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NEW GOVERNMENT CHALLENGES ON CONTRACTOR RECOVERY

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Presentation Agenda

- Welcome & Course Overview
- Cost reasonableness developments
  - Overview of cost reasonableness
  - Review of recent reasonableness case law
- CAS issues related to hybrid and ID/IQ contracts
  - Discuss common CAS exemptions
  - Review CAS coverage issues related to hybrid and ID/IQ contracts
- Affirmative defenses that must be asserted as a CDA claim
  - Discuss the *Maropakis* doctrine and its resulting implications
  - Review recent case law that has limited the *Maropakis* doctrine
- Statute of limitations challenges
  - Summarize the standard for when claims accrue, and discuss the issue with determining when a CAS 413 claim accrues
  - Summarize recent case law that highlights SOL issues


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Cost Reasonableness

Cost Reasonableness

Reasonableness is a component of cost allowability.

- Under cost reimbursement contracts, government only pays allowable costs.
- If a fixed price solicitation requires certified cost or pricing data, allowable costs will be considered to develop/support price negotiations.

No presumption of reasonableness for costs incurred.

- Once reasonableness is challenged regarding a specific cost, the contractor has the burden of proof, unaided by a presumption of reasonableness, to establish the challenged costs were reasonable.

“Prudent person” standard.

- FAR 31.201-3 - “A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.”
- This is a facts and circumstances test.

Cost Reasonableness: Increasing Burden

- KBR cases established that reasonableness, once challenged, is a fact and case-specific inquiry, meaning the government or court may second guess your judgment.
- Current environment:
  - Increasingly, cost reasonableness is being raised at any time, even during a litigation.
  - Reasonableness challenges may arise even though a cost is initially disallowed per a specific cost principle in FAR 31.205.
    - Appropriate only to extent that a cost principle does not address either nature or amount of the cost.
    - Inappropriate when cost principle addresses both nature and amount of the cost.

Cost Reasonableness: Case Law

Dyncorp Int'l LLC, ASBCA No. 61950, 20-1 BCA ¶ 37,703

USG disallowed CEO severance payments based on DCAA's audit.

- Severance payment calculated as "two times the sum of Base Salary and Bonus at Target."
- USG claimed severance is type of "wages" or, alternatively, "related" to compensation unallowable under FAR 31.205-6(p) and, therefore, is an unallowable directly associated cost under FAR 31.201-6(d).
- ASBCA found costs unallowable as unreasonable under FAR 31.201-3.
  - ASBCA took jurisdiction over a FAR 31.201-3 disallowance despite no COFD on reasonableness without explanation.
  - ASBCA held severance payments are not compensation under FAR 31.201-6(p), but portion of severance pay based on salary and bonus components over the FAR 31.205-6(p) cap applicable to such costs is an unreasonable cost.

Takeaway: If any type of compensation cost not subject to FAR 31.205-6(p) is measured using costs subject to FAR 31.205-6(p), that portion of the compensation cost may be challenged as unreasonable.

Cost Reasonableness: Case Law

Recent Appeal

Contractor incurred costs on a PYG basis for a non-qualified pension plan.

- Amount of pension benefits earned in a given year measured, in part, based upon participant's salary.
- In certain years, certain salary paid to participants exceeded FAR 31.205-6(p) compensation cap.

- Government disallowed pension costs related to/based upon salary paid in excess of the FAR 31.205-6(p) cap as unallowable directly associated costs under FAR 31.201-6.
- During summary judgment briefing, the government argued that the questioned costs were unreasonable under FAR 31.201-3 based on *Dyncorp* rationale.
- Contractor moved to dismiss the FAR 31.201-3 argument as outside of the ASBCA's jurisdiction because no COFD.

Cost Reasonableness: Case Law

Recent Appeal (cont.)

ASBCA denied Contractor's motion on basis that:

- The facts underlying the FAR 31.201-6 disallowance as directly associated costs are the material facts for the FAR 31.201-3 reasonableness issue.
- There is no material difference in the applicable legal standard.

Takeaway: Cost disallowances under the FAR 31.205 cost principles will now routinely involve a FAR 31.201-3 reasonable assessment when government counsel chooses to raise reasonableness during a litigation.

- Creates a government "second bite at the apple."
- Undermines purpose of FAR 31.205.


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CAS Issues Related to
“Hybrid” and ID/IQ Contracts

CAS Exemptions

CAS applies to negotiated contracts and subcontracts unless an exemption applies.

There are nine categories of exempt contracts and subcontracts. The most common exemptions applied to negotiated (non-sealed bid) contracts include:

- Negotiated contracts not in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation;
- Contract types authorized in 48 CFR 12.207 for the acquisition of commercial items; and
- FFP contracts awarded on the basis of adequate price competition without submission of certified cost or pricing data.

Two additional important exemptions are:

- Subcontracts awarded under a prime contract or a higher trier subcontract that is exempt from CAS under 48 CFR 9903.201-1; and
- Specific contracts for which the head of an agency has waived CAS applicability.

Application of CAS Exemptions to “Hybrid” Contracts

A common issue is the application of CAS exemptions in the context of a so-called “hybrid” contract.

- FAR does not use the term “hybrid” contracts.
- CAS does not use the term “hybrid” contract, referring only to “contracts.”

FAR 16.104(e) permits combining contract types in one agreement, supporting that each contract type within one agreement is a separate and distinct contract.

Each contract-type within a “hybrid” contract must be reviewed to determine whether that portion of the contract is exempt.

- CAS distinguishes between contract types in other areas, i.e. a contract that contains both commercial item and non-commercial item CLINS.
- Agencies are not permitted to circumvent CAS applicability or exemption by combining multiple contract types into one contract.
- Not all clauses included in a “hybrid” contract apply to each portion of a contract within the “hybrid.”

Application of CAS Exemptions to "Hybrid" Contracts (cont.)

Example showing how the CASB analyzed a hypothetical commercial item T&M contract:

- "Time" element: composed of fixed hourly rates that are similar to a FFP contract = exempt.
- "Material" element: includes direct materials and other direct costs that are typically subject to reimbursement and CAS, however it is CAS-exempt for a different reason.
  - CASB believes the FAR provides other adequate safeguards and limitations on these costs in this context.

Application of CAS Exemptions to ID/IQ Contracts

Indefinite-delivery, indefinite-quantity ("ID/IQ") contract: requires the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services.

- Typcailly, delivery orders and task orders are subject to the terms and conditions of the "parent" ID/IQ contract.

Two types of ID/IQ:

1. Establishes the prices to be applied to orders issued under the ID/IQ, and is effectively an option contract.
   - Treat as an exercise of option.
2. Does not establish priced options and, therefore, each order is a new pricing action and the award of a new contract (or combination of contracts).
   - = Treat as a modification, essentially a new contract.

Application of CAS Exemptions to ID/IQ Contracts (cont.)

Option:

- Terms of the ID/IQ contract control, including CAS, if applicable.

Modification:

- If ID/IQ contains CAS clause, it does not necessarily subject the subsequent orders to CAS.
- If an order qualifies for a CAS exemption, then the CAS clause will be inapplicable, even if it were incorporated into the order.
  - It is commonly understood that numerous clauses will be included in the base ID/IQ that become self-deleting if they are not applicable to orders placed thereunder.
- DCAA audit guidance: a contract modification that adds new work "must be treated for CAS purposes as if it were a new contract. In this case, if the modification exceeds the threshold, it will be CAS-covered."


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Certain Affirmative Defenses
Must Be Asserted as a CDA Claim

The *Maropakis* Doctrine

In a 2010 Federal Circuit case, Maropakis countered the government's liquidated damages assessment by asserting a "factual defense" based on excusable delay.

- Court did not allow Maropakis' argument because it found that the contractor's so-called defense was actually an affirmative contractor claim.
  - A party "seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the [CDA], whether asserting the claim against the government as an affirmative claim or as a defense to a government claim."

Subsequent decisions:

- COFC found *Maropakis* did not apply when a contractor challenged the facts underlying a government claim. *See Total Engineering, Inc. v. U.S.*, 120 Fed. Cl. 10, 14-16 (2015).
- CBCA held that the doctrine also does not prohibit defenses which do not seek "monetary relief" nor "any separate contract adjustment." *See Jane Mobley Assoc., Inc. v. GSA*, CBCA No. 2878 (Jan. 5, 2016).

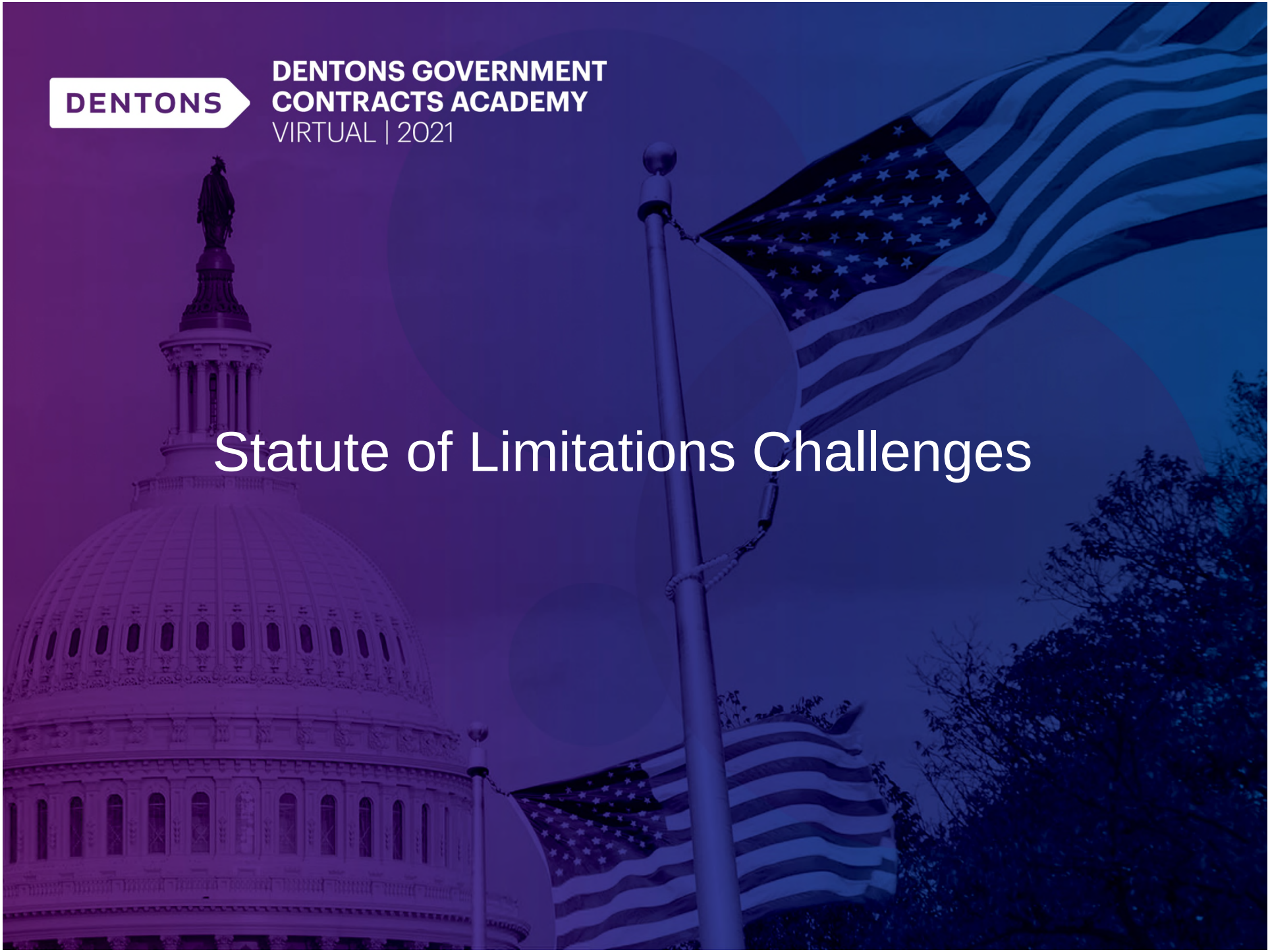
The *Maropakis* Doctrine: Case Law

Sec'y of the Army v. KBR, 779 Fed. Appx. 716 (Fed. Cir. 2019).

KBR's complaint included a breach of contract count ("Count II") claiming that the Army breached its contractual obligation to provide adequate force protection.

- The Army argued that ASBCA did not have jurisdiction over Count II because KBR failed to submit a claim to the CO alleging breach of contract.
- The Court agreed with ASBCA's finding that it did have jurisdiction to consider Count II because it characterized it as an affirmative defense of a prior material breach, which was asserted against the Army's claim to recover allegedly unallowable costs previously paid that KBR incurred as a result of the Army's breach.
- The Court distinguished this case from *Maropakis* because KBR's defense does not seek to adjust the terms of the contract; instead, KBR seeks only a denial of the government's monetary claim.

Takeaway: An affirmative defense that does not seek to change the terms of a contract does not need to first be presented to the CO.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Statute of Limitations Challenges

Statute of Limitations: When does a claim accrue?

The CDA requires that a party must assert any claim within six years of the date it accrues.

- A claim is a "written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." FAR 2.101(b).
- A claim seeking the payment of money in excess of $100K must be certified.
- A routine request for payment that is not in dispute is not a claim; however, it may be converted to a claim, by written notice the CO, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

When does a claim accrue?

- A claim accrues 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." FAR 33.201.
  - For liability to be fixed, some injury must have occurred, however, monetary damages need not have been incurred.
- An unresolved issue is how the accrual analysis is impacted when a claim springs from a routine request for payment versus a non-routine request for payment.

Statute of Limitations:

Routine versus Non-Routine Requests for Payments

Routine Request for Payment

- A request for payment under the terms of the contract, and includes vouchers and progress payments.
- If not in dispute when submitted, it is not a claim.
- Converts into a claim when the Government disputes it or fails to act in a reasonable time, and the contractor provides written notice to the CO.

Non-Routine Request for Payment

- Presence of some unexpected or unforeseen action on the Government's part that ties it to the demanded costs, i.e. the Government has injured the contractor in some way. *See Parsons Global Services, Inc. v. McHugh*, 677 F.3d 1166 (Fed. Cir. 2012).
- Accrues when the Government has injured the contractor in some way, fixing the Government's liability and permitting the contractor to submit a claim.

Statute of Limitations:

Example: When does the clock start for CAS 413 claims?

One SOL issue that lacks guidance is when a claim accrues under CAS 413.

CAS 413 requires an adjustment of pension costs previously recognized in the costs and prices of government contracts subject to CAS in the event of a segment closing, pension plan termination, or pension plan curtailment.

- Contains a particular process for adjusting previously recognized pension costs before a contractor may assert a claim.
- After measuring costs, contractor submits a “CAS 413 Submission,” and the contractor and Government agree or negotiate the adjustment.

Does a CAS 413 event accrue a claim for CDA purposes?

- Is a CAS 413 submission a routine or non-routine request for payment?
- When would a CAS 413 Submission amount to a “claim”?

Statute of Limitations: Case Law

Elec. Boat Corp. v. Sec'y of Navy, 958 F.3d 1372 (Fed. Cir. 2020)

Electric Boat asserted a CDA claim for increased costs due compliance with an OSHA regulation that was enacted during contract performance on August 15, 2005.

- ASBCA found that Electric Boat's CDA claim accrued on the day the OSHA regulation was enacted and Electric Boat failed to file its CDA claim within six years.
- Electric Boat argued that its claim did not accrue until the CO denied its request for a price adjustment on May 2, 2011.
- The Court found that even though the contract required Electric Boat to "promptly notify" the Navy of a qualifying change in law, it was not required to await a unilateral Navy price adjustment prior to filing a claim.
- Therefore, Electric Boat's injury was the enactment of the OSHA Regulation, not the Navy's refusal to adjust the price.

Takeaway: If the contract does not impose mandatory pre-claim procedures, the CDA SOL begins to run as soon as some injury has occurred.


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Questions?

Thank you

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