ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Raytheon Company, Space & Airborne Systems	)	ASBCA Nos. 57801, 57802 57804, 57833
	)	
	)	
Under Contract No. F04701-03-C-0008	)	

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OPINION BY ADMINISTRATIVE JUDGE GRANT
ON APPELLANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Appellant Raytheon Company, Space & Airborne Systems (Raytheon) moves for a declaratory judgment that the Board lacks jurisdiction over the government's claims in these four docketed appeals on the basis that the government did not assert its claims within the six-year statute of limitations period of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. The government argues that the claims are timely, based on when the government knew or should have known of the accrual of the claims, and thus the Board has jurisdiction. The Board informed the parties on 28 August 2012 that it would treat the motion for a declaratory judgment as a motion to dismiss for lack of jurisdiction. For the reasons stated below, Raytheon's motion is denied as to ASBCA No. 57801, and granted as to ASBCA Nos. 57802, 57804, and 57833.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 21 February 2003, Raytheon was awarded Contract No. F04701-03-C-0008, the contract that is the subject of the government's claims in these appeals. The contract contained FAR clause 52.230-2, COST ACCOUNTING STANDARDS (APR 1998), which, among other things, requires the contractor to amend its Cost Accounting Standards (CAS)

Disclosure Statement when making changes to its accounting practices. Specifically, the clause states that "[i]f the contract price or cost allowance of this contract is affected by such changes, adjustment shall be made in accordance with subparagraph (a)(4) or (a)(5) of this clause, as appropriate." FAR 52.230-2(a)(2). (R4, tab 1 at G-14)

2. The contract also contained FAR clause 52.230-6, ADMINISTRATION OF COST ACCOUNTING STANDARDS (NOV 1999). Among other things, this clause requires the contractor to report its accounting practice changes to the contracting officer (CO), and identify the total potential impact of the change on contracts containing a CAS clause. Further, the contractor is required to specify a general dollar magnitude (GDM) of the change which identifies the potential shift of costs between CAS-covered contracts by contract type and other contractor business activity, and, for CAS covered contracts, "identify the potential impact on funds of the various Agencies/Departments." FAR 52.230-6(a).[1] (R4, tab 1 at G-14)

Revision 1 (ASBCA No. 57801)

3. On 10 February 2004, Raytheon submitted to the Defense Contract Management Agency (DCMA) Revision (Rev.) 1 to Raytheon's CAS Disclosure Statement. Rev. 1 changed four accounting practices and incorporated clarifications to accounting practice descriptions. One of these accounting changes related to property accounting/property management, transferring these two functions from the [REDACTED] cost pool to the [REDACTED] pool (property accounting), and the El Segundo [REDACTED] (property management). The other three accounting changes concerned the [REDACTED]. These changes in cost accounting practice were effective 1 January 2004. (R4, tab 3)

4. In its 10 February 2004 notice concerning Rev. 1, Raytheon did not identify the total potential dollar impact of any of the four changes, or even state in general whether the changes would cause a positive or a negative impact on the government. As to a GDM, Raytheon did not specify the potential shift of costs between CAS-covered contracts by contract type, nor address the impact on funds from the various departments and agencies affected. Rather, Raytheon advised that a GDM analysis would be "submitted at a later date," the delay being attributable to "the forward pricing rate proposal...and SAP implementation processes taking place simultaneously" with the preparation of Rev. 1. (R4, tab 3)

[1] In their briefs, the parties appear to address the 2010 clause; however, the contract clause in question here was the November 1999 version, with different requirements from the clause discussed in the briefs.

5. In an audit report dated 7 February 2005,[2] the Defense Contract Audit Agency (DCAA) commented that a GDM for these changes had not yet been submitted, that Raytheon had "committed" to submitting GDM analyses at a later date, and that DCAA would not try to estimate the cost impact because the full GDM analysis "should be forthcoming from the contractor" (R4, tab 8 at G-121).

6. On 15 February 2005, Raytheon notified the government of a dollar impact concerning one of the four Rev. 1 changes, specifically the [REDACTED]. The dollar impact for this change, which Raytheon described as "immaterial," was an increased cost allocation of less than $1,000 to flexibly priced contracts, and a $15,000 decreased cost allocation to firm fixed-priced (FFP) contracts. This 15 February 2005 notice did not mention the property accounting/property management change, or the other two Rev. 1 changes, or provide any cost impact related to them. (R4, tab 9)

7. Raytheon notified the government of the dollar cost impact of the Rev. 1 property accounting/property management change on 3 April 2006. This notice reported a $313,200 increased cost impact on flexibly priced contracts, and a $281,100 decreased cost impact on FFP contracts. Raytheon described this impact as "immaterial" in relation to its total G&A base. (R4, tab 13)

8. On 7 July 2011, the DCMA divisional administrative contracting officer issued a final decision (CO's final decision) as to Rev. 1, demanding $1,176,600.86 from Raytheon, consisting of $772,590 in alleged increased costs for the Rev. 1 "Property Accounting and Capital Management" changes, plus $404,010.86 in compound interest (R4, tab 45).

Revision 3 (ASBCA No. 57802)

9. On 19 November 2004, Raytheon submitted to DCMA Rev. 3 to its CAS Disclosure Statement, changing two accounting practices and incorporating clarifications to accounting practice descriptions. The two changes were (1) transferring IT Finance from [REDACTED] to the [REDACTED] Pool, and (2) transferring Enterprise Resources Planning (ERP) from the [REACTED] pool to Raytheon's [REDACTED] pool. The 19 November 2004 notice stated that these changes would be effective 1 January 2005. (R4, tab 5)

10. In the 19 November 2004 notice, Raytheon reported a cost impact for the ERP transfer of an increased cost allocation of $367,100 to flexibly priced contracts, and a decreased cost allocation of $298,300 to FFP contracts. Raytheon described this change

[2] The audit report is dated 7 February 2004, but the year should be 2005 (gov't opp'n at 25).

as "immaterial" in relation to "total cost input." (R4, tab 5) On 15 February 2005, Raytheon submitted what it described as a revised GDM to DCMA for the ERP accounting change resulting from Rev. 3, again asserting the impact was "immaterial" but adjusting the previous numbers downward slightly ($346,500 increased cost allocation to flexibly priced contracts and $281,500 decreased cost allocation to FFP contracts) (R4, tab 9 at 2).

11. In a 28 September 2005 audit of Rev. 3, DCAA reported that "[f]or the ERP change, a GDM analysis was submitted by the contractor. Our office is in the process of evaluating the ERP GDM...." (R4, tab 11 at G-144)

12. Raytheon provided the government with a revised calculation of the cost impact of the Rev. 3 ERP change on 3 April 2006. Raytheon reported that there was a $613,300 increased cost impact on flexibly priced contracts, and a decreased cost impact of $515,900 on FFP contracts. Raytheon asserted the impact was "immaterial" in relation to Raytheon's annual total G&A base. (R4, tab 13 at G-158-59)

13. DCMA issued a CO's final decision as to Rev. 3 on 7 July 2011, demanding $2,137,234.94 from Raytheon, consisting of $1,467,960 in alleged increased costs for accounting changes related to ERP, plus $669,274.94 in compound interest (R4, tab 46).

Revision 4 (ASBCA Nos. 57804, 57833)

14. On 24 November 2004, Raytheon submitted to DCMA Rev. 4 to its CAS Disclosure Statement, describing eleven changes. Only Changes 5, 6, and 11 are relevant to these appeals. Change 5 affected how labor rates were calculated, changing from [REDACTED] and thus "includ[ing] [REDACTED] in labor rate calculation"; it was to be effective 24 January 2005. Raytheon estimated that this change would increase the labor rates by [REDACTED] cents, but that a special module would "compensate" for the variance, making any impact immaterial. (R4, tab 6 at G-107, -109)

15. Rev. 4, Change 6 was also reported by Raytheon to DCMA in this 24 November 2004 notice. Change 6 concerned the accommodation fringe rate (changing from a [REDACTED] rate to an [REDACTED] rate); like Change 5, it too was to be effective 24 January 2005. Raytheon reported that Change 6 would result in an increased cost allocation to flexibly priced contracts of $170,000, and a decreased cost allocation to FFP contracts of $173,000. Raytheon also noted that it considered this impact "immaterial." (R4, tab 6 at G-107, -110)

16. Rev. 4, Change 11 was also reported by Raytheon to DCMA in this 24 November 2004 notice. Change 11 eliminated the application of [REDACTED] to [REDACTED] inter-organizational transfers (IOTs); this change had gone into effect

1 January 2004. Raytheon reported that this would result in an increased cost allocation to flexibly priced contracts of $123,000, and a decreased cost allocation to FFP contracts of $124,000. Raytheon described the cost impact of these two changes as "immaterial." (R4, tab 6 at G-108, -110)

17. On 3 April 2006, Raytheon provided additional information to DCMA about Rev. 4, Change 6. Specifically, Raytheon reported an increased cost impact on flexibly priced contracts of $174,600, and a decreased cost impact on FFP contracts of $184,500, again considering the impact of the change to be immaterial. (R4, tab 13 at G-158-59)

18. DCMA issued a CO's final decision as to Rev. 4, Changes 6 and 11, on 22 August 2011, demanding $3,708,039.12 from Raytheon, consisting of $2,463,399 in alleged increased costs flowing from those two changes, plus $1,244,640.12 in compound interest (R4, tab 50).

19. DCMA issued a CO's final decision as to Rev. 4, Change 5, on 11 October 2011, demanding $1,744,135 from Raytheon, consisting of $1,189,326 in alleged increased costs from that change, plus $554,809 in compound interest (R4, tab 54).

20. Earlier in 2011, before the four CO's final decisions were issued in these appeals, DCAA issued a memorandum to designated staff (dated 18 January 2011) concerning a joint DCAA-DCMA "Cost Recovery Initiative" (CRI). This initiative focused on timely prioritizing and resolving outstanding audit issues. (R4, tab 30) On an attachment listing outstanding Raytheon audit matters, one column was labeled "Est. Accrual of Claim Date," setting out 1 January 2005 as the designated date for Revs. 1, 3, and 4 (gov't opp'n, ex. G-2 at 2, 3).

DECISION

Although each of the four docketed appeals will be decided separately, the same standard as to claim accrual applies to all four. The CDA requires a contract claim to be submitted "within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A). 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. FAR 33.201; *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,475-76. 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. *Raytheon Missile Systems*, ASBCA No. 58011, 2013 ASBCA LEXIS 11, at *8 (28 Jan. 2013). The "concealed or inherently unknowable" test is interchangeable with the "knew or should have known" test which includes a reasonableness component. The statute of limitations will not begin to run until the claimant "*learns or reasonably should have learned*" of his cause of action. *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 (Ct. Cl. 1967)) (emphasis in original).

To evaluate when the claimed liability was fixed, we look to the legal basis of the claim. *Gray Personnel,* 06-2 BCA ¶ 33,378 at 165,475-76. Here, the government claims are monetary claims to recover the increased costs to the government caused by various Raytheon accounting changes. The basis for these claims is FAR clause 52.230-2, which requires a monetary adjustment if the contract price or cost allowance of the contract is affected by a change in accounting practices (SOF ¶ 1). Thus the issue is: when did the government know, or reasonably should have known, that it had a basis to seek a cost adjustment because of the accounting changes?

Revision 1, Property Accounting/Property Management (ASBCA No. 57801): Timely

As to Rev. 1's property accounting/property management change, Raytheon argues the statute of limitations was triggered on 10 February 2004, when Raytheon gave the government notice of that change and that it was effective 1 January 2004. Alternatively, Raytheon argues that the trigger date is 15 February 2005, when Raytheon notified the government of a specific cost impact of one of the other four accounting changes caused by Rev. 1. Using either date, the government's 7 July 2011 claim would be untimely. (App. mot. at 15-16) The government argues that neither date triggers the statute of limitations, because Raytheon did not say whether the change would result in cost increases in its 10 February 2004 notice, and the cost impact information Raytheon did provide on 15 February 2005 did not concern the property accounting/property management change, which is the subject of the government's claim. In the government's view, the earliest the claim accrued was 3 April 2006 when Raytheon first provided cost impact information as to the property accounting/property management claim, and that since the CO's 7 July 2011 final decision was within six years of this date, the government's claim is timely. (Gov't opp'n at 25-27)

Analyzing this issue under the "claim accrual" standard articulated above, looking to the nature of the claim and the reasonableness component, the government's claim did not accrue until 3 April 2006. Although Raytheon notified the government on 10 February 2004 about the four Rev. 1 accounting changes, nothing in that notice indicated whether or not there would be an adverse impact; indeed, Raytheon stated it would provide a GDM analysis about that later (SOF ¶¶ 3, 4). When, a year later, Raytheon provided DCMA with three cost impact assessments, only one involved Rev. 1, and that one did not pertain to the property accounting/property management change (SOF ¶ 6). It was not until 3 April 2006 that Raytheon provided a cost impact assessment relating to the property accounting/property management part of Rev. 1 (SOF ¶ 7).

Raytheon argues that the government should have known of the existence of the claim on 10 February 2004 because the government had access to Raytheon's accounting system and could verify that Raytheon had implemented the changes and was billing the government pursuant to the changed practices (app. mot. at 15). However, as discussed above, the "knew or should have known" standard contains an element of reasonableness as part of the analysis. Here, the government did not know it had a claim because Raytheon did not report that there would be an adverse impact, and stated instead that its analysis would be provided later. Although the government knew of the fact of the change, it did not know the consequences (i.e., it did not know if it had a cause of action), nor do we think it reasonable for the government to have to pursue this on its own, especially in light of the affirmative duty FAR 52.230-6(a) places on the contractor to submit a GDM. Once Raytheon provided cost impact information to the government on 3 April 2006, the statute of limitations began to run. That adverse impact information served as the basis for the government's claim, and as a result, the CO's 7 July 2011 final decision was timely.

The absence of contractor-provided information in this case stands in contrast to decisions where an early claim accrual date was found because of more specific information provided to the government. For example, in *Raytheon Co. v. United States,* 104 Fed. Cl. 327, 329, *aff'd on motion for recons.*, 105 Fed. Cl. 351 (2012), Raytheon provided specific cost information to the government in the 1999 Advance Agreement for the government to review and analyze, triggering an early claim accrual date. In *Raytheon Missile Systems*, 2013 ASBCA LEXIS 11, at *9-12, the government had information, provided by Raytheon, that Raytheon was expanding the application of a special burden to a broader group of major subcontracts but that a Lockheed Martin subcontract was not receiving a special burden. Because the contractor had provided relevant facts, the government's delay in assessing them could not serve to delay the claim accrual date. These situations are distinguishable from the case at hand, where Raytheon only reported the fact of a change, not the implications of it or other data from which the government should reasonably conclude it had a claim.

As a final note, the conclusion that this claim accrued on 3 April 2006 is not altered by the government's 2011 CRI prioritization report, referring to 1 January 2005 as the "Est. Accrual of Claim Date" for Rev. 1 (SOF ¶ 20). Labels contained in a government document dated in 2011 do not substitute for a proper claim accrual analysis as to whether, years earlier, the government knew or reasonably should have known of the legal basis for its claim.

Revision 3, ERP (ASBCA No. 57802): Untimely

Concerning the government's Rev. 3 ERP claim, Raytheon argues that the statute of limitations began to run on 1 January 2005, based on the 19 November 2004 notice

that changes with specified cost impacts would be effective on 1 January 2005, thereby making the 7 July 2011 final decision untimely (app. mot. at 17). Alternatively, Raytheon argues that the statute of limitations would start to run at the latest on 15 February 2005, when the change was already in effect and a revised cost impact provided, and thus the claim would still be outside the six-year statute of limitations (app. reply br. at 15). The government disagrees, asserting, among other things, that Raytheon did not provide enough supporting data as to cost impact, described the cost impact as immaterial, and revised the numbers later, thereby making the proper trigger date 3 April 2006 and the final decision timely (gov't opp'n at 27-32).

Under the claim accrual standard set forth above, this claim is untimely. On 19 November 2004, the government knew that adverse cost impacts would start to occur on 1 January 2005 (SOF ¶¶ 9, 10). The statute of limitations is triggered 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. FAR 33.201; *Gray Personnel,* 06-2 BCA ¶ 33,378 at165,475-76. Raytheon's 15 February 2005 notice provided updated cost impact information (SOF ¶ 10), and the government admits it was evaluating Raytheon's GDM information (SOF ¶ 11). Here, no later than 1 January 2005, the government knew that Rev. 3/ERP change had created a cost impact adverse to the government and that injury was now occurring; the statute of limitations had thus started to run.

The government argues that Raytheon did not submit the level of information and supporting data required by FAR 52.230-6. However, Raytheon did notify the government of a dollar cost impact from the accounting change, which is enough to trigger the statute of limitations. Claim accrual does not depend on the degree of detail provided, whether the contractor revises the calculations later, or whether the contractor characterizes the impact as "immaterial." It is enough that the government knows, or has reason to know, that some costs have been incurred, even if the amount is not finalized or a fuller analysis will follow. *McDonnell Douglas Services, Inc.*, ASBCA No. 56568, 10-1 BCA ¶ 34,325 at 169,528 ("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."). As of 1 January 2005, the government should have known that at least some adverse costs impacts were occurring, and certainly this was so by 15 February 2005; the final decision dated 7 July 2011 is thus untimely.

Revision 4, Changes 6 and 11 (ASBCA No. 57804): Untimely

Concerning the government's Rev. 4/Changes 6 and 11 claim, Raytheon argues that the statute of limitations began to run on 24 January 2005, the effective date provided in Raytheon's earlier notice to DCMA on 24 November 2004 of the impending change and of a cost impact (app. mot. at 18). The government argues it did not have enough information to know whether or not it had a claim and that Raytheon had reported that

any cost increase from these changes was immaterial. At the earliest, the government asserts the claim accrued on 3 April 2006, making the 22 August 2011 final decision timely. (Gov't opp'n at 33-36)

Following the analysis set forth in ASBCA No. 57802, this claim is untimely. Regarding the portion of the claim that concerns Change 6 (fringe rate), Raytheon notified the government of a specific, adverse cost impact on 24 November 2004, noting the change would go into effect 24 January 2005 (SOF ¶ 15). Thus, this part of the claim accrued 24 January 2005, and the final decision asserting it on 22 August 2011 is untimely. Regarding the portion of the claim that concerns Change 11 (IOTs), Raytheon notified the government of a specific, adverse cost impact flowing from Change 11 (IOTs) on 24 November 2004, noting the change had gone into effect 1 January 2004 (SOF ¶ 16). This part of the claim accrued on 24 November 2004,[3] and the final decision asserting it on 22 August 2011 is untimely as to this change.

Revision 4, Change 5 (ASBCA No. 57833): Untimely

Concerning the government's Rev. 4/Change 5 claim, Raytheon argues that the claim accrued on 24 January 2005, when that change went into effect, after Raytheon's earlier notice to DCMA on 24 November 2004 of the impending change and of a cost impact of 15 cents increase in labor rates (app. mot. at 18). The government argues this information was inadequate to trigger claim accrual because Raytheon reported that a special module would "compensate" for the variance. Presumably considering 3 April 2006 as when the claim accrued, the government argues that the 11 October 2011 claim is timely. (Gov't opp'n at 35-36)

Following the analysis set forth in ASBCA No. 57802, this claim is untimely. Raytheon reported on 24 November 2004 that Change 5 was to "include [REDACTED] in labor rate calculation." The government knew that additional costs [REDACTED] were now going to be incorporated into [REDACTED] labor rates, and that this change would go into effect 24 January 2005. (SOF ¶ 14) Raytheon's statement that there would be an automatic adjustment "which will compensate for this variance" does not negate the disclosure of additional costs being included in labor rate calculations. The events fixing potential liability had occurred once this change was implemented on 24 January 2005; the government reasonably should have known of the basis for a cause of action at this point. Because the government's claim as to Rev. 4/Change 5 accrued on 24 January 2005, the CO's 11 October 2011 decision is untimely.

[3] Even if both parts of this claim are deemed to have accrued on the later date (24 January 2005), the government's final decision would still be untimely.

CONCLUSION

For the reasons stated above, Raytheon's motion to dismiss for lack of jurisdiction is denied as to ASBCA No. 57801. Raytheon's motion is granted as to ASBCA Nos. 57802, 57804, 57833; the government claims underlying these three appeals are untimely and invalid, and the appeals are dismissed for lack of jurisdiction.

Dated: 22 April 2013

Elizabeth M. Grant

ELIZABETH M. GRANT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

Eunice W. Thomas

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 Nos. 57801, 57802, 57804, 57833, Appeals of Raytheon Company, Space & Airborne Systems, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals