

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
The Boeing Company ) ASBCA No. 57490  
 )  
Under Contract Nos. N00383-97-G-002N )  
DAAH23-00-C-0044 )

APPEARANCES FOR THE APPELLANT: Martin P. Willard, Esq.  
Kara M. Sacilotto, Esq.  
Wiley Rein LLP  
Washington, DC

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.  
DCMA Chief Trial Attorney  
Charles W. Goeke, Esq.  
Senior Trial Attorney  
Defense Contract Management  
Agency  
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE MELNICK ON APPELLANT'S MOTION  
FOR SUMMARY JUDGMENT OR TO DISMISS

Appellant, The Boeing Company (Boeing), appeals under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, from a contracting officer's final decision, dated 25 October 2010, issued by the Defense Contract Management Agency (DCMA). The decision seeks \$6,420,000 from Boeing in increased costs alleged to have been incurred by the government as a result of a voluntary change by Boeing in its accounting system.

Boeing has moved for summary judgment, or for dismissal of the government's claim, on the ground that the decision was issued more than six years after the claim accrued, and it is therefore time barred under 41 U.S.C. § 7103(a)(4)(A). We dismiss the appeal for lack of jurisdiction.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

The following facts are undisputed for purposes of the motion.

On 31 October 2000, Boeing submitted a Cost Accounting Standards Disclosure Statement to DCMA-Philadelphia, providing notice that it had revised its accounting

practices for 2001 and beyond as a result of its 1997 merger with McDonnell Douglas Corporation. The revised practices went into effect on 1 January 2001. (R4, tab 3) In response to a subsequent DCMA request, Boeing provided an analysis of the cost impact of its accounting change upon its contracts with the Department of Defense (R4, tab 9; app. supp. R4, tab 2). That analysis was audited by the Defense Contract Audit Agency (DCAA), which issued its final audit report on 14 June 2002 to the DCMA-Philadelphia divisional administrative contracting officer (DACO or contracting officer) (R4, tab 12). The report summarized its findings as follows:

In our opinion, Boeing Philadelphia's cost impact proposal indicates an approximate \$7.4 million of increased cost (including profit and interest) to the government as a result of lesser allocation of cost to firm-fixed priced contracts. Of this amount, we estimate that about \$5.3 million is applicable to Chinook foreign military sales contracts and \$2.1 million is attributable to V-22 ASP (spares) contracts. We determined that substantially all of the increased cost to the government occurred in 2001.

(R4, tab 12 at G-137) Thus, DCAA concluded that Boeing's revised accounting practices reduced the costs allocated by Boeing to two types of fixed-price contracts, causing \$7.4 million in increased costs to the government that were incurred almost entirely in 2001.<sup>1</sup>

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<sup>1</sup> To the extent it is not intuitively clear that reduced cost allocations to these fixed-price contracts dictate that the government's costs have increased, the audit report explained:

In accordance with 48 CFR 9903.306(b), if a contractor under any fixed-price contract, including a firm fixed-price contract, fails during contract performance to follow its cost accounting practices or to comply with applicable Cost Accounting Standards, increased costs are measured by the difference between the contract price agreed to and the contract price that would have been agreed to had the contractor proposed in accordance with the cost accounting practices used during contract performance.

(R4, tab 12 at G-138-39) Essentially, DCAA's position was that Boeing's reduction in the costs it allocated to these contracts from what was contemplated by the parties when they were negotiated, without a corresponding decrease in price, would provide Boeing with unintended windfall profits.

Approximately 72% of the increased costs were attributable to Chinook foreign military sales contracts, and 28% of the costs were associated with V-22 spare parts contracts.

On 15 September 2003, the contracting officer prepared a “PRENEGOTIATION MEMORANDUM” for a “Cost Impact Settlement of 2001 Accounting Change.” Referring to Boeing’s 2001 accounting revision, the memorandum explained that the contracting officer was preparing to “settle the cost impact related to the 2001 Accounting change.” (R4, tab 15 at G-161) The contracting officer noted DCAA’s finding that the government had incurred increased costs upon its fixed-price contracts due to the accounting revision, and explained that:

FAR Part 30 indicates that the Government shall not pay any increased cost in the aggregate as a result of a unilateral accounting change. FAR 30.602-3 goes further to indicate that increased costs resulting from a voluntary change may be allowed only if the ACO determines that the change is desirable and not detrimental to the interest of the Government.

...Since there is no clearly apparent nor demonstrated benefits in terms of increased efficiencies and compliance, the DACO (who is also the CFAO) has deemed the change not to be beneficial to the Government. Further, she has deemed the increased costs to be material.

....

Based on the audit report and the fact finding, the DACO will accept the contractor’s proposal[.] Since the net increase cost to the Government is the reduction of \$5[.]581M to fixed price contracts, the DACO will ask for contract adjustments to the two programs most affected which is Chinook FMS and V22 spares. She is open to a counter offer from Boeing if the company wants to submit a refund check in lieu of contract adjustments.

(R4, tab 15 at G-163) Accordingly, the contracting officer memorialized a determination that Boeing’s accounting revision was not in the government’s interests, barring the government from paying resulting increased costs, and described a negotiation strategy for obtaining reimbursement of costs the government had incurred. The strategy was receptive to counteroffers from Boeing.

Two days later, on 17 September 2003, the contracting officer wrote a letter to Boeing about its accounting revision. It stated in pertinent part:

The purpose of this letter is to inform you of my determination regarding the 2001 accounting change. At the start of CFY2001, a significant voluntary accounting change was made by Boeing Philadelphia. The change was designed to make the Philadelphia cost structure consistent with the A&M common cost policy for its primary accounting entities. Although quite of [sic] a number of audits and discussions have occurred as well as cost impacts submitted, a formal determination if this change is desirable to the Government has never been made. In accordance with the provisions FAR 30.602-3, while the accounting change is now adequate and compliant, I have determined the change not to be desirable to the Government. In other words, I've deemed the change to be a unilateral one and as such, the Government will not pay any increased costs, in the aggregate, as a result of this change.

(R4, tab 16 at G-166) The contracting officer therefore notified Boeing of her finding that Boeing's accounting revision was not desirable, and that the government would not bear the increased aggregate costs arising from it. She then proposed the following resolution of the issue:

I'm confirming the written settlement offer I made on September 11, 2003, to accept your latest proposal of \$5.581M. To those costs, I'm adding a 15% profit factor and using the simple interest factor of 7.75% that was in effect at the time the transition occurred....

....

Therefore, I'm proposing that a \$6.915M adjustment occur to a representative contract from Chinook FMS and V22 spares. The Chinook program represents approximately 72% of the impact and V22 represents the remaining 28%. The adjustment should be applied according to those ratios.

I await your response so we can finally settle this issue. I feel obligated to tell you if we can't reach agreement on an appropriate cost adjustment within a reasonable period of

time, I'm prepared to make a unilateral determination subject to appeal as provided for in the Disputes clause, FAR 52.233.

(*Id.* at G-166-67)

Boeing responded to the contracting officer's letter on 23 December 2003, disagreeing with her conclusions (R4, tab 17). In that letter, as well as a subsequent meeting between the parties on 14 January 2004, Boeing suggested that the adjustment sought by the government had been "given consideration" in the negotiated price of one of the Chinook contracts at issue, and that therefore the government had already received an adjustment for those costs (R4, tab 17; gov't opp'n, affidavit of Carol Anne Di Girolamo ¶ 16 (Di Girolamo aff.)). Boeing also contended that the costs identified by the government should have been offset against lower priced future contracts that would result from the accounting revision (Di Girolamo aff. ¶ 18).

The accounting change was raised at a series of additional meetings between the parties between 2004 and April 2005. During those meetings, Boeing also contended that the accounting revision's effect upon fixed-price contracts should not have been included in the assessment of its costs, and that interest was not recoverable by the government. (Di Girolamo aff. ¶¶ 22-23) At another meeting in 2005, Boeing provided support for its contention that the increased costs were accounted for in one of the Chinook contracts (Di Girolamo aff. ¶¶ 24-27). Subsequently, between 2005 and 2010, some "intermittent discussions and evaluations continued between [the contracting officer] and Boeing representatives in an attempt to settle the matter" (Di Girolamo aff. ¶ 28).

On 25 October 2010, the government issued what purports to be a contracting officer's final decision, demanding \$6.42 million from Boeing in increased aggregate costs as a result of the 2001 accounting change. Again, the government allocated 72% of the costs to a Chinook contract, and 28% to V-22 spare parts contracts. Accordingly, it declared that Boeing was indebted to the government in the amount of \$4.62 million under Contract No. DAAH23-00-C-0044, executed in 1999, and \$1.8 million under Contract No. N00383-97-G-002N, executed in 1997. (R4, tabs 1, 2, 18) Boeing appealed this decision on 21 January 2011.

### DECISION

Although Boeing appealed from the government's 25 October 2010 decision claiming the accounting revision costs, among other things its motion now calls into question our jurisdiction to entertain that appeal. Quite simply, it contends that because the decision was issued more than six years after the government's claim for those costs accrued, it is a nullity.

## I. The CDA's Jurisdictional Requirements

The CDA imposes specific prerequisites for the Board to exercise jurisdiction over an appeal from a government claim such as this. The initial jurisdictional condition is that “[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer.” 41 U.S.C. § 7103(a)(3); *Unconventional Concepts, Inc.*, ASBCA No. 56065 *et al.*, 10-1 BCA ¶ 34,340 at 169,591 (citing 41 U.S.C. § 605(a), the prior codification of section 7103(a)). Significantly, for a government claim to be valid and cognizable under the CDA, it “shall be submitted within 6 years after the accrual of the claim.” 41 U.S.C. § 7103(a)(4)(A). An untimely government claim has been held to be beyond the Board’s jurisdiction to review. *McDonnell Douglas Servs., Inc.*, ASBCA No. 56568, 10-1 BCA ¶ 34,325 at 169,527-29. Additionally, the Board’s jurisdiction is also dependent upon a claimant appealing a contracting officer’s final decision within 90 days of the decision’s receipt. 41 U.S.C. § 7104(a); *D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997). Alternatively, a claimant may challenge the decision by bringing an action in the United States Court of Federal Claims within 12 months of its receipt. 41 U.S.C. § 7104(b).

## II. Claim Accrual

In its response to Boeing’s motion, the government does not really deny that its claim accrued more than six years before it issued the 25 October 2010 decision, and we agree.

The CDA does not define “accrual” so we rely upon the definition contained in FAR 33.201. *McDonnell Douglas*, 10-1 BCA ¶ 34,325 at 169,528; *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,475. The version of that definition that existed when the two contracts upon which the claim is based were executed in 1997 and 1999 stated 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.

The current version of the regulation is virtually identical. *See Gray Personnel*, 06-2 BCA ¶ 33,378 at 165,475. Accordingly, a claim accrues when the events giving rise to liability were known or should have been known.

The government's 25 October 2010 final decision quite succinctly describes the events upon which it premises its claim, and demonstrates that the government knew of those events more than six years earlier. The decision commences by discussing Boeing's 2000 notification to the government of the accounting revision and Boeing's subsequent submittals analyzing the revision's cost impact. It notes that the submittals were audited by DCAA, and that the contracting officer received DCAA's audit report identifying the government's costs in June of 2002. The decision cites the contracting officer's 17 September 2003 letter to Boeing, which formally declared the accounting revision to be undesirable and that therefore Boeing was liable to the government for the resulting costs. The decision observes that the letter allocated 72% of the costs to the Chinook program, and 28% to the V-22 spare parts program. The decision then acknowledges that the contracting officer expressed a willingness to negotiate the amounts to be paid, describes the parties' subsequent discussions, and Boeing's reasons for disagreeing with the government. However, the decision does not describe any other events occurring after the contracting officer's 17 September 2003 letter that give rise to the claim being made. Only discussions about whether Boeing would pay the costs occurred after that date. (R4, tab 18 at G-170-73) Thus, the 25 October 2010 decision itself demonstrates that all of the events upon which it bases Boeing's alleged liability occurred, and were known to the government at the latest, by 17 September 2003. Accordingly, it is clear the government's claim accrued more than six years before it issued its 25 October 2010 final decision.

### III. The Government's Contentions

Although it does not deny the accrual date of its claim, the government advances two arguments in response to Boeing's motion. First, the government suggests that its 25 October 2010 decision is not the relevant final decision in this appeal. According to the government, the contracting officer's 17 September 2003 letter to Boeing is the contracting officer's final decision asserting the government's claim for the costs of the accounting revision. (Gov't opp'n at 8-14) Alternatively, the government contends that its 25 October 2010 final decision is valid because the six-year limitation for bringing the claim was equitably tolled by Boeing's conduct (gov't opp'n at 14-18). Neither argument is persuasive.

The government engages in an extensive effort to persuade us that the contracting officer's 17 September 2003 letter "fulfilled the claim submission requirements of the CDA statute of limitations," suggesting that it pursued its formal claim for the costs arising from the accounting revision as long ago as 2003 (gov't opp'n at 14). Even if the 17 September 2003 letter constituted the government's claim for the accounting revision costs, Boeing would have had to appeal it within 90 days of its receipt in 2003 for us to exercise jurisdiction over the matter now. 41 U.S.C § 7104(a); *D.L. Braughler*, 127 F.3d at 1480. It

did not. Thus, even if the contention were true, it would not dictate that we possess jurisdiction over this appeal.

In any event, the 17 September 2003 letter is not a final decision asserting a claim for the accounting revision costs. A valid government claim for money due upon a contract must demand a sum certain. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc). Instead of making such a demand, the contracting officer's 17 September 2003 letter merely made a settlement proposal, demonstrated by her statement in the letter that she was "confirming [a] written settlement offer [she] made on September 11, 2003," and reiterated when she described herself as "proposing that a \$6.915M adjustment occur to a representative contract." Additionally, rather than demand a sum certain due at that point in time, the contracting officer closed the letter by saying if the parties could not "reach agreement," she was then "prepared to make a unilateral determination subject to appeal." (R4, tab 16 at G-166-67) She therefore made it clear that the letter itself was not an appealable final decision, but that one might be coming. "An expression of intent to submit a claim in some amount at some time in the future is not a claim for purposes of the CDA." *National Gypsum Co.*, ASBCA No. 53259, 01-2 BCA ¶ 31,532 at 155,673; see also *Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1328 (Fed. Cir. 2010) (concluding that communication of an intention to assert a claim is not a claim).<sup>2</sup>

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<sup>2</sup> The government's actions, or inactions, both before and after the contracting officer issued the 17 September 2003 letter, are consistent with the conclusion that the letter was not intended to constitute a final decision, but to advance a settlement proposal. Two days prior to issuing that letter to Boeing, the contracting officer's internal "PRENEGOTIATION MEMORANDUM" memorialized her strategy of engaging in an effort "to settle the cost impact to Government contracts as a result of" the accounting revision, and stated that she was "open to a counter offer from Boeing..." (R4, tab 15 at G-162-63). Additionally, the government fails to explain why, if it considered the 17 September 2003 letter to be a final decision, it did not file an action in state or federal court to enforce it once it became unreviewable one year from its receipt by Boeing. 41 U.S.C. § 7103(g); *Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1380 (Fed. Cir. 2007) ("Absent commencement of such review within the prescribed period of time, the decision becomes impervious to any substantive review" (quoting *United States v. Kasler Elec. Co.*, 123 F.3d 341, 346 (6<sup>th</sup> Cir. 1997))); *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1562 n.4 (Fed. Cir. 1990) (holding that, upon a government claim becoming unreviewable, the government may file suit to enforce it in a state or federal court). Instead, the government continued to negotiate with Boeing about the accounting revision costs. Similarly, the government fails to explain why it issued the 25 October 2010 decision, with its explicit demand that Boeing pay a sum certain, if it considered the 17 September 2003 letter to already perform that function.

In the alternative to its suggestion that the 17 September 2003 letter is its final decision claiming the accounting revision costs, the government returns to the 25 October 2010 decision. It attempts to salvage that decision's validity by arguing that Boeing's negotiation tactics justify application of the doctrine of equitable tolling to the CDA's six-year time limit upon claim presentment (gov't opp'n at 14-18). As support for its contention, the government emphasizes that three months after the contracting officer issued the 17 September 2003 letter, Boeing "unexpectedly took issue with each and every facet of the...letter," and also suggested that one of the Chinook contracts had been priced three years earlier to account for the costs at issue. The government contends that Boeing could have raised that issue sooner, and then waited another year and a half, until 14 April 2005, before presenting the evidence it claimed supported that position. Similarly, the government complains that Boeing initially agreed in 2002 that the accounting revision costs affected fixed price contracts, but then reversed that position during discussions in 2004. (Gov't opp'n at 15-17)

The government summarizes its position by accusing Boeing of leading the contracting officer "to believe that the contract adjustment issue was on the verge of settling" but then it "belatedly interjected entirely new, overriding issues into the discussions; and finally it compounded the situation by providing supporting information in a thoroughly, untimely manner." According to the government, these actions breached Boeing's duty not to "hinder or delay the [government] in performance of the contract" by "play[ing] [the contracting officer] along" which then "induced [her] into allowing the limitations period to pass." Therefore, the six-year limitation should be considered tolled. (Gov't opp'n at 17-18)

The CDA's six-year limitation upon submitting claims is subject to equitable tolling. *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785, 798-800 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 3503 (2010). Equitable tolling may apply when a party has been induced or tricked by its adversary's misconduct into permitting a filing deadline to pass. *See Frazer v. United States*, 288 F.3d 1347, 1353-54 (Fed. Cir. 2002) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)); *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995). In the case of late filings though, much less forgiveness is to be afforded if a claimant did not exercise due diligence in asserting its rights. *Frazer*, 288 F.3d at 1353; *Juice Farms*, 68 F.3d at 1346.

We do not perceive any misconduct by Boeing that could have induced or tricked the government into missing the deadline for submitting its claim for the accounting revision costs. Indeed, nowhere in the contracting officer's affidavit, upon which the government relies as its source for Boeing's actions, does she say that she believes that Boeing's actions tricked or induced her in any way. Instead, that affidavit merely demonstrates that after the contracting officer issued her 17 September letter, inviting

Boeing to negotiate with her, it did just that. (Di Girolamo aff. ¶¶ 11-28) Although Boeing may have unexpectedly disputed her conclusions, which it continued to do with various arguments and materials it presented to her in meetings that occurred over the next year and half, nothing about that constituted misconduct, or should have induced her not to protect the government's rights. If anything, Boeing's continued resistance to the government's conclusions, and to settling the matter, should have heightened the government's awareness of the need to issue a final decision to preserve its claim before the deadline expired. It should not have caused the government to believe that a final decision would be unnecessary.

Additionally, the primary series of discussions and presentations the contracting officer describes only occurred over a year and half period, from the issuance of her 17 September 2003 letter until April 2005. Although "intermittent discussions and evaluations" took place after that, mere continuation of negotiations is not a ground for tolling. *Brighton Village Assocs. v. United States*, 52 F.3d 1056, 1061 (Fed. Cir. 1995). Given the facts, it seems clear that it was lack of diligence, and not any misconduct by Boeing, that was the reason the government sat on its rights here until it was too late. Accordingly, there is no basis to find that the CDA's six-year limitation upon the government's submittal of its claim was tolled.

#### IV. Disposition of the Appeal

The final issue we address is the appeal's proper disposition. Specifically, we consider whether the CDA's six-year limitation upon presenting claims is a condition of our jurisdiction, mandating dismissal of the appeal of the government's untimely claim for lack of jurisdiction. If it is not, but instead is more like a substantive condition of the government's claim or an affirmative defense to it, then the government's failure to comply with it would dictate sustaining Boeing's appeal upon the merits. *See Do-Well Mach. Shop, Inc. v. United States*, 870 F.2d 637, 639-40 (Fed. Cir. 1989). As previously stated, we have dismissed an appeal of an untimely government claim for lack of jurisdiction. *McDonnell Douglas*, 10-1 BCA ¶ 34,325 at 169,527-29. That holding is supported by both the Court of Appeals' decision in *Arctic Slope*, 583 F.3d at 793, and its recent decision in *Systems Development Corp. v. McHugh*, 658 F.3d 1341, 1345-47 (Fed. Cir. 2011).

In *Arctic Slope*, claimants before the Civilian Board of Contract Appeals sought either class action tolling or equitable tolling of the six-year claim presentment limitation. The claimants contended that, because they were members of putative classes that were also pursuing their claims in district court under the Indian Self-Determination and Education Assistance Act (ISDA), the CDA's six-year presentment limitation upon their own claims to the board was subject to class action tolling until class certification was

denied in the district courts.<sup>3</sup> The board rejected the argument. On appeal, the Court of Appeals recognized that class action tolling of individual claims was available to all asserted class members who could have been parties in the district court class actions had they continued. *Arctic Slope*, 583 F.3d at 791-96. However, the Court of Appeals held that the timely submission of a claim within six years was both a jurisdictional condition for membership in the class as well as for the claimants' own appeals to the board. As the Court of Appeals explained:

The six-year presentment period is part of the requirement in section 605(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 605(a) is a prerequisite to suit in the Court of Federal Claims or review by a board of contract appeals. 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, subject to any applicable tolling of the statutory time period, 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.

*Id.* at 793 (citations omitted). The Court therefore denied class action tolling on the ground that the claimants would not have been eligible to be class members, had the class actions been permitted to continue, due to their failure to timely comply with the six-year limitation's jurisdictional condition. *Id.* at 793-96 (quoting *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975)).

Similarly, *Systems Development* affirmed our dismissal of an appeal of equitable adjustment claims that had been submitted to the contracting officer more than six years after accrual. Relying upon *Arctic Slope*, the Court of Appeals agreed that the Board lacked jurisdiction, given "[t]he equitable adjustment claims were submitted to the [contracting officer] outside the six-year statute of limitations in 41 U.S.C. § 605(a)." *Sys. Dev. Corp.*, 658 F.3d at 1347.

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<sup>3</sup> The ISDA makes the CDA applicable to disputes concerning self determination contracts entered into by Indian tribes to manage federally funded activities. In addition to providing the normal avenues to pursue such disputes, the ISDA also permits claims to be brought in district court. *Arctic Slope*, 583 F.3d at 788-89.

Notwithstanding these holdings, some questions arise as to whether *Arctic Slope* might be abrogated by the Supreme Court's recent treatment in *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (en banc), *rev'd*, 131 S. Ct. 1197 (2011), of the statute of limitations for bringing actions in the United States Court of Appeals for Veterans Claims. Additionally, given that *Arctic Slope* also holds that the six-year presentment limitation is subject to equitable tolling, another question that arises is whether either *Henderson* or the Court of Appeals' recent en banc decision in *Cloer v. Secretary of Health and Human Services*, 654 F.3d 1322 (Fed. Cir. 2011) (en banc), dictate that the limitation cannot then also be jurisdictional. We address each issue separately below.

A. *Henderson's* General Treatment of the Jurisdictional Nature of Statutes of Limitations and Its Implications for the Six-Year Presentment Restriction

In *Henderson*, the Supreme Court considered whether 38 U.S.C. § 7266(a), the 120-day limitation upon appealing decisions of the Board of Veterans Appeals to the Court of Appeals for Veterans Claims, is a jurisdictional requirement. The Court began its analysis by repeating its prior observation that a rule should not be referred to as jurisdictional unless it addresses "a court's adjudicatory capacity." *Henderson*, 131 S. Ct. at 1202 (citing *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243-44 (2010)). It explained that "claim-processing rules," designed "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times," should not be considered jurisdictional. The Court considered the 120-day filing deadline for appealing to the Veterans Court to be just such a rule. *Id.* at 1203. Nevertheless, the Court recognized that in practice the analysis "is not quite that simple because Congress is free to attach the conditions that go with the jurisdictional label to a rule that we would prefer to call a claim-processing rule." *Id.* Accordingly, it held a forum must look to whether there is a clear indication Congress expected the rule to be jurisdictional. *Id.*

Elaborating upon the inquiry into Congress' expectations, *Henderson* stressed that Congress need not use any particular words to designate a rule as jurisdictional. Thus, context and the Court's past history interpreting similar provisions are relevant. Citing its recent treatment of the six-year limitation for bringing suit in the United States Court of Federal Claims, the Court explained that when Congress has left undisturbed a long line of the Court's decisions treating a filing limitation as jurisdictional, "we will presume that Congress intended to follow that course." *Id.* (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008)).

In analyzing the Veterans Court's 120-day time limit under the standards it had announced, *Henderson* found that the limit's failure to speak in jurisdictional terms, and placement in the Veterans Judicial Review Act's subchapter entitled "Procedure," rather than in the subchapter entitled "Organization and Jurisdiction," provided some indication

of Congressional intent. *Id.* at 1204-05. However, what was most informative for the Court was “[t]he contrast between ordinary civil litigation...and the system that Congress created for adjudication of veterans’ benefits claims...” *Id.* at 1205-06. Thus, unlike ordinary litigation, veterans seeking benefits function in a highly solicitous environment. Veterans need not initiate a claim within any fixed period and proceedings before the VA are informal and non-adversarial. The VA must assist the veteran in developing a claim and veterans may then pursue unsuccessful claims to the Board of Veterans Appeals, and onward to the Veterans Court if necessary. However, a board decision in favor of the veteran is final. And, should a veteran still be unsuccessful, the veteran may reopen the claim by presenting new and material evidence. Having acknowledged these factors, the Court held that “[r]igid jurisdictional treatment of the 120-day period for filing a notice of appeal in the Veterans Court would clash sharply with this scheme,” especially given the canon that the provision of benefits to the Armed Services should be construed in favor of the beneficiaries. *Id.* at 1206.

*Henderson’s* focus upon the nature of the veteran’s review scheme, and recognition that entrenched interpretations of similar limitations left undisturbed by Congress deserve deference, lead us to conclude that it does not dictate that we disregard the long-established principle that the CDA’s prerequisites for appeal to this forum, including the six-year time limit upon the government’s submittal of a claim, are jurisdictional. First, unlike the veterans benefit program, the CDA does not provide a review scheme that is “unusually protective” of claimants. *See id.* at 1204-06. The CDA establishes a deadline for submitting initial claims through the six-year limitation, which, if denied, can lead to adversarial proceedings, either here or in the Court of Federal Claims, that are much like any other civil litigation. Appeals must be taken within a specified time limit, 41 U.S.C. § 7104; review is “de novo,” 41 U.S.C. §§ 7103(e), 7104(b)(4); and both parties possess a right of appeal, 41 U.S.C. § 7107. Thus, the circumstances found by *Henderson* to be “most telling” to its holding do not exist here. 131 S. Ct. at 1205-06.

Second, unlike the limitation considered in *Henderson*, the CDA’s six-year limitation upon presentment of a claim is not a mere procedural limit divorced from jurisdiction. Instead, it is embedded with, and governs, the preconditions of the government’s waiver of sovereign immunity, dictating it too defines our jurisdiction. *See United States v. Dalm*, 494 U.S. 596, 608 (1990) (holding that the government’s terms of its consent to be sued, including a statute of limitations restricting suit to a certain time period, define a court’s jurisdiction to entertain suit). As originally codified at 41 U.S.C. § 605(a), the CDA’s claim requirements stated:

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the

government against a contractor relating to a contract shall be the subject of a decision by the contracting officer.

Binding precedent has always held that submittal of a valid claim, and issuance of a contracting officer's final decision, are conditions of the CDA's waiver of sovereign immunity, and therefore a limitation upon our jurisdiction. *E.g.*, *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981) (finding that to invoke CDA jurisdiction in court "there must first be a 'decision' (or failure to decide) by the contracting officer"); *Skelly and Loy v. United States*, 685 F.2d 414, 419 (Ct. Cl. 1982) (emphasizing that for either the Board or what is now the Court of Federal Claims to exercise CDA jurisdiction there must first be a written claim by the contractor followed by a contracting officer's decision upon that claim); *McDonnell Douglas Corp. v. United States*, 754 F.2d 365, 370 (Fed. Cir. 1985) (explaining that the "linchpin" of the Board's CDA jurisdiction is a contracting officer's final decision); *Reflectone*, 60 F.3d at 1575 ("Under the CDA, a final decision by a CO on a 'claim' is a prerequisite for Board jurisdiction"); *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996) (noting that the CDA's requirements for a claim and final decision are part of the terms of the United States' waiver of sovereign immunity and therefore define jurisdiction); *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004) (explaining that the Board's CDA jurisdiction is dependent upon the presentation of a claim and issuance of a final decision, which are "strict limits" and "jurisdictional prerequisites"); *Maropakis Carpentry*, 609 F.3d at 1327-28 (finding CDA jurisdiction requires both a valid claim and contracting officer's final decision); *Lumbermens Mutual Casualty Co. v. United States*, 654 F.3d 1305, 1318 (Fed. Cir. 2011) (holding the CDA claim submittal requirement to be jurisdictional). These jurisdictional principles apply equally in appeals such as this involving government claims. *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1279-81 (Fed. Cir. 1985) (government counterclaims on contracts subject to the CDA must be the subject of a contracting officer decision before assertion in the Court of Federal Claims); *Sharman Co. v. United States*, 2 F.3d 1564, 1568-69 (Fed. Cir. 1993) (en banc) ("Under the CDA, a final decision by the contracting officer on a claim, whether asserted by the contractor or the government, is a 'jurisdictional prerequisite' to further legal action thereon"), *overruled in part on other grounds by Reflectone*, 60 F.3d at 1579 n.10; *Daff v. United States*, 78 F.3d 1566, 1571 (Fed. Cir. 1996) (requiring a valid contracting officer's final decision to challenge a government default termination).

Against the backdrop of these consistent rulings that section 605(a) conditioned our jurisdiction upon a valid claim and final decision, in 1994 Congress enacted the Federal Acquisition Streamlining Act, Pub. L. No. 103-355, § 2351(a), 108 Stat. 3243, 3322 (1994) (FASA). FASA inserted into section 605(a) the mandate that a claim be submitted by either the contractor or the government within six years of accrual. This was an additional requirement for submitting a valid claim. *See FAR 33.206*. Given this

context, it is clear that an untimely claim is not a valid claim, and under the precedent binding upon us we lack jurisdiction over an appeal where there has been no valid claim.

Nothing in *Henderson* empowers us to disregard these binding precedents. To the contrary, in that case the Court emphasized that Congress' intent to attach jurisdictional implications to a requirement can be discerned from its failure to disturb prior determinations that similar provisions are jurisdictional. *Henderson*, 131 S. Ct. at 1203; see also *John R. Sand & Gravel*, 552 U.S. at 138 (recognizing the significance of definitive prior interpretations of congressional intent). Congress has never disturbed the Federal Circuit's 30 years-worth of precedent regarding the jurisdictional nature of the CDA's pre-filing claim and final decision requirements.<sup>4</sup> Indeed, the Federal Circuit has recognized that an amendment to the CDA occurring prior to FASA indicated the contrary, observing:

[A]lthough the recent amendments to the CDA allow post-filing curing of technical defects in certification, they do not dispense with the "jurisdictional prerequisite" of a pre-filing final decision by the contracting officer. See 138 Cong.Rec. S17799 (daily ed. October 8, 1992) (statement of Sen. Heflin) (stating that "[a] contracting officer's final decision under the Contract Disputes Act will remain a jurisdictional prerequisite....")

*Sharman*, 2 F.3d at 1569. Given these significant differences in circumstances between *Henderson* and *Arctic Slope*, we conclude that the Supreme Court's jurisdictional analysis in *Henderson* does not abrogate *Arctic Slope*'s holding that the CDA's six-year presentation requirement is jurisdictional. Indeed, the Court of Appeals' recent decision in *Systems Development*, 658 F.3d at 1345-47, which followed *Henderson* and reiterates *Arctic Slope*'s holding, also suggests that it does not consider *Arctic Slope* to be abrogated.

B. *Henderson's and Cloer's Impact Upon Whether the Six-Year Presentment Limitation May be Both Jurisdictional and Subject to Equitable Tolling*

The other issue we address is whether a statute of limitations subject to equitable tolling, which *Arctic Slope* held is the case for the six-year presentment statute, can also be jurisdictional. *Arctic Slope* indeed held to that effect, expressing no difficulty with the

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<sup>4</sup> *Henderson's* observation about prior jurisdictional determinations left undisturbed by Congress was referring to determinations by the Supreme Court. However, we conclude that our review of applicable precedent must also include the determinations of the Court of Appeals.

concept that the six-year presentment statute is both jurisdictional and subject to equitable tolling. Indeed, the Court of Appeals compared the CDA's claim presentment limitation to the presentment requirement in the Federal Tort Claims Act (FTCA), and observed that the FTCA requirement is also both jurisdictional and subject to equitable tolling, stating:

[A]lthough the presentment requirement in the FTCA, like the presentment requirement in section 605(a), is frequently referred to as "jurisdictional," a majority of the courts of appeals have held that it is nonetheless subject to equitable tolling in appropriate cases. *See T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 961 (8<sup>th</sup> Cir. 2006) ("[C]onsiderations of equitable tolling simply make up part of the court's determination whether an action falls within the scope of the waiver of sovereign immunity granted by Congress, and thus within the jurisdiction of the federal courts.")....

*Arctic Slope*, 583 F.3d at 795 n.2. Nevertheless, language from *Henderson* and the Court of Appeals' recent en banc decision in *Cloer* raise questions about this issue. After careful consideration we conclude that *Arctic Slope* is not abrogated by either decision.

#### 1. Background

Before addressing *Henderson* and *Cloer* for this purpose, we review the prior precedent. In finding the six-year presentment statute to be both jurisdictional and subject to equitable tolling, *Arctic Slope* relied upon *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), to guide its review. *Arctic Slope*, 583 F.3d at 798. In *Irwin*, a fired government employee filed an untimely complaint of discrimination in district court against the Department of Veterans Affairs under Title VII of the Civil Rights Act. Accordingly, the government sought dismissal for lack of jurisdiction, which was granted. *Irwin*, 498 U.S. at 91; *Irwin v. Veterans Administration*, No. W-87-CA-104, slip op. (W.D. Tex. Aug. 26, 1987), reprinted in *Irwin* Jt. App., 1990 WL 10023004, at \*16aa-19aa (order dismissing untimely complaint for lack of jurisdiction). The United States Court of Appeals for the Fifth Circuit affirmed, also holding that because the 30-day limit for filing the complaint constituted a jurisdictional limit, it could not excuse the late filing. *Irwin v. Veterans Admin.*, 874 F.2d 1092, 1095 (5<sup>th</sup> Cir. 1989).

The Supreme Court agreed that the filing time limit was a condition of the waiver of sovereign immunity that must be strictly construed. *Irwin*, 498 U.S. at 94. However, the Court ruled that the fact the time limit was part of that waiver did not bar application of equitable tolling to it. As the Court explained:

A waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.” Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.

*Id.* at 95-96 (citations omitted). Thus, *Irwin* found that equitable tolling can be applied to time limits that are part of a jurisdictional waiver of sovereign immunity, applying a rebuttable presumption in favor of such treatment. Subsequently, the Court characterized the test as asking the “negatively phrased question: Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?” and established five factors to apply to determine the answer. *United States v. Brockamp*, 519 U.S. 347, 350 (1997). Significantly, after then determining in *Irwin* that no grounds justifying equitable tolling existed, the Court affirmed the dismissal of the time barred suit for lack of jurisdiction, *Irwin*, 498 U.S. at 96, belying any suggestion that limitations subject to equitable tolling cannot also be a condition upon a jurisdictional waiver of sovereign immunity.

The Supreme Court, at the very least, implied the same conclusion in *United States v. Beggerly*, 524 U.S. 38 (1998). There, among other things, the Court considered whether the statute of limitations for naming the United States as a party defendant under the Quiet Title Act, 28 U.S.C. § 2409a, is subject to equitable tolling. The Court first cited its decision in *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 275-76 (1983). *Beggerly*, 524 U.S. at 47-48. *Block* squarely holds that the Quiet Title Act is a waiver of sovereign immunity, and that its statute of limitations is a condition of that waiver. *Block*, 461 U.S. at 275-78. However, nothing about that conclusion impeded the Court from considering in *Beggerly* whether equitable tolling should apply to the limitation. *Beggerly* ultimately held that it did not, under *Brockamp*’s refined application of the *Irwin* test, because equitable tolling would be inconsistent with the text of the statute. *Beggerly*, 524 U.S. at 48-49.

Notwithstanding these decisions, other statements by the Supreme Court have suggested that filing restrictions that limit a court’s jurisdiction cannot be subject to equitable tolling. For instance, in *Bowles v. Russell*, 551 U.S. 205 (2007), the Court

considered whether a federal appellate court could entertain an appeal filed after the statutory time limit, but within the period allowed by the district court. *Bowles* held that the Court “has no authority to create equitable exceptions to jurisdictional requirements....” *Id.* at 214. In *John R. Sand & Gravel*, the Supreme Court considered whether the statute limiting the period for commencement of suit in the United States Court of Federal Claims, 28 U.S.C. § 2501, is sufficiently absolute that the court should apply it despite its waiver by the government. *John R. Sand & Gravel*, 552 U.S. at 133-39. In answering in the affirmative, the Court constructed its analysis around the premise that there are two types of statutes of limitations. One type protects defendants against stale claims, constituting an affirmative defense, and is subject to equitable tolling. The other seeks broader goals, such as limiting a waiver of sovereign immunity. This type of limit is more absolute and forbids application of equitable considerations. The Court explained that “[a]s convenient shorthand [it] has sometimes referred to the time limits in such statutes as ‘jurisdictional.’” *Id.* at 133-34. Thus, the Court appeared to suggest that it viewed jurisdictional time limits to not be subject to equitable tolling. *Id.* at 136-38.

*Arctic Slope* came after *Bowles* and *John R. Sand & Gravel* and acknowledged both decisions. 583 F.3d at 798, 800 n.6. *Arctic Slope* rejected the government’s contention that, under *John R. Sand & Gravel*, a jurisdictional statute of limitations as absolute as the six-year presentment requirement could not be subject to equitable tolling. Instead, *Arctic Slope* followed *Irwin*’s rebuttable presumption that all statutes of limitation, including jurisdictional ones, are subject to equitable tolling in the absence of a reason to conclude that Congress intended the contrary, and then applied the *Brockamp* factors to conclude that the presumption applied to the six-year provision. *Arctic Slope*, 583 F.3d at 798-800. *Arctic Slope* held that *Bowles* had no application because that decision addressed a timing of review statute and not a statute of limitations such as the CDA’s six-year presentment statute. *Id.* at 800 n.6 (declaring section 605(a) of the CDA to be a statute of limitations, as opposed to the kind of timing of review provision at issue in *Bowles*).

## 2. Henderson

Shortly after its decision in *Arctic Slope*, the Court of Appeals issued its en banc decision in *Henderson*, which was subsequently reversed by the Supreme Court in the decision discussed earlier. *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (en banc), *rev’d*, 131 S. Ct. 1197 (2011). In *Henderson*, the Court of Appeals held that, under the Supreme Court’s decision in *Bowles*, the 120-day limit for appealing to the Court of Appeals for Veterans Claims is jurisdictional and therefore not subject to equitable tolling. In so holding, the Court of Appeals again drew a distinction between the notice of appeal, or time of review, provision it perceived to be at issue in *Bowles*, and the statute of limitations for initiating a claim it found to be at issue in *Irwin* and *John R.*

*Sand & Gravel*, 589 F.3d at 1213-17, as well as in *Arctic Slope*, 583 F.3d at 800 n.6. The court ruled that, under *Bowles*, timing of review provisions are mandatory and jurisdictional and not subject to equitable tolling. 589 F.3d at 1220.

On appeal to the Supreme Court, the Court rejected the Court of Appeals' conclusion that all deadlines for pursuing judicial review are jurisdictional, and, as noted previously, held that section 7266 is not jurisdictional. *Henderson*, 131 S. Ct. at 1203-06. The Court explained that *Bowles* "concerned an appeal from one court to another court." *Id.* at 1203. The Court remanded the matter for consideration of whether equitable tolling should be applied given that the deadline is not jurisdictional. The Court's singular inquiry into whether section 7266 is jurisdictional at least implies that if it had agreed that the deadline is jurisdictional it would have affirmed the Court of Appeals' holding that the deadline is not subject to equitable tolling. Nevertheless, we conclude that the Supreme Court decision in *Henderson* does not abrogate *Arctic Slope*'s determination that the CDA's six-year presentment requirement is both jurisdictional and subject to equitable tolling. Whatever *Henderson* might have concluded had it agreed that section 7266 is jurisdictional, *Henderson* does not expressly expand *Bowles*' application beyond timing of review provisions to categorically bar all jurisdictional time limits from being subject to equitable tolling, including statutes of limitations like the CDA's six-year presentment provision.<sup>5</sup> Indeed, to do so would overrule *Irwin*, which applied equitable tolling to a jurisdictional statute of limitations. The Supreme Court has stressed that it does not typically overrule prior precedents without saying so. *John R. Sand & Gravel*, 552 U.S. at 137. Accordingly, we conclude that *Henderson* does not abrogate *Arctic Slope*.

### 3. Cloer

The second decision we consider is the Court of Appeals' recent en banc decision in *Cloer*. There, the Court considered, among other things, whether the statute of limitations contained in the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-16(a)(2), is subject to equitable tolling. *Cloer*, 654 F.3d at 1340. In assessing the legal landscape, *Cloer* followed *John R. Sand & Gravel*'s analysis, recognizing that some limitations statutes "do not implicate the jurisdiction of a court, and thus do not preclude relief from time filing limits by way of equitable tolling," while "[t]he time

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<sup>5</sup> Even if *Henderson* dictates that jurisdictional statutes of limitations cannot also be subject to equitable tolling, that does not necessarily require us to conclude that *Arctic Slope* incorrectly found that the CDA's six-year limitation is jurisdictional. We do not know whether, if confronted with an impermissible conflict between its holdings, the Court of Appeals would modify its conclusion that the limitation is jurisdictional or its conclusion that the limitation is subject to tolling.

limits in other statutes...have been read in the light of the statute's overall purpose as 'more absolute.'" Thus, the Court explained that:

Whether a particular statute of limitations is treated as "jurisdictional" thus depends on the overall context of the statute. The term "jurisdictional" has no notable meaning in such contextual inquiries and is merely convenient shorthand for statutory limits that are absolute and require a court to consider timeliness questions without reference to equitable considerations. The "jurisdictional" determination thus merges into the question of whether Congress intended to allow equitable tolling of the Vaccine Act's statute of limitations.

*Cloer*, 654 F.3d at 1340-41 (citing *John R. Sand & Gravel*, 552 U.S. at 133-34 ).

Like *Arctic Slope*, *Cloer* acknowledged that its analysis of whether equitable tolling applies begins with *Irwin*, noting that there, "the Supreme Court established a presumption that all federal statutes of limitations are amenable to equitable tolling absent provision by Congress to the contrary." *Id.* at 1341-42. Also like *Arctic Slope*, the Court then applied the *Brockamp* test, asking the question "whether there is good reason to believe that Congress did not want equitable tolling to apply." *Id.* at 1342 (quoting *Brockamp*, 519 U.S. at 350). After rejecting the significance of two *Brockamp* factors that the government argued cut against tolling, *id.* at 1342-44, the Court saw "no reason to bar equitable tolling of the statute of limitations in the Vaccine Act, and therefore...conclude[d] that there is not [sic] 'good reason to believe that Congress did not want the equitable tolling doctrine to apply.'" *Id.* at 1344 (quoting *Brockamp*, 519 U.S. at 350).

Given that *Cloer*'s analysis of equitable tolling essentially repeats the Supreme Court's analysis in *John R. Sand & Gravel*, which did not impede the Court of Appeals' holding in *Arctic Slope*, we conclude *Cloer* does not abrogate *Arctic Slope*. Just as the Court of Appeals did in *Arctic Slope*, notwithstanding *John R. Sand & Gravel*'s language, *Cloer* recognizes that *Irwin* governs the equitable tolling analysis and "established a presumption that all federal statutes of limitations are amenable to equitable tolling absent provision by Congress to the contrary." *Id.* at 1341-42. Again, *Irwin* applied equitable tolling to a jurisdictional waiver of sovereign immunity. To the extent *Cloer* is suggesting that "jurisdictional" limitations "preclude relief from time filing limits by way of equitable tolling," it also makes clear that its use of the "term 'jurisdictional' has no notable meaning in such contextual inquiries and is merely convenient shorthand for statutory limits that are absolute and require a court to consider timeliness questions without reference to equitable considerations." *Id.* at 1341. Under *Irwin* and *Brockamp*,

that would be those statutory limits that Congress made clear it did not want to be subject to equitable tolling.

It is true that, in a footnote, *Cloer* overrules a prior affirmation of a dismissal for lack of jurisdiction for failure to comply with the Vaccine Act's statute of limitations. The Court declared that:

The only purpose of the statute of limitations in the Vaccine Act is to protect the government from stale or unduly delayed claims. Whether viewed from the overall purpose perspective or...from the perspective of whether Congress barred equitable tolling by erecting a jurisdictional barrier, the answer is the same. There is no barrier to equitable tolling under 42 U.S.C. § 300aa-16(a)(2), and the statute of limitations is not jurisdictional. Previous law to the contrary is overruled.

*Id.* at 1341 n.9. Nevertheless, *Cloer*'s conclusion that the Vaccine Act's limitations period is subject to equitable tolling does not depend upon the conclusion that it is not jurisdictional. The holding is based upon the Court's application of the *Brockamp* factors to conclude that there is no indication that Congress did not want equitable tolling to apply. *Id.* at 1341-44. Whatever the exact meaning of *Cloer*'s footnote might be for the Vaccine Act statute of limitations, its language is simply not sufficiently direct or comprehensive to prompt us to conclude that it abrogates *Arctic Slope*'s holding that the CDA's six-year limitation upon claim presentment is both jurisdictional and subject to equitable tolling. *Arctic Slope*, 583 F.3d at 793-800. We are especially convinced of this given that *Systems Development* has since followed *Cloer* and reiterated *Arctic Slope*'s conclusion that the six-year requirement is jurisdictional. *Sys. Dev. Corp.*, 658 F.3d at 1345-47.

At bottom, we are unconvinced that any intervening decisions abrogate *Arctic Slope*'s holding that the CDA's six-year presentment requirement is jurisdictional. Accordingly, we adhere to that conclusion.

CONCLUSION

Because the government's 25 October 2010 final decision claiming the accounting revision costs was untimely, it is not valid. Given that it is invalid, it is a nullity and we lack jurisdiction to entertain an appeal from it. Accordingly, we dismiss the appeal for lack of jurisdiction.

Dated: 6 January 2012



MARK A. MELNICK  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 57490, Appeal of The Boeing Company, rendered in conformance with the Board's Charter.

Dated:

\_\_\_\_\_  
CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals