ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Bernard Cap Company, Inc.	)	ASBCA Nos. 56679, 56703, 56705
	)	56716
Under Contract Nos. SPO100-97-D-1017	)	
SPO100-00-D-0313	)	
SPO100-99-D-0310	)	
SPO100-96-D-0339	)	

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APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.
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OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON GOVERNMENT'S MOTIONS TO DISMISS

The government has filed a motion to dismiss in each of these appeals,[1] contending that the claims of Bernard Cap Company, Inc. (appellant) under the above contracts are time-barred, in whole or in part, for failure to file the claims within six years of the date of claim accrual as required by the Contract Disputes Act (CDA), 41 U.S.C. § 601(a)(5). In ASBCA Nos. 56679, 56703 and 56705, the government seeks dismissal of each appeal in part. In ASBCA No. 56716, the government seeks dismissal of the appeal in its entirety. Appellant has filed briefs opposing the government's motions in each appeal.[2] We first address the appeal related to the earliest contract awarded to appellant, and then the appeals related to each subsequently awarded contract.

[1] These appeals are not consolidated. However, the government's motions and the appellant's oppositions to the motions raise common issues, and we address them in a single opinion for ease of reference.

[2] Along with each opposition brief in each appeal, appellant has filed a Declaration by its Chief Executive Officer, Mr. Lawrence Weinstein, explaining appellant's efforts to obtain full payment on its invoices, and attaching exhibits that documented these efforts. Mr. Weinstein's declarations and exhibits show that, for the most

STATEMENT OF FACTS (SOF) FOR PURPOSES OF MOTION TO DISMISS UNDER ASBCA No. 56716[3]

1. On 30 August 1996, Defense Supply Center Philadelphia (the government or DSCP) awarded Contract No. SPO100-96-D-0339 ("Contract 0339") to appellant (R4, tab 2). This contract was an indefinite delivery/indefinite quantity (IDIQ) contract to deliver men's garrison caps, and included a base contract year with options to extend (*id.* at 2).

2. The contract incorporated FAR 52.232-25, PROMPT PAYMENT (MAR 1994), which states in pertinent part:

> *(a) Invoice Payments*
>
> ....
>
> (2) Except as indicated in subparagraph (a)(3) and paragraph (c) of this clause, the due date for making invoice payments by the designated payment office shall be the later of the following two events:
>
> (i) The 30th day after the designated billing office has received a proper invoice from the Contractor.
>
> (ii) The 30th day after Government acceptance of supplies delivered or services performed by the Contractor. On a final invoice where the payment amount is subject to contract settlement actions, acceptance shall be deemed to have occurred on the effective date of the contract settlement. However, if the designated billing office fails to annotate the invoice with the actual date of receipt, the invoice payment due date shall be deemed to be the 30th day after the date the Contractor's invoice is dated, provided a proper invoice is received and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(R4, tab 1 at 30)

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part, these efforts applied equally to obtaining payments for invoices on all the subject contracts.

[3] For purposes of the motion filed under ASBCA No. 56716, the government accepts as true the facts as alleged in appellant's claim and complaint.

3. On 30 August 1996, the government issued Deliver Order (DO) 0001 under Contract 0339 for 12,000 units (R4, tab 3). On or about 30 December 1996, appellant shipped and then tendered an invoice for payment for 749 units, using a copy of the DD 250 as the invoice to evidence acceptance, for which appellant was not paid (R4, tab 4; compl. at 2, ¶ 6). On or about 30 December 1996, appellant shipped and then tendered an invoice for payment for 200 units, using a copy of the DD 250 as the invoice to evidence acceptance (R4, tab 5), for which it was not paid (compl. at 2, ¶ 8).

4. On 9 September 1997, the government issued DO 0004 under the contract for 2,815 units (R4, tab 6). On or about 24 September 1997, appellant shipped and tendered an invoice for payment for 40 units, using a copy of the DD 250 as the invoice to evidence acceptance (R4, tab 7), for which appellant was not paid (compl. at 2, ¶ 10).

5. On 10 March 1998, the government issued to appellant DO 0028 for 625 units (R4, tab 8). On or about 18 March 1998, appellant shipped and then tendered an invoice for payment for 625 units, using a copy of the DD 250 as the invoice to evidence acceptance (R4, tab 9), for which appellant was not paid (compl. at 2, ¶ 12).

6. On 19 May 1998, the government issued DO 0035 to appellant for 6,600 units (R4, tab 10). On or about 24 September 1998, appellant shipped and then tendered an invoice for payment for 444 units, using a copy of the DD 250 as the invoice to evidence acceptance (R4, tab 11), for which appellant was not paid (compl. at 2, ¶ 15; R4, tab 11).

7. The government issued to appellant DO 0059 under the contract for 10,800 units (R4, tab 12). On or about 3 December 1998, appellant shipped and then tendered an invoice for payment for 2,700 units, using a copy of the DD 250 as the invoice to evidence acceptance (R4, tab 13), for which appellant was paid in part (compl. at 2, ¶¶ 16, 17).

8. According to appellant, the government issued DO 0069 under this contract, but the DO is not of record. On or about 17 December 1998, appellant shipped and tendered an invoice for payment for 238 units under this DO using a copy of the DD 250 as the invoice to evidence acceptance (compl., ex. G), for which it did not receive payment (*id*. at 3, ¶ 19).

9. On or about 28 January 1999, appellant shipped and then tendered an invoice for payment for 1,200 units under DO 0059, using a copy of the DD 250 as the invoice to evidence acceptance (R4, tab 15; compl., ex. H), for which appellant was paid in part (compl. at 3, ¶¶ 20, 21).

10. According to appellant, the government issued DO 0094 under this contract but the DO is not of record. On or about 29 December 1999, appellant shipped and then tendered an invoice for payment for 632 units, using a copy of the DD 250 as the invoice to evidence acceptance (compl., ex. I), for which appellant was paid in part (compl. at 3, ¶ 23).

11. By memorandum to Ms. Ann E. Beecroft, DSCP-CRDC, dated 21 December 1999, appellant advised: "We have been trying to collect past due money on contracts from DFAS [Defense Finance and Accounting Service] through our ACO and DCMC-Orlando for the past year.... [W]e are talking about $600,000 of accounts receivable that are PAST DUE – some going back years and most past due over 90 days." (Weinstein decl., ex. A at 1)

12. By memorandum to Mr. Lawrence Bogus/DCMC-Orlando, dated 21 January 2000, appellant advised of its open accounts receivable. Appellant stated: "You will note that the vast majority of these are very, very past due. Promises from DFAS have not been kept and we are not getting enough oxygen to keep breathing." (Weinstein decl., ex. C) Appellant did not submit a claim to the contracting officer (CO) for overdue amounts at or around this time.

13. A memorandum to DFAS regarding open DD 250s was also sent to DFAS on 10 March 2000 (Weinstein decl., ex. D). A similar memorandum was sent to DCMC-Orlando on 14 March 2000 (*id.*, ex. E).

14. In late 2001 and early 2002, appellant met with DFAS to address accounts past due. Thereafter, many outstanding invoices were paid but many remained unpaid, including a number of invoices under Contract 0339. (Weinstein decl. ¶¶ 17-20) Appellant did not submit a claim to the CO at this time.

15. By letter to DFAS dated 4 June 2003, appellant reiterated its demands for full payment of its unpaid invoices. Appellant stated: "We have been government contractors since the 1930's and with all the technology that has been added to the accounting area at DFAS we cannot understand why we still have to wait, wait, and wait some more – all the time sending repeated evidence of shipment. HELP!!!!" (Weinstein decl., ex. H at 1, 2)

16. Several years went by, and appellant had not received full payment for units accepted by the government under its contracts. Appellant did not file a claim with the CO. Rather, by letter to DFAS dated 11 September 2006, appellant wrote of its "extreme frustration" in not getting paid. Insofar as pertinent, appellant stated: "please know that from 1996-1999 we are owed $32,630 and from 2000-2005 we have $409,008 that is unpaid" (Weinstein decl., ex. J at 1).

17. Throughout 2006/2007, appellant resubmitted copies of DD 250s to DFAS, matched available shipping documents and proof of delivery and some payments "did occasionally trickle in" (Weinstein decl. ¶ 26). However, significant amounts remained outstanding under Contract 0339 and other contracts, including Contract Nos. SPO100-97-D-1017, SPO100-99-D-0310 and SPO100-00-D-0313 which are the subject of these appeals (*id*., ex. K at 9 of 12, 8 of 12, 6 of 12, and 7 of 12). Appellant did not file a claim with the CO.

18. Rather, appellant next sought the assistance of Congressman Mario Diaz-Balart. By letter dated 11 October 2007, appellant advised Congressman Diaz-Balart that appellant had many delinquent invoices with DFAS, in the amount of $350,000 (Weinstein decl., ex. L). Congressman Diaz-Balart wrote a letter to DFAS, and DFAS replied that it was reviewing the matter (*id*., ex. M).

19. Some additional funds were provided by DFAS to appellant at or around this time, but according to appellant, the due and owing balance was still approximately $200,000. DFAS made no further payments on Contract 0339. (Weinstein decl. ¶ 33)

20. By email dated 14 March 2008, DFAS advised appellant: "The old contracts have been reconciled to the best of our ability and the documents to include payment histories are being shipped to you. At this time, we cannot pay anything additional on the old contracts." (Weinstein decl., ex. N at 1)

21. Appellant, however, continued to press its case with DFAS (Weinstein decl., ¶ 38). By email dated 24 September 2008, DFAS advised appellant: "DFAS paid what was obligated in the system. If more items were shipped then that would have to be taken up with DLA.... We cannot continue to use resources to review the same payments" (Weinstein decl., ex. Q). At this point, it became clear to appellant that "no one in the Government would work on the payment resolution any further [and] we turned the matter of the payments due under Contract 0339 to our counsel" (Weinstein decl., ¶ 43).

22. On 14 November 2008, appellant submitted a claim to the CO, seeking $13,804.66 under Contract 0339 for alleged underpayments under the invoices stated above (Bd. corr. file). The CO did not issue a decision, and this appeal followed.

DECISION ON ASBCA No. 56716

In brief, the government contends that appellant's claim of 14 November 2008 for amounts due and owing under Contract 0339 for each of the above-stated invoices was time-barred under the CDA, because the claim was submitted to the CO more than six years after the claims accrued. Appellant contends that the claim was timely because the claim did not accrue until 24 September 2008, the date upon which DFAS advised it was ending its review of the payment records.

The CDA, 41 U.S.C. ¶ 605(a), requires that a claim to the CO be submitted within six years of the accrual of the claim. As stated in *Arctic Slope Native Ass'n v. Secretary of Health and Human Services*, 583 F.3d 785, 793 (Fed. Cir. 2009):

> 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. [Citations omitted]...[S]ubject 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.

Under FAR 33.201, the accrual of a claim is defined as follows:

> "Accrual of a claim" means the date when all events, that 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.

By appellant's own account – which the government does not dispute for purposes of the motion to dismiss – appellant made shipments and tendered proper invoices for accepted goods under this contract on or about 30 December 1996; 24 September 1997; 18 March 1998; 24 September 1998; 3 December 1998; 17 December 1998; 28 January 1999 and 29 December 1999 (SOF ¶¶ 3-10), for which the government failed to pay in full within 30 days as required by the contract (SOF ¶ 2). Hence, appellant's claims for these unpaid invoices accrued, respectively, on or about 30 January 1997; 24 October 1997; 18 April 1998; 24 October 1998; 3 January 1999; 17 January 1999; 28 February 1999; and 29 January 2000. At that point, all events fixing liability for these unpaid invoices were or should have been known, FAR 33.201. *See also Oceanic Steamship Co. v. United States*, 165 Ct. Cl. 217, 225 (1964) (claim against the United States, based upon a contract obligation to pay, accrues on the date when payment becomes due and is wrongfully withheld). Clearly, appellant's claim letter to the CO for these unpaid amounts, dated 14 November 2008, was submitted more than six years from the date of the accrual of these claims. We believe they are all time barred under the CDA.

Appellant suggests that DFAS' general assurances that it would review and/or seek to reconcile the payment records served to equitably toll the running of the limitations period, or equitably estopped the government from relying upon the same. We do not agree. For appellant to prove equitable estoppel against the government, it must adduce facts showing some affirmative government misconduct. *Frazer v. United States*, 288 F.3d 1347, 1354 (Fed. Cir. 2002); *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000). Appellant asserts no such facts here.

As for equitable tolling, federal courts have extended such dispensation only sparingly and under limited circumstances. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (*e.g.*, claimant filed timely defective pleading; claimant induced or tricked by adversary, allowing deadline to pass). *Former Employees of Sunoco Products Co. v. Chao*, 372 F.3d 1291, 1299 (Fed. Cir. 2004); *Frazer*, 288 F.3d at 1354 (lateness attributable, in part, to some misleading government action). Appellant presents no such equitable basis to support the tolling of the limitation period of the statute. Rather, the record shows a claimant that failed to exercise due diligence in preserving and protecting its legal rights under the contract. As stated by the Federal Circuit in *Esso Standard Oil Co. (PR) v. United States*, 559 F.3d 1297, 1305 (Fed. Cir. 2009):

> The Supreme Court has warned that "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence," *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984), and "the principles of equitable tolling...do not extend to what is at best a garden variety claim of excusable neglect," *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990).

We have reviewed the cases cited by appellant but they are factually and legally distinguishable.

Next, appellant asserts that its 14 November 2008 claim was timely, based upon the public policy supporting "judicial husbandry" that discourages the splitting of claims. *See generally Phillips/May Corp. v. United States*, 524 F.3d 1264 (Fed. Cir. 2008) (contractor forbidden to split claims; claim preclusion applied to bar contract claim before Court that could have been brought before Board). However, we have no splitting of claims here, nor do we have any "piecemeal presentation of a yet undetermined and impractical claim" (app. opp'n. at 11). Each government failure to pay in full within 30 days for goods accepted and invoiced under this contract was a separate and discrete wrong under the contract for which appellant was entitled to relief. The contract defined the time by which the government was required to pay, and concomitantly when that duty was breached. The date of that breach was the date that fixed all events necessary to fix liability, and established the date of the accrual of the claim, FAR 33.201. The manner or

method by which DFAS chose to pay the invoices had no bearing on when claims accrued on the unpaid invoices. Appellant's cited cases are distinguishable.

Appellant next contends that there needed to be "administrative finality" before its cause of action could accrue, and such finality did not occur until DFAS unilaterally determined to stop its review of the payment records in late September 2008. We do not agree. Appellant cites to nothing in the contract, the CDA or any other statute or regulation that required appellant to seek and/or exhaust any administrative reconciliation action by DFAS before its cause of action on unpaid invoices could accrue. We have reviewed the cases cited by appellant that discuss the requirement of administrative "exhaustion of remedy" but they are legally and factually distinguishable.

For reasons stated, we conclude that appellant's claim for the above stated unpaid invoices under this contract is time-barred under the CDA, and we grant the government's motion. ASBCA No. 56716 is dismissed.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF MOTION TO DISMISS IN PART UNDER ASBCA No. 56679[4]

23. On 25 June 1997, the government awarded Contract No. SPO100-97-D-1017 (Contract 1017) to appellant to deliver men's garrison caps. This was an IDIQ contract and included a base contract period with options to extend. (R4, tab 2, at 1-6)

24. The contract incorporated FAR 52.232-25, PROMPT PAYMENT (MAR 1994), set out in pertinent part above (SOF ¶ 2), which required payment for accepted goods no later than 30 days from receipt of a proper invoice (R4, tab 1 at 48).

25. By DO 0047, dated 28 July 1998, the government issued an order to appellant to provide 2,158 units (R4, tab 3). On or about 30 July 1998, appellant shipped and then tendered an invoice for payment for 1,917 units, using a copy of the DD 250 as the invoice to evidence acceptance (R4, tab 4), for which appellant was paid in part (compl. ¶ 6).

26. By DO 0073 dated 10 November 1999 (most likely "1998"), the government issued an order to appellant to provide 213 units (R4, tab 5). On or about 11 November 1998, appellant shipped and then tendered an invoice for payment for 30 units, using a copy of the DD 250 as the invoice under this DO to evidence acceptance (R4, tab 6), for which it did not receive any payment (compl. ¶ 8).

[4] For purposes of the motion filed under ASBCA No. 56679, the government accepts as true the facts as alleged in appellant's claim and complaint.

27. By DO 0092 dated 29 January 1999, the government issued an order to appellant to provide 200 units (R4, tab 7). On or about 2 February 1999, appellant shipped and then tendered an invoice for payment for 80 units, using a copy of the DD 250 as the invoice to evidence acceptance (R4, tab 8), for which it was paid in part (compl. ¶ 10).

28. By DO 0101 dated 2 March 1999, the government issued an order to appellant for 2,561 units (R4, tab 9). On or about 4 March 1999, appellant shipped and then tendered an invoice for payment for 2,498 units, using a copy of the DD 250 as the invoice to evidence acceptance (R4, tab 10), for which it was not paid (compl. ¶ 12).

29. By DO 0195 dated 13 February 2001, the government issued an order to appellant for 60,000 units (R4, tab 11). On or about 12 July 2001, appellant shipped and then tendered an invoice for payment for 14,160 units, using a copy of the DD 250 as the invoice to evidence acceptance (R4, tab 12), for which it was paid in part (compl. ¶ 14). On or about 2 August 2001 (erroneously cited in the complaint as 1 August 2002), appellant shipped and then tendered an invoice for payment for 5,760 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 13), for which appellant was paid in part (compl. ¶ 16). On or about 9 August 2001, appellant shipped and then tendered an invoice for payment for 6,840 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 14), for which appellant was paid in part (compl. ¶ 18).

30. By DO 0205, dated 7 May 2001, the government issued an order to appellant for 60,000 units (R4, tab 15). On or about 1 November 2001, appellant shipped and then tendered an invoice for payment for 7,440 units, using a copy of the DD 250 as the invoice to evidence acceptance (R4, tab 16), for which it was paid in part (compl. ¶ 20). On or about 1 November 2001, appellant shipped and then tendered a second invoice for payment for 2,780 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 18), for which it was paid in part (compl. ¶ 22). On or about 9 November 2001, appellant shipped and then tendered an invoice for payment for 7,570 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 17), for which it was paid in part (compl. ¶ 24).

31. By DO 0215 dated 25 April 2002, the government issued an order to appellant for 23,040 units (R4, tab 19). On or about 22 October 2002, appellant shipped and then tendered an invoice for payment for 2,750 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 20), for which it was paid in part (compl. ¶ 26).

32. By DO 0220 dated 13 March 2003, the government issued an order to appellant for 50,640 units (R4, tab 21). On or about 3 February 2004, appellant shipped and then tendered an invoice for payment for 2,400 units, using a copy of the DD 250 as the invoice showing acceptance (R4, tab 22), for which it was paid in part (compl. ¶ 28).

33. By DO 0224 dated 9 April 2004, the government issued an order to appellant for 14,400 units (R4, tab 23). On or about 21 June 2004, appellant shipped and then tendered an invoice for payment for 4,560 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 24), for which appellant was paid in part (compl. ¶ 30).

34. Over a number of years, appellant sought but was unable to obtain full payment for the above stated invoices under this contract (SOF ¶¶ 11-21; app. opp'n, Weinstein decl). On 9 October 2008, appellant submitted a claim letter to the CO for the amounts due and owing under the foregoing invoices under Contract 1017, in the amount of $56,051.53 (Bd. corr. file). The CO failed to issue a decision, and this appeal followed.

DECISION ON ASBCA No. 56679

In brief, the government contends that appellant's claim of 9 October 2008 for amounts due and owing under the above stated invoices was time-barred in part because in many cases the claim was submitted to the CO more than six years after the claims for payment on the invoices accrued. Appellant contends that its claim was timely in all respects because its claim did not accrue until 24 September 2008, the date upon which DFAS advised that it was ending its review of the payment records.

By appellant's own account – conceded by the government for purposes of this motion – appellant tendered proper invoices for goods accepted on or about 30 July 1998; 11 November 1998; 2 February 1999; 4 March 1999; 12 July 2001; 2 August 2001; 9 August 2001; 1 November 2001 (2 invoices); 9 November 2001; 22 October 2003; 3 February 2004; and 21 June 2004 (SOF ¶¶ 25-33), for which the government failed to pay in full within 30 days as required by the contract (SOF ¶ 24). Hence, appellant's claims of payment for these unpaid invoices accrued respectively on or about 30 August 1998; 11 December 1998; 2 March 1999; 4 April 1999; 12 August 2001; 2 September 2001; 9 September 2001; 1 December 2001 (2 invoices); 9 December 2001; 22 November 2002; 3 March 2004; and 21 July 2004. At that point, all events fixing liability for these unpaid invoices were or should have been known for purposes of claim accrual, FAR 33.201. Appellant's claim letter to the CO for amounts owed under these invoices was dated 9 October 2008. The claim letter was submitted more than six years after the date of accrual of most of these claims, and these claims are time-barred under the CDA (compl. ¶¶ 5-24). The claims not time barred are those that accrued on or about 22 November 2002, 3 March 2004, and 21 July 2004 (*id*., ¶¶ 25-30).

In support of its position that its claim of 9 October 2008 was timely, appellant contends that throughout the contract, changes made by the buying agency in end-item destination quantities and inconsistent DFAS payment procedures created a paperwork "mess" that could only be resolved by an end-of-contract reconciliation, and accordingly

its claim accrued only when DFAS aborted that process in late September, 2008 (app. opp'n at 12). The short answer to this is that the government's duty of payment under this contract was not dependent upon a DFAS reconciliation, or any other DFAS fact-finding process. The government's duty to pay an invoice for accepted goods was predicated on the language of the contract, and the contract required the government to pay for accepted goods within 30 days of a proper invoice. *See Pennsylvania Coal & Coke Corp. v. United States*, 108 Ct. Cl. 236, 248 (1947) cited by appellant (question of whether cause of action accrues depends upon the written agreement of the parties). As was the case under ASBCA No. 56716, appellant offers nothing to suggest any misleading or wrongful government assurances to estop the government from relying upon the limitations period in the statute, nor does appellant offer any equitable considerations to equitably toll the limitations period.

Appellant next asserts that the legal doctrines of "ripeness," "administrative finality" and "judicial husbandry" support its position. We addressed and rejected the latter two contentions under ASBCA No. 56716. We address the ripeness doctrine below.

We agree that the ripeness doctrine, which stems from the "case or controversy" requirement in Article III of the U.S. Constitution, prohibits courts from deciding hypothetical or abstract claims. *See Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 297-98 (1979). Assuming for present purposes that this doctrine of judicial restraint has some application to an agency board of contract appeals under the CDA, appellant fails to persuade us that this doctrine has any application to the facts before us. Appellant has alleged -- and the government has admitted for purposes of this motion -- that over the course of this contract appellant shipped specific units of product under duly issued delivery orders, the government accepted the product, appellant invoiced for the product and the government failed to pay the full contract price for the product. There is nothing hypothetical or abstract about any such claims. Evidently, appellant also did not think so -- for years it sought the assistance of government representatives to pay its outstanding invoices.

We have duly considered all of appellant's contentions but are not persuaded of their merit. For reasons stated, we conclude that appellant's claim for payment for the above stated unpaid invoices is time-barred under the CDA to the extent provided herein. The government's motion to dismiss ASBCA No. 56679 in part is granted to the extent provided herein.

STATEMENT OF FACTS (SOF) FOR PURPOSES
OF MOTION TO DISMISS IN PART UNDER ASBCA No. 56705[5]

35. On 22 January 1999, the government awarded to appellant Contract No. SPO100-99-D-0310 (Contract 0310), an IDIQ contract to deliver women's service caps. The contract included a base contract period with options to extend. (R4, tab 2 at 2-4) The contract included FAR 52.232-25, PROMPT PAYMENT (MAR 1994), set out above (SOF ¶ 2), which obligated the government to pay for goods accepted within 30 days of a proper invoice (R4, tab 1 at 48).

36. By DO 0001 dated 22 January 1999, the government issued an order to appellant for 5,640 units (R4, tab 3). On or about 24 June 1999, appellant shipped and then tendered an invoice for payment for 352 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 4), for which appellant was paid in part (compl. ¶ 6). On or about 14 October 1999, appellant shipped and then tendered an invoice for payment for 200 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 5), for which appellant was paid in part (compl. ¶ 8). On or about 19 October 1999 appellant shipped and then tendered an invoice for payment for 120 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 6), for which appellant was paid in part (compl. ¶ 10). On or about 27 October 1999, appellant shipped and tendered an invoice for payment for 176 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 7), for which appellant was paid in part (compl. ¶ 12). On or about 13 January 2000, appellant shipped and then tendered an invoice for payment for 386 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 8), for which appellant was paid in part (compl. ¶ 15).

37. By DO 0002 dated 28 December 1999, the government issued an order to appellant for 1,600 units (R4, tab 9). On or about 23 July 2000, appellant shipped and then tendered an invoice for payment for 1,000 units, using a copy of the DD 250 as the invoice to show acceptance, for which appellant was paid in part (compl. ¶¶ 16, 17).

38. By DO 0004 dated 2 October 2000, the government issued an order to appellant for 2,936 units (R4, tab 11). On or about 16 April 2001, appellant shipped and then tendered an invoice for payment for 344 units, using a copy of the DD 250 as the invoice showing acceptance (R4, tab 12), for which appellant was paid in part (compl. ¶ 19).

39. By DO 0009 dated 2 May 2002, the government issued an order to appellant for 3,752 units (R4, tab 13). On or about 18 June 2002, appellant shipped and then tendered an invoice for payment for 176 units, using a copy of the DD 250 as the invoice

[5] For purposes of the motion filed under ASBCA No. 56705, the government accepts as true the facts as alleged in appellant's claim and complaint.

to show acceptance (R4, tab 14), for which appellant was paid in part (compl. ¶ 21). On or about 15 January 2003, appellant shipped and then tendered an invoice for payment for 310 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 15), for which appellant was paid in part (compl. ¶ 23).

40. Over a number of years, appellant sought but did not obtain full payment from the government for the above invoices (SOF ¶¶ 11-21; app. opp'n, Weinstein decl.). On 14 October 2008, revised on 6 November 2008, appellant submitted a claim letter to the CO for amounts due and owing under these invoices under Contract 0310, in the amount of $23,756.28 (Bd. corr. file). The CO failed to issue a decision, and this appeal followed.

DECISION ON ASBCA No. 56705

In brief, the government contends that appellant's claim of 14 October 2008, as revised on 6 November 2008 was time-barred in part under the CDA, because in a number of cases the claim was submitted to the CO more than six years after the claims on the invoices accrued. Appellant contends that its claim was timely in all respects because the claim for all unpaid invoices did not accrue until 24 September 2008, the date upon which DFAS advised that it was ending its review of the payment records.

By appellant's own account – conceded by the government for purposes of this motion – appellant tendered proper invoices for accepted goods on or about 24 June 1999; 14 October 1999; 19 October 1999; 27 October 1999; 13 January 2000; 23 July 2000; 16 April 2001; 18 June 2002; 15 January 2003 (SOF ¶¶ 36-39) for which the government failed to pay in full within 30 days as required by the contract (SOF ¶ 35). Hence, appellant's claims for these unpaid invoices accrued respectively on or about 24 July 1999; 14 November 1999; 19 November 1999; 27 November 1999; 13 February 2000; 23 August 2000; 16 May 2001; 18 July 2002; 15 February 2003. At that point, all events fixing liability for these unpaid invoices were or should have been known for purposes of claim accrual, FAR 33.201. Appellant's claim letter to the CO for the amounts owed under these invoices was dated 14 October 2008 and was revised on 6 November 2008. We conclude that the claim to the CO was submitted more than six years after the date of accrual of the claims and is time–barred under the CDA (*see* compl. ¶¶ 5-21), with the exception of the claim for the unpaid invoice that accrued on or about 15 February 2003 (*id*. ¶¶ 22, 23).

In support of its position on this appeal, appellant reiterates the same legal arguments we considered and rejected under ASBCA Nos. 56679 and 56716. As was the case under ASBCA No. 56716, appellant offers nothing in this appeal to suggest any misleading or wrongful government assurances that would estop the government from relying upon the limitations period in the statute, nor does appellant offer any equitable considerations to equitably toll the limitations period.

For reasons stated, we conclude that appellant's claim for unpaid invoices under Contract 0310 is time-barred to the extent provided herein. Accordingly, the government's motion to dismiss ASBCA No. 56705 in part is granted to the extent provided herein.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF MOTION TO DISMISS IN PART UNDER ASBCA NO. 56703[6]

41. Contract No. SPO100-00-D-0313 (Contract 0313) was awarded to appellant on 6 January 2000. This was an IDIQ type contract to deliver men's black service cap frames, and included a base contract period with options to extend. (R4, tab 2 at 2-6)

42. The contract incorporated FAR 52.232-25, PROMPT PAYMENT (JUN 1997), which states, in pertinent part, as follows:

> (a) Invoice Payments (1) Due date. (i) Except as indicated in subparagraph(a)(2) and paragraph (c) of this clause, the due date for making invoice payments by the designated payment office shall be the later of the following two events:
>
> (A) The 30th day after the designated billing office has received a proper invoice from the Contractor (except as provided in subdivision (a)(1)(ii) of this clause).
>
> (B) The 30th day after Government acceptance of supplies delivered or services performed by the Contractor. On a final invoice where the payment amount is subject to contract settlement actions, acceptance shall be deemed to have occurred on the effective date of the contract settlement.
>
> (ii) If the designated billing office fails to annotate the invoice with the actual date of receipt at the time of receipt, the invoice payment due date shall be the 30th day after the date of the Contractor's invoice; provided a proper invoice is received and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(R4, tab 1 at 56)

[6] For purposes of the motion filed under ASBCA No. 56703, the government accepts as true the facts as alleged in appellant's claim and complaint.

43. By DO 0008 dated 24 August 2000, the government issued an order to appellant to deliver 26,660 units (R4, tab 3). DO 0008 was subsequently amended several times to make minor modifications to delivery amounts (*id*., Amendment Nos. 01, 02 and 03). On or about 25 January 2001, appellant shipped and then tendered an invoice for payment for 1,250 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 4), for which appellant was paid in part (compl. ¶ 6).

44. By DO 0012 dated 20 February 2001, the government issued an order to appellant for 24,000 units (R4, tab 5). On or about 26 July 2001, appellant shipped and then tendered an invoice for payment for 1,559 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 6), for which appellant was not paid (compl. ¶ 8). On or about 2 August 2001, appellant shipped and then tendered an invoice for payment for 1,220 units, using a copy of the DD 250 as the invoice showing acceptance (R4, tab 7), for which appellant was not paid (compl. ¶ 10). On or about 2 August 2001, appellant shipped and then tendered a second invoice for payment for 1,640 units (erroneously recorded in the complaint as 2,498 units), using a copy of the DD 250 as the invoice showing acceptance (R4, tab 8; compl. ex. D), for which appellant was paid in part (compl. ¶ 12). On or about 20 December 2001, appellant shipped and then tendered an invoice for payment for 740 units (compl., ex. I). The DD 250 is not of record. Appellant was paid in part on this invoice (compl. ¶ 22).

45. By DO 0013 dated 22 May 2001, the government ordered from appellant 11,500 units (R4, tab 9). On or about 18 October 2001, appellant shipped and then tendered an invoice for payment for 520 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 10), for which appellant was paid in part (compl. ¶ 14). On or about 21 November 2001 appellant shipped and then tendered an invoice for payment for 600 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 11), for which appellant was paid in part (compl. ¶ 16). On or about 7 December 2001, appellant shipped and then tendered an invoice for 410 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 14), for which appellant was paid in part. On or about 10 January 2002, appellant shipped and then tendered an invoice for payment for 690 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 15), for which appellant was paid in part (compl. ¶ 24). On or about 10 January 2002, appellant shipped and then tendered a second invoice for payment for 510 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 16), for which appellant was paid in part (compl. at 26). On or about 24 January 2002 appellant shipped and tendered an invoice for payment for 270 units, using a copy of the DD 250 as the invoice (R4, tab 17), for which appellant was paid in part (compl. ¶ 28).

46. By DO 0015 dated 16 November 2001, the government issued an order to appellant for two special measurement items (R4, tab 12). On or about 27 November 2001, appellant shipped and then tendered an invoice for the two units, using a copy of

the DD 250 as the invoice to show acceptance (R4, tab 13), for which it was not paid (compl. ¶ 18).

47. By DO 0016 dated 27 February 2002, the government issued an order to appellant for 47,650 units (R4, tab 18). On or about 7 November 2002, appellant shipped and then tendered an invoice for payment for 350 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 19), for which appellant was paid in part (compl. ¶ 30). On or about 7 November 2002, appellant shipped and then tendered a second invoice for payment for 480 units under this DO (erroneously recorded in the complaint as DO 0013), using a copy of the DD 250 as the invoice to show acceptance (R4, tab 20), for which it was not paid (compl. ¶ 32). On or about 3 February 2003, appellant shipped and then tendered an invoice for payment for 1,640 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 21), for which appellant was paid in part (compl. ¶ 34). On or about 12 February 2003, appellant shipped and then tendered an invoice for payment for 340 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 22), for which appellant was paid in part (compl. ¶ 36).

48. By DO 0020 dated 23 January 2003, the government issued an order to appellant for 21,000 units (R4, tab 23). On or about 15 July 2003, appellant shipped and then tendered an invoice for payment for 2,330 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 24), for which appellant was paid in part (compl. ¶ 38). On or about 5 August 2003, appellant shipped and then tendered an invoice for payment for 1,440 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 25), for which appellant was paid in part (compl. ¶ 40). On or about 13 August 2003, appellant shipped and then tendered an invoice for payment for 490 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 26), for which appellant was paid in part (compl. ¶ 42).

49. By DO 0026 dated 3 June 2004, the government issued an order to appellant for 8,710 units (R4, tab 27). On or about 25 October 2004, appellant shipped and then tendered an invoice for payment for 1,560 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 28), for which appellant was not paid (compl. ¶ 44).

50. By DO 0030 dated 10 January 2005, the government issued an order to appellant for three special measurement items (R4, tab 29). On or about 8 February 2005, appellant shipped and then tendered an invoice for two of these items, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 30), for which appellant was not paid (compl. ¶ 46). On or about 8 February 2005, appellant shipped and then tendered an invoice for the remaining special item, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 31), for which appellant was not paid (compl. ¶ 48).

51. By DO 0033 dated 11 May 2005, the government issued an order to appellant for 6,860 units (R4, tab 32). On or about 27 September 2005, appellant shipped and then tendered an invoice for payment for 1,180 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 33), for which appellant was paid in part (compl. ¶ 50).

52. By DO 0035 dated 8 November 2005, the government issued an order to appellant for 19,180 units (R4, tab 34). On or about 20 January 2006, appellant shipped and then tendered an invoice for payment for 980 units, using a copy of the DD 250 as the invoice to show acceptance (R4, tab 35), for which appellant was paid in part (compl. ¶ 52).

53. Over a number of years, appellant sought but did not obtain full payment from the government for the above invoices (SOF ¶¶ 14-21; app. opp'n, Weinstein decl). On 21 October 2008, appellant submitted a certified claim letter to the CO for the above stated unpaid invoices under Contract 0313, in the amount of $111,465.57 (Bd. corr. file). The CO did not issue a decision on the claim and this appeal followed.

DECISION ON ASBCA No. 56703

In brief, the government contends that appellant's claim of 21 October 2008 for amounts due and owing under the above stated invoices was time-barred in part under the CDA because in a number of cases the claim was submitted to the CO more than six years after the claims accrued. Appellant contends that its claim was timely in all respects because its claim did not accrue until 24 September 2008, the date upon which DFAS advised it was ending its review of the payment records.

By appellant's own account – and conceded by the government for purposes of its motion – appellant tendered proper invoices for accepted goods under Contract 0313 on or about 25 January 2001; 26 July 2001; 2 August 2001 (two invoices); 20 December 2001; 18 October 2001; 21 November 2001; 7 December 2001; 10 January 2002 (two invoices); 24 January 2002; 27 November 2001; 7 November 2002 (two invoices); 3 February 2003; 12 February 2003; 15 July 2003; 5 August 2003; 13 August 2003; 25 October 2004; 8 February 2005 (two invoices); 27 September 2005; 20 January 2006 (SOF ¶¶ 43-52) for which the government failed to pay in full within 30 days as required by the contract (SOF ¶ 42). At that point, all events fixing liability for these unpaid invoices were or should have been known for purposes of claim accrual, FAR 33.201. Hence, appellant's claims for these unpaid invoices accrued respectively on or about 25 February 2001; 26 August 2001; 2 September 2001 (two invoices); 20 January 2002; 18 November 2001; 21 December 2001; 7 January 2002; 10 February 2002 (two invoices); 24 February 2002; 27 December 2001; 7 December 2002 (two invoices); 3 March 2003; 12 March 2003; 15 August 2003: 5 September 2003; 13 September 2003; 25 November 2004; 8 March 2005 (two invoices); 27 October 2005; and 20 February

2006. Appellant submitted a claim to the CO for these unpaid invoices on 21 October 2008. We conclude that all of the above claims that accrued prior to 21 October 2002 (*see* compl. ¶¶ 5-28) were submitted to the CO more than six years after the claims accrued and are time-barred under the CDA.

In its opposition, appellant reiterates the same legal arguments we considered and rejected under ASBCA Nos. 56679, 56705 and 56716. As was the case under ASBCA No. 56716, appellant offers nothing in this appeal to suggest any misleading or wrongful government assurances that would estop the government from relying upon the limitations period in the statute, nor does appellant offer any equitable considerations to equitably toll the limitations period.

For reasons stated, we conclude that appellant's claim for payment for the above-stated unpaid invoices under Contract 0313 is time-barred to the extent provided herein. Accordingly, the government's motion to dismiss ASBCA No. 56703 in part is granted to the extent provided herein.

CONCLUSION

In summary, we conclude as follows:

ASBCA Nos. 56679, 56703, 56705 – The government's motion to dismiss in part is granted consistent with this opinion.

ASBCA No. 56716 – The government's motion to dismiss is granted.

Dated: 19 February 2010

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 56679, 56703, 56705, 56716, Appeals of Bernard Cap Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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