

UNTIMELY CLAIMS: EQUITABLE TOLLING OR EXCUSABLE NEGLIGENCE?

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A recent Armed Services Board Case gave some insight on the 6-year statute of limitations for filing claims under the Contract Disputes Act (“CDA”), explaining the circumstances under which equitable tolling could operate to extend the 6 years. Unfortunately, it did not apply to the appellant in this case. *Khenj Logistics Group*, ASBCA No. 61178, Feb. 15, 2018.

Khenj was awarded a construction contract by the Army for barracks, bunkers and support buildings in Afghanistan in May 2009. When the facility location changed, the Army terminated the contract for convenience, and subsequently agreed to pay Khenj the cost of its Defense Base Act insurance and the cost of its materials. When Khenj soon thereafter (June 2009) attempted to contact the contracting officer by phone and in person to obtain payment, it was unable to reach him. There was no evidence in the record that Khenj further attempted to contact the contracting officer, but the Army paid the insurance cost to Khenj in October 2009. On March 6, 2017, Khenj submitted a claim to the contracting office and sought the cost of its materials procured prior to the termination (\$2.2 million). The contracting officer denied the claim.

At the Board, the Army maintained that the claim was barred by the statute of limitations in the CDA, which states:

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 the a contract shall be submitted within 6 years after the accrual of the claim.

41 U.S.C. § 7103(a)(4)(A). Although the Army asserted that the claim accrued on the date when the contracting officer promised to promptly process the invoice (June 27, 2009), the Board held that the claim actually accrued on the last date of government payment activity, which took place in October 2009. The six year CDA limitation period therefore ended October 21, 2016.

The Board next considered the possibility of equitable tolling, noting that this applies to the 6-year CDA time limitation. The CDA’s six-year limitation upon submittal of a claim may be equitably tolled when a litigant:

- (1) Has been pursuing his rights diligently; and
- (2) Some extraordinary external circumstance “stood in his way and prevented timely filing.”

Menominee Indian Tribe of Wisconsin v. United States, 136 S. Ct. 750, 755 (2016) quoting *Holland v. Florida*, 560 U.S. 631 (2010).

Unfortunately for Khenj, it did not identify any action it took to pursue its claim between October 2009 and March 2017. Nor did it identify any circumstance that stood in its way or impaired its ability to submit a claim. Thus, Khenj could not demonstrate either of the two elements of equitable tolling.

The Board called Khenj's claim a "garden variety claim of excusable neglect" for which equitable tolling provides no relief. The Board granted summary judgment to the Army and dismissed the case.

The takeaway: Contractors must adhere scrupulously to the 6 year CDA statute of limitations. If a claim cannot be submitted within that period, and you seek to have it equitably tolled, pursue your rights diligently (frequently letters or email to the contracting officer), and also explain what extraordinary external circumstances made it impossible for you to make a timely claim.

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