

## WHEN DOES A CLAIM ACCRUE WHEN THERE IS AN ADMINISTRATIVE APPEAL?

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When does a claim accrue for a tax or duty imposed after award by a foreign government? And what happens if the contractor appeals the tax or duty? Does accrual occur when the tax or duty was first imposed, or after the administrative appeal is resolved. The answer is in *Triple Canopy, Inc. v. Sec’y of the Air Force*, No. 2020-2165, (Fed. Cir. Sept. 29, 2021).

Triple Canopy was a private security company that had six U.S. contracts for security services in Afghanistan. The contracts were fixed price and all required Triple Canopy to comply with local law, and incorporated Federal Acquisition Regulation (“FAR”) 52.229-6, Taxes-Foreign Fixed Price Contracts (the “Foreign Tax Clause), which stated:

[T]he contract price shall be increased by the amount of any after-imposed tax or of any tax or duty specifically excluded from the contract price by a provision of this contract that the Contractor is required to pay or bear, including any interest or penalty, if the Contractor states in writing that the contract price does not include any contingency for such tax and if liability for such tax, interest, or penalty was not incurred through the Contractor’s fault, negligence, or failure to follow instructions of the Contracting Officer or to comply with the provisions of paragraph (i) below.

....

The Contractor shall take all reasonable action to obtain exemption from or refund of any taxes or duties, including interest or penalty, from which the United States Government, the Contractor, any subcontractor, or the transactions or property covered by this contract are exempt under the laws of the country concerned or its political subdivisions or which the governments of the United States and of the country concerned have agreed shall not be applicable to expenditures in such country by or on behalf of the United States.

FAR 52.229-6(d)(1), -6(i)

In February 2008, the Afghan government issued a directive limiting the number of personnel in each Security company to 500. On August 13, 2010, the Air Force contracting officer sent a letter to the Afghan government requesting an exemption from the 500 person limit. On March 15, 2011, the Afghan government imposed a sum for each person over the 500 person cap, and on March 24, 2011, the Afghan government assessed Triple Canopy a penalty of \$879,648. (The parties agreed that this penalty was subject to the Foreign Tax clause). However, the Afghan government informed Triple Canopy that it could object to the assessment and provide its reasoning in writing within two weeks. Triple Canopy formally appealed the Assessment on April 8, 2011, and on April 21, 2011, informed its contracting officer that it would submit a request for equitable adjustment if its appeal of the assessment was denied. On July 6, 2011, the

Afghan government sent a letter to Triple Canopy adjusting the total penalty downward to \$430,995, and soon thereafter, Triple Canopy paid the assessment. On June 6, 2017, within six years of the revised assessment and the payment, Triple Canopy submitted claims on all six contracts for reimbursement under the Foreign Tax clause. The contracting officer and the Armed Services Board denied the claims, asserting that the claims had not been submitted to the contracting officer within six years of the date they accrued (as required by the Contract Disputes Act (“CDA”)), but rather had accrued earlier, when the Afghan Government first assessed them (March 24, 2011), more than six years before the claims were submitted.

The Court stated that “when a CDA claim accrued is determined in accordance with the FAR, the conditions of the contract, and the facts of the particular case.” The Court held that these considerations compelled the conclusion that Triple Canopy’s claim did not accrue until its appeal of the Afghan government assessments was resolved on July 6, 2011. Triple Canopy was required to “take all reasonable action” to obtain exemption from the assessment according to paragraph (i) of the Foreign Tax assessment—and this included making the appeal to Afghanistan. Therefore, the accrual date was July 6, 2011 and Triple Canopy’s claim was within the 6 year statute of limitations.

Takeaway. Where a contractor takes all reasonable action to obtain exemption from an after award tax or fee, this includes appealing the assessment if possible. The statute of limitations on any claim will not begin until the appeal is settled.

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