Paul Pompeo, of Arnold Porter & Porter, did a great presentation late last year on the status of the Contract Disputes Act (CDA) Statute of Limitations (SoL) issue. Unfortunately, we don't have it to share with you. So we have to muddle through without benefit of legal counsel.

And make no mistake: we here at Apogee Consulting, Inc. are not attorneys and you should not rely on any of our layperson legal analyses to guide you. Instead, you should seek counsel from knowledgeable and experienced government contract attorneys, such as Mr. Pompeo.

So with that caveat out of the way, let's look at a **recent decision** by Judge Freeman at the Armed Services Board of Contract Appeals (ASBCA) in the matter of
Fluor Corporation v. United States Government
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We don't get it.

We've written extensively on the CDA SoL topic. As we've noted more than once, this is an area of the law that's "evolving" (as they say), and each decision adds a bit to what we think we know about it. That evolution is not necessarily a linear progression: there are setbacks and victories, and great leaps forward and small steps backward. The two contract disputes fora (the ASBCA and the U.S. Court of Federal Claims, or CFC), don't always agree with each other. Importantly, Judges are not required to treat each other's decision as precedent-setting; they can ignore decisions with which they disagree. Accordingly, it's very tough to determine any "bright line" with respect to when the CDA SoL jurisdictional timeclock begins to run—though everybody's crystal clear that the timeclock runs out exactly six years after it starts.

Let's recap a bit to illustrate what we mean.

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In January, 2012, we wrote that the ASBCA had thrown-out a 2010 government claim against Boeing alleging increased costs related to changes in cost accounting practice because the government knew, or should have known, by 2003 (at the latest) that it had

been harmed. It was in 2003 that the cognizant Administrative Contracting Officer (ACO) issued a letter to Boeing finding that Boeing owed the government money and offered to negotiate a settlement. Unfortunately, Judge Melnick did not determine exactly when the CDA SoL timeclock actually started (*i.e.*, did it start when Boeing submitted a revised CASB Disclosure Statement, or when it submitted its cost impact showing increased costs to CAS-covered government contracts, or when DCAA issued its audit report identifying $7.4 million of increased costs? Each of those events happened prior to 2003.). He simply concluded that the government claim was time-barred.

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In April, 2012, we wrote that the CFC had thrown-out a 2008 government claim against Raytheon related to a 1999 Advance Agreement in which Raytheon had already paid the government $4.75 million, in 2003. Judge Hodges concluded that the government had all the information it needed to file a claim nine years before it actually filed it. Thus, the government claim was time-barred. Importantly, Judge Hodges rejected the government's argument that the "continuing claims doctrine" meant that each new year's claimed cost represented a new start to the CDA SoL, finding that each year's claimed cost was based on the original 1999 Advance Agreement.

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In June, 2012, we wrote that the ASBCA had accepted a government claim against Lockheed Martin related to alleged noncompliances with Cost Accounting Standards (CAS), even though the DCAA had issued an audit report determining the CAS noncompliance in 2002, the DACO had issued a Final Determination that Lockheed Martin was in noncompliance in 2008, and the DACO had issued a Final Decision/Demand for Payment in 2010 (i.e., eight years after DCAA had reported the CAS noncompliance). Judge Delman wrote that, although DCAA had identified "inappropriate charges" in 2002, "*DCAA did not identify any overbillings or increased costs paid by the government resulting from the alleged inappropriate charges."*
Because DCAA had never identified overbillings or increased costs paid, the CDA SoL did not start to run. We didn't think very highly of that decision.

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In July, 2012, we wrote about two decisions at the CFC (*Sikorsky* and a motion for reconsideration on the *Raytheon* decision), in which it was made clear that the CDA SoL timeclock does not pause or stop simply because the government is going through its administrative procedures. The timeclock continues to run.

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In January, 2013, we wrote about two more *Raytheon* decisions at the ASBCA, in which Judge Delman found (with respect to allegations of unallowable costs) that the CDA SoL timeclock starts running when the contractor *submits its annual proposal to establish final billing rates* (aka, "the incurred cost submission"). The government has six years from that date to assert any claims that the contractor included allegedly unallowable costs in its rate calculations. Importantly, Judge Delman treated each separate contractor proposal as a separate start to the CDA SoL timeclock, such that even though claims against a stream of costs (such as depreciation) might be time-barred with respect to incurred cost submissions aged more than six years, claims against that same cost stream would not be time-barred with respect to incurred cost submissions aged less than six years. We thought Judge Delman was focused on factual knowledge of events rather than the events themselves, and offered some criticism on those grounds.

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In March, 2013, we wrote about yet another Raytheon decision at the ASBCA, in which Judge Melnick found that "The events fixing liability should have been known when they occurred unless then can be reasonably found to have been either concealed or 'inherently unknowable' at that time." As you might guess, the government's claim against Raytheon (related to a noncompliance with CAS) was thrown-out as being time-barred. This is an important decision because Judge Melnick took pains to distinguish the facts before him from those presented in Judge Delman's *Lockheed Martin* decision. Here's **a link** to our article in case you want to check-out the quotes we pasted from the decision.

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In April, 2013, we wrote about Judge Lettow's decision at the CFC in the matter of the Sikorsky CAS noncompliance, in which Sikorsky won on the merits but lost its motion to have the entire claim thrown out as being time-barred. We criticized that aspect of the decision, but obviously Sikorsky was thrilled.

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In June, 2013, we wrote about several new Raytheon appeals at the ASBCA, in which it won several motions for summary judgment and lost another motion—all related to the CDA SoL. Judge Grant tied the start of the CDA SoL timeclock to submission of the contractor's cost impact analysis. Absent that analysis, Judge Grant found the government lacked sufficient information to know it had been harmed. But once that analysis had been submitted, the CDA SoL timeclock started to run.

Today we want to discuss the Fluor case at the ASBCA and Judge Freeman's opinion regarding Fluor's motion to dismiss the government's claim for increased costs related to an alleged CAS noncompliance because it was time-barred by the CDA SoL. Judge Freeman didn't agree and found an interesting approach to the issue.

Looking at the recaps above, you might think to yourself that the issue should have been relatively straightforward. When did the government know of the alleged non-compliance and when did it know it had been damaged through identification of increased costs or overbillings? Those events should have (we believe) started the CDA SoL timeclock running, so that if the government's claim (made by Contracting Officer Final Decision) was issued more than six years after those events, then the government would be SOL (pun intended) and its claim would be determined to be a nullity.

Not so fast, according to Judge Freeman.

Fluor's cost accounting practices related to allocation of its "Burden and Benefits" ("B&B") pool to its salary costs had been in place and disclosed to government oversight officials as early as January, 2001. Fluor's salary costs included project assignment allowances, foreign service incentives and foreign hardship allowances (among other salary costs). In August, 2004, DCAA provided Fluor with a preliminary audit finding that its hazard pay and foreign assignment salary uplifts were too high and therefore unreasonable in amount. In February, 2006, another DCAA audit found that Fluor's cost allocation methodology was compliant with FAR and CAS 418. In December, 2005, another DCAA audit report focused on B&B allocation methodology concluded that Fluor was in compliance with the requirements of CAS 403 (after a preliminary report prepared in September, 2005, found it was not in compliance).

Regardless of the foregoing, in September, 2007, DCAA issued yet another audit report stating that Fluor's B&B cost allocation methodology was noncompliant with the requirements of CAS 403. In November, 2010 (more than three years later), the cognizant ACO issued a final determination that Fluor was noncompliant with CAS 403 because "the B&B allocation base was not representative of the factors on which total B&B pool payments were based." In November, 2011, the ACO issued a Final Decision and asserted a claim against Fluor for $63.4 Million related to alleged increased costs on Fluor's CAS-covered contracts for the period 2004 through 2010.

Simply looking at the facts, it seems quite clear that in 2007 the government objected to a practice that it had already stated was compliant in 2006, a practice that had been in place, unchanged, since at least 2001, a practice that had been the subject of multiple government audits. It seems quite clear that the government knew, or should have known, as early as 2004 that Fluor's allocation methodology included "uplifts" which may have distorted the pool allocations. Thus, it seems quite clear that the government's claim should have been dismissed as being time-barred.

But no. Judge Freeman found that "the government did not and could not know at that time, much less submit a CDA claim for, the increased costs … *until that work was performed, billed and paid* ." (Emphasis added.)

Judge Freeman found that—

The government's 17 November 2011 claim was a continuing claim inherently susceptible to being broken down into a series of independent distinct events each having its own associated damages—namely, each payment by the government to Fluor for a CAS non-compliant billing on a government contract.

But all was not lost for Fluor. The part of the government's claim relating to payments made on or before September, 2005 (the date on which DCAA concluded, on a preliminary basis, that Fluor was in non-compliance with the requirements of CAS 403) accrued on that date for purposes of the CDA SoL, so any claims asserted against Fluor for those pre-September 2005 payments after September 2011 were time-barred. (Remember, the ACO issued the CoFD in November, 2011.) As for the rest of the government's claim, the CDA SoL timeclock started to run "on the date [Fluor's invoices] were paid." Thus, any payments made to Fluor before 17 November 2005 were thrown-out.

Now we don't know *what* to make of this muddle. It occurs to us that there were a couple of approaches Judge Freeman might have used. First, he could have looked to the contractor's cost impact analysis as the date the government knew it had been harmed. Unfortunately, Fluor refused to provide a cost impact analysis, perhaps under the theory that it doesn't make much sense for to give the government any ammunition it is going to use to shoot at you.

Another approach would be to say that the government knew of Fluor's practices as early as

2001, so what the heck? Or perhaps that the government knew in 2004 that Fluor included in its cost allocation base the very components that formed the basis for the eventual CAS noncompliance. In either scenario the entire government claim would be time-barred.

Another approach would be to say that any costs estimated, accumulated, or billed in a manner noncompliant with applicable CAS requirements were unallowable costs (see FAR 31.201-2) and therefore, like all unallowable costs, the CDA SoL timeclock started running when Fluor included them in a proposal to establish final billing rates. In that scenario, incurred cost submissions dated earlier than November, 2005 would be thrown-out, but submissions after than date would be susceptible to a trial on the merits.

But we really don't like Judge Freeman's approach, which focused on individual contract billings. We get that such an approach might actually help Fluor, since generally invoices are paid before submission of a final billing rate proposal (*i.e.*, invoices related to 2012 costs have been paid before the contractor submits its 2012 final billing rate proposal in June, 2013). But we think such an approach flies in the face of the CAS noncompliance regime, codified in the FAR CAS Administration clause (52.230-6). As we read that clause, it seems that the impact of any CAS noncompliance must be estimated, and that estimate is used as the basis for negotiating contract price adjustments. Judge Freeman's approach seems to ignore that statutorily-required approach in favor of an invoice by invoice analysis that is going to be hugely time-consuming for both parties.

Judge Freeman appeared to have embraced the "continuing claims" doctrine, while other Judges seem to have found it to be not very helpful. It's unclear to us how this will impact disputes involving "stream-of-cost" issues such as depreciation.

All in all, we're confused. And we bet others are, as well. We continue to look for the various contract disputes fora—and their Judges—to give the parties a bright line test that can be used to resolve issues and avoid litigation.

As far as we can tell, this ain't it.