquidated damages.

Developments

- *Raytheon Co. v. United States*, 747 F.3d 1341 (Fed. Cir. 2014)
 - The government's failure to obtain a CO's final decision on its equitable adjustment defense prohibited the Court from considering the government's defense.
- *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000 (Fed. Cir. 2015)
 - Contractor sought (1) remission of liquidated damages, asserting the LD clause was unenforceable; (2) remission of LDs, asserting entitlement to time extensions; (3) additional compensation on account of other contract changes.
 - Federal Circuit affirms COFC dismissal of the claim for remission based on entitlement to time extension.
 - Entitlement to an extension had not been properly submitted for the CO's final decision, meaning the COFC had no jurisdiction.

Where Are We Now?

- “Seeking an adjustment of contract terms”
- “Traditional common law defenses”
- Does the label matter, if the effect is the same?



Practical Takeaways

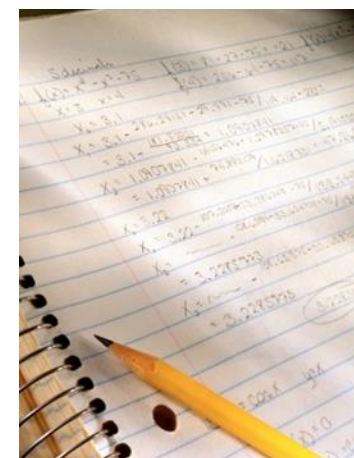


- Be mindful of potential impacts
- Identify defenses to government claims early in the claims process
- Recognize this is a developing area of law
- Consider protective claims to the contracting officer

Identifying Claims / REAs and Pursuing Affirmative Recovery Opportunities

Identifying Potential Claims

- Key contract clauses and doctrines
- How to spot a potential “claim”
- How to document and present a potential “claim”



REA and Contract Disputes Act “Claim”: Differences?

- Differences between an REA and a “Claim” under the CDA
 - What are the differences?
 - Why are these differences important?
 - How do these differences impact your approach?

REA vs. Contract Disputes Act Claim

- Key differences between CDA claim and REA
 - Timing
 - Interest
 - Cost allowability



Claims, cont.

- Nonappropriated Fund Instrumentality (NAFIs)
- Tucker Act Claims

Other considerations when filing a claim:

- Customer considerations
- Business considerations
- Costs of litigation

Case Study

- *SUFI Network Servs., Inc. v. United States*

Questions?

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