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# The Contract Dispute Act's Statute of Limitations: The Failure to Deliver Procedural Predictability

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**THE CONTRACT DISPUTE ACT’S STATUTE OF  
LIMITATIONS: THE FAILURE TO DELIVER  
PROCEDURAL PREDICTABILITY**

*By: Peter M. Casey†*

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## I. INTRODUCTION

The Contract Disputes Act of 1978 (“CDA”) governs disputes “relating to a contract” between federal executive agencies and contractors.<sup>1</sup> It establishes the process for parties to seek administrative remedies for claims under covered contracts.<sup>2</sup> It also limits the right to judicial review of agency decisions to specific “boards of contract appeals” (“BCA”) and the United States Court of Federal Claims (“COFC”). According to the CDA’s sponsors, Congress enacted the law to bring reliability and order to a hodge-podge of conflicting and inconsistent rules for adjudicating contract disputes used by the various executive agencies. The law aimed to simplify the process for resolving agency-contractor disputes in light of the growing complexities and importance of Government procurement programs.<sup>3</sup> In introducing the bill, its primary sponsor underscored the need for an efficient adjudicatory process in which both Government agencies and the contracting industries had confidence:

One cannot dispute the almost universal expressions of industry and the practicing bar that the system needs change. A good remedies system is a major element in good procurement, and a good system depends not only on fairness and justice, but also on whether the people who are subject to the system believe it is fair and just.<sup>4</sup>

In some respects, the CDA fell short of providing a comprehensive framework for Government contract dispute resolution and its stated aim to “provide to the fullest extent practicable, informal, expeditious,

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1. Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 7101-7109 (2012)).

2. *See id.* The CDA is a procedural law. It does not create any substantive rights or causes of action. The types of claims and defenses that may arise under any subject “contract” are as numerous and variegated as the contracts themselves, their subject matter, applicable Federal Acquisition Regulations, 48 C.F.R. 1 et seq. (“FAR”), and federal “common law.” The FAR, the comprehensive set of regulations generally covering federal acquisition, was first promulgated in 1984 to create “uniform policies and procedures” for procurement hitherto covered by disparate agency regulations. This Article considers only a few of the more frequent or typical types of disputes litigated under the CDA in illustrating significant statute of limitations issues. *See infra* Part IV. For comprehensive treatises covering contract disputes under the CDA, see, for example, GREGORY C. SISK, *LITIGATION WITH THE FEDERAL GOVERNMENT* 298-326 (4th ed. 2006); KAREN L. MANOS, *GOVERNMENT CONTRACT COSTS AND PRICING* (2d ed. 2011).

3. *See* S. REP. NO. 95-1118, at 4 (1978).

4. *Contract Disputes Act of 1978: Joint Hearings on S. 2292, S. 2787, and S. 3178 Before the Subcomm. on Fed. Spending Practices & Open Gov’t of the Comm. on Governmental Affairs & the Subcomm. on Citizens & S’holders Rights & Remedies of the Comm. on the Judiciary*, 95th Cong. 2 (1978) (statement of Sen. Lawton Chiles, Chairman, Subcomm. on Fed. Spending Practices & Open Gov’t).

and inexpensive resolution of disputes.”<sup>5</sup> In particular, the Act did not prescribe any period of time for a party to submit an administrative claim for monetary or other relief after occurrence of the breach or other injury. After sixteen years and many complaints from both Government agencies and contractors about dealing with stale claims, Congress finally adopted a CDA limitations period as part of the Federal Acquisition Streamlining Act of 1994 (“FASA”). That statute of limitations, now codified at 41 U.S.C. §7103(a) (4), provides:

Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.

Decisions by BCAs and Federal Circuit courts under the CDA statute of limitations were relatively rare in the several years following the amendment. Since the early 2010s, however, the number of cases has skyrocketed. This spike in limitations disputes undoubtedly is attributable to the massive increase in military procurement following September 11, including unprecedented spending for goods and services in Afghanistan, Iraq, and other conflict zones. The sheer volume of defense contracts and contractual activity often made it difficult for the parties to recognize and submit claims within six years of the occurrence of the underlying facts. In a relatively short period of time, the tribunals with jurisdiction over defense contract litigation had to decide a large number of limitations disputes with little guidance from direct precedent or legislative or regulatory history. These circumstances have led to case law that is not always consistent in analysis or reconcilable in outcome.

Part I of this Article provides an overview of the architecture and key features of the CDA. Part II examines the salient legislative and regulatory history surrounding the adoption of the CDA statute of limitations. Part III discusses when a CDA claim “accrues” and triggers the six-year time period for submitting a claim. In Part IV, we review some of the major issues that arise under the statute in significant and recurrent types of contractor-agency disputes. Part V concludes with a brief evaluation of whether the CDA statute measures up to the “long tradition of judicial authority to formulate rules ensuring fair and predictable enforcement of statutes of limitations.”<sup>6</sup>

## II. AN OVERVIEW OF THE CONTRACT DISPUTES ACT

### A. *Disputes Governed by the CDA*

The CDA applies to disputes between executive agencies and contractors arising under or relating to “express or implied” Government

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5. See Contract Disputes Act of 1978 § 8(e).

6. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 761 (1995) (Kennedy, J., concurring).

contracts for the procurement of property, services, construction, repair, and maintenance of real property, and the disposal of personal property.<sup>7</sup> The statute expressly excludes from its ambit disputes relating to contracts concerning the procurement of real property in being.<sup>8</sup> The dispute, moreover, must relate to an existing contract between the parties. The CDA does not apply, for example, to protests by disappointed contract bidders.<sup>9</sup> The statute also carves out from its coverage any claims for “fraud.”

### B. *The Forums for Judicial Review*

The CDA establishes the administrative boards of contract appeals and the Court of Federal Claims, an Article I court, for appeals by contractors from Government agency “contracting officer” final decisions, which may deny a contractor’s claim against the Government agency or assert a Government claim against the contractor.<sup>10</sup> The Armed Services Board of Contract Appeals (“ASBCA”) has jurisdiction over appeals from final decisions of all Department of Defense (“DoD”) components and the National Aeronautics and Space Administration (“NASA”). The Civilian Board of Contract Appeals, part of the General Services Administration, has jurisdiction over appeals from all executive agency final decisions other than the DoD, the Post Office, and the Tennessee Valley Authority (“TVA”), the latter two of which also have their own appeals boards.

To obtain administrative judicial review, a contractor must file an appeal within ninety days of its receipt of an agency’s final decision (except in the case of the TVA, which is twelve months).<sup>11</sup> Alternatively, a contractor may appeal to the COFC within twelve months of the final decision. Timely filing of an appeal from a final decision is “jurisdictional.” That is, the BCAs and the COFC must dismiss any untimely appeal for lack of subject matter jurisdiction.<sup>12</sup>

BCA and COFC review of agency final decisions entails “de novo” adjudication of facts and determinations of law.<sup>13</sup> The reviewing panel

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7. 41 U.S.C. § 7102(a) (2012).

8. § 7102(a) (1).

9. *Statistica, Inc.*, ASBCA No. 44116, 92-3 BCA ¶ 25,095.

10. 41 U.S.C. §§ 7104–7105.

11. § 7104.

12. *See, e.g.*, *Precision Metals Corp.*, ASBCA No. 61422, 18-1 BCA ¶ 37,035, at 180,314–15 (“We conclude that we lack jurisdiction over this appeal. It is familiar that, under the Contract Disputes Act (Act), a contracting officer’s final decision ‘is not subject to review by any . . . tribunal . . . unless an appeal . . . is timely commenced.’ 41 U.S.C. § 7103(g). In turn, the Act defines timely commencement to be bringing an appeal to the Board ‘within 90 days from the date of receipt of a contracting officer’s decision.’ 41 U.S.C. § 7104(a). Numerous decisions give effect to this time limitation, treating it as jurisdictional.”).

13. § 7104(b) (1), (3), (4). The United States Claims Court was renamed the United States Court of Federal Claims on October 29, 1992. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516.

“is constrained neither by the findings and determination of the contracting officer nor by the issues framed in the pleadings.”<sup>14</sup> Although the CDA expressly refers only to COFC proceedings as “de novo,” Congress did not intend for there to be any differences in the review function between agency boards and the COFC. On the contrary:

One primary purpose of the CDA . . . is to achieve parity between the jurisdiction of the United States Court of Federal Claims and the boards. The CDA has as one of its purposes the elimination of differences in the jurisdictions of the forums which decide Government contract disputes. See, e.g., S. Rep. No. 1118, 95th Cong., 2d Sess. 12 (1978) (“The considerable disharmony between the administrative and judicial systems that oversee the resolution of disputes was a matter of considerable concern to the Procurement Commission. . . . [The CDA provides a] pragmatic answer.”). Thus, the CDA provides for appeals from a CO’s decision alternatively to either the Board or directly to the Court of Federal Claims.<sup>15</sup>

Under the CDA, the Court of Appeals for the Federal Circuit (“Federal Circuit”) has jurisdiction over appeals from dispositive decisions by the BCAs and the COFC.<sup>16</sup> Federal Circuit decisions in CDA cases are binding precedent in the COFC and the BCAs. The COFC and the BCAs are not bound by the decisions of the other.<sup>17</sup>

### C. *The Administrative Requisites to Judicial Review*

Under the CDA, a party’s assertion of a written “claim” that includes certain formal elements, and an agency contracting officer’s “final decision,” are both necessary to establish subject matter jurisdiction for an appeal to a BCA or the COFC.<sup>18</sup> In a “final deci-

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14. Space Age Eng’g, Inc., ASBCA No. 26028, 82-1 BCA ¶ 15,766.

15. *Garrett v. General Elec. Co.*, 987 F.2d 747, 749–50 (Fed. Cir. 1993). Thus, “[w]here the contractor chooses to appeal to a contract appeals board, the statute declares that in exercising its jurisdiction ‘the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court’ (41 U.S.C. § 607(d))—thus placing the board’s authority on a par with that of the Claims Court.”

16. 41 U.S.C. § 7107(a) (1) (2012); 28 U.S.C. § 1295(a) (3), (10) (2012) (vesting the Court of Appeals for the Federal Circuit with jurisdiction over appeals from final decisions of the COFC and BCAs).

17. See, e.g., *Premiere Bldg. Servs., Inc.*, ASBCA No. 51804, 00-1 BCA ¶ 30,696, at 151,639 (“decisions of the COFC are not controlling precedent for this Board”); *Sikorsky Aircraft Corp. v. United States*, 110 Fed. Cl. 210, 219 n.21 (2013) (“Although decisions of the Armed Services Board of Contract Appeals (‘ASBCA’) ‘are not accorded *stare decisis* effect, the court may find the reasoning contained therein persuasive.’” (quoting *W. Bay Builders, Inc. v. United States*, 85 Fed. Cl. 1, 29 n.29 (2008))).

18. *L-3 Commc’ns Integrated Sys., L.P.*, ASBCA Nos. 60713, 60716, 17-1 BCA ¶ 36,865, at 179,623 (“CDA jurisdiction requires both a valid claim and a contracting officer’s final decision on that claim” (citing *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010))); *Accord*, *J.P. Donovan Constr., Inc. v. Mabus*, 469 Fed. Appx. 903, 906 (Fed. Cir. 2012) (“The ‘jurisdictional prerequisites to any appeal’ under the CDA are that ‘the contractor must submit a proper claim . . . [and] . . . the contractor must have received the contracting officer’s final decision on

sion,” the agency contracting officer asserts a Government claim, or approves or denies a contractor’s claim. Under the CDA’s structure, the Government agency through the “final decision” controls the disposition of all “claims.” Contracting officer “final decisions” are binding on the contractor unless it files an appeal. Thus, only contractors file appeals from final decisions.<sup>19</sup>

The CDA administrative “claim” is at the core of the CDA. A “claim” asserted by the contractor or the Government agency against the other party to the contract, often referred to as “presentment,” initiates the disputes process.<sup>20</sup> Importantly, “claim” in this context includes, but is not synonymous with, “cause of action.” Rather, the CDA “claim” is a written assertion of a cause of action that must conform to several formal elements. The consequences of failing to conform to these “presentment” requirements may doom the opportunity to pursue an otherwise meritorious cause of action. In general, the BCAs and the COFC are deemed to lack “jurisdiction” over a non-conforming “claim,” regardless of whether the “written assertion” adequately pleads a cause of action for which relief otherwise could be granted. Of equal significance for present purposes, a non-conforming claim, even if submitted within the six-year period after “accrual,” does *not* stop the running of the statute of limitations.<sup>21</sup>

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that claim.” (quoting *Maropakis*, 609 F.3d at 1328)); *Maropakis*, 609 F.3d at 1327, 1329 (“[a]ll claims by a contractor against the government . . . shall be in writing” and “shall be submitted to the contracting officer for a decision” (quoting 41 U.S.C. § 605 (2006) (recodified at 41 U.S.C. § 7103 (2012)))) (noting that each claim must also “indicate to the contracting officer that the contractor is requesting a final decision” (citing *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1543 (Fed. Cir. 1996))).

19. A final decision asserting a government claim for money creates a valid debt due to and collectible by the government within 30 days from its issuance. That debt remains collectible, including in some circumstances by offset of receivables due the contractor under other contracts, notwithstanding a contractor’s timely appeal.

20. In general, the “Disputes and Appeals” section of the Federal Acquisition Regulations contains the regulations that implement the CDA. FAR 33.2 (2010). The “Initiation of a claim” section states that:

(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995. The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to contracts awarded prior to October 1, 1995, or to a Government claim based on a contractor claim involving fraud.

FAR 33.206.

21. *See, e.g.*, *TMS Envirocon, Inc.*, ASBCA No. 57286, 12-2 BCA ¶ 35,084, at 172,296 (invalid contractor claim); *Boeing Co.*, ASBCA No. 57490, 12-1 BCA ¶ 34,916, at 171,673 (invalid government claim).

Despite its centrality to the CDA process, “claim” has never been defined in the statute. The CDA requires that a “claim” is in writing and, in the case of a contractor, is submitted to a contracting officer “for a decision.”<sup>22</sup> The statute further provides that contractor claims in excess of \$100,000 must contain an authorized certification that the claim is made in good faith and that supporting data is accurate and complete. Beyond that, however, the CDA does not spell out what a “claim” may or must assert and how it should assert the cause. Without any statutory definition, the judiciary, as if by default, applies the definition of claim in the Federal Acquisition Regulations (“FAR”).<sup>23</sup> The FAR definition, adopted in substantially its present form in 1984, augments the specifications for a cognizable formal “claim” beyond CDA requirements. The FAR definition states:

“Claim” means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under [the Contract Disputes Act], until certified as required by the statute. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.<sup>24</sup>

As a general rule, the jurisdictional validity of a “claim” presentation and whether it stops the running of the limitations period, depends on its satisfaction of the requirements of a “claim” in the CDA *and* the FAR definition.<sup>25</sup> If a “claim” does not satisfy these requirements, a contracting officer is deemed to lack “authority” to issue an

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22. 41 U.S.C. § 7103(a) (1) (3) (2012).

23. “The CDA does not explicitly list comprehensive requirements for a ‘claim’ in all situations . . . . Therefore, a contested claim’s sufficiency may properly be evaluated against regulations implementing the CDA, the language of the contract in dispute, and the facts of the case.” *Dawco Constr., Inc. v. United States*, 930 F.2d 872, 877 (Fed. Cir. 1991) (adopting FAR definition of “claim”). *See also* *Gen. Elec. Co. & Bayport Constr. Corp.*, ASBCA Nos. 36005, 38152, & 39696, 91-2 BCA ¶ 23,958, at 119,943 (“The CDA does not define the term ‘claim.’ The filling of this gap has been left to rules issued by the agencies charged with administering the Act”).

24. FAR 2.101 (2017). The FAR differs from the CDA in additionally requiring that the claim “seek, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.” *Id.* (emphasis added).

25. *See id.*; § 7103(a) (1)–(3). Part 52 of the FAR sets forth “Solicitation Provisions and Contract Clauses” that are incorporated into contracts in accordance with and as specified by other provisions of the FAR. Most government contracts include the “disputes” clause in FAR 52.233-1, which, among other things, provides that all disputes arising under or relating to the contract be resolved under the CDA. FAR 33.215 (2004). The “disputes” clause includes the definition of “claim” in FAR 2.101. FAR 52.233-1(c) (2014).

appealable final decision on the “claim.” An administrative board or the COFC must dismiss an appeal for lack of subject matter jurisdiction taken from a putative “final decision” on a claim that does not meet the requirements of a “proper” CDA “claim.”<sup>26</sup>

Beyond the express requirements of the CDA and the FAR definition, the case law has embroidered additional features for a valid “claim.” In general, the tribunals have applied the FAR definitional requirement that a written demand for monetary relief must assert “as a matter of right” a “sum certain” amount. A written demand for an amount that expressly, or in context, can be construed as an “offer” to settle a dispute or as a step in negotiation is not a “claim.” Similarly, a putative monetary claim that asserts a non-specific amount, such as a demand for “an amount to be determined at a hearing,” or that is couched as an “estimate,” or that even specifies an amount but adds “at a minimum,” “no less than,” or similar qualification, will not meet the “sum certain” requirement and will be deemed invalid. The case law, moreover, has added the gloss that, to qualify as a “claim,” the written demand must expressly, or at least by evident implication, request a “final decision” from the contracting officer. In addition, a “claim” that omits a “certification”<sup>27</sup> that substantially complies with

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26. If the “claim” does not comply with the FAR 2.101 definition, it is irrelevant that the contracting officer treated it as a “claim” in issuing final decision. *See Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc); *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981); *Hejran Hejrat Co., ASBCA No. 61234, 18-1 BCA ¶ 37,039, at 180,323* (“A contracting officer’s characterization of a submission by a contractor cannot establish that a CDA claim has been submitted.”).

27. FAR 33.207, respecting “certification,” provides:

- (a) Contractors shall provide the certification specified in paragraph (c) of this section when submitting any claim exceeding \$100,000.
- (b) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.
- (c) The certification shall state as follows:  
I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.
- (d) The aggregate amount of both increased and decreased costs shall be used in determining when the dollar thresholds requiring certification are met (see example in 15.403-4(a) (1) (iii) regarding certified cost or pricing data).
- (e) The certification may be executed by any person authorized to bind the contractor with respect to the claim.
- (f) A defective certification shall not deprive a court or an agency BCA of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency BCA, however, the court or agency BCA shall require a defective certification to be corrected.
- (g) The certification may be executed by any person authorized to bind the contractor with respect to the claim.
- (h) A defective certification shall not deprive a court or an agency BCA of jurisdiction over that claim.

the statutory requirements, signed by an agent who may bind the contractor with respect to the claim, is not a valid “claim.”<sup>28</sup>

In view of the nuances of a CDA claim, more than a few claimants have lost their “day in court” to litigate an otherwise meritorious claim by failing to include all the elements necessary to claim “validity.” The same subtleties create risks for tolling the CDA statute of limitations.<sup>29</sup> A litigant who timely submits what he or she believes to be a valid “claim” may be told by the COFC or a BCA, months or years after appeal is taken from a contracting officer’s final decision, that the “claim” is not valid and that the tribunal lacks jurisdiction to consider the “claim”. If that occurs more than six years after the “claim” accrued, then the “claim” is likely lost forever.<sup>30</sup>

### III. 1995 ENACTMENT OF CDA STATUTE OF LIMITATIONS

#### A. *Rejection of Efforts to Impute a Statute of Limitations for Administrative Claims*

As noted, the CDA originally did not prescribe a period of time for a claimant to file an administrative claim against the contra-party after the occurrence of events forming the basis for the claim. The statute contained two time limits. On receipt of contractor’s claim, the Government had a sixty-day period to respond with a final decision.<sup>31</sup> In

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Prior to the entry of a final judgment by a court or a decision by an agency BCA, however, the court or agency BCA shall require a defective certification to be corrected.

28. L-3 Commc’ns Integrated Sys., L.P. v. United States, 132 Fed. Cl. 325, 334 (2012) (claim submitted with putative certification that does not “at least resemble the statutory language” is not “valid” and precludes the appeals tribunal from exercising jurisdiction); NileCo Gen. Contracting, LLC, ASBCA No. 60912, 17-1 BCA ¶ 36,862, at 179,605 (because typewritten signature block does not qualify as required signature on certification, board had no jurisdiction over contractor’s claim).

29. The CDA forums from time to time assert that “a claim need not be submitted in any particular form or use any particular wording,” that the “request for a decision can be implied from the context of the submission,” and that, in “determining whether a contractor has submitted a claim, the Board applies a common sense analysis on a case-by-case basis, examining the totality of the correspondence between the parties.” Rover Constr. Co., ASBCA No. 60703, 17-1 BCA ¶ 36,682, at 178,613. In general, however, any written assertion that does not track the specific requirements of the “claim” definition in FAR 2.101 runs a high risk of disqualification as a “claim.”

30. Government contractors must heed the difference between the time to present their claims to a contracting officer (six years from accrual) and the time to appeal from a final decision on that claim (90 days to a BCA, one year to the COFC). A CDA tribunal has no jurisdiction to consider a late appeal from a final decision even if the contractor’s appeal is taken within the six years after accrual. Newtech Research Sys., LLC v. United States, 99 Fed. Cl. 193, 208–09 (2011).

31. The statute prevents the government from sidestepping judicial review of a contractor’s claim by providing that, if the officer does not timely issue a final decision (generally, sixty days after receipt), the claim will be “deemed denied,” allowing the contractor to appeal. 41 U.S.C. § 7103(f)(5) (2016). At the same time, the government cannot assert the date a contractor’s claim will be “deemed denied” as triggering the time to appeal. If the claim is deemed denied, the contractor is authorized to file suit under 41 U.S.C. § 7103(f), but the contractor is not required to do so. Pathman Con-

addition, the contractor had to file an appeal in a BCA or the COFC within the applicable ninety-day or twelve-month period from receipt of an agency contracting officer's final decision ("COFD"). The statute was silent on the passage of time between claim-creating events and presentment of the claim to the other party. Further, CDA legislative history shows no consideration of a time limit for a party to assert a claim, the threshold event for initiating the dispute process. As a result, parties were able to sit on potential "causes of action" for an indefinite period after the other party's breach or commission of other injury. Other than possible equitable defenses, such as laches, unintentional or strategic delays in submitting "claims" had no legal consequence.<sup>32</sup>

The courts and boards, moreover, rejected litigant efforts to assert limitations periods borrowed from other statutes. In response to stale Government claims, contractors sought to invoke the six-year statute of limitations in 28 U.S.C. § 2415, applicable to Government claims for "money damages." Section 2415 provided:

[E]very action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later. . . .

In 1985, the Federal Circuit held that § 2415 did not apply to a Government CDA claim. The court reasoned that, under the CDA, a Government "claim" is "not an 'action for money damages brought by the

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str. Co. v. United States, 817 F.2d 1573, 1577 (Fed. Cir. 1987). "[B]ecause the limitations period begins to run upon receipt of a decision, the limitations period is only triggered by a written decision, not by a deemed denial." *Patton v. United States*, 74 Fed. Cl. 110, 115-16 (2006) (citing *Pathman*, 817 F.2d at 1576) (emphasis omitted). *See also* *Env'tl. Safety Consultants, Inc. v. United States*, 95 Fed. Cl. 77, 91 (2010) ("Under the CDA, upon receipt of a written claim from a contractor, a Contracting Officer must issue a final decision within sixty days.").

32. The CDA tribunals have never squarely held that laches is available as an affirmative defense to a government claim. *JANA, Inc. v. United States*, 936 F.2d 1265, 1269 (Fed. Cir. 1991) (noting "that it is not entirely clear whether the defense of laches may be asserted against the government"). It appears that contractors have rarely, if ever, prevailed on a laches defense, whether before or after FASA's adoption of a CDA statute of limitations. *See, e.g.*, *Northrop Grumman Corp.*, ASBCA No. 57625, 14-1 BCA ¶ 35,501 ("Assuming *arguendo*, that the equitable doctrine of laches may be applied against the government under these circumstances . . . we believe that the claim was not unreasonably or inexcusably delayed."); *cf.* *Eurasia Heavy Indus.*, ASBCA No. 52878, 01-2 BCA ¶ 31,574 (rejecting argument that government claim filed within six-year CDA limitations period cannot be barred by laches as matter of law). The government appears to have had marginally better success in asserting laches in response to "inexcusably delayed" contractor claims. *See* *JRS Mgmt.*, ASBCA No. 57238, 10-2 BCA ¶ 34,571 (12-year delay); *Ahmed S. Al-Zhickrulla Est.*, ASBCA No. 52137, 03-2 BCA ¶ 32,409 (7-year delay); *Bierauegel*, ASBCA No. 47145, 95-1 BCA ¶ 27,536 (10-year delay).

United States' as expressly required by the statute. Instead, it is an administrative appeal by a contractor from a contracting officer's decision that the contractor owes the Government the amount of certain disallowed costs."<sup>33</sup>

In substance, of course, a Government claim to recoup unallowable costs previously paid to a contractor is an "action for money damages." The decisions that rejected § 2415 as a surrogate statute of limitations in defense of Government CDA claims nevertheless may be justified by the more persuasive rationale that judges generally lack the power to create law where the legislature has failed to act. Indeed, in connection with aged contractor CDA claims, the Federal Circuit courts and BCAs relied on this principle in rejecting the Government's assertion of the Tucker Act's<sup>34</sup> six-year limitations period.<sup>35</sup> As a claims court decision explained:

Although defendant urges that the Claims Court's general six-year statute of limitations, 28 U.S.C. § 2501 (1982), applies to a suit filed pursuant to the CDA, this court recently held that the [only the] CDA's 12-month limitations period [to file an appeal] governs all suits that are based on the CDA . . . . Plaintiff commenced this action within 12 months after receipt of the contracting officer's decision, although he had delayed for years in submitting his claim to the contracting officer . . . . Allowing the contractor to proceed in court under the circumstances present could have been avoided had the CDA limited the time within which the contractor is required to present his claim to a contracting officer. It did not. Even if defendant's argument is consistent with the CDA's legislative goal of arriving at prompt resolution of contract claims . . . the court's function is not to fashion a judicial bandage for an unfortunate gap in legislation.<sup>36</sup>

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33. *S.E.R. Jobs for Progress, Inc. v. United States*, 759 F.2d 1, 5 (Fed. Cir. 1985). *See also* *Motorola, Inc. v. West*, 125 F.3d 1470, 1472–74 (Fed Cir. 1997) (although Government agreed that its claim asserted in its final decision accrued more than six years before submitted to contractor, claim not time-barred; section 2415(a) did not apply, and FASA's SOL did not apply retroactively to contracts entered before act). *See also* *Radiation Systems, Inc.*, ASBCA No. 41065, 91-2 BCA ¶ 23,971 (applying *S.E.R.* as binding Federal Circuit precedent).

34. The Tucker Act limitations provision, 28 U.S.C. § 2501, states: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." Enacted in 1887, the Tucker Act grants a limited waiver of sovereign immunity for suits for money damages against the United States under express or implied contracts, among other matters. Since inception, moreover, the limitations provision functions as limiting the Court of Claims jurisdiction to timely filed claims. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133–34 (2008).

35. *Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1580 (Fed. Cir. 1987).

36. *La Coste v. United States*, 9 Cl. Ct. 313, 314–315 (1986).

### B. *Federal Acquisition Streamlining Act of 1994*

To plug the “gap in legislation,” Congress created a limitations period for CDA administrative claims in 1994 as part of the much broader Federal Acquisition Streamlining Act (“FASA”).<sup>37</sup> “FASA was intended, as its name suggests, to streamline and simplify federal acquisition procedures.<sup>38</sup> [FASA] was the product of Congress’ conclusion that the entire federal procurement regime had become a ‘complex and unwieldy system.’”<sup>39</sup>

Prior to FASA, there were occasional, aborted efforts in Congress to create a CDA statute of limitations. In particular, in 1985 and 1986, bills were introduced in the Senate that would have barred payment on any contractor claim submitted to a contracting officer more than “18 months after the date of the event on which the claim is based”<sup>40</sup> or “arising out of events occurring more than 18 months before the submission of the claim, request, or demand.”<sup>41</sup> According to its proponents, the proposed legislation responded to complaints from the Justice Department, backed up by a study of the (then) General Accounting Office, that “contractors often wait years before submitting claims for payment, thereby making adjudication of disputes difficult.”<sup>42</sup> The proposed amendments contained no limitations period for Government claims against contractors. These proposals, however, never became law.

The momentum to add a CDA limitations period picked up in the early 1990s and came to fruition as part of FASA’s enactment. The original Senate version<sup>43</sup> required both the Government and contractors to submit administrative claims “within 6 years after the *occurrence of the event or events giving rise to the claim.*” (emphasis added).<sup>44</sup> The accompanying Senate report explained that the provision would amend the CDA “to clarify the periods for filing claims”—an enigmatic remark, given that there had been no limitations period in need of “clarification.”<sup>45</sup>

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37. See generally Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243.

38. See S. Rep. No. 103-259, at 1 (1994), reprinted in 1994 U.S.C.C.A.N. 2598, 2598.

39. *Corel Corp. v. U.S.*, 165 F. Supp. 2d 12, 20 (D.D.C. 2001) (citing S. Rep. No. 103-258, at 2 (1994), reprinted in 1994 U.S.C.C.A.N. 2561, 2563).

40. 131 CONG. REC. 12,962 (1985) (offered as amendment to National Defense Authorization Act of 1986, S. 1160).

41. Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 7101-7109 (2012)).

42. 132 CONG. REC. 10,075-76 (1986) (statement of Sen. Cohen).

43. 132 CONG. REC. 26,205, 26,233 (1986); Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, §2552, 108 Stat. 3243.

44. S. 1587, 103rd Cong. § 2351 (1994) (enacted).

45. See 103 CONG. REC. 26,256 (1993) (“Sec. 2552 would amend the Contract Disputes Act to clarify the periods for filing claims.”).

Ultimately, a revised Senate bill, which became law, and adopting in all material respects the current language, provided:

Each claim by a contractor against the Government relating to a contract and each claim by the Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the Government against a contractor that is based on a claim by the contractor involving fraud.<sup>46</sup>

The FASA amendment to the CDA, however, did not define “accrual.” The record sheds no light on what Congress intended by the term. There is no indication, for example, whether “accrual” reflected a rejection, or a mere truncation, of the earlier version of the bill’s language requiring submission of a claim within the six-year period “after the occurrence of the event or events giving rise to the claim”—or something else altogether. The final language appears to have been slipped into the Senate amendment with no record of any comment, discussion, or debate about the meaning of the statutorily undefined “accrual,” including reference to any other federal statutes of limitations as a model or source material.

Legislative inattention may also explain the apparent double-meaning of the word “claim” in the limitations amendment that “[e]ach *claim* . . . relating to a contract shall be submitted within [six] years after the accrual of the *claim*.” The reviewing tribunals apply two distinct meanings to “claim”—notwithstanding the “vigorous” presumption that the same words in the same sentence of a statute have the same meaning.<sup>47</sup> The judiciary reflexively construes the “claim” that must “be submitted” in accordance the FAR 2.101 definition—a written assertion that conforms with the technical requirements of a “claim” necessary to BCA or COFC jurisdiction. In contrast, “claim” in “after the accrual of the claim” is given its typical legal meaning—that is, “cause of action,” and *not* the FAR definition.<sup>48</sup>

The case law has not examined the fact of “claim’s” double-meaning in the “accrual” provision. This may be due in part to the obvious

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46. 140 CONG. REC. 15,977 (1994). In the 2011 recodification, Congress changed “government” to “Federal Government” and broke out the last sentence to a new subsection 7103(4)(b).

47. “[T]he presumption that a given term is used to mean the same thing throughout a statute is at its most vigorous when a term is repeated within a given sentence.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994). On the other hand, the “same words, same meaning” rule of thumb is by no means an inflexible canon of statutory construction. *See Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (“In law as in life, however, the same words, placed in different contexts, sometimes mean different things . . . We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute.”).

48. *But see Kellogg Brown & Root Services, Inc. v. Murphy*, 823 F.3d 622, 626 (Fed. Cir. 2016) (“[F]ixing the date of accrual of a claim requires first that there is a ‘claim’ as defined in the Contract Disputes Act and associated Regulations”).

incongruity in using the FAR definition to determine “accrual” of a “claim.” It would be nonsensical to construe a “claim” to “accrue” only upon its reduction to a writing that asserts “as a matter of right, the payment of money in a sum certain,” accompanied by a certification, along with the other statutory and regulatory bells and whistles of a CDA “claim.” Indeed, if the FAR defined the “claim” that “accrues,” no “claim” could ever be untimely. The limitations period would begin and end simultaneously on submission of a jurisdictionally valid “claim.”<sup>49</sup>

Conversely, it is not obvious that, in enacting FASA, Congress intended the “claim” that “shall be submitted within 6 years” to be given the technical and restrictive definition in the FAR. The little legislative history relevant to the CDA’s statute of limitations does not refer to the FAR’s definition of “claim,” or even reflect awareness that CDA tribunals had been rejecting appeals for lack of “jurisdiction” for claims that did not conform to the FAR definition. If it could be said to have “intended” anything, Congress reasonably may have intended that a claimant’s unadorned written assertion of an accrued would stop the limitations clock. To date, there do not appear to be any decisions to consider that proposition.<sup>50</sup>

### C. *Statute of Limitations: From “Jurisdictional” to “Claims Processing”*

One of the first significant issues under the FASA amendment was whether timely presentment of a claim was necessary for CDA forum subject matter jurisdiction. “Filing deadlines ordinarily are not jurisdictional,” according to the Supreme Court.<sup>51</sup> This is true of most “statutes of limitations,” which typically function as an affirmative defense on which the respondent bears the burden of proof. A respondent, moreover, may waive an affirmative statute of limitations defense. Filing deadlines, however, sometimes may be “jurisdictional,” in that non-compliance with the filing deadline deprives a court or forum from exercising any power to consider the claim. Under “jurisdictional” limitations periods, the claimant, as proponent of jurisdiction, bears the burden to prove that he or she timely filed

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49. The FAR definition of “claim” predated FASA by at least ten years. Under ordinary rules of statutory construction, that would raise a presumption that Congress intended the FAR definition of “claim” to apply the CDA statute adopted in FASA. *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . [or] adopts a new law incorporating sections of a prior law, . . . at least insofar as [the prior interpretation] affects the new statute”). The absurdity of applying the FAR definition of “claim” as the object of “accrue” would be enough to rebut any such presumption.

50. *But see* *Kellogg Brown & Root Services, Inc. v. Murphy*, 823 F.3d 622, 627 (Fed. Cir. 2016) discussed *infra* p 50.

51. *Henderson v. Shinseki*, 562 U.S. 428 (2011).

the claim. In recent years, the Supreme Court has been emphatic that statutory filing deadlines are “jurisdictional” only where “Congress has clearly stated that the rule is jurisdictional; absent such a clear statement, [the Court has] cautioned [that] courts should treat the restriction as nonjurisdictional in character.”<sup>52</sup>

The CDA statute of limitations contains no “clear statement” that the filing of a claim within six years of “accrual” is jurisdictional. Nevertheless, in 2006, the ASBCA concluded that the amendment’s “placement” in what it called the “jurisdictional” section of the statute dictated that the limitations period should be treated as a jurisdictional gateway:

Section [7103(a)] as implemented by FAR subpart 33.2, Disputes and Appeals, is the key provision in determining whether there is a proper or formal claim for purposes of the CDA . . . . FASA added the six-year requirement to this key provision, rather than, for example, to 41 U.S.C. § [7104(a) and (b)], establishing filing periods at the boards and the United States Court of Federal Claims. We conclude, in view of the placement of the six-year provision in § [7103(a)], that the requirement that a claim be submitted within six years after its accrual, like the other requirements in that section, is jurisdictional.<sup>53</sup>

The Federal Circuit Court of Appeals in 2009 reached the same conclusion:

The six-year presentment period is part of the requirement in section [1703(a)] that all claims by a contractor against the Government be submitted to the contracting officer for a decision. This court has held that the presentment of claims to a contracting officer under section [1703(a)] is a prerequisite to suit in the Court of Federal Claims or review by a board of contract appeals. *England v. Swanson Group*, 353 F.3d 1375, 1379 (Fed. Cir. 2004); *Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993). Statutory time restrictions on the submission of administrative claims are a part of the requirement that a party must satisfy to properly exhaust administrative remedies . . . . Therefore . . . the timely submission of a claim to a contracting officer is a necessary predicate to the exercise of jurisdiction by a court or a board of contract appeals over a contract dispute governed by the CDA.<sup>54</sup>

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52. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515–16 (2005).

53. *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,475 (citations omitted). In an earlier decision, the ASBCA had concluded without discussion that the “statute of limitations and *laches* are affirmative defenses that do not go to the jurisdiction of the Board.” *Woodside Summit Group, Inc.*, ASBCA No. 54554, 05-2 BCA ¶ 33,113 at 164,102. *Gray* dismissed this as “dictum.” *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,475 n.2.

54. *Arctic Slope Native Ass’n v. Sebelius*, 583 F.3d 785, 793 (Fed. Cir. 2009) (citation omitted). *See also* *Sys. Dev. Corp. v. McHugh*, 686 F.3d 1341, 1347 (Fed. Cir. 2011) (following *Arctic Slope*).

With timely submission a jurisdictional requirement, the party asserting the claim bore the burden to prove “presentment” within six years of “accrual.” In practice, respondents frequently challenged claims at the outset by filing a motion for lack of subject matter jurisdiction. In response, the claimant had to establish by a preponderance of evidence that its claim “accrued” within the six-year window. As a challenge to subject matter jurisdiction, the CDA forums typically decided motions to dismiss for untimely filing before addressing the merits or permitting discovery.

In 2014, however, the Federal Circuit abruptly reversed course, and held that the six-year limitations period was not jurisdictional.<sup>55</sup> The Court ruled:

Our decision in *Systems Development* was effectively overruled by the Supreme Court’s more recent decision in the latest in a series of Supreme Court opinions that have articulated a more stringent test for determining when statutory time limits are jurisdictional. . . . The Court articulated a “readily administrable bright line” rule, under which the inquiry is “whether Congress has clearly stated that the rule is jurisdictional; absent such a clear statement, [the Court has] cautioned [that] courts should treat the restriction as nonjurisdictional in character.” [citations omitted] Congress need not “incant magic words [‘jurisdictional’] in order to speak clearly,” and render the provision jurisdictional. . . . Here, § 7103 “does not speak in jurisdictional terms” or refer in any way to the jurisdiction of the Claims Court. . . . [Section] 7103 does not have any special characteristic that would warrant making an exception to the general rule that filing deadlines are not jurisdictional. We conclude that § 7103 is not jurisdictional and need not be addressed before deciding the merits.

*Sikorsky* had a swift impact on CDA litigation. The decision effectively rendered moot dozens of pending motions to dismiss based on untimely presentment. The burden shifted to respondents to prove untimeliness—a burden rarely met at the pleadings stage. Early exit would now have to wait until the summary judgment stage, where the respondent must demonstrate that there are no material facts in dispute and that the claim is untimely as a matter of law. In an appeal of a contractor claim against the Government, the Civil Board of Contract Appeals summarized *Sikorsky*’s impact:

The transformation of the CDA’s six-year statute of limitations from jurisdictional to non-jurisdictional changes how we must approach a motion to dismiss a case for failure to meet that deadline. No longer can the Government through a motion to dismiss, challenge the factual allegations that the contractor has made in its complaint and require the contractor to prove jurisdictional facts by a preponderance of the evidence. Instead, the CDA’s six-year statute

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55. *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1321 (Fed. Cir. 2014).

of limitations is now an affirmative defense that the Government must plead in its answer to the appellant's complaint. . . . [T]he burden is on the Government, not the appellant, to prove its affirmative defense that the contractor's claim is time-barred. . . . [T]he party seeking to enforce the limitations period must do so using the same procedural rules that the Board applies to other non-jurisdictional issues: motions for failure to state a claim, summary [judgment], and, if there are genuine issues of material fact relating to the statute of limitations issue, a hearing or record submission to resolve competing versions of the facts.<sup>56</sup>

#### IV. THE CONCEPT OF CLAIM "ACCRUAL" UNDER THE CDA

As noted, the FASA Congress did not define the pivotal term "accrual" in creating a CDA limitations period. Instead, the Government agencies charged with Federal Acquisition Regulation rule-making (convening a "FAR Council") promulgated a definition on their own initiative. They defined accrual ostensibly under their statutory general power to implement "requirements for protests and disputes in Government procurement."<sup>57</sup> In September 1995, the agencies issued a final rule defining "accrual." Since the agencies' decision, the judiciary itself has not undertaken to interpret the statutory meaning of "accrue." Instead, the Federal Circuit courts and BCAs have applied the regulatory definition by virtual default.

##### A. Regulatory Definition of "Accrue"

In early January 1995, the FAR Councils issued a proposed rule, drafted by the interagency drafting team responsible for FAR Case 94-730, "Protests, Disputes, and Appeals," in an effort to clarify the provision that each CDA claim "shall be submitted within 6 years *after the accrual of the claim*." The proposed rule would have added the following section 33.206 of FAR, "Initiation of a claim":

(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within six years *after the contractor knew or should have known the facts and circumstances giving rise to the issue in controversy* unless a shorter time period has been agreed to. . . .

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within six years after accrual of the claim. The six-year period shall not apply to a Government claim against a contractor that is based on a claim by the contractor involving fraud.

56. *Sys. Mgmt. & Research Techs. Corp. v. DOE*, 2015 CIVBCA LEXIS 176, \*13-14, 2015-1 B.C.A. (CCH) P35,976 (B.C.A. May 12, 2015).

57. Federal Acquisition Regulation; Protests, Disputes, and Appeals, 60 Fed. Reg. 2630 (proposed Jan. 10, 1995).

In response, almost all commentators criticized the rule's language regarding the "initiation of a [contractor or Government] claim" for lack of parallelism. Under the draft language, a contractor had to bring its claim within six years after the contractor "knew or should have known of the facts and circumstances giving rise to the issue in controversy." The Government, on the other hand, had to submit its claims within the six years after "accrual"—left undefined in the draft. Reacting to the criticism, the drafting team prepared a revised "draft final rule" that, among other things, included a new general definition of "accrual."<sup>58</sup> The draft final rule included the following definition:

Accrual of a claim occurs on the date when the facts and circumstances giving rise to the issue in controversy and the resulting damage were known or should have been known. In any event, all claims accrue not later than the date of contract completion, except for Government claims concerning latent defects or Government claims based on contractor claims involving fraud.

The draft final rule also revised new section 33.206 of FAR to provide both contractor and Government claims were required to be submitted "within [six] years after accrual of the claim."

The majority of those who commented, from both the private and Government agency communities, again remonstrated, this time strongly critical of the proposal's "discovery" standard language—that a claim would not accrue until the claimant "knew or should have known" of the facts constituting the cause of action. Instead, commentators urged the Councils to adopt the standard of "accrual" the courts had applied under the Tucker Act<sup>59</sup>—the statutory language of which is substantively identical to the CDA and, similarly, does not define "accrual."<sup>60</sup> Under the Tucker Act precedent (referred to in the regu-

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58. Memorandum for Agency Contact Points from Edward C. Loeb, Deputy Project Manager, on Review of FAR Case 94-730, PROTESTS, DISPUTES, AND APPEALS 11-12 (May 26, 1995).

59. In particular, many cited the rule as stated in the Tucker Act decision. *Japanese War Notes Claimants Ass'n v. United States*, 373 F.2d 356, 358-59 (Ct. Cl. 1966). See, e.g., Letter from American Bar Association, Section on Public Contracts, to General Services Administration, FAR Secretariat, re: FAR Case 94-730, PROTESTS, DISPUTES, AND APPEALS (Mar. 10, 1995) ("The Section's recommendation would adopt the definition of accrual that has been developed under the Tucker Act. *Japanese War Notes Claimants Association v. United States*, 178 Ct. Cl. 630, 632 (1977). This test is well understood and has been applied in numerous cases."); Memorandum of Department of Defense, Office of General Counsel, to Deputy Undersecretary of Defense for Acquisition Reform, re: FAR Case 94-730, PROTESTS, DISPUTES, AND APPEALS (June 9, 1995) (citing *Japanese War Notes* standard); DLA [Defense Logistics Agency] Comments on FAR Case 94-730, PROTESTS, DISPUTES, AND APPEALS (Mar. 14, 1995) (citing *Japanese War Notes Claimants Ass'n v. United States*, 373 F.2d 356, 358 (Ct. Cl. 1966)).

60. Compare the Tucker Act language, 28 U.S.C. § 2501 ("Every claim . . . shall be barred unless the petition thereon is filed within six years after such claim first accrues"), with the CDA Language, 41 U.S.C. 7103(a)(4) ("Each claim . . . shall be submitted within 6 years after the accrual of the claim").

latory history as the *Japanese War Notes* standard<sup>61</sup> by a prominent Tucker Act case), a claim accrues “when all the events have occurred which fix the alleged liability of the United States and entitle the claimant to institute an action.”<sup>62</sup> Put simply, the period commences on the occurrence of events that create a cause of action. Accrual is not contingent on whether or when the claimant “knew or should have known” of those events.<sup>63</sup>

Despite significant resistance, the FAR Council decided to adopt a “discovery” standard. In issuing what became the final rule, the drafting team stated the following:

We have included a known or should have known standard for discovery. Many pricing defect cases have their original events at the beginning of the contract or on contract award, but often cannot be discovered by the Government until years later. Therefore, the discovery requirement must remain. As to having the claim accrue upon discovery of damages, we agree to include discovery of damage as an element of the definition. We did not limit claim submis-

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61. 178 Ct. Cl. 630, 632 (1977).

62. Since 1883, the federal claims courts have held that a Tucker Act claim accrues on occurrence of the events, that timely filing was necessary to establish a court's jurisdiction over an action, and that “equitable tolling” could not extend the absolute six-year limit. Such a strict approach followed the historical practice of “limiting the scope of a governmental waiver of sovereign immunity.” *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008). *See Japanese War Notes Claimants Association v. United States*, 178 Ct. Cl. 630, 632 (1977) (“a claim first accrues when all the events have occurred which fix the alleged liability of the United States and entitle the claimant to institute an action”). *Accord*, *Hart v. United States*, 910 F.2d 815, 817 (Fed. Cir. 1990) (“[a] claim first accrues and the six-year statute of limitations begins to run (28 U.S.C. § 2501), ‘when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.’ *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988) (quoting *Oceanic Steamship Co. v. United States*, 165 Ct. Cl. 217, 225 (1964))”; *Reliance Motors, Inc. v. United States*, 112 Ct. Cl. 324, 328 (1948) (“The general rule is that a claim accrues, within the meaning of the statute . . . when all the events have occurred which fix the liability of the United States to a claimant and which entitle such person to sue thereon”).

63. *See* Letter from Council of Defense and Space Industry Associations to General Services Administration, FAR Secretariat, re: FAR Case 94-730, PROTESTS, DISPUTES, AND APPEALS 3 (Mar. 10, 1995) (noting that, if following Tucker Act meaning of “accrue,” “it is not relevant to the accrual of a claim ‘when the contractor knew or should have known the facts and circumstances giving rise to the controversy,’” citing *Brown*, “The New Time Limits on Contract Claims under the Federal Acquisition Streamlining Act of 1994,” 63 Federal Contracts Report 32 (BNA Jan. 9, 1995)); Letter from American Bar Association, Section on Public Contracts, to General Services Administration, FAR Secretariat, re: FAR Case 94-730, PROTESTS, DISPUTES, AND APPEALS 11-12 (Mar. 10, 1995) (“The Section’s recommended definition of “accrual” would make clear that a general discovery rule would not apply to proposed contract claims under the Contract Disputes Act. . . . As a policy matter, the Section’s recommended definition would encourage a reasonably prompt investigation and assertion of potential claims. The six-year limitations period is already sufficiently generous without confusing the matter by creating an issue over when the limitation period has started to accrue.”)

sions to six years after contract completion in order to avoid litigation over the definition of contract completion.<sup>64</sup>

The drafters further explained that the team did not accept the proposition, urged by commentators that the *Japanese War Notes* standard was incompatible with a “discovery” standard. On the contrary, it remarked that “[w]e retained the ‘knew or should have known’ language based on *Catellus Development Corp. v. United States*,<sup>65</sup> and a damages element under *Shermco Industries v. United States*.<sup>66</sup> Both cases are in the *Japanese War Notes* series of cases.”<sup>67</sup> The definition of “accrual” published in the final rule, added to FAR 33.201, states the following:

*Accrual of a claim* occurs on the date when all events, which fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.<sup>68</sup>

The foregoing regulatory history demonstrates that the FAR Council purported to rely on Tucker Act case law to define “accrual,” including the “knew or should have known” “discovery” language. Its reliance on the *Japanese War Notes* series of cases to justify the “knew or should have known” *discovery rule* standard for the CDA, however, is questionable. A Tucker Act claim does not accrue on discovery: it accrues on occurrence of the events that create a claim. Under the “accrual suspension” *exception* to this rule, accrual may be “suspended” only if the claimant can make an extraordinary showing that the respondent concealed the facts, or the injury is “inherently unknowable.” In those “rare circumstances,”<sup>69</sup> “the statute will not begin

64. Most commentators had argued against using the date of contract completion as the last date for accrual, claiming that contract “completion date” is an “undefined concept . . . likely to vary on contract type and individual fact situation. Memorandum of Department of Defense, Office of General Counsel, to Deputy Undersecretary of Defense for Acquisition Reform, re: FAR Case 94-730, PROTESTS, DISPUTES, AND APPEALS 2 (June 9, 1995).

65. *Catellus Development Corp. v. United States*, 31 Fed. Cl. 399 (1994).

66. *Shermco Industries v. United States*, 6 Cl. Ct. 588 (1984).

67. Memorandum from Craig E. Hodge, Chair of drafting committee, Department of the Army, for Captain Barry L. Cohan, Acting Assistant Deputy Undersecretary for Defense (Acquisition Process and Policies), re: Federal Acquisition Streamlining Act of 1994—FAR Part 33, FAR Case 94-730 (31 July 1995) at 2. Whether mindfully or not, the drafting committee citation to the “*Japanese War Notes* [(i.e., Tucker Act)] series of cases” for language to create a “discovery rule” accrual standard was misleading. As noted above, under the Tucker Act, a “should have known” inquiry only applies to “suspend” a claim that has accrued in extraordinary circumstances in which claimant can show that the respondent concealed the operative facts or that its claim was “inherently unknowable.”

68. 60 Fed. Reg. 48224 (Sept. 18, 1995).

69. *Michael v. United States*, 642 Fed. Appx. 987, 988 (Fed. Cir. 2016) (accrual “suspended” only in “rare circumstances in which ‘the government concealed its acts or the plaintiff’s injury was ‘inherently unknowable’”).

to run until a plaintiff learns or reasonably should have learned of his cause of action.” This exception is “strictly and narrowly applied.”<sup>70</sup> *Japanese War Notes* made this point with an oft-repeated example of an injury that is “‘inherently unknowable’ at the accrual date:”

An example of the latter would be when defendant delivers the wrong type of fruit tree to plaintiff and the wrong cannot be determined until the tree bears fruit. . . . *In this situation* the statute will not begin to run until plaintiff learns or reasonably should have learned of his cause of action. . . . Once the plaintiff is on inquiry that it has a potential claim, the statute can start to run.<sup>71</sup>

Thus, to craft and promote a CDA “discovery” standard, the FAR Council dubiously borrowed from the “rare” exception to the Tucker Act’s harsh, non-discovery standard. The ambiguity in judicial effects to define when a CDA claim accrues arguably reflects the FAR Councils’ attempt to cross-breed fundamentally incompatible accrual standards.

Except for non-substantive changes, the definition of “accrual” under FAR 33.201 has remained in place.<sup>72</sup> Without analysis, and without any judicial exegesis of Congressional intent behind the phrase “accrual of the claim,” the CDA forums adopted the FAR definition in deciding whether a claim “has been submitted within [six] years after [its] accrual” under section 7103(4) (a).<sup>73</sup>

### B. *Gray Personnel*

In *Gray Personnel, Inc.*,<sup>74</sup> the ASBCA first addressed the FAR’s “accrual” definition. The Board’s decision established the framework

70. “The “suspension” of accrual of a claim on occurrence of the underlying events is “‘strictly and narrowly applied’ and requires a plaintiff to show either (1) ‘that defendant has concealed its acts with the result that plaintiff was unaware of their existence,’ or (2) ‘that [the plaintiff’s] injury was inherently unknowable at the accrual date.’” *Brizuela v. United States*, 492 Fed. Appx. 97, 99–100 (Fed. Cir. 2012). “When a claim is inherently unknowable it does not mean that the claim is ‘somewhat difficult to discover,’ or is ‘not entirely obvious.’ That which is inherently unknowable is that which is unknowable by its very essence, i.e., its existence at the critical moment simply cannot be ascertained.” *Catellus Dev. Corp. v. United States*, 31 Fed. Cl. 399, 407 (1994).

71. (emphasis added) 178 Ct. Cl. at 364.

72. Federal Acquisition Regulation; Protests, Disputes, and Appeals, 66 Fed. Reg. 2132 (Jan. 10, 2001) (codified at 48 FAR 33.201).

73. *See, e.g.*, *Lord Corp.*, ASBCA No. 54940, 06-2 BCA ¶ 33,314, at 165,168 (citing and applying FAR 33.201’s definition without attempt to interpret “accrual” in CDA); *Axion Corp. v. United States*, 68 Fed. Cl. 468, 480, (2005) (noting that “the Contract Disputes Act does not define when a claim “accrues”; cites and applies FAR definition without examining meaning of “accrual” in CDA). *But see* *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, “deference is not due [a regulatory definition of a statutory term] unless a ‘court, employing traditional tools of statutory construction,’ is left with an unresolved ambiguity. . . . Where, as here, the canons supply an answer, ‘*Chevron* leaves the stage.’”)

74. *See generally* *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378.

for CDA statute of limitations analysis and articulated several important precepts that recur frequently in subsequent litigation. Accordingly, the decision's salient facts and rationale merit some attention.

In *Gray*, the Army in May 1997 awarded a fixed price contract to appellant to provide nursing services to Walter Reed Memorial Hospital for veterans. The fixed price for Gray's provision of nursing staff was based on estimated "full time equivalents" at specific hourly labor costs. Under the contract's "requirements" clause, the contractor provided the services only upon authorized delivery or task orders. In October 1997, the Army began issuing a series of delivery orders that in effect significantly increased the staffing the contractor needed to provide. To meet the demand, the contractor was forced to retain and pay more nurses on an "as needed" basis, resulting in contractor costs in excess of the contract's scheduled rates. As a result, Gray's costs exceeded the fixed price, resulting in a loss by the time the contract was completed in May 2002.

In April 2004, Gray submitted a claim for the increased costs under all of the delivery orders, which the Army denied in full. On Gray's appeal, the Army argued that the statute of limitations barred the contractor's claim in its entirety. It contended that the contractor knew in October 1997, more than six years before it submitted its claim, that the Army had constructively changed the contract. The contractor, on the other hand, argued that it could not have known the amount of money damages until it completed the contract. The Board rejected both arguments, settling on a middle ground. In the process, it made several important rulings.

First, the Board laid down the threshold inquiry for deciding a CDA statute of limitations dispute: "[t]o determine when liability is fixed, we start by examining the legal basis of the particular claim." In the case before the Board, the "legal basis" was a claim for "constructive change" through delivery orders that enlarged the contractor's obligations. Under the particular requirements contract," the contractor had no obligation to provide services, and the Government had no obligation to pay, except under specific delivery orders issued from time to time. The Board held:

Absent a delivery order . . . no performance was required. We conclude that the Government's potential liability for enlarging appellant's performance could not be "fixed" until the Government had issued a delivery order authorizing performance, and required appellant to provide "as needed" services under that order.<sup>75</sup>

Second, the Board rejected the contractor's argument that its claim did not "accrue" until it completed the contract. It held:

The second and third sentences of the definition in FAR 33.201 state that in order for liability to be fixed "some injury must have

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75. *Id.* at 165, 475.

occurred,” but “monetary damages need not have been incurred.” . . . Accordingly, appellant must have actually begun performance and incurred some extra costs for liability to be fixed. We do not think, however, that appellant must have completed the delivery order, or even, as appellant argues, have completed the contract in order for liability to be fixed. The CDA permits contractors to submit claims before they have incurred the total costs relating to the claim. Indeed, the Congressional intent was that “contractors . . . submit claims as soon as they are identified.”<sup>76</sup>

Third, the Board ruled that the contractor “knew or should have known” of the events that fixed the Government’s liability “at the time of those events.” Citing *Japanese War Notes*,<sup>77</sup> the Board ruled: “Once a party is on notice that it has a potential claim, the statute of limitations can start to run.”<sup>78</sup> Applying that “notice” concept, the Board rejected the contractor’s assertion that its claim did not accrue until it subjectively “recognized” the reasons for the “cost impact.”

Finally, the Board disagreed with the Government’s argument that the appellant’s entire claim accrued on the initial delivery order in October 1997. Rather, the statute only barred the claim to the extent it sought recovery for work performed on delivery orders more than six years before the contractor presented its claim—a conclusion that naturally followed the Board’s determination that Government liability for enlargement of the contractor’s performance became “fixed” on an order by order basis. *Gray* arguably complicated the analysis, however, by espousing a “doctrine”—the “continuing claims doctrine”—to justify its decision. According to this “doctrine,” which the Board also borrowed from Tucker Act precedent:

We disagree [with argument that the claim should be barred in its entirety] because we believe the “continuing claim” doctrine developed under the Tucker Act is applicable here. As explicated in *Brown Park Estates-Fairfield Development Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997). . . periodic pay claims arising more than six years prior to suit are barred, but not those arising within the six-year span. . . . In order for the continuing claim doctrine to apply, the plaintiff’s claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages. . . . However, a claim based upon a single distinct event, which may have continued ill effects later on, is not a continuing claim.

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76. *Id.* (citations omitted; emphasis added)

77. In pertinent part, 28 U.S.C. § 2501 states: “Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.”

78. *Japanese War Notes Claimants Ass’n of the Philippines, Inc. v. United States*, 178 Ct. Cl. 630, 634 (1967) (holding that, under § 2501, under the accrual suspension rule, “[o]nce plaintiff is on inquiry that it has a potential claim, the statute can start to run.”).

The board concluded that, in this case, “appellant’s claim is inherently susceptible to being broken down into a series of independent and distinct events, viz., the changes to the individual delivery orders.”<sup>79</sup>

*Gray* created the paradigm for analyzing CDA statute of limitations disputes. It established—albeit without analysis—that the definition of “accrual” drafted by regulators in FAR 33.201 determines when a claim “accrues” under the CDA. *Gray* further framed the two fundamental two-step inquiry in any given case: What are the “events” that “fix the alleged liability” and “permit assertion of the claim,” and when did the claimant know or should have known of the events. It also articulated the analytical tool that the “events that fix” liability require an examination of the “legal basis of the particular claim.” As *Gray* illustrated, that analysis does not start and stop with the claimant’s legal cause of action (e.g., breach of contract). Rather, a tribunal must look at the claimant’s theory of its case—the facts and circumstances by which the claimant intends to establish his or her cause of action. Consistent with treating the definition of accrual as a “discovery rule,” as the FAR Council intended,<sup>80</sup> moreover, *Gray* also held that the statute is triggered *not* by the events that “fix the liability,” but only when a “party is on notice” of those events.

*Gray* crafted a durable template for CDA limitations decisions. As discussed below, however, later cases deviate from *Gray*’s “notice” accrual test—and, indeed, are equivocal on whether or what type of “discovery rule” applies.

## V. CDA CLAIM ACCRUAL—ISSUES AND APPLICATION

The decisions by the CDA forums under the statute of limitations do not yield any clearly defined and consistently applied principles across the universe of cases. For practitioners and students, the cases are not uniform in analysis and do not create any well-defined roadmap to predictable results. This Section tries to unravel some of the knots in the most fundamental statements of the accrual standard and examines how the statute has been applied in the more typical and significant types of CDA disputes.

### A. *Issues in Defining the Standard*

#### 1. “Knew or Should Have Known”

The CDA tribunals have been inconsistent at best in interpreting and applying the FAR definition of “accrual;” that is “the date when

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79. *Gray Personnel, Inc.* ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,476. Because no part of the contractor’s claim accrued until the Army “fixed” its liability by issuing specific delivery orders that enlarged performance, the invocation of a distinct “doctrine” to reject the government’s argument that the entire claim accrued on the first such delivery order would appear gratuitous.

80. *See generally* 48 C.F.R. § 33.201.

all events, which fix the alleged liability . . . and permit assertion of the claim, were known or should have been known.” The decisions create confusion by relying, in substantial part, on Tucker Act precedent,<sup>81</sup> stating that a claim accrues at the time of the underlying operative events unless that information is concealed or “inherently unknowable.” More importantly, regardless of differing formulations of the legal standard, a close examination of the decisions show that a claimant will be time-barred only if aware, or in actual possession of, the facts underlying the claim more than six years before presentment. As *applied*, only actual knowledge or possession of the information of the facts that make out a claim will trigger the statute.

A limitations period triggered when the claimant “knew or should have known” the facts of its claim is the classic formulation of a “discovery rule.” Under a “discovery rule,” the occurrence of events underlying a claim is necessary, but not sufficient, for “accrual.” In general, the limitations period cannot commence at least until a claimant knows (or “should know”) information “that would lead a reasonable person to begin investigating the possibility that his legal rights had been infringed.”<sup>82</sup> Under an “inquiry notice” version, the limitations period begins to run when a “reasonable person” in the claimant’s position would have learned the operative facts while exercising due diligence.<sup>83</sup> *Gray*’s conclusion that the statute of limitations starts to run “[o]nce a party is on notice that it has a potential claim” seemingly endorsed an “inquiry notice” type of discovery rule.

After *Gray*, the ASBCA’s habit of borrowing language from Tucker Act decisions has sidelined any “inquiry notice” or similar discovery rule analysis. In *Raytheon Missile Systems*, for example, the ASBCA cited Tucker Act precedent to hold that that the “events fixing liability should have been known when they occurred unless they can be reasonably found to have been either concealed or ‘inherently unknow-

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81. See 28 U.S.C. § 1491 (2006).

82. *Merck & Co. v. Reynolds*, 559 U.S. 633, 650 (2010) (quoting *Franze v. Equitable Assurance*, 296 F.3d 1250, 1254 (11th Cir. 2002)). There are myriad variants of the “discovery rule,” under which the limitations period may commence at the moment of “notice” or at some other defined point. See 559 U.S. 633, 650 (2010) (quoting *Franze v. Equitable Assurance*, 296 F.3d 1250, 1254 (11th Cir. 2002)) (noting at least three types of “discovery” rules: (i) period triggered “when information puts plaintiffs on ‘inquiry notice’ of the need for investigation”; (ii) period deferred “if plaintiff does investigate,” and begins to run “from the date such inquiry should have revealed the fraud”; and (iii) period begins “only when a reasonably diligent plaintiff, after being put on “inquiry notice,” should have discovered facts constituting violation”).

83. *TRW Inc. v. Andrews*, 534 U.S. 19, 30 (2001) (The discovery rule would trigger the limitations period at [the] point [that] a reasonable person in [plaintiff’s] position would have learned of the injury in the exercise of due diligence.); See *Stone v. Williams*, 970 F.2d 1043, 1049 (2d Cir. 1992) (“The duty of inquiry having arisen, plaintiff is charged with whatever knowledge an inquiry would have revealed.”); 2 C. Corman, *Limitation of Actions* § 11.1.6, p. 164 (1991) (“It is obviously unreasonable to charge the plaintiff with failure to search for the missing element of the cause of action if such element would not have been revealed by such search.”).

able' at that time.”<sup>84</sup> This formulation upended the language of FAR 33.201, which by definition states that no CDA claim “accrues” unless and until the claimant knew or should have known about the underlying facts *regardless* of when the events occurred. Contrary to the Tucker Act case law—and *Raytheon Missile Systems*—under FAR 33.201, there is no presumption that “events fixing liability should have been known when they occurred.”<sup>85</sup> In a “discovery rule” scheme, “concealment” or “inherently unknowability” may be relevant to determining when a claimant knew or should have known of the facts supporting a claim. But those concepts are not integral to the standard or constitute a threshold that a claimant must overcome to ensure that the trier will undertake the “knew or should have known” discovery analysis.

Just three months after *Raytheon Missiles Systems*, the ASBCA in *Raytheon Space & Airborne* appeared to revert to a more traditional discovery type of rule, but only after further jamming the square peg of Tucker Act cases into the round hole of FAR’s 31.201 discovery rule. *Raytheon Space*<sup>86</sup> restated the accrual analysis as follows:

A claim accrues when “all events, that fix the alleged liability . . . and permit assertion of the claim, were known or should have been known,” and some injury has occurred.<sup>87</sup> The events fixing liability should have been known when they occurred unless they can be reasonably found to have been either concealed or inherently unknowable at that time.<sup>88</sup> The “concealed or inherently unknowable” test is interchangeable with the “knew or should have known” test which includes a reasonableness component. The statute of limita-

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84. *Raytheon Missile Sys.*, ASBCA No. 58011, 13-1 BCA ¶ 35,241 at 173,017 (quoting *Holmes v. United States*, 657 F.3d 1303, 1317–20 (Fed. Cir. 2011)).

85. *See id.* *Raytheon Missile* parenthetically added that they “knew or should have known” test is “interchangeable” with the “concealed or inherently unknowable” test, which includes a reasonableness component.” In addressing the Tucker Act statute, however, the court in *Holmes* held only that, under the accrual suspension exception, whether the claimant who has filed a claim more than six years after the occurrence of the underlying events—that is, more than six years after accrual—“knew or should have known” of those events notwithstanding concealment or inherent unknowability is examined under a reasonableness standard. *Holmes* did not purport to address, much less decide, whether a claimant reasonably “knew or should have known” of the events—a discovery standard of accrual—is “interchangeable” with the Tucker Act’s standard of accrual on the occurrence of the events. At best, *Raytheon Missile*’s introduction of Tucker Act accrual suspension concepts (“concealment;” “inherently unknowable”) to the analysis of the CDA’s discovery rule concepts (“knew or should have known”) was unnecessary and confusing.

86. *Raytheon Company, Space & Airborne Systems*, ASBCA No. 57801, 13-1 BCA ¶ 35, 319.

87. *Id.*, citing FAR 33.201; *Gray Personnel, Inc.*, ASBCA No. 54652, 2006 ASBCA LEXIS 71, 2006-2 BCA P 33,378 at 165, 475–76.

88. *Id.*, citing *Raytheon Missile Systems*, ASBCA No. 58011, 2013 ASBCA LEXIS 11, at \*8 (28 Jan. 2013).

tions will not begin to run until the claimant “learns or reasonably should have learned” of his cause of action.<sup>89</sup>

Turning to the facts, the Government knew it had a “potential claim” based on changes in the contractor’s cost accounting more than six years before presentment. Although Raytheon did not honor its contractual obligation to disclose an estimate of increased Government costs from the accounting changes, the Government could have accessed “cost impact” data in the contractor’s possession. Indeed, the Government made no claim that any facts had been concealed or were “inherently unknowable.” The ASBCA nevertheless concluded that, under the “reasonableness standard,” the Government’s claim did not accrue until the contractor sent it a cost impact estimate. In short, *Raytheon Space* by implication held that neither “concealment” nor “inherent unknowability” were necessary to determining when a claimant “reasonably should have learned” of its claim.

Although the tribunals routinely recite the above passage from *Raytheon Space* as the legal standard, *Raytheon Space* and later cases neither analyze nor apply a “concealed or inherently unknowable” test as a predicate to inquiring when the claimant learned or reasonably should have learned of the cause of action.<sup>90</sup> The gap between legal standard and its application, moreover, goes further—the statute in theory may be triggered when a claimant “reasonably should have learned” of the claim. In practice, the tribunals generally have found claims to accrue only when the claimant has *actual possession* of the information that forms the basis of the claim. Thus, a claimant that “reasonably” could have acquired the facts after being put on “notice” of a “potential claim” will not trigger the statute of limitations period.<sup>91</sup> But the claimant’s failure to appreciate the legal significance of facts it possesses will not delay accrual.<sup>92</sup> The cases simply do not discuss accrual in the language of traditional “discovery rule” analysis, which considers when a *reasonably diligent* claimant would have discovered the claim, or when, and under what circumstances, a claimant’s *duty to investigate* a potential claim may trigger the statute.<sup>93</sup>

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89. *Id.*, citing *Holmes v. United States*, 657 F.3d 1303, 1320 (Fed. Cir. 2011) (quoting *Japanese War Notes Claimants Ass’n of the Philippines, Inc. v. United States*, 373 F.2d 356, 359, 178 Ct. Cl. 630 (Ct. Cl. 1967)) (emphasis in original).

90. In a small number of CDA decisions, the BCAs or COFC have purported to consider “accrual Suspension doctrine” criteria and find that the claimant had presented no evidence of “concealment” or “inherent unknowability.” *Raytheon Co. v. United States*, 104 Fed. Cl. 327, 331 (2012); *Laguna Constr. Co.*, 14-1 BCA ¶ 35,618 at 174,459. In those cases, however, it was undisputed that the claimants possessed all information necessary to assert their claims more than six years before presentment.

91. See *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,476.

92. In contrast, the Board in *Raytheon Space* held that the claim did not accrue until the Government had all the claim facts.

93. See *Merck & Co. v. Reynolds*, 559 U.S. 633, 644 (2010).

## 2. Is “Should Have Known” an “Objective” or “Subjective” Inquiry?

The case law is inconsistent on whether and to what extent “actual” or “subjective” knowledge of ascertainable facts underlying a claim is necessary for determining that a claim has accrued. The COFC has ruled that “[w]hether events have occurred to fix a party’s liability ‘is determined under an objective standard; a [claimant] does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue’. . . . The question of when a claimant should know of its claim is a fact-bound inquiry that depends on the reasonableness of the claimant’s actions.”<sup>94</sup> Cases from the ASBCA similarly state an “objective” standard, under which “claim accrual does not turn upon what a party subjectively understood; it objectively turns upon what facts are reasonably knowable.”<sup>95</sup>

On the other hand, as noted, after *Sikorsky*’s reversal of treating the statute of limitations as “jurisdictional,” many more limitations disputes are decided on the summary judgment stage. In that context, several cases have provided that the “‘knew or should have known test’ includes a reasonableness component regarding ‘what facts were reasonably knowable to the claimant. Summary judgment is not normally appropriate where reasonableness and *subjective knowledge* are facts at issue.’”<sup>96</sup> Applying that criteria, several opinions have denied summary judgment motions because of unresolved factual issues concerning a claimant’s *actual knowledge* of facts underlying the claims.<sup>97</sup> It does not appear that any cases have held that a CDA claim accrued

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94. *Sikorsky Aircraft Corp. v. United States*, 105 Fed. Cl. 657, 673 (2012).

95. *Raytheon Missile Sys.*, ASBCA No. 58011, 13-1 BCA ¶ 35,241, at 173,016; *accord Laguna Constr. Co.*, ASBCA No. 58569, 14-1 BCA ¶ 35,618, at 174,459 (“The ‘should have been known’ test of claim accrual has a reasonableness component - it turns, objectively, upon what facts were reasonably knowable to the claimant.”).

96. *IBM Corp.*, ABSCA No. 60332, 18-1 BCA ¶ 37,002, at 180,192 (quoting *Kellogg Brown & Root Servs., Inc.*, ABSCA Nos. 58518, 59005, 16-1 BCA ¶ 36,408, at 177,528 (citing *Raytheon Co.*, ABSCA No. 58840, 15-1 BCA ¶ 36,000, at 175,868)).

97. *See, e.g., IBM Corp.*, ABSCA No. 60332, 18-1 BCA ¶ 37,002, at 180,191, 93 (denying contractor’s summary judgment motion under statute of limitations in connection with government claim that contractor failed to perform adequate information technology services, enabling third party intrusions: “In order to draw conclusions about the timing and scope of the *government’s knowledge* of the network intrusions, and IBM’s alleged failure to prevent the intrusions, we would need significantly more information about the government’s investigations”); *Kellogg Brown & Root Servs.*, ABSCA No. 58465, 16-1 BCA ¶ 36,253, at 176,869–70 (denying motion for summary judgment on government claim to recover costs paid to contractor for reimbursement of costs of trucks where contractor failed to show that government “actually knew or was even aware that the trucks were faulty or non-functional” at time of payment of contractor’s bills); *Kellogg Brown & Root Servs.*, ABSCA No. 58175, 15-1 BCA ¶ 35,988 at 175,591 (denying motion to bar government claim as untimely where contractor acknowledged that it had not subjectively appreciated its non-compliance with contract more than six years before presentment).

at the time a claimant “objectively” “should have known” facts underlying the claim that were, in fact unknown to the claimant.

### 3. Who knew or should have known?

CDA litigation frequently involves multi-year, complex contracts involving hundreds, if not thousands, of employees from multiple Government agencies, contractors, subcontractors, and their respective agents and representatives. In the simplest cases, for example, a DoD contract will often involve the procuring service or department, the same or a separate contract administration agency, a separate payment office, and Government contract auditors. A large contractor's performance may likewise involve the participation of personnel performing a wide variety of tasks from numerous business departments and offices.

Under the discovery-type definition of “accrual” in FAR 31.201, there are different approaches to determining how—and therefore when—an entity-claimant “knows or should have known” of its claim. At one extreme, an entity could be deemed to “know” all information in its collective possession, no matter how compartmentalized or fragmented. At the other extreme, information showing the existence of a claim may not be imputable to an organization unless all that information is known by single, authorized, natural person. A rule of imputation falling anywhere between these two poles raises complications. In deciding whether a statute of limitations for securities fraud enforcement actions should “accrue” when the violation occurs or when it is “discovered,” for example, the Supreme Court remarked on the difficulties presented by imputation under a “discovery” rule:

Determining when the Government, as opposed to an individual, knew or reasonably should have known of a fraud presents particular challenges for the courts. Agencies often have hundreds of employees, dozens of offices, and several levels of leadership. In such a case, when does “the Government” know of a violation? Who is the relevant actor? Different agencies often have overlapping responsibilities; is the knowledge of one attributed to all?<sup>98</sup>

Despite the complex nature of the parties and their relationships in many CDA disputes, the imputation of knowledge relevant to an entity's potential claims appears to have been expressly addressed in only one case. In *Raytheon Missiles*, a Government contract administration “cost and pricing” analyst in 1999 approved the proposed pricing of a contract, unaware that the terms did not conform to a recent disclosed change in the contractor's accounting practices, which would have resulted in costs lower to the Government than presented in the proposed contract. More than six years later, the same analyst, who by then was aware of the change in accounting practice, reexamined

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98. *Gabelli v. SEC*, 568 U.S. 442, 452 (2013).

the contract and determined that the contractor overcharged the Government. The ASBCA found that the Government's subsequent claim was time-barred, rejecting the argument that only the knowledge of the authorized contracting officer could be imputed to the Government:

The Government fails to cite any authority . . . that claim accrual is based only upon the knowledge of the individual clothed by a contracting party with authority to assert the claim. If that were the case, then both contractors and the Government could suspend accrual by internally compartmentalizing relevant information and insulating senior decision makers from it for as long as they choose. Nothing in FAR 33.201 [accrual definition] contemplates permitting such gamesmanship. Claim accrual is not suspended simply because the Government may have been delayed . . . in funneling to the individual authorized to act upon the claim all of the information relevant to it.<sup>99</sup>

*Raytheon Missiles* leaves many questions unanswered, including those suggested in *Gabelli*. The decision does not hold that unassimilated knowledge of entity personnel will be imputed for purposes of accrual. Nor does it imply that claim facts may be imputed even if no single natural person agent “knew or should have known” of all the information.<sup>100</sup> Consistent with the common law, the usual rules of agency should apply in determining when a cause of action accrues under a “discovery” rule. For example, in a case against a Government agency under the Administrative Procedures Act, the district court observed:

For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal. . . . Though not as often invoked for purposes of applying a statute of limitations as for other legal relations such as liabilities, the rule is generally applicable. *Veal v. Geraci*, 23 F.3d 722, 725 (2nd Cir. 1994) (internal citations omitted). . . . Furthermore, this principle applies outside the context of corporate

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99. *Raytheon Missile Sys.*, ASBCA No. 58011, 13-1 BCA ¶ 35,241, at 173,016–17. (The Board's “host of horrors” is not a persuasive reason for rejecting the government's argument. It is unlikely that any organization would design a system of internal communication to conceal information material to contract performance or issues from decision makers for the sake of extending the amount of time to present claims for hypothetical causes of action that may arise under any contract. On the contrary, it is more likely that a party, aware that it had violated the other's rights under the contract in some way, may selectively disclose bits and pieces of the material information to different persons, elements, or functions of the other party to obscure recognition, or timely recognition, of a redressable harm.)

100. In *Raytheon Missiles*, a single Government agent, the pricing analysis, charged with evaluating the pricing of the proposed contract, arguably should have known all circumstances material to that assessment, including the contractor's current accounting practices.

or business law, and may be applied to Government entities that act through agents.<sup>101</sup>

#### 4. Is Knowability of a “Sum Certain” Required?

As discussed above, the CDA tribunals, without analysis, give two meanings to “claim” in the CDA limitations provision that “[e]ach claim . . . shall be submitted within [six] years after the accrual of the claim.” The first reference to “claim” in “each claim . . . shall be submitted” means the technical CDA “claim” defined in section 2.101 of FAR, the “submittal” of which is necessary to stop the limitations clock and ensure jurisdiction in the CDA forums. On the other hand, the second reference to “claim” in “after the accrual of the claim” is synonymous with “cause of action.” For the reasons discussed above, it is incongruous to speak of “accrual” of a “claim” as defined by section 2.101 of FAR. In a 2016 decision, however, the Federal Circuit purported to do precisely that.<sup>102</sup>

In *Kellogg Brown & Root Services, Inc. v. Murphy*, the prime Government contractor, appellant Kellogg Brown & Root (“KBR”), terminated a subcontract for certain services in July 2003. The subcontractors sued KBR in 2004 for moneys due and termination costs. In January 2005, KBR in a settlement committed to pay the subcontractors’ costs and invoice the Government. For the next seven years, however, KBR and the subcontractors disputed the amount due. On May 2, 2012, KBR submitted a certified claim to the Government in the amount it finally agreed to pay the subcontractors. The Government’s final decision rejected KBR’s claim as time-barred. On appeal to the ASBCA, KBR contended that its claim did not “accrue” until, at the earliest, November 2006 (within the six-year period) when the subcontractors first sent a specific “claim” amount. The Board rejected this argument, holding that KBR’s claim accrued when it terminated the subcontract in 2003. At the latest, the claim accrued when KBR executed the January 2005 settlement agreement, obligating it to pay the subcontractors’ costs, even though the amount had not been determined. Consistent with prior precedent, the ASBCA held:

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 [or contractor] 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.<sup>103</sup>

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101. *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. U.S. Corps of Eng’rs*, 2014 U.S. Dist. LEXIS 130732, at \*22-23 (D.S.D. Sept. 18, 2014).

102. *Kellogg Brown & Root Services, Inc. v. Murphy*, 823 F.3d 622, 627 (Fed. Cir. 2016).

103. *Kellogg Brown & Root Servs., ASBCA No. 58492*, 14-1 BCA ¶ 35,713, at 174,866 (citation omitted).

It also disagreed that KBR's claim could not have accrued until November 2006, on receipt of the subcontractors' specific demand:

We reject this approach chiefly because it makes accrual dependent upon KBR's diligence in organizing and submitting its claim. As such, it runs headlong into our holding in *Raytheon Missile Systems*,<sup>104</sup> holding that "[a]ccrual of a contracting party's claim is not suspended until it performs an audit or other financial analysis to determine the amount of its damages." We relied upon the principle . . . that "a single party [cannot] postpone unilaterally and indefinitely the running of the statute of limitations."<sup>105</sup>

On KBR's appeal, the Federal Circuit Court reversed, ruling that "[f]ixing the date of accrual of a claim requires first that there is a 'claim' as defined in the Contract Disputes Act and the associated Regulations." It then stated that "a 'claim' for 'the payment of money' does not 'accrue' until the amount of the claim, 'a sum certain' . . . is 'known or should have been known.'"<sup>106</sup> The court reasoned that, although KBR knew it had unspecified monetary liability for more than six years before presentment, its reimbursement "claim" against the Government could not have accrued until the subcontractors presented a "claim" amount to KBR (less than six years before). The court concluded that "[a]ccrual in accordance with [Section 33.201 of the] FAR does not occur until KBR requests, or reasonably could have requested, a sum certain from the Government."

On its face, *Kellogg* unambiguously held that a claim does not accrue until the claimant asserts, or reasonably could assert, a "sum certain," which cannot happen until that sum certain is "known or should have been known." The decision would appear to overrule well-established precedent in the BCAs and the COFC that, for a claim to accrue, "some extra costs must have been incurred . . . *but there is no requirement that a sum certain be established.*"<sup>107</sup> Whether the *Kellogg*

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104. Appeal of Raytheon Missile Systems, ASBCA No. 58011, 13 BCA ¶ 35,241 at 173,018.

105. Kellogg Brown & Root Servs., ASBCA No. 58492, 14-1 B.C.A ¶ 35,713.

106. (citing FAR 2.101; 33.201).

107. McDonnell Douglas Services, Inc., ASBCA No. 56568, 10-1 BCA ¶ 34,325 (emphasized added). *Accord*, Sikorsky Aircraft Corp. v. United States, 105 Fed. Cl. 657, 672 (2012) (quoting and following McDonnell Douglas); Kellogg Brown & Root Servs., ASBCA No. 58175, 15-1 BCA ¶ 35,713 ("although the claim accrual definition contemplates the possibility of non-monetary injury, when monetary damages are alleged, some extra costs must have been incurred before liability can be fixed and a claim accrues, but there is no requirement that a sum certain be established"); *See also* Boeing Co., ASBCA No. 58660, 15-1 BCA ¶ 35,828 ("when monetary damages are alleged, some extra costs must have been incurred before liability can be fixed and a claim accrued, but there is no requirement that a sum certain be established"). *See also* R.R. Gregory Corp., ASBCA No. 58517, 14-1 BCA ¶ 35,524 ("Accrual of a contracting party's claim is not suspended until it performs an audit or other financial analysis to determine the amount of its damages. '[A] single party [cannot] postpone unilaterally and indefinitely the running of the statute of limitations.' United States v. Commodities Export Co., 972 F.2d 1266, 1271 (Fed. Cir. 1992). *Raytheon*, 104 Fed. Cl.

decision will command respect is another matter.<sup>108</sup>

### 5. The Practical Unavailability of “Equitable Tolling”

Under the “equitable tolling” doctrine, a CDA claimant may avoid dismissal of an otherwise untimely claim under “equitable tolling.” As a practical matter, however, the circumstances in which this doctrine may be invoked are scarce. Equitable tolling of a statute of limitations requires a litigant to establish two elements: “(1) that [the claimant] has been pursuing his [or her] rights diligently, and (2) that some extraordinary circumstance stood in his [or her] way and prevented timely filing.”<sup>109</sup> To meet the “extraordinary circumstance” element, the claimant must show that an “external obstacle” “stood in his way and prevented timely filing.”<sup>110</sup> The “mere excusable neglect is not enough to establish a basis for equitable tolling; there must be a compelling justification for delay, such as ‘where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.’”<sup>111</sup>

In *Khenj Logistics Group*, the contractor (“KLG”) procured required materials for the contract project and delivered them to the work site shortly before the Government issued a stop-work order. The Government later terminated the contract for convenience. In June 2009, the contracting officer promised KLG that it would reimburse KLG on its invoice for the materials cost. Although the Government paid an invoice for a separate item in October 2009, it did not pay the materials invoice. The Board held that because KLG should have known that the Government would not honor its promise to pay the materials invoice at the time it paid for the separate item, KLG’s claim accrued in October 2009. KLG did not submit a CDA claim for the unpaid materials costs until March 2017. The Board held that equitable tolling did not save KLG’s claim, dismissing its claim because the “delay in submitting its claim is ‘a garden variety claim of excusable neglect’ for which equitable tolling provides no relief”:

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at 330-3. Damages need not have actually been calculated for a claim to accrue. *See* CACI Int’l, Inc., ASBCA No. 57559, 12-1 BCA ¶ 35,027 at 172,138–9. The fact of an injury must simply be knowable.”).

108. In *Crane & Co., Inc. v. Dept. of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539. The CBCA rejected the argument that, under *Kellogg*, a contractor’s claim could not accrue until it had incurred all damages arising from the Government’s alleged breach. Citing *Gray*, the CBCA stated that for “a claim to accrue, the contractor ‘must [only] have begun actual performance and incurred some extra costs for liability to be fixed,’ and the completion of a change or of the contract [is] not necessary in order for liability to be fixed.” It ruled that *Kellogg*’s “sum certain” holding did not require any different result. It is unclear from that decision whether the CBCA dismissed any part of the contractor’s claim for damages accruing within the six-year period.

109. *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016).

110. *Id.* at 752.

111. *Al-Juthoor Contr. Co. v. United States*, 129 Fed. Cl. 599, 615 (2016).

KLG does not identify any action it took to pursue its claim between October 2009 and March 2017. Nor does it identify a circumstance that impaired its ability to submit a claim. Notwithstanding KLG's unsuccessful attempts in June 2009, there was nothing preventing further contact with Army contracting officials to submit its claim, as confirmed by its successful submission in March 2017. Thus, it is unable to demonstrate either element of equitable tolling.

### B. *Application of "Accrual" to Claim Types*

This Section summarizes how the CDA forums have applied the CDA statute of limitations in more significant and recurrent cases brought by the Government and contractors.

#### 1. Government Claims

##### a. *Claims for Unallowable Indirect Costs*

In a majority of cases litigated under the CDA, contractors are paid as contracts are performed throughout the year, often on a semi-weekly basis. Typically, contractors prepare "public vouchers," which will include detailed invoices and schedules to break out the types of costs (such as labor, materials, and subcontractor costs) and submit them for payment to the appropriate paying office or agency. In general, under typical "cost-type" contracts, contractors bill for "direct costs" incurred for goods and services specifically required by the contract. The Government also pays contractors "indirect costs," such as overhead; general and administrative expenses; "fringe" benefits paid to employees; and independent research and development costs. A contract will also provide for payment of some amount of profit (or "fee") for the contractor's work.

Reimbursable direct and indirect costs are subject to a variety of contractual requirements. In general, a contractor is entitled to payment of reasonable costs, for work authorized by the contract, that the contractor actually incurred and paid, and that complied with limitations under "cost principles" set forth in Federal Acquisition Regulations. For interim billing, indirect costs typically are determined by provisional rates agreed on by the parties in advance. Within six months after the end of the year, contractors must submit a lengthy, detailed summary of costs in an "incurred cost" or "indirect rate" proposals ("cost proposals"), which are subject to audit by Government auditors, such as the Defense Contract Audit Agency ("DCAA"). "Cost proposals" enable the contractor and Government to "true up" actual and reimbursable costs, indirect cost rates, and fee for the completed year.

With the explosion in military spending and defense contracts in the 2000s, contractors began to file enormous and unprecedented volumes of annual cost proposals. Accordingly, the DCAA faced significant challenges in auditing a growing backlog of annual submissions. As a

result, it often took years to audit annual submissions for unallowable costs, creating challenges for contracting officers to determine within six years of the cost submissions whether the Government was entitled to reimbursement or penalties from contractors. These circumstances contributed significantly to the marked increase in statutes of limitations disputes.

Over the past several years, contractors routinely have argued that Government claims asserted more than six years after receipt of the relevant cost submissions are time-barred. Contractors contended that Government claims accrued, at the latest, on Government receipt of the cost proposals. In some cases, contractors have gone farther, maintaining that the Government knew or should have known that a cost proposal would include unallowable costs based on prior year's submissions that included similarly unallowable costs. In a series of decisions, however, the ASBCA generally rejected these arguments. As the Board explained in *Technology Systems*,<sup>112</sup> a Government claim for unallowable indirect costs cannot possibly "accrue" before receipt of the cost proposal:

[It is] legally impossible for the Government to issue its [contracting officer's final decision or "COFD" for unallowable indirect costs] before submission of the ICP [incurred cost proposal], because the legal bases for establishing the indirect costs . . . presuppose[s] action upon a "final" ICP submitted by the contractor. Since no COFD approving or disapproving portions of the . . . ICP [can be] issued until after submission of said proposal . . . and the ability to assert such a claim is a prerequisite to claim accrual . . . it is impossible for the statute to have begun to run . . . prior to submission of [the] ICP.

Under the "knew or should have known" test, moreover, the Board has also rejected the argument that Government claims accrue on receipt of the cost proposals. Instead, the decisions have been fairly consistent that, unless the proposal itself discloses information revealing that a cost is improper, a "[c]laim does not 'accrue' . . . until there is sufficient supporting data to establish [the] Government[s] knowledge of the claim."<sup>113</sup> Cost proposals generally do not include any

112. ASBCA No. 59577, 2017-1 BCA ¶ 36,631 at 178,388–89.

113. *See id.* at 178,399 (Clark, A.L.J., dissenting in part on other grounds) (citing *Combat Support Associates*, ASBCA Nos. 58945, 58946, 2014-1 BCA ¶ 35,782, at 175,041–42, *vacated on other grounds*, 2015-1 BCA ¶ 35,923 (Government claim for direct costs included in cost proposal did not accrue until auditor received the "supporting data related to those costs" less than six years before the final decision. "[T]he government . . . knew or had reason to know of its claims only . . . upon appellant's submission of the 'supporting data' from which the government learned, or had reason to learn, of its claims.")). *See also, e.g.*, *Coherent Logix, Inc.*, ASBCA No. 59725, 2015-1 BCA ¶ 35,497, at 175,679 (no precedential value pursuant to Board Rule 12.2) (Claim filed more than six years after receipt of ICP was timely as "there is nothing . . . to indicate that [unallowability of legal fees] would have been apparent to the government from a review of the submitted [ICP], which simply listed 'Legal Fees.'").

breakout of individualized indirect costs or underlying documentation needed to determine whether the claimed costs are allowable. Thus, a Government claim ordinarily will not accrue until the time when, during an audit or other review of the cost proposal, the Government obtains information (usually from the contractor itself) that reveals the “unallowability” of the costs. This may often be months or even years after receipt of the cost proposal.<sup>114</sup>

The CDA tribunals have not yet examined when the Government, in the exercise of due diligence after receipt of a cost proposal, “should have known” that indirect costs were unallowable. In several cases, there has been considerable delay between receipt of a cost proposal and subsequent audit or other work to determine the allowability of the contractor’s claimed costs.<sup>115</sup> The decisions leave an arguable impression that the Government may indefinitely delay efforts to assess the accuracy of a cost proposal without any effect on the accrual of any subsequently filed claims.

*b. Claims to recoup payment for direct costs*

The Boards of Contract Appeals have issued conflicting decisions on the accrual date for Government claims to recover payments for direct contract costs that the Government asserts it should not have been billed. In *Sparton DeLeon Springs, LLC*,<sup>116</sup> the Government paid a contractor’s vouchers for direct labor costs incurred by a subsidiary during 2007. The payment vouchers included line-item detail for the costs, but it did attach primary source documents, such as labor time cards, to substantiate the costs. More than seven years later, the contracting officer filed a claim to recover the labor costs, alleging that the contractor had failed to provide supporting documents to show that the costs had actually been incurred or paid despite several recent Government requests. The ASBCA granted the contractor’s summary judgment motion, ruling that the Government’s claim accrued at the time it paid the vouchers, which was more than six years earlier. “If it is the case that the interim vouchers lacked support such

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114. See, e.g., *Combat Support Assoc.*, 2014-1 BCA ¶ 35,782 at 175,041 (Denying dismissal of government claim where DCAA auditor testified without rebuttal “information it needed to know that it had the claims set forth” in 2013 final decisions was not received until several months after May 2007 cost proposal.”); *Alion Science and Technology Corp.*, ASBCA No. 58922, 2015-1 BCA ¶ 36,168 at 176,490–91 (COFD issued 7.5 years after receipt of ICP not untimely; ICP did not include the underlying detail until 20 months after cost proposal, which showed “specific nature of the costs,” that enabled Government “to identify the [costs] at issue as expressly unallowable.”).

115. See, e.g., *Combat Support Assoc.*, 2014-1 BCA ¶ 35,782 at 175,041 (more than six years between cost proposal submission and DCAA audit report on unallowable costs); *Coherent Logix, Inc.*, ASBCA No. 59725, 2015-1 BCA ¶ 35,497, at 175,679 (DCAA auditors did not request documents revealing unallowability of costs until five years after cost proposal).

116. ASBCA No. 60416, 17-1 B.C.A. ¶ 36,601, *reh’g denied*, ASBCA No. 60416, 17-1 B.C.A. ¶ 36,764.

as certified time cards, the government knew or should have known that no later than 10 January 2007, by when it paid those interim vouchers,” it held.

The holding in *Sparton DeLeon* casted doubt upon prior ASBCA decisions, which held that a Government claim to recover payment for direct costs did not accrue on payment of the invoices alone.<sup>117</sup> In *DRS Global Enterprise Solutions, Inc.*, however, a different ASBCA judge forcefully revived the earlier precedent. As in *Spartan*, the Government in *DRS* asserted a claim based on the contractor’s failure to support direct costs that the Government paid more than six years before the claim. The ASBCA dismissed the appellant’s argument, based on *Sparton DeLeon*, for a “blanket rule that the statute begins to run when the government pays the invoice.”<sup>118</sup> The contractor further argued that the claim accrued upon payment because “whether certain costs were substantiated or not involves objective facts that are reasonably knowable.” The ASBCA rejected this argument as well, finding that the appellant adduced no evidence that the Government “knew” or was “aware” of the lack of supporting documents at the time of payment.

By denying any “blanket rule” stating that a Government claim to recoup payment of unallowable direct costs must be brought within six years of payment, *DRS* affirmed that, under the “knew or should have known” accrual standard, “when [a claimant] reasonably should have known of its claim requires consideration of the unique facts in [the particular] appeal.”<sup>119</sup> At the same time, the decision illustrates the propensity of the CDA tribunals to focus on actual knowledge or awareness as the trigger instead of the availability of “objective facts that are reasonably knowable.”

In a decision reached just a few weeks before *DRS*, by the Civilian Board of Contract Appeals arguably hewed more closely to a “discovery type” inquiry in a case involving a Government claim for overpayment of direct costs. In *United Liquid Gas Company d/b/a United Pacific Energy v. General Services Agency*,<sup>120</sup> the General Services Administrations (“GSA”) awarded United Pacific Energy a “multi award schedule contract” to provide propane gas to the procuring agency, a DoD facility (Ft. Irwin), for \$1.32 a gallon. Under the contract, a GSA contracting officer was responsible for contract administration and monitoring. For reasons unexplained in the opinion, Ft. Irwin subsequently issued task orders to procure gas at \$1.44 per gallon. The DoD-paying agency, the Defense Finance and Accounting

117. See, e.g., Appeal of Kellogg Brown & Root Services, Inc., ASBCA No. 58465, 2016-1 BCA ¶ 36,253.

118. ASBCA No. 61368, 2018 ASBCA LEXIS 255 \*8 (Aug. 30, 2018).

119. *Id.*

120. *United Liquid Gas Co. v. Gen. Servs. Admin.*, CBCA No. 5846, slip op. (July 12, 2018).

Service (“DFAS”), received and paid invoices that charged \$1.44 per gallon amount in January 2011. More than six years later, GSA filed a claim that sought to recover amounts paid in excess of the \$1.32 contract amount. The CBCA held that the Government claim accrued, and the statute began to run, when DFAS began to pay UPE’s invoices in January 2011. As a result, the statute cut off the claim to the extent that it sought recovery of the excess amount paid more than six year before the Government filed the claim. The CBCA concluded:

GSA’s argument that the invoices were submitted and paid by DFAS, as opposed to GSA’s finance office, is . . . unavailing. Although Ft. Irwin ordered [and] received . . . the propane gas orders [and] DFAS paid the invoices, GSA was obligated to monitor those payments in its role as the administrator of the [contract]. Had GSA been properly monitoring the . . . contract, it would have realized that there were problems with overbillings as they occurred.<sup>121</sup>

While consistent with a discovery rule analysis, *DRS*’s conclusion that the Government should have known the facts is potentially significant, adverse authority for the Government. The opinion gives no indication that GSA itself was aware of or in possession of information that the contractor had overbilled under the contract. Instead, GSA’s failure to perform its contractual duty to “monitor” invoices to and payments by a separate paying agency was enough to meet the “should have known” test. A broader recognition of “accrual” based on contract administrative duties to “monitor” payments by a separate payment agency such as DFAS, which handles in excess of 13 million in DoD contract payments annually,<sup>122</sup> may pose risks to the Government in timely recognizing and asserting claims to recover payments of unallowable or improper direct costs.<sup>123</sup>

*c. “Accounting change” claims*

In negotiating prices for “cost plus” and fixed price contracts, the Government may rely on the contractor’s disclosed accounting practices to determine how it accumulates, estimates, and records costs. In general, under the Government’s Cost Accounting Standards (“CAS”) accounting practices should remain “consistent.”<sup>124</sup> In the

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121. *Id.* at 7.

122. See DEF. FIN. & ACCT. SERV., <https://www.dfas.mil/pressroom/aboutdfas.html> [<https://perma.cc/WGU3-KREH>] (last visited Jan. 6, 2019).

123. Notably, the basis for the *DRS* decision permitted the CBCA to avoid addressing the problematic question whether distinct knowledge of different agencies, none of which alone have all facts necessary to show a claim, may nevertheless be deemed collective knowledge of the “Government” for determining when a claim accrues.

124. “The CAS encompasses a series of accounting standards intended to achieve uniformity and consistency in measuring, assigning, and allocating costs to contracts with the federal government.” *Rice v. Martin Marietta Corp.*, 13 F.3d 1563, 1565 (Fed. Cir. 1993). “The cost accounting standards (CAS) consist of nineteen standards promulgated by the Cost Accounting Standards Board (CASB) designed to ensure

event a contractor wishes to change an accounting practice, it must disclose the change to the Government within prescribed periods of time in advance of the effective date of the change. In addition, upon request by the contracting officer, the contractor must disclose any cost increase or “impact” the change will have on applicable contracts in effect at the time of the change.<sup>125</sup> In an accounting change cost impact claim, the Government seeks a type of “benefit of the bargain” damages by being placed in the same position it would have been in had the contractor not made the accounting change.<sup>126</sup>

In general, the CDA forums have held that a Government claim for a cost impact resulting from an accounting change accrues on the date that the Government is provided with notice of the change, a statement of adverse cost impact, and at least some costs have been incurred.<sup>127</sup> Determining when a Government accounting change cost impact claim “accrues” can be a complicated undertaking. For example, in *Raytheon Missile Sys.*, the Government asserted a claim for increased costs caused by the contractor’s accounting practice change more than six years after the effective date of the disclosed change and after the contractor gave the Government a statement of a “cost impact” it described as “immaterial.” The Government’s claim ultimately asserted a cost impact more than two orders of magnitude greater than the contractor’s disclosed “immaterial” amounts.<sup>128</sup> The Government argued that the contractor’s “cost impact” “did not submit the level of information and supporting data required by” the cost impact regulation (which ordinarily requires a “General Dollar Magnitude,” or “GDM,” impact estimate) and, therefore, could not have triggered the statute. Although earlier acknowledging that the contractor had a contractual obligation to submit a GDM, the Board rejected the Government’s argument and dismissed its claim as time barred:

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

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uniformity and consistency in the measurement, assignment and allocation of costs to contracts with the United States Government. CAS covers a variety of costs such as depreciation, pension plans, personal compensation, indirect costs and other areas of cost accounting.” *Cost Accounting Standards (CAS)*, DEF. ACQUISITION U., <https://www.dau.mil/acquikipedia/Pages/ArticleDetails.aspx?aid=8cc390ac-fe08-4198-aa4d-3e3f261d74e8> [<https://perma.cc/E6R5-43YG>] (last visited Aug. 20, 2018).

125. See FAR 30.602 (2017).

126. Cf. *CI<sup>2</sup>, Inc.*, ASBCA No. 59948, 2016-1 BCA ¶36,410 at 177,533 (discussing basic measures for breach of contract).

127. *Raytheon Co., Space & Airborne Sys.*, ASBCA Nos. 57801 et al., 13-1 BCA ¶ 35,319 at 173,376; *The Boeing Co.*, ASBCA No. 57490, 12-1 BCA ¶ 34,916.

128. *Raytheon Missile Sys.*, ASBCA No. 58,011, 2013-1 BCA ¶ 35,241 at 173,018.

some costs have been incurred, even if the amount is not finalized or a fuller analysis will follow.<sup>129</sup>

The Board's conclusion that it was "enough that the Government knows, or has reason to know, that some costs have been incurred" is a mantra routinely recited as part of the interpretation of the accrual standard. That position, however, is in tension with the Federal Circuit's holding in *Kellogg Brown* that "a 'claim' for 'the payment of money' does not 'accrue' until the amount of the claim, 'a sum certain,' is 'known or should have been known.'<sup>130</sup>"<sup>131</sup> To date, no decisions have addressed the impact of *Kellogg Brown* on the lower forums' interpretations.

*d. Noncompliance with Cost Accounting Standards*

In Government claims for violations of CAS standards, the CDA forums generally have applied *Gray's* "continuing claims" doctrine, under which "portions of the claim within the statutory limitation period can survive although the statute of limitations has lapsed for earlier events."<sup>132</sup> In *Appeal of Fluor Corp.*, the Government in 2004 learned that the contractor (Fluor) had misallocated "home office costs" in violation of a CAS standard.<sup>133</sup> In November 2011, the contracting officer issued a final decision, asserting a Government claim for increased costs of \$63 million resulting from the CAS noncompliance over the years 2004 through 2010. On appeal, the contractor argued that the Government's entire claim accrued on January 1, 2004, the date that the COFD asserted as the start date of Fluor's noncompliance, and was therefore time-barred. Invoking the "continuing claims" doctrine, the Board rejected Fluor's argument:

[T]he Government did not and could not know at that time, much less submit a CDA claim for, the increased cost of those practices to the Government work over the next seven years until that work was performed, billed and paid. . . . 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. . . . [W]e find that the Government's 17 November 2011 CDA claim was a continuing claim in which each payment by the Government of the increased cost in an alleged CAS non-compliant

129. Raytheon Missile Sys., ASBCA No. 58,011, 2013-1 BCA ¶ 35,241 at 173,017 ("Damages need not have actually been calculated for a claim to accrue . . . The fact of an injury must simply be knowable").

130. (citing FAR 2.101; 33.201).

131. *Kellogg Brown & Root Services, Inc. v. Murphy*, 823 F.3d 622, 627 (Fed. Cir. 2016) (citing FAR 2.101, 33.201).

132. *ASFA Int'l Constr. Indus. & Trade, Inc.*, ASBCA No. 57880, 2014-1 BCA ¶ 35,736 at 174,911.

133. ASBCA No. 57852, 2014-1 BCA ¶ 35,472.

billing for Government work was an independent and distinct event having its own associated damages.

Accordingly, the Board held that the claim for increased costs resulting from the noncompliance paid more than six years before the final decision was time-barred, but that the claim for increased costs paid within the six-year period could proceed.

## 2. Contractor Claims

### a. *Constructive changes*

In a claim for increased costs resulting from a “constructive change,” a contractor must establish that an authorized contracting officer compelled the contractor to perform work not required by the contract, resulting in increased costs of performance.<sup>134</sup> In general, a claim for a constructive change cannot accrue at least “until the Government enlarges the contractor’s performance duties.” In line with *Gray*, however, accrual will not be delayed until the contract is complete or the contractor has a tally of all costs it has incurred as a result of the change.

In *Robinson Quality Constructors*,<sup>135</sup> the contractor claimed that, immediately after commencing performance to renovate an Air National Guard facility, it uncovered undisclosed site conditions that required additional remediation, and encountered numerous other delays and disruptions it attributed to the Government. The contractor completed performance on June 1, 1999. On June 2, 2005, six years and one day after contract completion, the contractor submitted a claim for alleged additional costs. In its appeal from a final decision denying the claim, the contractor argued that it could not have known whether and what to extent it had incurred additional costs until after it completed the work. Among other things, it asserted that in performing a long-term construction contract under multiple change orders, it was not feasible for contractors to determine a reliable estimate of its increased costs immediately on completion.

The Board dismissed the appeal as untimely, rejecting “the suggestion that the rules relating to application of the six-year statute of limitations should depend on the subject matter of the contract or the complexity of the facts.” The Board stated:

Robinson argues that until the facts of its damages “could actually be developed,” “the extent of costs incurred could not have been known until after completion of its work on the Project” (finding 46). We rejected this argument in *Gray Personnel*, and said for a claim to accrue, the contractor “must have actually begun performance and incurred some extra costs for liability to be fixed,” and the

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134. Hanley Indus., ASBCA No. 58198, 2014-1 BCA ¶ 35,500 at 174,016.

135. ASBCA No. 55784, 2009-1 BCA ¶ 34,048.

completion of a change or of the contract was not necessary in order for liability to be fixed.

It further dismissed the contractor's alternative argument that the Government breached the contract within the six-year period by denying the contractor's claim to "equitably adjust the contract," referring to its certified claim. The Board ruled that the "plain language" of the CDA and the FAR's "accrual" definition did not support the proposition that a "claim does not accrue until the [contracting officer] decides a contractor's claim."

*b. Requests for equitable adjustment*

Contractors may make a "request for an equitable adjustment" ("REA") for costs incurred above contract requirements in connection with constructive changes, changes due to unforeseen circumstances, extra costs incurred as a result of flaws in the Government's statement of work, and other reasons. An REA is often a useful starting point for negotiating a contract adjustment with the Government. For the purposes of the CDA's statute of limitations, however, an REA confers no benefit for the contractor.

A typical REA is not a CDA claim. As its name implies, it is a *request* for an adjustment and will often solicit a negotiation with the Government over the amount of increased costs. An REA usually (1) will lack a "demand . . . seeking, *as a matter of right*, the payment of money"; (2) will not demand or request a "final decision" from the contracting officer; (3) may run afoul of the "sum certain" requirements by using "estimate," "approximate," "at least," or the like; (4) and may lack the certification required by the CDA and the FAR "claim" definition. A REA will not stop the statute of limitations from running.<sup>136</sup> On the other hand, an REA submitted more than six years before presentment of a valid CDA "claim" concerning the same circumstances, is evidence that the claim is untimely.<sup>137</sup>

*c. Termination for convenience claims*

The Government typically has the right to terminate a contract for "convenience" by written notice. The regulations generally grant the contractor the right to reimbursement for unpaid, allowable costs incurred prior to termination, allocable indirect costs, costs caused by

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136. See, e.g., Certified Constr. Co. of Kentucky, LLC, ASBCA No. 58782, 2014-1 B.C.A. ¶ 35,662.

137. See TMS Envirocon, Inc., ASBCA No. 57286, 2012-2 B.C.A. ¶ 35,08. A contractor may convert a REA into an appealable claim by a subsequent writing that, together with the REA, meets the "claim" requirements. An oral request to convert a REA to a "claim" will not suffice. H2L1-CSC, JV, ASBCA No. 61404, 2018-1 B.C.A. ¶ 37,074 (dismissing appeal from final decision denying oral request to convert prior written REA to claim).

the termination itself, and reasonable costs incurred in preparing proposals to settle the contract.

With respect to time limits for claim presentment, termination for convenience claims are unique in two respects. Under the relevant contract clause, a contractor must submit a certified “final termination settlement proposal” within one year from the effective date of the termination. On written request within the one-year period, the contracting officer may extend the period. The contracting officer, in his or her discretion, may also accept and act on a proposal received after one year. When the contractor submits a late proposal, or none at all, “the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.”<sup>138</sup>

Untimely submission of a termination settlement proposal may be fatal to recovery of any costs to which a contractor may otherwise be entitled:

The Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer under . . . this clause, except that if the Contractor failed to submit the termination settlement proposal or request for equitable adjustment within [one year from termination] . . . and failed to request a time extension, there is no right of appeal.<sup>139</sup>

Thus, if a contractor submits a proposal after the one-year period, or submits no proposal at all, an otherwise valid appeal, filed *within* the six-year statute of limitations, is nevertheless subject to dismissal for untimeliness under the one-year clause.<sup>140</sup>

The contractor’s claim for termination costs accrues only when negotiation with the Government over a settlement proposal reaches an “impasse.” Indeed, an “appeal” filed before an “impasse” will be dismissed as “premature.”<sup>141</sup> When an “impasse” is reached “is an inherently factual question.” The CDA decisions have been somewhat opaque in defining “impasse” and “claim” in this context.<sup>142</sup> On the

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138. FAR 52.249-2 (e) (2017).

139. FAR 52.249-2 (j) (2017).

140. *Id.* See also Abdul Khabir Constr. Co., ASBCA No. 61155, 18-1 BCA ¶ 37,027.

141. Thorpe See-Op Corp., ASBCA No. 58960, 15-1 BCA ¶ 35,833 at 175,246. The ASBCA has further explained: When a contractor submits a termination for convenience settlement proposal to the Government, the proposal first must ripen into a claim before we have jurisdiction to review that submission. . . . A termination settlement proposal is not a CDA claim when it is first submitted to the contracting officer even though it otherwise meets the requirements of the CDA because the proposal is not submitted to the contracting officer for a final decision. . . . Instead, the proposal represents an instrument of negotiation. . . . Only after the negotiations reach an impasse, at a point when the contractor demands a final decision, does the termination proposal convert to a CDA claim. Appeal of Cent. Envtl., Inc., ASBCA No. 51086, 98-2 BCA ¶ 29,912, at 148,080.

142. See Cent. Envtl., Inc., ASBCA No. 51086, 98-2 BCA ¶ 29,912 at 148,080. (“Impasse means deadlock; the point where an objective, reasonable, third-party ob-

other hand, the parties in termination cost matters have significant control over claim accrual by deciding whether and when to terminate “negotiations.” There do not appear to be any cases holding that a contractor failed to present a termination for convenience “claim” within six years after “impasse” and therefore suffered dismissal for untimely presentment under the statute of limitations.

*d. Breach of Payment Clause*

Under the “Allowable Cost and Payment Clause” in most Government contracts, the “Government will make payments . . . when requested as work progresses, but . . . not more often than . . . every [two] weeks.”<sup>143</sup> In the ordinary course, contractors have every reason to promptly bill and collect on contracts, and they have little reason to delay submitting invoices. On the other hand, Government contracts typically do not impose any time requirements for contractors to request payment during performance.

Several CDA decisions have held that a contractor’s claim for payment does not accrue as work progresses and when goods and services are delivered, or even at the time the contractor submits an invoice. Instead, a nonpayment claim will not “accrue” “until [the contractor has] requested payment [by invoice or other means] and the Government [has] rejected the request.”<sup>144</sup> The cases reason that, under a breach of contract theory, “there can be no breach of [the Allowable Cost and Payment] clause, and therefore no claim accrual from which the limitation period is measured, until the contractor requests payment and the Government fails to pay.”<sup>145</sup> Under this precept, the forums have denied Government statute of limitations motions to dismiss in cases where the contractors delayed issuing invoices up to ten years after the right to request payment itself had accrued.<sup>146</sup>

In holding that a contractor claim for payment does not accrue on the date that the contractor earned the right to payment, the case law arguably is not consistent with the accrual standard. A contractor who performs all work required and has a contractual right to payment on submission of an invoice would appear to constitute “all events, that

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server would conclude that resolution through continued negotiations is unlikely and continued negotiation is unwarranted.”). *See also* James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1544 (Fed. Cir. 1996) (“Consequently, while Ellett’s termination settlement proposal met the FAR’s definition of a claim, at the time of submission it was not a claim because it was not submitted to the contracting officer for a decision”).

143. FAR 52.216-7(a) (1) (2017).

144. Parsons–UXB Joint Venture, ASBCA No. 56481, 2009-2 BCA ¶ 34,305 at 169, 459.

145. Todd Pac. Shipyards Corp., ASBCA Nos. 55126, 56910, 2011-1 BCA ¶ 34,759 at 171,087.

146. *See, e.g.,* Sys. Mgmt. & Research Techs. Corp. v. Dep’t of Energy, CBCA 4068, 2015-1 BCA ¶35,976 (2014 claim for fixed fees earned from 2004 through 2007 but not billed until late 2010 not untimely).

fix the alleged liability of . . . the Government and permit assertion of the claim.” Indeed, many Government contracts include a “Prompt Payment” clause, under which the Government must pay a proper invoice within thirty days of receipt, or pay a penalty calculated for the period from the payment date to the date of actual payment *without regard to any request therefore by the contractor*.<sup>147</sup> The delayed invoice cases also do not mesh with the oft-repeated maxim that a “single party [cannot] postpone unilaterally and indefinitely the running of the statute of limitations.”<sup>148</sup> If a contractor has “unilateral” control over anything, it is the submission of invoices.

The Civilian Board of Contract Appeals recently confronted this issue in addressing a Government agency motion to dismiss a contractor claim for payment of work that had gone unbilled for seven to ten years prior to claim presentment. The Board acknowledged the “untenability” of allowing a contractor to pursue claims for unbilled work performed in the distant past:

[I]f taken to its extreme, [the] theory—that the limitations period does not start to run under [the] contract until the contractor submits an invoice and the Government denies it—would be untenable. Under its theory, SMARTECH presumably could have waited ten or twenty years to submit its invoice and, by so doing, deferred accrual of its fixed fee claim. Yet “it cannot be true that one who has a claim against another which he can perfect and make actionable by acts within his own power can keep the claim alive indefinitely by merely refraining from doing those acts.” . . . “[W]here a preliminary step is required before suit is begun, a reasonable time will be granted therefor but only a reasonable time.”<sup>149</sup>

Constrained by precedent, the CBCA nevertheless denied the Government agency’s motion to dismiss.

Ironically, when a contractor issues an invoice which goes unpaid, the date when a claim will be deemed to accrue can be a matter of uncertainty. In this context, the FAR expressly excludes from the definition of “claim” any “voucher, invoice, or other routine request for payment that is not in dispute when submitted.”<sup>150</sup> A routine request for payment will not become a “claim” for purposes of CDA forum

147. See FAR 52.232-25 (2017); see also *Pub. Warehousing Co., K.S.C.*, ASBCA 59020, 2016-1 BCA ¶ 36,366 at 177,270 (“The Prompt Payment Act . . . imposes an obligation on a government agency to pay an interest penalty when it fails to make a payment by the required payment date. That interest penalty is calculated for the period from the day after the required payment date to the date of actual payment, and is to be paid without regard to whether such an interest penalty was requested.”)

148. *R.R. Gregory Corp.*, ASBCA No. 58517, 2014-1 BCA ¶ 35,524 at 174,111 (quoting *United States v. Commodities Exp. Co.*, 972 F.2d 1266, 1271 (Fed. Cir. 1992)).

149. *Sys. Mgmt. & Research Techs. Corp. v. Dep’t of Energy*, CBCA 4068, 2015-1 BCA ¶ 35,976, citing *Duhamé v. United States*, 135 F. Supp. 742, 744, 133 Ct. Cl. 360 (Ct. Cl. 1955); *Dawnic Steamship Corp. v. United States*, 90 Ct. Cl. 537, 579 (1940).

150. FAR 2.101 (2017).

jurisdiction until the contractor provides “written notice to the contracting officer . . . if [the request] is disputed either as to liability or amount or is not acted upon in a reasonable time.”<sup>151</sup> Under the “reasonable time” language, the tribunals have dismissed as untimely contractor non-payment claims based on invoices that the Government ignored more than six years after receipt.<sup>152</sup> The standard for whether an amount of time is a “reasonable time” cannot be determined by any specific criteria, and it will depend on the facts of each case.

## VI. CONCLUSION

Increasing litigation about limitations periods are challenging CDA tribunals to develop coherent and consistent criteria for parties to determine when the six-year period begins to run on their potential claims. Arguably, the trial judges have made that challenge more difficult by attempting to impose precedent under the Tucker Act’s non-discovery-accrual standard on FAR 31.201’s “discovery” rule language. That challenge has been compounded by a general tendency of the BCAs and COFCs to find that claims do not accrue until the claimant possesses the information on which the claim is based. It is reasonable to conclude that the decisional law has not matured to the ideal, and perhaps, idealistic, state of consisting of “rules ensuring fair and predictable enforcement of statutes of limitations.”<sup>153</sup>

It may also be observed that, despite the FAR Council’s express intent and “knew *or should have known*” definition of “accrual” in FAR 33.201, the decisional law to date has not developed or applied typical discovery rule analysis in examining the facts of the cases or in judgments whether claims are timely or untimely. With rare exception, the decisions have not dismissed as untimely claims based on when a claimant “should have known” or been aware of the relevant facts where the claimant did not have actual knowledge or possess the information showing that it had a claim. As a result, the precedent offers virtually no guidance on issues traditionally fundamental to a “reasonably should have learned” analysis, which include the following:

- (1) What information is sufficient to put a claimant on “notice”?
- (2) Does “notice” itself trigger the period (as *Gray* suggests), or does the statute initiate when a diligent claimant discovers the facts, or reasonably would have discovered the facts?
- (3) When and under what circumstances does a claimant have an affirmative duty to make a reasonable inquiry aimed towards “discovery” of potential claims?

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151. *Id.*

152. Adamant Grp. for Contracting & Gen. Trading, ASBCA No. 60316, 16-1 BCA ¶ 36,577.

153. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995).

(4) When and under what circumstances may a claimant rely on the other party's *contractual duties* to provide information in determining the nature and extent of any "diligence" expected of the claimant?

On a more fundamental level, however, the cases have never addressed whether the FAR's discovery rule definition of "accrual" appropriately serves as controlling over the definition of the otherwise undefined term "accrual" in section 7103(4)(a) of the CDA. The FAR Council undertook to define the word "accrue" in Section 4(a) pursuant to its general authority to promulgate regulations "as may be necessary to implement this Act,"<sup>154</sup> and not in response to any specific delegation. The failure to examine whether the FAR Council's adoption of its definition of "accrue" is sufficient under the recent Supreme Court decision relating to proper construction of statutory limitations provisions and, separately, deference to federal agencies in implementing regulations, raises questions of whether any "discovery rule" should apply in CDA statute of limitations cases.

In several recent cases, the Supreme Court has sent a strong signal that the courts should not "graft" a "discovery rule" on the term "accrues" or the like in a federal statute of limitations absent "textual, historical, or equitable reasons" to do so.<sup>155</sup> In *Gabelli v. SEC*, the SEC in 2008 filed a civil enforcement action against defendants for securities law violations between 1999 and 2002 and sought civil penalties, which are subject to a statute of limitations that require an action to be brought "within five years from the date when the claim first accrued."<sup>156</sup> The SEC argued that the statute is subject to a "discovery rule," delaying accrual until it discovered or "could have been discovered with reasonable diligence." The Court rejected that argument:

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154. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, §10002, 108 Stat. 3243.

155. *Gabelli v. SEC*, 568 U.S. 442, 454 (2013); *see also, e.g.*, *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017) (internal citations omitted) ("Statutes of limitations are designed to encourage plaintiffs 'to pursue diligent prosecution of known claims.' In accord with that objective, limitations periods begin to run 'when the cause of action accrues'—that is, 'when the plaintiff can file suit and obtain relief.');" *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods.*, 137 S. Ct. 954, 962 (2017) (internal citations omitted) ("First Quality says that the accrual of a claim, the event that triggers the running of a statute of limitations, occurs when 'a plaintiff knows of a cause of action,' but that is not ordinarily true . . . [a] claim ordinarily accrues 'when [a] plaintiff has a complete and present cause of action.' While some claims are subject to a 'discovery rule' under which the limitations period begins when the plaintiff discovers or should have discovered the injury giving rise to the claim, that is not a universal feature of statutes of limitations."); *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (internal citations omitted) ("[I]t is the standard rule that [accrual occurs] when the plaintiff has 'a complete and present cause of action' that is, when 'the plaintiff can file suit and obtain relief[.]'"").

156. 568 U.S. at 446–47 (quoting 28 U.S.C. § 2462).

“In common parlance a right accrues when it comes into existence . . . .” . . . Thus the “standard rule” is that a claim accrues “when the plaintiff has a complete and present cause of action.” . . . That rule has governed since the 1830’s when the predecessor to §2462 was enacted. . . . And that definition appears in dictionaries from the 19th century up until today. See, e.g., 1 A. Burrill, *A Law Dictionary and Glossary* 17 (1850) (“an action accrues when the plaintiff has a right to commence it”); *Black’s Law Dictionary* 23 (9th ed. 2009) (defining “accrue” as “[t]o come into existence as an enforceable claim or right”).<sup>157</sup>

The Court added: “[T]he cases in which ‘a statute of limitation may be suspended by causes not mentioned in the statute itself . . . are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it.’”<sup>158</sup>

At a minimum, the CDA forums will need to address, if and when any litigant raises the question, whether “accrues” in section 7103(a) (4) (A) means (1) when the claimant “knew or should have known” of the cause, or (2) in light of *Gabelli* and other recent precedent, when the claimant “has a complete and present cause of action” regardless of the claimant’s state of mind. In this regard, while the FAR Council and the CDA forums have relied significantly on Tucker Act precedent, neither appears to have considered that, as in the CDA, the Tucker Act does not define “accrue,” and since its enactment, the federal courts consistently have construed “accrue” in the Tucker Act to mean the date when “when all the events have occurred which fix the alleged liability of the United States and entitle the claimant to institute an action.”<sup>159</sup>

The Supreme Court, moreover, recently clarified that under the *Chevron* deference analysis,<sup>160</sup> “deference is not due [a regulatory definition of a statutory term] unless a ‘court, employing traditional tools of statutory construction,’ is left with an unresolved ambiguity. . . . Where . . . the canons supply an answer, ‘*Chevron* leaves the stage.’”<sup>161</sup> Notably, there is no indication in the record that the FAR Council determined that the CDA statute’s use of “accrue” was “ambiguous,” or adopted its “discovery” definition standard to clarify an ambiguity. On the contrary, it noted the “discovery requirement must

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157. *Id.* at 448.

158. *Id.* at 454.

159. *Compare* 28 U.S.C. § 2501 (2012) (“Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues”), *with* 41 U.S.C. § 7103(4)(a) (2012) (“Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim”); *Holmes v. United States*, 657 F.3d 1303, 1317–20 (Fed. Cir. 2011).

160. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

161. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

remain,” notwithstanding little support and much objection among commentators, because “many pricing defect cases have their original events at the beginning of the contract or on contract award, but often cannot be discovered by the Government until years later.” The CDA forum’s “discovery” rule, and the CDA forum’s default use of that definition, may be vulnerable in light of *Gabelli*, a growing hostility to *Chevron* deference,<sup>162</sup> and the regulatory record.<sup>163</sup>

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162. See Joshua Matz, *The Imminent Demise of Chevron Deference?*, TAKE CARE (June 21, 2018), <https://takecareblog.com/blog/the-imminent-demise-of-chevron-deference> [<https://perma.cc/85BY-6LCQ>].

163. Notwithstanding *Gabelli*, at least one court since has found the “meaning of the word ‘accrue’ is not free of ambiguity.” *McDonough v. Anoka Cnty.*, 799 F.3d 931, 942 (8th Cir. 2015).

