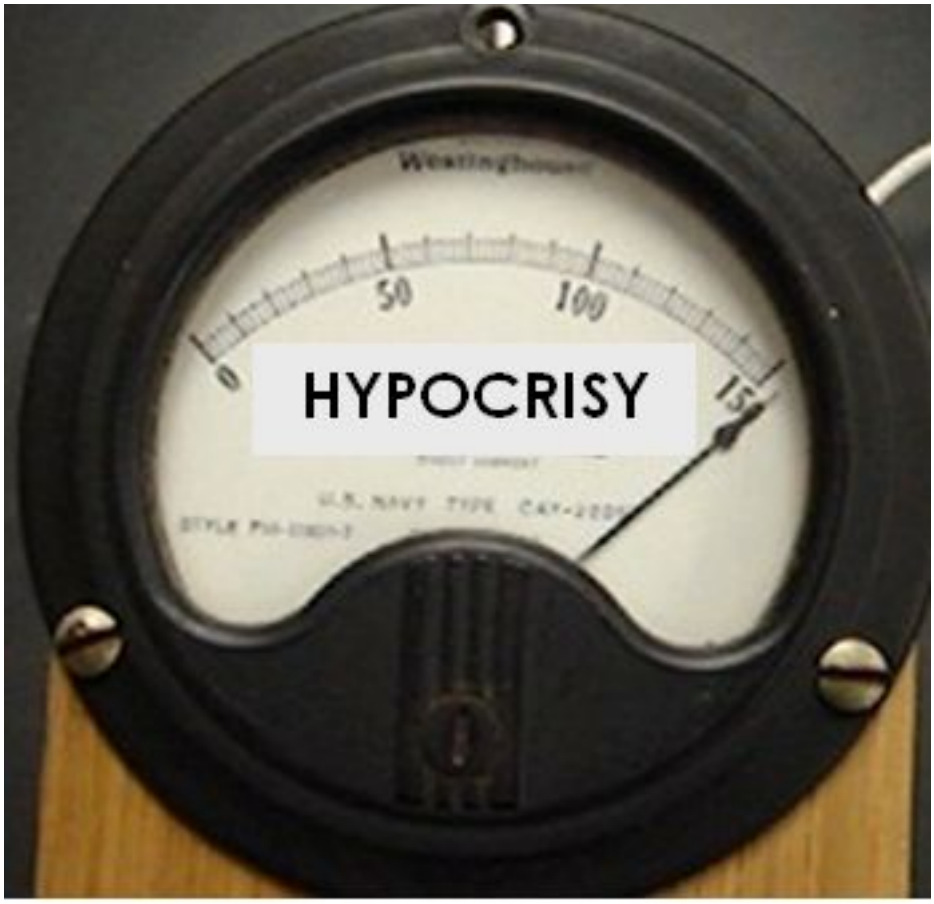

We have another U.S. Court of Federal Claims decision to discuss today. But before we do so, you need some background.

1.

Sikorsky Aircraft Corporation has been enmeshed in complex litigation with the U.S. Government over an alleged noncompliance with Cost Accounting Standards (CAS 418), appealing the Government's demand for roughly $80 million at the Court of Federal Claims. In December 2011, we **told readers** about the factual background of the case and expressed some layperson-type approval for Judge Lettow's interpretation of the requirements found in CAS 418. Subsequently, Judge Lettow **ruled against** the Government's argument that its claim was not time-barred by the Statute of Limitations found in the Contract Disputes Act of 1978 (as implemented in the Federal Acquisition Regulations). As we told readers, the Judge helpfully ruled that an agency's administrative procedures—even those mandated by the FAR—do not act to delay accrual of a Governmental claim. The clock starts ticking when the Government knew—*or should have known*—that it had suffered an injury

. *Period.*

That's not to say the Judge Lettow ruled for Sikorsky that the Government's claim was time-barred; rather, the Judge simply ruled against the Government's argument as to why it should not be time-barred, finding there were genuine issues of material fact that needed to be addressed in a trial.

1.

The DCAA has recently issued audit guidance that (1) auditors are to report that a contractor is denying them access to records when the contractor asserted that any of its records were protected by attorney-client privilege, and (2) auditors are to obtain contractors' internal audit reports (and, where helpful, the associated working papers), and to report that a contractor is denying them access to records if the contractor refuses to provide the requested information—even when the contractor asserts that that requested internal audit reports were generated under attorney-client privilege. We discussed the two pieces of audit guidance **right here** . Our concerns revolved around the fact that Courts have consistently denied DCAA access to contractors' internal audit reports—whether or not they were prepared under attorney-client privilege. DCAA seems to be ignoring legal precedent in its quest for contractor information. Attorney Karen Manos' excellent article on the topic can be found **over here** . Further, we were concerned about DCAA's attack on the time-honored concept of attorney-client privilege. As Ms. Manos noted (and as we subsequently wrote about), disclosing attorney-client privileged documents to DCAA may well result in a broad waiver of that privilege, to the detriment of the contractor. So it's kind of a big deal and every contractor's counsel should be in the process of drafting policy positions regarding what information will and will not be released to DCAA.

With that background in mind, let's now look at Judge Lettow's September 13, 2012 decision in the continuing Sikorsky CAS 418 litigation, in which **he ruled on a motion** by the Government to strike e-mails between DCAA auditors (used by Sikorsky as evidence in its arguments that the Government's claim was time-barred by the CDA Statute of Limitations), because those e-mails were subject to the "deliberative process privilege."

Yeah, you read that right. The Government asserted that e-mails between DCAA auditors were subject to privilege and should not be disclosed to the contractor, even though the contractor is using those e-mails in its appeal of a Government claim for some $80 million dollars.

On one hand the DCAA is mounting a concerted attack on attorney-client privilege and may well be recommending that contractors' costs be suspended if the contractor refuses to provide protected documents—and this is with respect to an ongoing audit where no wrong-doing has been alleged. But on the other hand, DCAA has declared that its own internal communications (where no attorney was present) are privileged and should not be provided even in the midst of on-going litigation, where the contractor might use those communications to its advantage.

The hypocrisy *burns*, doesn't it?

Judge Lettow explained the situation thusly—

Germane to Sikorsky's statute of limitations defense is the string of e-mails (identified as 'Exhibit P,' …) at the nexus of the current dispute. Exhibit P comprises exchanged e-mail messages between Mr. Robert Boyer, an auditor, and Ms. Janice Berardi, his superior at the Defense Contract Auditing Agency ('DCAA'), regarding audits of Sikorsky. The exhibit has an extensive history in this litigation. It was originally produced to Sikorsky by the government on February 17, 2011, more than eighteen months ago, as part of an unremarkable (and unremarked) set of discovery responses. … Five months later, on July 20, 2011, Sikorsky deposed Mr. Boyer and questioned him about Exhibit P, without any contemporaneous objections from the government. … At the end of Mr. Boyer's deposition, however, counsel for the government stated, '[i]t's come to my attention that [Exhibit P] may be the subject of deliberative process privilege, because it . . . refers to an ongoing DCAA audit. So I would like to request that [Exhibit P] and the deposition transcript be sealed for now, until this deliberative process issue can be determined.'
…
Sikorsky agreed to the government's request. ….

Sikorsky's counsel spent the next six months trying to get the Government to determine whether it would or would not be asserting "deliberative process privilege" over the Exhibit P e-mails, to no avail. Meanwhile, DCAA was wrestling internally with establishing procedures regarding when and how the deliberative process privilege would be asserted. Finally, on December 19, 2011, DCAA Director Pat Fitzgerald "officially delegated the authority to assert the deliberative process privilege to certain subordinates. … A month later, on January 19, 2012, DCAA Regional Director Ronald C. Meldonian asserted the deliberative process privilege over, among other documents, Exhibit P."

Let's digress here and delve into the concept of "deliberative process privilege," courtesy of Judge Lettow. He wrote—

The deliberative process privilege protects 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' …

The deliberative process privilege asserted here is one of the several branches of 'executive privilege.' Those branches relate to a range of executive functions and actions and may be considered as having a hierarchical ranking in importance. The strongest branch of executive privilege consists of what may be termed the 'Presidential privilege,' which rests in large part on the constitutional separation of powers, affords the President of the United States considerable autonomy and confidentiality, and gives 'recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties.' … Still another branch of the executive privilege consists of the 'state secrets' or 'national security' privilege, which protects from disclosure the executive branch's military, diplomatic, and foreign policy secrets.
…
Other aspects of executive privilege include a quasi-judicial privilege that protects the mental processes of executive officials when acting in a judicial capacity… the informer's privilege, which protects the identity of criminal informants … and the law enforcement investigatory privilege, which protects information produced pursuant to investigations of potential violations of the law. …

The deliberative process privilege 'was created to encourage 'open, frank discussion between subordinate and chief concerning administrative action,' and to 'prevent injury to the quality of agency decisions.'' … The privilege is a creation of federal common law and thus is recognized under Fed. R. Evid. 501. … The privilege is delineated by several procedural and substantive requirements. Procedurally, the privilege can only be invoked by an agency head or his or her subordinate after careful, personal review … and that head or designee must identify the specific information that is subject to the privilege and provide reasons for maintaining the confidentiality of the pertinent record … Substantively, the government must demonstrate that the allegedly privileged material is both pre-decisional and deliberative. Material is pre-decisional if it addresses activities 'antecedent to the adoption of an agency policy.' … 'Subjective documents which reflect the personal opinion of the writer, rather than the policy of the agency are considered privileged information because they are predecisional.'
…
Material is deliberative if it addresses 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.'
…
Thus, the privilege does not protect purely factual material, 'except as necessary to avoid indirect revelation of the decision making process.' ….

In a footnote, Judge Lettow reported that the notion of deliberative process privilege can be

traced back to the Eisenhower Administration. In other words, it is the creation modern jurisprudence and has no roots in English Common Law. (Let's note here that we are not attorneys and we are deducing the lack of pedigree solely from Judge Lettow's decision.)

The Judge spent several pages describing the tests for deliberative process privilege and discussing whether or not the DCAA e-mails met those tests. For example, he wrote—

… Exhibit P consists of communications between two government employees about DCAA audits that were ongoing at the time. In particular, the e-mail chain focuses on the subjective thoughts of a DCAA auditor, Mr. Boyer, regarding the status of the audits. Mr. Boyer uses his opinion of a past event, Sikorsky's alleged violation of CAS 418 some years earlier, to convey to his superior his opinion about what action the DCAA should take in the *ongoing* audits. In short, Mr. Boyer's impressions regarding the events surrounding the prior CAS 418 compliance issue are pre-decisional because the recounting of the past occurrence is subjective and was recited specifically to influence DCAA's handling of an ongoing audits [*sic*]. In the same vein, the entirety of Exhibit P also is deliberative. In the commentary to his superior, Mr. Boyer recommends that the agency change course before it issues final audits. …

Disclosure of government employees' correspondence — and a candid assessment of an agency's ongoing policy-making activities — could lessen employees' willingness to have a full and frank discussion about the merits of ongoing audits, thereby sapping the process of robust debate and collaborative analysis among audit team members. Overall, because Sikorsky has not demonstrated that its interest in Exhibit P outweighs the government's interest in preserving the confidentiality of the document, the balance of interests favors the government, and Exhibit P is protected under the deliberative process privilege.

[Emphasis in original.]

Even though Judge Lettow found that the DCAA internal correspondence was protected by the deliberative process privilege, that wasn't the end of the story. The Judge had to decide whether or not the Government had waived its claim of privilege when it delayed asserting it. The Judge wrote—

Applying the three-part test in Fed. R. Evid. 502(b), the court must determine whether the government's disclosure of Exhibit P was inadvertent, whether the government took reasonable steps to prevent its disclosure, and whether the government promptly took reasonable steps to rectify the error.

Ultimately, Judge Lettow ruled that "the government did not act with sufficient alacrity to claw back the records produced in this case," and thus had waived its ability to assert privilege with respect to Exhibit P. He wrote—

… Mr. Boyer's deposition took place on July 20, 2011, yet the government waited until January 19, 2012, roughly six months later, to assert the deliberative process privilege over Exhibit P. Thereafter, inexplicably and inexcusably, the government waited until May 14, 2012, nearly four months after its assertion of privilege and two-and-one-half months after Sikorsky had used Exhibit P in a brief, to communicate its assertion of privilege to Sikorsky. In total, the government waited almost ten months, from July 20, 2011 until May 14, 2012, to convey its assertion of privilege over Exhibit P. By any measure, that is simply too long a time to try now to resuscitate the privilege. Its spirit has long since entered the Elysian Fields of the public domain.

At the end of the day, Sikorsky won its argument that the DCAA auditors' e-mail correspondence was not subject to privilege and should be admissible. On the other hand, the fact that the Court of Federal Claims has blessed DCAA's ability to assert deliberative process privilege over its internal communications may be a blow to those who are seeking to litigate DCAA-related issues.

We think it's a shame that DCAA would seek to overturn contractor's ability to rely on privilege while at the same time asserting privilege with respect to its own documents. That seems like the rankest kind of hypocrisy. We think DCAA should be ashamed of itself.