Government Contracts
& Disputes

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An Evolving Landscape

Timeliness of government disallowance of expenses contained in incurred cost proposals may depend on government access to contractor electronic data.

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The last three years have seen a run of Contract Disputes Act (CDA) statute of limitations (SOL) cases involving contractor incurred cost proposals (ICP). The sledding has been more difficult for contractors after the Federal Circuit (see Sikorsky Aircraft Corp. v. United States, *773 F.3d 1315 (Fed. Cir. 2104)) ruled in 2014 that the SOL constituted an affirmative defense for which the proponent bears the burden of proof. We can now add to the list a new Armed Services Board of Contract Appeals (ASBCA) decision which ventures into the question of what underlying detailed data the contractor may need to provide in order to trigger the SOL.* Alion Science and Technology Corporation (Alion), *ASBCA No. 58992 (Nov. 10, 2015).* Alion *reflects the increasing difficulties contractors now face in meeting that SOL burden. However, all is not lost. The decision does provide helpful insight into resolving the central question of when the Government reasonably "should have known" enough about a contractor's cost to start the SOL running.*

In *Alion*, the administrative contracting officer (ACO) issued a final decision dated August 21, 2013 for penalties for expressly unallowable costs in the amount of $388,921, which contractor Alion had allegedly included in its fiscal year (FY) 2005 ICP. Under the CDA, the government has six years from the date of accrual to assert a claim against a contractor. Thus, in this instance, the SOL would have barred as untimely any government claim that accrued prior to August 21, 2007. The Federal Acquisition Regulation (FAR) provides that a government claim accrues when the government knew or should have known of all events that fix the contractor's alleged liability. In *Alion*, the contractor lost a motion for summary judgement arguing that the statute of limitations had lapsed because the government's claim of inclusion of nine expressly unallowable costs in its ICP was brought more than six years after the contractor had

submitted that proposal. The questioned costs included engineering overhead, salary-related costs (SRC) and non-SRC costs.

The ASBCA decision turned on the "knew or should have known" standard based on the contents of Alion's final ICP submitted on March 31, 2006. This ICP, which Alion submitted electronically, did include spreadsheets corresponding to the various schedules such that double-clicking on cells would open a spreadsheet containing hundreds of individual items of cost with accompanying information, including the amount, date, general description and various accounting data. However, these spreadsheets did not include data for all the costs in question, and the ICP also did not include the required Schedule H. Notably, there was a link to a spreadsheet including data about salary related adjustment costs at issue (*i.e.*, SRC), but that link did not identify all of the specific cost adjustments made by the contractor. The Defense Contract Audit Agency (DCAA) subsequently notified Alion of certain errors and omissions in its ICP submittal. Alion's final revisions to its Schedule H and Schedule H-1 for FY 2005 were not received until February 8, 2008. In early 2008, Alion also submitted additional transaction details and provided DCAA with access to its database reflecting tens of thousands of transactions. Alion nevertheless argued that its final indirect cost proposal submitted in March 2006 provided transaction-level detail for its claimed costs, triggering the government's statute of limitations time period. The Board disagreed and sided with the government, finding that Alion's FY 2005 submission in March 2006 did not contain all of the detailed transaction data required to determine the allowability of Alion's costs and that Alion failed adequately to identify the specific costs at issue in the appeal. Even though there was some level of detail in the ICP submission, the detail was limited to some of the SRC costs, but none of the non-SRC costs.

The contractor lesson is a simple one—provide a comprehensive and detailed ICP, on time. That is, provide all of the electronic links possible. While the Board did not specifically address whether the subsequent data provided by the contractor in early 2008 would have been adequate to establish that the government should have known of the costs had Alion provided it in March 2006, it can be reasonably concluded that it would have met the test. DCAA's well documented delays in performing audits, *see e.g.* May 2011 House Report 112-78, and its growing backlog of uncompleted audits will likely present contractors with additional opportunities to challenge these audits as untimely. However, contractors must also realize that they too have a duty to timely submit all of their required documentation. Alion's two-year delay in submitting the final schedules accompanying its indirect cost proposal prevented the company from successfully challenging a 2013 final decision regarding their fiscal year 2005 indirect cost rates.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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