Over the past decade we have devoted many words to the Contract Disputes Act's Statute of Limitations. In our view, the CDA Statute of Limitations represents one of the most significant legal issues to impact contractors during that time frame. Or at least it did, before the Federal Circuit **turned it** from a jurisdictional issue into an affirmative defense about six years ago. Regardless, the CDA Statute of Limitations can still come into play during disputes and litigation.

This article is a reminder that the CDA Statute of Limitations can work to the advantage—or disadvantage—of either party. A failure of *either party* to file its claim within the six-year statute of limitations very likely will lead to that claim being denied by the courts.

We were reminded of this truism once again, when the ASBCA heard **an appeal** by Parsons Government Services with respect to its 2011 indirect cost rates, which were unilaterally established by its DCMA Corporate Administrative Contracting Officer (CACO).

In summary, Parsons owned its own corporate headquarters building until 2011, when it entered into a sale/leaseback arrangement. Prior to 2011, the building had been depreciating, and Parsons had claimed that depreciation as an allowable cost. But the sale/leaseback changed the situation. (See the cost principles at 31.205-11, 31.205-16, and 31.205-36. As you might guess, it's a bit complicated.) When Parsons calculated its 2011 indirect rates, in September 2012, it included a credit for the gain on the sale of its building as well as the actual lease expenses it was now paying. Arguably, the cost principle(s) required an adjustment of the actual lease expenses; the previous depreciation amount (plus other ownership costs) as adjusted by the gain or loss recognized on disposition established a ceiling on the amount of allowable costs that could be claimed. From the ASBCA decision, it seems that Parsons did not make the required analysis to determine how much of its lease payments were allowable.

Apparently, Parsons realized its error after completion of the DCAA audit, when the parties were negotiating final indirect cost rates (also known as "final billing rates"). In March or May 2018 (the decision cites both dates), Parsons noted that it had under-claimed allowable lease expenses and "respectfully request[ed] that the Government recalculate lease cost allowability, as well as the separate allowability of the other building costs the company incurred in 2011 and 2012." Judge D'Alessandris, writing for the Board, noted that "Parsons did not submit a revised indirect cost rate proposal incorporating the costs asserted in the letter, and did not include a claim certification." Which makes some sense to us, because Parsons thought they were negotiating with the CACO, not filing a claim.

However, Parsons' request was unavailing. In September 2018, the CACO was done negotiating, and issued unilateral final indirect cost rates. The unilateral rate determinations rejected certain lease costs included in Parsons' indirect cost rate proposals, and did not address Parsons' claimed additional costs. The CACO determined that Parsons (via its subsidiaries) had claimed millions of dollars in unallowable lease expenses in its 2012 final billing rate proposal, and directed Parsons to submit adjustment vouchers for all affected contracts if the unilaterally determined rates differed from the rates used in Parsons' interim billings. That determination was received by Parsons on September 13, 2018.

Notably, the unilateral determination did not inform Parsons of its appeal rights, as it probably should have. However, Parsons is a big corporation, a long-time government contractor, and it has top-notch administrative personnel who are well-versed in government contracting requirements. Thus, it should not have needed to be reminded of its appeal rights.

It took six months for Parsons to file a claim with its CACO regarding the unilaterally determined 2011 indirect cost rates. It filed its claim on March 24, 2019 and the CACO denied the claim on May 24, 2019. Parsons subsequently appealed the denial at the ASBCA on July 1, 2019.

The chronology related above proved fatal for Parsons' appeal.

First and foremost, Judge D'Alessandris found that Parsons did not need to file another claim with the CACO after receiving the unilateral rate determination. We are going to quote the Judge (legal citations omitted) because it's that important:

It is well settled that a unilateral rate determination is a government claim. See FAR 52.216-7(d)(4) ('Failure by the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of the Disputes clause.'). Upon receipt of the unilateral rate determination, Parsons could either accept the determined indirect cost rate as the final rate, or appeal the unilateral rate to this Board or the Court of Federal Claims within the time permitted by the CDA. Parsons did not appeal within the allowable time period (90 days for appeals to the Board) and the FY2011 unilateral rate determination became Parsons' final indirect cost rate. See FAR 2.101 ('Final indirect cost rate means the indirect cost rate established and agreed upon by the Government and the contractor as not subject to change.').

Based on that language, the Judge found that Parsons' failure to submit its appeal to a judicial forum (either the Court of Federal Claims or ASBCA) within the Contract Disputes Act's deadlines was fatal to the Board's jurisdiction. ("As Parsons did not file its appeal within 90 days of its receipt of the unilateral rate determination, its claim pertaining to the FY2011 lease costs is barred by the statute of limitations.")

Parsons argued that its new costs (raised in March or May 2018) were not included in the CACO's unilateral rate determination and thus could be heard by the Board. However, the Board didn't accept that argument, writing –

Parsons further asserts that the additional lease costs first raised in its May 2018 letter were not considered by the government in the September 2018 unilateral rate determinations. According to Parsons, these costs were raised in its March 2019 certified claim, and thus, are properly before the Board. … However, even if Parsons were correct that it could raise a claim for new indirect costs after the establishment of the final indirect cost rates by the unilateral determination, *Parsons' claim here would be barred by the six-year statute of limitations*. Parsons' claim asserts a sum certain for FY2011 costs, but not for any later years. Thus, to be timely, Parsons' claim would have had to have been submitted by the end of 2017, but it was not submitted until March of 2019.

(Emphasis added.)

The point of this article is not to beat up on Parsons. The point of this article is to reinforce the idea that contractors must be aware of the statute of limitations language in the Contract Disputes Act, and that they must be aggressive in asserting their rights before the statute of limitations kicks-in. Each of us needs to watch that timeclock and, when it approaches the deadline, we need to take the appropriate action.

For example, if you submitted your proposal to establish final billing rates in July, 2019, then you have until July, 2025 to establish final billing rates. (Unless the parties agree to "toll" the statute of limitations.) If it is January, 2025 and the rates haven't yet been finalized, it's time to discuss next steps with your legal counsel. It may be appropriate to submit a claim at that time in order to preserve your right to appeal.

If you don’t submit a proactive claim and you let the CDA statute of limitations timeclock expire without having done so, then you may have to live with whatever decision your ACO, or DACO, or CACO makes.