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Statute of Limitations

Running Out of Time: Rapidly Developing Case Law on the CDA Six-Year Statute of Limitations on Contractor and Government Claims

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When the Contract Disputes Act ("CDA") was enacted in 1978, it did not include a statute of limitations for the submission of a claim.[1] However, the Federal Acquisition Streamlining Act ("FASA") in 1994 added a statute of limitations,[2] amending the CDA to specify that:

> Each claim by a contractor against the federal government relating to a contract and each claim by the federal government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.[3]

The FAR implementation of the statute provides additional detail, stating that contractor claims must be submitted "in writing, to the contracting officer for a decision within 6 years after the accrual of a claim. . . ."[4] With respect to government claims, the FAR requires the contracting officer to "issue a written decision on any government claim initiated against a contractor within 6 years after accrual of the claim. . . ."[5] The FAR states that the parties to a government contract may agree to a shorter statute of limitations,[6] but is silent as to whether they may agree to extend or toll the six year period.[7]

FASA did not define "accrual of a claim," but the FAR states:

> *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.[8]

In the 18 years since FASA enacted the six-year statute of limitations, numerous court and board decisions have demonstrated that applying the FAR's definition of accrual to a particular circumstance is not always straightforward or clear.[9] In particular, a number of recent decisions have alternatively muddied and clarified the law of accrual for both parties. As a result, contractors as well as government agencies have unknowingly slept on their rights, not realizing a claim had accrued, only to find later that a claim was barred by the statute of limitations.[10]

The Armed Services board of Contract Appeals ("ASBCA") has noted that accrual analysis requires "examining the legal basis of the particular claim."[11] Accordingly, this article will examine: (1) the circumstances under which various types of contractor and govern-

[1] Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (1978).
[2] Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2351(a), 108 Stat. 3243 (1994).
[3] 41 U.S.C. § 7103(a)(4).
[4] FAR 33.206(a).
[5] FAR 33.206(b).
[6] FAR 33.206(a)-(b).
[7] *See Preservation of Claims*, *infra*.

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[8] FAR 33.201.
[9] Even the crafting of the FAR definition of accrual was a challenging task. In implementing the CDA statute of limitations, the FAR regulators explained that "[t]he largest number of public comments concerned the definition of 'accrual.' Some commentators felt that contractor and government claims were to be treated differently because 'accrual' was defined only in terms of the contractor claim. To resolve that problem, a general definition of 'accrual' has been added. . . .There were also a number of alternate definitions of 'accrual' proposed. In addition to the discovery of the events, a discovery of some damage has been added to cover the unusual case where the party is aware of the events giving rise to the claim, but not of any resulting damage." 60 Fed. Reg. 48,224-225, Sept. 18, 1995.
[10] *See* Robin Shultz and Karen L. Manos, *The Contract Disputes Act Statute of Limitations: Take your Time, DOD*, 6 CP&A Rep. ¶ 71 (Nov. 2011).
[11] *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,475.

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ment claims accrue, thus triggering the six-year statute of limitations; (2) how to prevent a claim from being barred by the statute of limitations; (3) the legal effect of filing a claim out of time; and (4) the limited circumstances under which a claim may proceed even when more than six years have elapsed from the time the claim accrued. While the case law on the CDA's statute of limitations is unsettled, particularly with regard to accrual, an understanding of the current status of the law will serve contractors and government agencies well.

Accrual of Contractor Claims.

Contractor Claims for Increased Performance Costs under a Contract with Successive Delivery Orders: The ''Continuing Claim'' Doctrine

A leading case involving contractor claims for increased performance costs under an indefinite delivery requirements contract is *Gray Personnel, Inc.*[12] There, the government awarded a services contract on May 13, 1997 for a base year and four option years. Performance was scheduled to end on March 31, 2002. Between 1997 and 2000, various issues arose, some of which were resolved by contract modification. The specific issue giving rise to the claim under review by the ASBCA was known early in contract performance.

On April 26, 2004, Gray filed a certified CDA claim for damages incurred during 1998-2000. The government argued that the entire claim was time barred because Gray was aware prior to April 1998 of the alleged government action upon which it based its claimed increased costs. Gray argued that none of the claim was time barred because Gray could not calculate its damages until completion of performance in 2002.

The ASBCA began its accrual analysis by ''examining the legal basis of the particular claim.''[13] Gray alleged a constructive change based on the government's enlargement of the performance requirements. However, since no performance could be required under the contract absent a delivery order, the ASBCA reasoned that ''the government's potential liability for enlarging appellant's performance requirements could not be 'fixed' until the government had issued a delivery order authorizing performance. . . .''[14] The ASBCA then examined the requirement in the definition of accrual in FAR 33.201 that ''some injury must have occurred.'' The ASBCA determined that:

> . . . [A]ppellant must have actually begun performance and incurred some extra costs for liability to be fixed. We do not think, however, that appellant must have completed the delivery order, or even as appellant argues, have completed the contract in order for liability to be fixed.[15]

Next the ASBCA examined the requirement that ''all events'' that fix liability must be known or should be known before accrual is achieved.'' The ASBCA explained that ''[o]nce a party is on notice that it has a potential claim, the statute of limitations can start to run.'' The ASBCA ruled that Gray became aware of the events that fixed the alleged liability as they occurred, and not at some later date. Since these events occurred at an early date during performance, the triggering event for accrual was shifted to the dates of the issuance of delivery orders. Here, many of the delivery orders were issued more than six years before April 2004 and the portion of Gray's claim relating to those delivery orders was barred.''[16]

The ASBCA then addressed the government's position that the entire claim should be barred, but rejected it based on the ''continuing claim'' doctrine. The ASBCA explained that periodic claims arising more than six years prior to suit are barred, but not those periodic claims arising within the six-year span. However, for the doctrine to apply, ''the plaintiff's claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages . . .''[17] In *Gray*, the doctrine applied because ''appellant's claim is inherently susceptible to being broken down into a series of independent and distinct events, *viz.*, the changes to the individual delivery orders.'' Issuance of each separate delivery order gave rise to a separate claim.[18]

Contractor Claims under the Variation in Quantity Clause

Emerson Construction Co.[19] involved a requirements contract under which the contractor asserted a right to adjustment under the Variation in Quantities clause when the government failed to order more than 39 percent of the estimated quantity. The government argued that the claim accrued at a point during performance when the contractor should have known that the estimated quantity would not be ordered. The ASBCA rejected this argument and fixed the accrual date as the last day on which the government could still have issued orders. To rule otherwise, the ASBCA stated, would ''surely proliferate litigation' if contractors were required to guess whether or not the government would ultimately fail to issue a sufficient number of delivery orders . . . .''[20]

Contractor Claims for Bid Mistake

In *DynCorp International, LLC*,[21] the contractor asserted a claim against the Army based on alleged bid mistakes. An abbreviated timeline of events will assist in understanding the opinion:

August 4, 2000: The Army awarded the contract for a four month base year ending January 31, 2001, and nine option years. The initial award funded only the first four month period.

January 2001: At some time during this month, DynCorp became aware of mathematical mistakes in its proposal causing under-realization of revenue under the contract.

May 2005: DynCorp filed a request for equitable adjustment (''REA'') disclosing the pricing errors.

September 2005: The Army responded stating that it did not have sufficient information and offering to review the matter further if DynCorp supplied the additional data.

October 3, 2005: DynCorp submitted additional supporting data.

[12] *Id.* at 165,469.
[13] *Id.* at 165,475.
[14] *Id.* at 165,476.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 165,477.
[18] *Id.*
[19] *Emerson Constr. Co.*, ASBCA No. 55165, 06-2 BCA ¶ 33,382
[20] *Id.* at 165,501.
[21] *DynCorp Int'l, LLC*, ASBCA No. 56078, 09-2 BCA ¶ 34,290.

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August 10, 2006: DynCorp submitted an updated and final REA.

January 25, 2007: DynCorp converted the REA into a CDA claim and certified it.

May 31, 2007: The contracting officer (''CO'') denied the claim and DynCorp filed an appeal.

The government argued that the statute of limitations should run from the date of contract award in August 2000, thus extinguishing the entire claim. Alternatively, the government argued that DynCorp knew of the mistake no later than January 9, 2001, and that the entire claim was untimely by that standard as well. DynCorp argued that the claim could not accrue until January 31, 2002, when the first performance period ended. DynCorp further argued that the continuing claim doctrine required that the base year and each option year be separately treated for statute of limitations purposes, and that none of the option year claims was time barred.

The ASBCA held that the date of contract award was not relevant, noting that ''some injury'' did not occur until October 2000 when DynCorp began performance. The ASBCA stated that the critical date was the date on which DynCorp became aware of the facts necessary to make a case of mistake. In this regard, an issue of fact remained as to when in January 2001 DynCorp became aware of the mistake, and thus that the case could not be disposed of without a hearing. As to the option years, the ASBCA ruled that the ''continuing claim'' doctrine applied, under which 'a claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs.''[22] Option year 1 was not awarded until January 30, 2001 and thus was not time barred when DynCorp submitted its certified claim on January 25, 2007.

Contractor Claims Based on the Labor Cost Adjustment Clause

DTS Aviation Services, Inc.[23] involved a claim for adjustment of labor costs based on a specific FAR entitlement clause. Because the ASBCA denied summary relief and set the matter for hearing, the record was not fully developed at the time the decision was issued. Nevertheless, the abbreviated timeline for statute of limitations purposes was:

August 1999: Award of the contract for a base year and six option years. The contract included a labor cost adjustment provision applicable only to the option years.

August 2000: The government exercised the first option year effective October 1. Year by year thereafter, it exercised the remaining options.

October 2000: During the first option year DTS began to incur the increased labor costs addressed by the remedial clause.

February 2007: DTS submitted an REA for increased costs under all of the option years.

May 2, 2007: DTS submitted a properly certified CDA claim for the increased costs.

February 25, 2008: The CO denied the claim.

March 17, 2008: DTS filed its appeal.

The government argued that the accrual date for the first option year claim was the date of award, August 2000, and that the first option year claim was time barred. DTS argued that it could not know its full costs for the first option year until the end of that year in December 2001.

The ASBCA rejected each argument, stating that the government's position was flawed because of the ''some injury'' requirement and noting that no injury could occur as of the option award date. The ASBCA rejected the DTS position on the grounds that not all costs need to be known before a claim accrues. The board concluded that it ''need[ed] a more developed record to address the time bar question.''[24]

Contractor Claims for Breach of Contract

Environmental Safety Consultants, Inc. v. United States (ESC)[25] involved breach claims based on a contract awarded in 1995 and performed between 1995 and 1997. ESC did not file a certified breach claim until October 22, 2003. In deciding that the claim was filed out of time, the Court of Federal Claims (''COFC'') noted that each event alleged to give rise to the breach occurred more than six years before the claim was submitted. Moreover, from the evidence of the claim itself, it was clear that ESC was aware of the claim-generating events as they occurred.[26] Similarly, in *RGW Communications, Inc.*, the ASBCA held that accrual of a breach claim under the CDA takes place at the date of breach (''the statute of limitations begins to run in contract claims against the government at the time of a breach'').[27]

Cardinal Maintenance Service, Inc.,[28] involved contractor claims to recover improper withholdings taken during contract performance in 2001-2003. During performance and for several years thereafter, the contractor filed a succession of REAs and even certified them, but did not request a final CDA decision. Finally, in September 2008 the contractor filed a proper CDA claim and appealed the partial denial. The government filed a motion to dismiss based on the CDA six-year statute of limitations. The ASBCA ruled that because the contractor knew of the impropriety of the withholdings when they were made, the claims accrued on those dates. Because each withholding was a separate claim, the ASBCA dismissed for lack of jurisdiction those claims that related to withholdings taken more than six years before the filing of the CDA claim.

Todd Pacific Shipyards Corp.[29] involved a claim for breach of an asserted agreement to reimburse the costs of refurbishing a drydock for use by Navy vessels. The Navy asserted that the claim accrued when the contractor began to request a change in accounting method for the drydock costs. The ASBCA disagreed, holding first that the breach claim could not accrue before award of the contract, and second that ''there is no breach of the Allowable Cost and Payment clause until the contractor requests payment and the government fails to pay.'' The

[22] *Id.* at 169,407.

[23] *DTS Aviation Servs., Inc.*, ASBCA No. 56352, 09-2 BCA ¶ 34,288.

[24] *Id.* at 169,379.

[25] *Environmental Safety Consultants, Inc. v. United States*, 97 Fed Cl. 190 (2011).

[26] *Id.* at 196-97.

[27] *RGW Communications, Inc.*, ASBCA No. 54557, 05-2 BCA ¶ 32,972, at 163,331; *See also Parsons-UXB Joint Venture*, ASBCA No. 56481, 09-2 BCA ¶ 34,305, at 169,459 (holding that ''a claim for breach of contract accrues at the time of the breach'').

[28] *Cardinal Maintenance Service, Inc.*, ASBCA No. 56885, 11-1 BCA ¶ 34,616.

[29] *Todd Pacific Shipyards Corp.*, ASBCA Nos. 55126, 56910, 10-1 BCA ¶ 34,368.

ASBCA concluded that there was insufficient evidence to fix the precise date of accrual and denied the government's motion to dismiss. In a subsequent decision, the ASBCA held that the claim accrued when the contractor sent a letter to the CO proposing an accounting change and including an indirect cost allocation, a date within the six-year window.[30]

Contractor Claim for Constructive Changes

Environmental Safety Consultants, Inc. (ESC)[31] involved a series of alleged constructive changes during contract performance. ESC was awarded a contract for cleanup and removal of underground fuel tanks in November 1995.[32] Various government actions forming the basis for the later constructive change claims occurred between May 1996 and June 1997. The earliest date on which the ASBCA could determine that a certified claim had been filed was October 22, 2003. The ASBCA examined the May 1996-June 1997 events upon which ESC's claims were based, and found that ESC was aware of the events as they occurred. The ASBCA also determined that ESC had asserted ''some injury or damage'' during this period.[33] Examining each claim separately, the board held that each one accrued before October 22, 1997, and thus that the entire appeal was time barred.[34]

Robinson Quality Constructors[35] involved a construction contract performed between 1997 and June 1999. During performance, the parties entered into a series of modifications to cover the costs of changes and other direct cost items, but reserved the impact costs for later resolution. The contractor filed its CDA claim for the impact costs on June 2, 2005. In holding that all of the impact claims were barred, the ASBCA noted that the contractor was knowledgeable and experienced, and knew as the changes were issued that there would be impact costs. Accordingly, the ASBCA found the impact claims accrued at that time and the CDA claim was filed more than six years later.[36]

In *Bannum, Inc. v. Dep't of Justice*,[37] Bannum alleged that certain actions of the contracting officer's technical representative (''COTR''), including overzealous inspections, constituted constructive changes for which Bannum was entitled to an equitable adjustment. The Civilian Board of Contract Appeals (''CBCA'') found that ''the 'events' that would fix the alleged liability, i.e., the acts or omissions of [the COTR], all had transpired as of December 2004.'' Thus, the claim accrued more than six years before Bannum submitted its claim in August 2011, and the claim was time-barred.[38] In its motion for reconsideration, Bannum argued that the board erred in finding that all events occurred prior to December 2004, and pointed to specific aspects in its claim alleging constructive changes between December 2004 and November 2005. The board reinstated Bannum's appeal to the limited ''extent Bannum has claimed relief for agency acts or omissions post-dating August 11, 2005.''[39]

Accrual of Government Claims. There is no separate definition of ''accrual'' for government claims, and the ASBCA has rejected the idea that the statute of limitations should be construed more liberally in the case of a government claim than a contractor claim.[40] Nevertheless, courts and boards have struggled with special issues that have caused the term ''accrual'' to acquire different nuances in the separate cases of government and contractor claims. Two key issues have been (1) determining which government employees may possess the ''knowledge'' necessary for a claim to accrue, and (2) identifying the point when those employees obtain the requisite level of ''knowledge'' triggering accrual.

Government Claims for Defective Pricing

The leading case of application of the six-year CDA statute of limitations to a government claim for defective pricing is *McDonnell Douglas Services, Inc.*[41] The government based its claim on alleged defective subcontractor data. The events leading up to the Contracting Officer's Final Decision (''COFD'') were as follows:

October 1996: The subcontractor submitted its proposal, which the Defense Contract Audit Agency (''DCAA'') audited. The subcontractor certified its data on April 25, 1997

May 1, 1997: The subcontract was issued.

May 1, 1997: The prime contract was issued as a letter contract, definitized on October 21, 1997.

October 16, 1997: The prime contractor certified its cost or pricing data.

February 10, 1998: DCAA European Branch office (EBO) initiated a post award audit of the subcontractor.

July 31, 1998: DCAA EBO issued a preliminary audit report addressed to the prime contractor resident DCAA office asserting $3.1 million in subcontractor defective pricing.

September 2, 2000: The subcontractor disputed the bases of the alleged defective pricing.

March 22, 2001: The DCAA EBO issued a final audit report addressed to the prime's DCAA resident audit office. The basis of the audit was essentially unchanged from the preliminary audit. The report noted that DCAA EBO had coordinated with the prime's DCAA resident as well as Air Force procurement personnel ***and the CO***.

May 14, 2002: The prime's resident auditor provided the DCAA EBO audit report to the prime.

June 17, 2002: The prime's resident auditor issued a final report for the Air Force incorporating the DCAA EBO audit and calculating the prime contractor add-ons.

June 3, 2008: The Air Force CO issued a COFD citing the audit reports and assessing $2 million in price reduction.

Based on these facts, the subcontractor argued that all events establishing the alleged liability, and thus sat-

[30] *Todd Pacific Shipyards Corp.*, ASBCA Nos. 55126, 56910, 11-1 BCA ¶ 34,759, at 171,067.

[31] *Environmental Safety Consultants, Inc.*, ASBCA No. 54615, 07-1 BCA ¶ 33,483.

[32] The date of the contract made the FASA statute of limitations applicable. The FASA statute of limitations went into effect on October 1, 1995.

[33] *Environmental Safety Consultants, Inc.*, 07-1 BCA at 165,984.

[34] *Id.* at 165,986.

[35] *Robinson Quality Constructors*, ASBCA No. 55784, 09-1 BCA ¶ 34,048.

[36] *Id.* at 168,396.

[37] *Bannum, Inc. v. Dep't of Justice*, CBCA No. 2696, 12-1 B.C.A. ¶ 34,963.

[38] *Id.* at 171,879.

[39] *Bannum, Inc. v. Dep't of Justice*, CBCA 2686-R, 12-1 B.C.A. ¶ 35,022, at 172,086.

[40] *SeeMcDonnell Douglas Servs., Inc.*, ASBCA No. 56568, 10-1 BCA ¶ 34,325, at 169,528.

[41] *Id.*

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isfying the accrual requirement, occurred more than eight years earlier and that ''the government's underlying theory of liability was set long before 17 June 2002.'' The government argued that: (1) there was an issue of fact as to when the CO knew or should have known of the events that fixed the liability; (2) the government did not know the amount of the liability until late June 2002; (3) the date of receipt of the final audit report, on or around June 17, 2002, was the first date on which accrual could be found.

The ASBCA followed the analysis in *Gray Personnel* by examining ''the legal basis of the claim,'' in this case the elements required to establish defective pricing. Here, the COFD alleged three separate bases for defective pricing. Two of these bases were enumerated in the DCAA EBO report of July 31, 1998. The third basis was contained in the May 3, 2000 DCAA EBO revised audit. Thus, all the claim bases were known to the government more than six years before issuance of the COFD. The ASBCA did not attempt to fix a precise accrual date because all of the possible accrual dates were more than six years before the COFD. Moreover, the injury to the government occurred more than six years before the COFD as well.

While the opinion is not definitive, the ASBCA may have linked ''accrual'' to the state of knowledge of the DCAA auditors. In any case, however, the contracting officer was alerted to the issue in March 2001, more than six years before the COFD was issued.

Government Claims for Title to Plant Equipment

In *American Ordnance, LLC v. United States*,[42] the CO issued a final decision asserting title to a line of ammunition production equipment at the Iowa Ammunition Plant. Mason & Hanger, American Ordnance's predecessor-in-interest, purchased the equipment line and installed it in 1996 and 1997. The government reimbursed the costs as part of the price of ammunition, but not as a separate contract line item. Upon installation of the equipment, Mason & Hanger tagged it as contractor property. The government at all times had access to the contractor's property records and conducted audits of its property control system. In September 2007, the CO issued a decision asserting ownership, and American Ordnance appealed. The Court of Federal Claims viewed the claim as a government claim despite the fact that the contractor initiated the appeal, and held that the government's claim ''accrued not later than October 21, 1997, the date when the contracting officer confirmed that Mason & Hanger had successfully completed the installation of the equipment. By that date, Mason & Hanger had placed property ownership tags on the equipment, and had recorded the equipment on its records . . . .''[43] The court added:

> The *government* had access to Mason & Hanger's and AO's property ownership records for eleven years thereafter and performed annual reviews of their property control system. Between 1996 and 2007, the *government* did not indicate that the Line 3A equipment was tagged improperly, or that the records showing Mason & Hanger and AO ownership were incorrect.[44]

The CO apparently did not have personal access or ability to or review the property control records. Accordingly, it appears that the knowledge of the government's property control personnel was adequate to establish accrual in this instance.

Government Claims Disallowing Costs

Raytheon Co. v. United States[45] involved a government cost disallowance under an advance agreement between the parties. The relevant events were as follows:

1997: Raytheon acquired Hughes Aircraft, assuming with its purchase a tax liability resulting from two Hughes retirement plans from which funds had been improperly distributed. Hughes had entered a Voluntary Compliance Resolution with the IRS to settle its obligation and preserve the plans' tax status. As a result of the improper disbursements of funds, Hughes' government contracts had been under-billed.

August 1999: Raytheon contacted the Defense Contract Management Agency (''DCMA'') to explain the circumstances leading to Hughes' under billing of the government and to request reimbursement for $105.9 million of costs relating to the under billings.

November 1999: Raytheon and the Department of Defense (''DoD'') entered an Advance Agreement on the allowability of Raytheon's costs. The Agreement gave preliminary authorization for $105.9 million of costs, subject to audit.

November 2003: DCAA issued a report on Raytheon's proposed costs to DCMA, concluding that some of the costs were unallowable.

March 2004: DCMA completed its assessment of Raytheon's costs and concluded that $4.75 million of Raytheon's proposed costs was unallowable. Raytheon provided a credit for the disputed costs, as required by the Advance Agreement.

2007: The DoD Inspector General issued an audit report criticizing the first government audit that had found only $4.75 million of unallowable costs.

August 2008: DCAA issued a supplemental report which purported to replace the November 2003 report in its entirety. The second report found that $25 million of Raytheon's proposed costs were unallowable.

December 2008: The CO issued a COFD, asserting a government claim for $25 million of unallowable costs

Raytheon filed suit in the Court of Federal Claims seeking a declaratory judgment that because the COFD was issued outside the six year statute of limitations, it was ''void and of no effect.'' Raytheon argued ''that 1999 was the year in which all events had occurred to establish any cause of action that [the government] might have had against Raytheon.''[46] The government counterclaimed for the $25 million allegedly due under the COFD and for breach of contract. The government argued that its claim could not have accrued until it completed its initial audit in March 2004, because ''[b]efore then, it could not have determined whether Raytheon's costs were unallowable; it did not reach the threshold of 'knowing' that it had a claim against Raytheon.''[47]

The Court of Federal Claims held that ''the government knew or should have known whether any of Raytheon's costs were unallowable after the Advance

[42] *American Ordnance, LLC v. United States*, 83. Fed Cl. 559 (2008).
[43] *Id*. at 562.
[44] *Id.* at 575 (emphasis added).
[45] *Raytheon Co. v. United States*, 2012 WL 1072294 (Fed. Cl. Mar. 22, 2012).
[46] *Id*. at *3.
[47] *Id*.

Agreement was signed in 1999.''[48] The government ''had been aware of all the information on which it based the $25 million government claim for nine years before the contracting officer issued his decision in 2008.'' Accordingly, the government's claim was time-barred.

Government Claims for Excess Reprocurement Costs

In *M.E.S., Inc. v. United States*,[49] ten years after terminating a contract for default, the government assessed $803,909 in reprocurement costs. MES filed suit in the Court of Federal Claims, challenging the assessment of reprocurement costs and seeking over $1 million in damages incurred during contract performance. The government counterclaimed for $803,909 in excess reprocurement costs.

MES contended that the government's claim for excess reprocurement costs accrued when MES was terminated for default on June 2, 1999, and that the government's February 19, 2009 COFD for excess reprocurement costs was barred by the CDA statute of limitations. The government countered that its claim accrued on September 27, 2006, when final payment was made to the reprocurement contractor.

The court first noted that claims for termination for default and claims for excess reprocurement costs were separate and distinct. The court cited *Marley v. United States*, to the effect that ''the point of a separate action for excess reprocurement in contracts governed by the CDA is that it 'relieves the government of the burden of proving market value in a suit for damages for breach of contract.' ''[50] The court explained:

> [T]hese efficiency gains would be lost, and the distinction between the two types of claims would be meaningless, if the excess reprocurement claim accrued at the same time as the termination for default claim. Such a requirement could force the government to prove excess reprocurement costs using market value estimates, the very issue that separating the claim for termination from the claim for excess reprocurement costs seeks to avoid.[51]

Accordingly, the court concluded that the government's claim for excess reprocurement costs accrued when it made final payment to the replacement contractor, and the government's claim was therefore timely.[52]

Government Claims Involving CAS Issues

The Boeing Company[53] involved a government claim of $6.4 million based on a voluntary contractor accounting change. The events giving rise to the claim were as follows:

October 31, 2000: Boeing filed a revised Disclosure Statement documenting an accounting change effective 2001 stemming from the McDonnell Douglas merger in 1997.

January 1, 2001: The accounting change went into effect.

June 14, 2002: DCAA issued a final audit report on the cost impact, concluding there was an increased cost of $7.4 million and all of the cost was incurred in 2001. The increased cost was due to decreased allocations to fixed price contracts. The fixed price contracts were 72 percent Chinook FMS and 28 percent V-22 spares.

September 15, 2003: The CO prepared a pre-negotiation memorandum finding that the accounting change was not ''desirable,'' and proposing to settle the matter with Boeing.

September 17, 2003: The CO sent a letter to Boeing determining the change not to be desirable; confirming an offer to settle the entire matter for $6.9 million; and stating that a unilateral decision would be made if there was no settlement.

December 23, 2003: Boeing sent a letter to the CO disagreeing with the conclusion that any cost impact was owed.

2004-10: Meetings occurred with no resolution.

October 25, 2010: The CO issued a final decision and demanded $6.42 million.

Boeing appealed to the ASBCA asserting the statute of limitations. Addressing the issue, the ASBCA found that the government knew of the events giving rise to its claim more than six years before it filed the COFD. These events were: (1) Boeing's notification of the change; (2) the cost impact submittals; (3) the DCAA audit of cost impact, the report of which the CO received in June 2002; and (4) the CO's September 17, 2003 letter to Boeing. All of these events occurred and were known to the government by September 17, 2003 at the latest.

Although it did not so state explicitly, the board may have linked ''accrual'' to the state of knowledge of the contracting officer.

Lockheed Martin Corporation (''LMC'')[54] involved a government claim for costs relating to LMC's alleged noncompliance with CAS 418, CAS 420, and FAR 31.205-18(a). The government asserted that certain costs claimed as Independent Research and Development (''IR&D'') costs under CAS 420 were unallowable because they were required in the performance of one of LMC's fixed-price contracts. The relevant events were as follows:

March 2001: The Air Force issued a solicitation for an Advanced Targeting Pod system.

April 2001: LMC submitted a proposal for its Sniper XR. LMC's proposal listed ''88D-Sniper XR as an ''ongoing IR&D task that involved 'research and development related to and/or concurrent' with performance of the contract, but which LMC 'consider[ed] not to be required by the contract.'' The IR&D was described as ''company-funded'' or ''LM IRAD fund[ing].''

August 20, 2001: The Air Force and LMC entered into a firm-fixed price contract.

December 31, 2002: DCAA sent a letter to LMC, with a copy to the Divisional Administrative Contracting Officer (''DACO''), summarizing the results of its audit of LMC's Contractor Fiscal Year (''CFY'') 2001 IR&D costs. The DCAA letter stated that LMC's 88D-Sniper XR costs did not appear to be independent IR&D costs under FAR 31.205-18's definition, because the government technical team had determined the research was required for the Sniper XR Contract. DCAA ''recommended a net downward adjustment to LMC's proposed G&A expense pool and an upward adjustment to direct costs and associated indirect costs in the G&A base

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[48] *Id.*

[49] *M.E.S., Inc. v. United States*, 2012 WL 1862359 (Fed. Cl. May 23, 2012).

[50] *Id.* at *17 (citing *Marley v. United States*, 423 F.2d 324, 333 (Ct. Cl. 1970)).

[51] *Id.*

[52] *Id.* at *18.

[53] *The Boeing Company*, ASBCA No. 57490, 12-1 BCA ¶ 34,916.

[54] *Lockheed Martin Corp.*, ASBCA No 57525, 12-1 BCA ¶ 35017.

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pools.'' However, the letter did not assert that the government had been overbilled or paid increased costs.

March 30, 2004: DCAA sent another letter to LMC and the DACO, summarizing its audit of LMC's IR&D costs in CFY 2002. DCAA raised the same contentions addressed in its December 2002 letter, and stated that the allegedly improper IR&D costs should ''be removed from the G&A pool and charged as direct costs to the Sniper firm-fixed price production Contract. . . .'' The letter did not identify overbillings or increased costs paid.

October 14, 2004: LMC responded to the two DCAA letters, disagreeing with the agency's conclusions.

March 25, 2005: DCAA sent a letter to LMC summarizing the results of its CFY 2003 audit and raising the same challenges to LMC's IR&D costs as in its previous letters.

September 2005: DCAA sent its draft audit report to LMC and the DACO, ''contending that LMC was in noncompliance with CAS 420, FAR 31.205-18 and CAS 418. . . and stat[ing] that [LMC's] noncompliance resulted in overbillings to the government.''

February 2, 2007: DCAA issued a final audit report to LMC and the DACO, which reiterated the allegations stated in the draft report.

February 16, 2007: The DACO sent an ''Initial Notice of Noncompliance'' to LMC.

September 12, 2008: The DACO sent a final decision on noncompliance to LMC.

December 8, 2010: The DACO issued a COFD, demanding $29,900,000 plus interest for LMC's noncompliance.

LMC appealed to the ASBCA and filed a motion to dismiss, alleging that the government's claim was timebarred because the COFD was issued more than six years after the claim had accrued. The ASBCA denied the motion, holding that LMC had failed to establish that the government knew or should have known of its claim more than six years before the December 8, 2010 COFD. With regard to the December 2002 DCAA letter, the ASBCA concluded that DCAA's questioning of LMC's IR&D costs ''did not *necessarily* make known to the government any potential monetary CAS claim to recover increased costs because the Sniper contract was a firm fixed price contract.''[55]

Similarly, the ASBCA explained that while the ''DCAA's letters to [LMC] of 31 December 2002 and 30 March 2004 recommended adjustment of certain accounts of appellant—some downwards and some upwards—for CFY 2002 and CFY 2003. . .there were no statements in either letter regarding overbillings to, or overpayments made by the government on government contracts.'' The ASBCA denied the motion to dismiss, concluding preliminarily that DCAA's draft audit report issued in September 2005 first raised the issue of overbillings to the government. The ASBCA thus concluded that the government's claim accrued in September 2005, and the December 2010 COFD was timely. However, the ASBCA stated in a footnote that its conclusion regarding the CDA statute of limitations was ''based on the evidence currently of record,'' and that it was willing to reconsider its decision if additional relevant evidence was presented at the hearing.[56]

Most recently, *Sikorsky Aircraft Corp.*[57] (''Sikorsky'') also involved a government claim for costs arising from Sikorsky's alleged noncompliance with CAS 418. On December 11, 2008, the CO issued a final decision asserting that Sikorsky's accounting practices had misallocated overhead costs and were not CAS compliant from 1999-2005. The decision also asserted that Sikorsky owed the government approximately $80 million as a result of the alleged noncompliance. Sikorsky asserted that the claim was untimely under the CDA six-year statute of limitations, because the government knew of the purported CAS violation in 1999. The government retorted that: 1) the CO and her successors had to follow certain FAR Part 30 procedures before the claim could accrue; and 2) the government did not have ''actual knowledge'' of the violation until October 29, 2004, when the DCAA reported a potential CAS noncompliance following a second audit of Sikorsky.[58]

The Court of Federal Claims held that internal government procedures have no bearing on accrual of a CDA claim.[59] The government may not unilaterally and indefinitely control the running of the statute of limitations through internal procedures or by omitting to request certain CAS-related information.[60] On the second point, the court focused on when the CO knew or reasonably should have known about the potential claim, thus strongly inferring that accrual of a government CAS-related claim must be determined in relation to the knowledge of the CO and not that of the DCAA auditor.[61] The court concluded there were disputes of material fact as to when the CO ''knew'' of the alleged violation for purposes of CDA claim accrual.[62]

Inconsistencies in Court and Board Decisions

The cases on accrual of government claims lack a consistent approach to the key issues that distinguish government claims from contractor claims. A critical question is which government employees may possess the ''knowledge'' necessary for a claim to accrue. Some cases appear to tie accrual to the knowledge of DCAA,[63] while others appear to focus on the knowledge of the CO[64] or other government personnel.[65]

The inconsistencies are even more pronounced regarding when the government obtains the requisite level of ''knowledge'' triggering accrual. The *Raytheon* and *Lockheed Martin* decisions provide the best examples of both ends of the decisional spectrum. In *Raytheon*, the ASBCA determined that the government pos-

[55] *Id*. at 172,065 (emphasis added).
[56] *Id*. at 172,065, n.1.

[57] *Sikorsky Aircraft Corp. v. United States*, COFC Nos. 09-844C & 10-741C, Slip Op. at 1-2 (July 18, 2012).
[58] *Sikorsky*, Slip Op. at 11.
[59] *Sikorsky*, Slip Op. at 16.
[60] *Id*.
[61] *Sikorsky*, Slip Op. at 19.
[62] *Id*. The court did not address a potentially significant problem, i.e., situations where an auditor or other agency withholds relevant information from the CO. If accrual is measured solely by reference to the CO's level of knowledge, and there is no examination of the information possessed by the government, the potential exists that a court or board determining that a claim did not accrue, even though the government was in possession of all of the relevant facts.
[63] *McDonnell Douglas Servs., Inc.*, ASBCA No. 56568, 10-1 BCA ¶ 34,325.
[64] *The Boeing Company*, ASBCA No. 57490, 12-1 BCA ¶ 34,916.
[65] *See American Ordnance, LLC v. United States*, 83 Fed. Cl. 559 (2008).

sessed all of the information needed to determine that certain costs were unallowable when the advance agreement was signed in 1999. The government's years-long delay in auditing the information provided by Raytheon was insufficient to delay accrual of the government's claim. The ASBCA determined that that ''the government knew or should have known whether any of Raytheon's costs were unallowable'' in 1999, and thus ''had been aware of all the information on which it based the $25 million government claim for nine years before the contracting officer issued his decision in 2008.''[66]

By contrast, in *Lockheed Martin* not only did the government possess the information relevant to the government's claim, but DCAA had performed numerous audits over the course of years, repeatedly identifying IR&D costs as improperly allocated, and had ''recommended a net downward adjustment to LMC's proposed G&A expense pool and an upward adjustment to direct costs and associated indirect costs in the G&A base pools.''[67] However, because DCAA's letters did not identify specific overbillings or increased costs paid, the ASBCA reasoned that these statements ''did not *necessarily* make known to the government any potential monetary CAS claim. . . .''[68] Therefore, the ASBCA concluded, the claim did not accrue until the DCAA actually identified overbillings in its September 2005 draft audit report.

There is a serious flaw in the ASBCA's ruling in *Lockheed Martin*. Not only does the holding in *Lockheed Martin* conflict with the holding in *Raytheon*, it also appears to ignore the phrase ''*should have known*'' in the FAR definition of accrual.[69] The ASBCA stated that the DCAA's letters ''did not *necessarily*'' make a claim known to the government. However, the decision neglected to consider whether the information in the government's possession—that the contractor was allegedly improperly allocating IR&D costs to its G&A pool rather than a fixed-price contract—was sufficient that the government ''*should have known*'' of a potential monetary CAS claim.

Most significantly, *Lockheed Martin*, if followed, would suggest that DCAA – an agency woefully behind in issuing audits of incurred direct and indirect costs – could readily sidestep any statute of limitations issue simply by continuing to delay its audits, in effect gutting the statute of limitations and preventing it from being applied to DCAA's audit activities.

Preservation of Government and Contractor Claims. There is only one action the government may take that definitively prevents a claim from being barred by the CDA statute of limitations. It must file a CDA-compliant contracting officer's final decision.[70] This was made clear in *Boeing*, discussed in detail above, where the government argued that the CO's September 17, 2003 non-COFD letter was the appropriate final decision, not the COFD issued in October 2010. The board disposed of this argument, affirming that the government's ''submittal'' of a claim to toll the running of the statute must take the form of a CDA-compliant final decision:

> [T]he 17 September 2003 letter is not a final decision asserting a claim for accounting revision costs. A valid government claim for money due upon a contract must demand a sum certain. . . . . [The CO] made it clear that the [September 17] letter itself was not an appealable final decision, but that one might be coming. 'An expression of intent to submit a claim in some amount at some time in the future is not a claim for purposes of the CDA.[71]

Likewise, it is clear that the only action a contractor may take that will definitively prevent a claim from being time-barred is to file a CDA-compliant claim.[72]

Less clear is whether the government and a contractor may enter an agreement to toll the statute of limitations. Outside of the government contracts arena, tolling by mutual agreement is broadly practiced.[73] The Federal Circuit, moreover, has recognized that the CDA statute of limitations may be *equitably* tolled by a party's misconduct.[74] It would seem logically inconsistent to conclude that the parties to a government contract are prohibited from accomplishing by mutual agreement what one could accomplish by misconduct. However, at least one case has held otherwise. In *Raytheon*, the Court of Federal Claims stated:

> Defendant suggests that the Agreement's provisions anticipating an audit delayed the statute of limitations. The Ad-

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[66] *Raytheon*, 2012 WL 1072294 at *5.

[67] *Lockheed Martin*, 12-1 BCA at 172,063.

[68] *Id*. at 172,065.

[69] FAR 33.201.

[70] Although not discussed in the cases, the government might also attempt self-help by simply ''collecting'' the amount at issue by offset. Such action by the government is the effective equivalent of a COFD from which a contractor may appeal immediately. *See, e.g.*, *Building Services Unlimited, Inc.*, ASBCA No. 33283, 87-3 BCA ¶ 20,135 at 101,929 (finding a unilateral determination made by a contracting officer to reduce the contract price and seek collection of the reduction through three installment payments was a claim by the government for which an appeal could be taken to the board); *Delco Systems Operations, Delco Electronics Corporation*, ASBCA No. 37097, 90-3 BCA ¶ 23,245 at 116,633 (''[appellant could have treated the contracting officer's] unilateral modification, reducing the contract price and demanding payment of the claimed amount, as a contracting officer's decision from which an appeal could be taken.'') Moreover, by taking collection action, the government triggers an independent right in the contractor to file a CDA claim to recover the amount at issue. More problematic is the case where the six years have clearly expired, and then the government collects the amount at issue. If the contractor appeals the collection, it would seem that the board has jurisdiction. May the government then justify its collection based on the facts and events occurring more than six years earlier? No case law exists on this point.

[71] *Boeing*, 12-1 BCA at 171,673.

[72] *Environmental Safety Consultants, Inc.*, 97 Fed. Cl. at 201-02.

[73] *See, e.g., United States v. Inn Foods, Inc.*, 383 F.3d 1319 (Fed. Cir. 2004) (Upholding an agreement to waive the statute of limitations between importer and the government for a period of two years); *United States v. Gulf Puerto Rico Lines, Inc.*, 492 F.2d 1249 (1st Cir. 1974) (Upholding an agreement between the contractor and the government to toll a one-year time limitation under the Carriage of Goods by Sea Act for bringing an action to recover for damage to goods during shipment.); *Derrickson v. Circuit City Stores, Inc.*, 84 F. Supp. 2d 679. 685 (D. Maryland 2000) (citing cases involving agreements to toll the applicable statute of limitations and stating that ''[a]greements to toll applicable statutes of limitations are not unusual and are generally upheld'').

[74] *Arctic Slope Native Ass'n v. Sibelius*, 583 F.3d 785 (Fed. Cir. 2009), cert. denied 130 S. Ct. 3503 (2010); *compare to United States v. John R. Sand & Gravel Co.*, 128 S. Ct 750 (2008) (holding that the Tucker Act statute of limitations, 28 U.S.C. § 2501, barred *both* tolling by mutual agreement and equitable tolling).

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> vance Agreement could not postpone accrual of the claim, however. Contracting parties cannot establish a statute of limitations longer than that set forth in the Contract Disputes Act, where the government is a party. *See* 48 C.F.R. § 33.206(b) (''The contracting officer shall issue a written decision on any government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties agree to a shorter time period.''). Thus, parties may set an (sic) shorter limitations period, but not a longer one.[75]

Therefore, while there remains some support for the assertion that parties may toll the CDA statute of limitations by mutual agreement, there is no guarantee that the courts or boards would enforce such an agreement. Accordingly, parties to a government contract should be aware that the only guaranteed method for preventing a claim from being barred by the CDA statute of limitations is to submit a CDA-compliant certified claim or COFD within the limitations period.

The Legal Effect of Filing a Claim Out of Time. In *Boeing*, the ASBCA considered the proper disposition of a claim filed by the government more than six years after its accrual. Specifically, the ASBCA questioned whether the six-year statute of limitations was ''a condition of our jurisdiction'' mandating dismissal for lack of jurisdiction; or whether the government's failure to file on time was ''more like a substantive condition on the government's claim or an affirmative defense to it,'' so that the proper disposition would be to sustain Boeing's appeal.[76] Citing *Arctic Slope Native Association v. Sibelius,* which addressed a contractor claim, the ASBCA determined that ''the timely submission of a claim to a contracting officer is a necessary predicate to the exercise of jurisdiction . . . over a contract dispute governed by the CDA,'' and that the same rule applied to government claims.[77] After a lengthy discussion, the ASBCA concluded:

> Because the government's 25 October 2010 final decision claiming the accounting revision costs was untimely, it is not valid. Given that it is invalid, it is a nullity and we lack jurisdiction to entertain an appeal from it. Accordingly, we dismiss the appeal for lack of jurisdiction.[78]

To the same effect is *Gray Personnel, Inc.*, which concluded that § 7103 of the CDA defines the jurisdictional requirements for a CDA appeal, one of which is the six-year statute of limitations added by FASA, and thus that ''the requirement that a claim be submitted within six years after its accrual, like the other requirements in that section, is jurisdictional.''[79]

Sidestepping the Statute of Limitations: Equitable Tolling. Equitable tolling of a statute of limitations ''addresses instances of unfairness where misconduct by a party is evident; it requires a showing of compelling justification amounting to misconduct.''[80] In *Arctic Slope*, the Federal Circuit held that equitable tolling applies to the CDA statute of limitations, and remanded to the CBCA to consider whether the facts merited the application of equitable tolling.[81] On remand, the CBCA declined to apply equitable tolling. The contractor based its claim of equitable tolling on statements made and litigation positions taken by the government in other related cases. The board held that none of these amounted to government misconduct:

> The very nature of litigation assumes that the agency and the plaintiffs disagree on a point of law. If the fact that the agency expresses a position which turns out to be incorrect is a warrant for tolling, the limitations period would be suspended indefinitely . . . . ASNA has not established any conduct of its adversary that caused it to miss the statutory deadlines applicable to its claims. Mistakes in judgment, whether based upon erroneous legal advice from counsel or upon a poor litigation strategy, do not protect the tribe from the consequences of its own actions.[82]

In *Boeing*, the board described the standards to establish equitable tolling. The party claiming tolling must have been ''induced or tricked by its adversary's misconduct into permitting a filing deadline to pass.''[83] The ''mere continuation of negotiations is not a ground for tolling.''[84] The government argued that Boeing had: (1) after some delay taken issue with the CO's position in her settlement offer letter although Boeing could have raised the issues earlier; (2) initially agreed with the existence of cost impact on fixed price contracts, but then reversed position; (3) led the CO to believe that the issue was on the verge of settling; (4) belatedly introduced new issues and then delayed in supporting them; (5) played the CO along and induced her to allow the limitations period to expire; and (6) breached its common law duty not to hinder or delay the government in performance.[85]

The board found these asserted Boeing actions and inactions insufficient to invoke tolling. Nothing in unexpectedly raising new issues, disputing the CO's position, or participating in protracted negotiations constituted ''misconduct.'' Boeing did nothing to induce the CO not to protect the government's rights by a timely filing, or to lead the CO to believe that a final decision would not be necessary.[86] Instead, it was the government's own lack of diligence that caused it to miss the deadline.[87]

Similarly, in *TMS Envirocon, Inc.*,[88] TMS argued that the statute of limitations should be equitably tolled because the contracting officer had encouraged the contractor to wait until contract performance was completed before submitting its claim. However, the board noted that contract performance was completed on November 6, 2004, and while TMS submitted a number of

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[75] *Raytheon*, 2012 WL 1072294 at *3, n.4.
[76] *Boeing*, 12-1 BCA at 171,674.
[77] *Boeing*, 12-1 BCA at 171,674 (quoting *Arctic Slope*, 583 F.3d at 793).
[78] *Id*. at 171,680.
[79] *Gray Personnel, Inc*., 06-2 BCA at 165,475; *see also McDonnell Douglas Services, Inc.*, 10-1 BCA at 169,529 (where there is no valid CO decision, the board dismisses without prejudice for lack of jurisdiction); *Environmental Safety Consultants*, 07-1 BCA at 165,983 (''the requirement that a claim be submitted within six years after its accrual . . . is jurisdictional'').
[80] *Raytheon*, 2012 WL 1072294 at *4.
[81] *Arctic Slope*, 583 F.2d at 798-800.
[82] *Arctic Slope Native Ass'n, Ltd. v. Dep't of Health and Human Servs.*, CBCA Nos. 1953-1958, 11-2 BCA ¶ 34,778, at 171,153 (internal quotations omitted).
[83] *Boeing*, 12-1 BCA at 171,673.
[84] *Id*. at 171,674.
[85] *Id*. at 171,673.
[86] *Id*. at 171,673-674.
[87] To the same effect analyzing equitable tolling based on government actions, *seeEnvironmental Safety Consultants, Inc.*, 97 Fed. Cl. at 201-02.
[88] *TMS Envirocon, Inc.*, ASBCA No. 57286 (June 18, 2012).

REAs, it did not convert the REAs into a CDA claim until March 30, 2010. Accordingly, the board concluded that ''TMS did not miss the statutory deadline because the government tricked it into waiting until contract performance was complete. Rather, TMS failed to act diligently in preserving its contract claim rights.''[89]

Conclusion The CDA statute of limitations is a double-edged sword. While it can serve as a powerful weapon in the defense of a claim, it can also wield a devastating blow that prevents an otherwise meritorious claim from being considered by a court or board. The case law on accrual is unsettled, and parties to government contracts should be alert to events that could potentially trigger accrual of a claim. Furthermore, only in exceptionally rare circumstances will a claim be permitted to proceed after the statute of limitations has expired. The sure solution is for parties to preserve their claims by promptly submitting a CDA-compliant claim or contracting officer's final decision.

[89] *Id.*

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