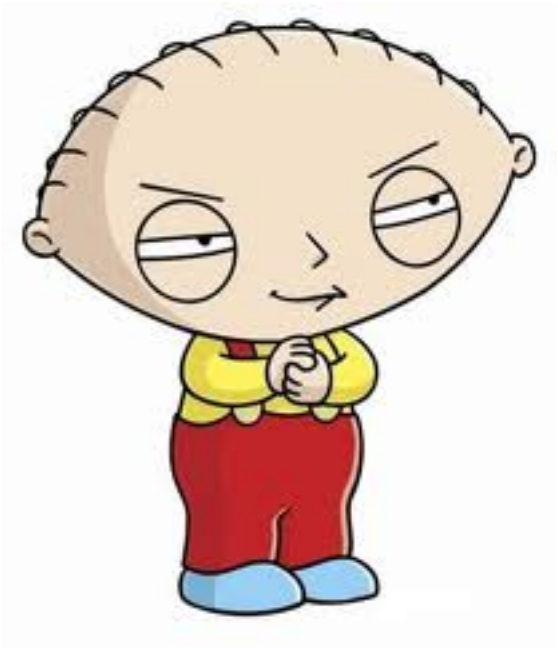

We have some well-placed minions, you know.

We have people in active government service—or who *claim* to be in active government service (we have no means to verify their *bona fides*)—who give us tidbits of insider information from time to time. Never anything that would get anybody into trouble. Nothing illegal. And never anything that would cause our government leadership to worry: no proprietary or privileged or FOUO stuff. Just little insider tidbits that may or may not turn into future blog articles. Audit leads, you might say.

One of our minions recently reported that "I attended a so-called DCAA Stand Down Day" that dealt with contractor proposals to establish final billing rates (commonly called "incurred cost proposals) that were approaching their 6-year Contract Disputes Act (CDA) Statute of Limitations (SoL) due dates. (If any of that lingo confuses you, then you may want to read one of our numerous articles on the topic.)

Our minion reported "The one important thing is that DCMA is adamant about the SoL dates." We already had an inkling that DCMA was taking the Court-enforced SoL dates seriously, having participated in some DCMA-led negotiations that established final billing rates without having (shall we say?) the *benefit* of a formal DCAA audit report. We have heard that DCMA is working on formal direction to its Contracting Officers that tells them what to do in such

circumstances, though we confess we have not yet seen it. Nonetheless, our experience (now confirmed by our minion's report) is that DCMA Contracting Officers are moving forward, with or without DCAA's support.

Which is a great thing and we applaud it!

In fact, we recall having suggested that in one or two past blog articles.

The fact of the matter is that DCMA needs to fulfill its responsibilities to taxpayers and buying commands by establishing contractor final billing rates, so as to permit contract close-outs. If the agency has to stand tall and act alone in order to meet its responsibilities, then so be it. We approve and wish the DCMA Contracting Officers the best of luck in doing what they need to do.

(We suspect the COs will find that the contractors are just as anxious to settle rates and close-out contracts as the government is—perhaps more so. Our experience is that these negotiations tend to go fairly well, with both sides making concessions. Kind of like the way it used to be … but we digress.)

Back to our minion's report: The Regional Director who attended the Stand-Down Day told the assemblage that the auditors were to "try and get [the incurred cost audits] done even if they are or would be shortly SoL … as many contractors are not cognizant of [the] SoL." Allegedly, this direction came "right from the top" of DCAA.

In other words, DCAA's direction to their auditors is to perform their audits of the contractors' final billing rate proposals regardless of the ability of the government to pursue a claim under the CDA. The rationale for this direction was that "many contractors" were unaware of the recent Court decisions that, in general, tend to strictly enforce the CDA SoL.

Well, those contractors must not read this blog. We expect that our readers are well aware of the CDA SoL and are acting accordingly.

Now, we need to digress another time and define what “acting accordingly” means with respect to the CDA SoL. And we’ll come back and reinforce our position again before this article’s done. But let’s state right now, for the record, that “acting accordingly” does not mean unnecessarily delaying responding to DCAA audit requests, nor does it mean doing anything that smacks of gamesmanship. To us, “acting accordingly” means a timely submission of the proposal to establish final billing rates, compliance with regulatory requirements regarding format and content of the proposal, and timely responses to DCAA requests for information related to the contractor’s proposal.

Even with all that, experience has shown that DCAA will still too often manage to take more than six years after the contractor’s submission to issue a final audit report. But that’s not the contractor’s fault. No contractor should put itself into a position where the government can credibly claim that it was tricked into missing the SoL deadline.

“Acting accordingly” also means that, once that CDA SoL date passes, the contractor is in a superior—almost unassailable—negotiating position, since the government no longer has rights to pursue a claim. It’s not necessarily time to thumb one’s nose at the ACO, but it is time to bargain hard, negotiating from a position of strength.

On the other hand, if you’re the contractor and the government owes you money because you haven’t trued-up to your final billing rates and issued adjustment vouchers, then if you let that CDA SoL date pass, you have put yourself in a very untenable negotiating position. You are now essentially dependent on the good graces of your ACO. We wouldn’t count on getting much, if any, of the unbilled receivables you’ve recorded on your books.

End of digression the second.

Anyway, back to our minion’s report, suffice to say that pursuing a course of action that was largely based on the contractors’ ignorance of their rights did not sit too well with our source. Thus: the report provided to us. Our minion went so far as to opine that continuing to audit contractors’ proposals after the SoL date had passed was tantamount to wasting taxpayer funds. But that’s not for us to decide.

And speaking of decisions, the Armed Services Board of Contract Appeals (ASBCA) finally issued the **Raytheon decisions** we've been waiting for, after passage of the 30-day redaction period. Raytheon prevailed on three of its four appeals: the ASBCA Judge dismissed the government's claims against Raytheon in three of four matters—leaving one matter for a trial on the merits. In the **words** of the attorneys at Arnold & Porter (who represented Raytheon before the Court): "
Raytheon defeats Government claims arising from changes in cost accounting practices as untimely.
"

Yes. Three more victories for this defense contractor. Three more government claims thrown-out of Court as being beyond the CDA SoL.

Let's discuss.

Raytheon filed four appeals at the ASBCA, disputing government claims for money allegedly owed as a result of increased costs stemming from changes to cost accounting practice the company made in 2004 and 2005. One matter concerned changes disclosed to the government in February 2004; the DCMA ACO issued a final decision in July, 2011, demanding $1.2 million (including $404,000 in compound interest). The second matter concerned changes disclosed to the government in November 2004; the ACO issued a final decision in July, 2011, demanding $2.1 million (including $669,000 in compound interest). The third and fourth matters concerned changes disclosed separately in November 2004; the ACO issued a final decision in August, 2011, demanding $3.7 million on one matter and $1.7 million on the other matter. Thus, at stake was some $8.7 million.

The four matters were differentiated (in Judge Grant's decision) by the information provided by Raytheon to the government concerning cost impacts stemming from the changes to cost accounting practice. In three of the four matters, Raytheon provided high-level cost impact information (by contract type) and claimed the cost impacts were immaterial in amount. In the first matter, Raytheon did not provide any cost impact information until 2006, roughly two years after submitting its revised CASB Disclosure Statement. Judge Grant found the differences in information provided to be significant.

Raytheon argued that the SoL clock began running when it notified the government of the changes to cost accounting practice. Consequently (according to Raytheon), each of the four

matters was now time-barred under the SoL requirements of the CDA. However, Judge Grant didn't agree with that argument. As we noted above, she found that more was needed from Raytheon in order to start the SoL clock. With respect to the first matter, she wrote—

Here, the government did not know it had a claim because Raytheon did not report that there would be an adverse impact, and stated instead that its analysis would be provided later. 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, especially in light of the affirmative duty FAR 52.230-6(a) places on the contractor to submit a GDM [Gross Dollar Magnitude cost impact analysis]. Once Raytheon provided cost impact information to the government on 3 April 2006, the statute of limitations began to run.

However, with respect to the other three matters, she found that Raytheon had provided sufficient information, at the time it filed its Disclosure Statement revisions, to have put the government on notice that it had suffered injury (in the form of increased costs arising from the changes to cost accounting practice). Even though the government argued that Raytheon had not submitted "the level of information and supporting data required by FAR 52.230-6,"Judge Grant found that the notification of a cost impact, regardless of the associated detail and support, was sufficient to start the SoL clock running. She wrote—

The government argues that Raytheon did not submit the level of information and supporting data required by FAR 52.230-6. However, Raytheon did notify the government of a dollar cost impact from the accounting change, 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.

[Emphasis added.]

In the words of the attorneys at Arnold & Porter—

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.

They then recommend that CAS-covered contractors making changes to cost accounting practices "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."

Practitioners of CAS will note that the contractor is *not required* by the CAS Administration clause (52-230-6) to submit an estimate of any cost impact stemming from a change in cost accounting practice at the time it submits its revised CASB Disclosure Statement. What is required is established by 52.230-6(b), which states that the only requirement is to submit the revised Disclosure Statement and (if applicable) a statement that the estimated impact of the changes is immaterial. A GDM cost impact is to be submitted only upon Contracting Officer request. Apparently, Raytheon complied fully with the clause requirements but Judge Grant found that Raytheon's failure to submit a cost impact estimate was fatal to its SoL argument.

Using Judge Grant's logic, a Contracting Officer can delay asking the contractor for a cost impact analysis, and thus indefinitely toll the CDA SoL. The only way to defeat this is to submit a cost impact estimate—of pretty much any type, so long as it's made in good faith—at the time the revised Disclosure Statement is submitted.

Consequently, the contractor is much better off (under the CDA SoL) providing as much cost impact information as it can at the time of the submission of the revised CASB Disclosure Statement. This is essentially what the attorneys at Arnold & Porter recommended. In this fashion, the contractor will start the SoL clock as early as possible.

Which brings us back to what we said earlier. The best way to win on a CDA SoL matter is to provide information early and to cooperate fully with government audits and reviews. Gamesmanship and unnecessary delays in responding risks having a Judge find that the contractor somehow misled the government into missing its SoL deadline. You don't want that.

Be aware of your SoL clock. Know when it started and know when it hit the six-year mark. You will then be prepared to bargain hard with your government ACO, knowing that a Court is unlikely to hear any government claims that are filed untimely.