



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR PARTIAL DISMISSAL DENIED:
May 12, 2015

CBCA 4068

SYSTEMS MANAGEMENT AND RESEARCH
TECHNOLOGIES CORPORATION,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Lorenzo F. Exposito, Washington, DC, counsel for Appellant.

James J. Jurich and Charmaine A. Howson, Office of General Counsel, Department of Energy, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **KULLBERG**, and **LESTER**.

LESTER, Board Judge.

Respondent, the Department of Energy (DOE), has filed a motion to dismiss, as time-barred, a portion of the claim that appellant, Systems Management and Research Technologies Corporation (SMARTECH), submitted to the contracting officer in March 2014. In its claim, SMARTECH seeks payment of \$788,303.29, most of which relates to unpaid fixed fees to which it asserts it is entitled under its contract. DOE asserts that, because services under the contract were performed on an annual or bi-annual basis between 2004 and 2008 and because the fixed fees were tied to each year's or half-year's contract work, SMARTECH's 2014 claim for fixed fees earned from 2004 through 2007 was

untimely because it was not submitted within six years of the date upon which the fees claim accrued, as required by the Contract Disputes Act (CDA), 41 U.S.C. § 7103(a)(4)(A) (2012). For the reasons set forth below, we deny the motion.

Background

The following factual allegations are taken from SMARTECH's complaint, supplemented with information from the contract to which SMARTECH repeatedly cites in its complaint.

On September 30, 2003, DOE awarded SMARTECH an undefinitized time-and-materials (T&M) letter contract, no. DE-AC01-03S020138, for technical support in the review of classified and unclassified-but-sensitive documents for the Office of Classified and Controlled Information Review. Complaint ¶¶ 1, 7, 17. The contract was definitized by the parties on March 17, 2005 (after SMARTECH had already begun performance of the first base year of the contract), pursuant to modification no. A006. *Id.* ¶ 7. Consistent with the nature of a T&M contract, DOE was to issue specific work/task orders, or “task assignments,” to SMARTECH during the contract period identifying the specific tasks that SMARTECH was to accomplish and for which it would be paid at an hourly labor rate. Exhibit 8 at 13, 32 (contract clauses C.4.0 and H.8);¹ *see* 48 CFR 16.601(b) (2014) (discussing T&M contracts).

As definitized, the contract had a base period of twenty-four months, plus four option periods totaling an additional thirty-six months. As set forth in modification no. A006, option periods one and two were for six months each, and option periods three and four were each for twelve months. Complaint ¶ 8.

SMARTECH alleges that, “[u]nlike a typical T&M contract, which would call for the capture of ‘fee’ as part of the burdened hourly rates, the Contract set out fixed and partially burdened hourly rates for direct labor and separate and stand-alone ‘fixed fee’ terms by contract/option period.” Complaint ¶ 9. Specifically, the contract, as definitized and subsequently modified, set out a “Fixed Fee” in the first base year of \$368,153 (a period running from September 30, 2003, to September 29, 2004);² in the second base year of

¹ All exhibits referenced in this decision are found in the appeal file, unless otherwise noted, and are cited in SMARTECH's complaint.

² SMARTECH has represented that, because the contract was definitized after SMARTECH had completed the first base year of work, there is no unpaid fee issue in this

\$718,779 (running from September 30, 2004, to September 29, 2005); in option period one of \$231,596 (running from September 30, 2005, to March 29, 2006); in option period two of \$231,596 (March 30, 2006, to September 30, 2006); in option period three of \$366,019 (October 1, 2006, to September 30, 2007); and in option period four of \$367,422 (October 1, 2007, to September 29, 2008). *Id.* ¶¶ 12, 29. SMARTECH alleges that the “Fixed Fee” provisions “were not in any way qualified and were clearly independent from the otherwise burdened hourly labor rates and other elements of contractor compensation.” *Id.* ¶ 13. It asserts that its entitlement to a stand-alone “fixed fee,” in addition to payment for direct costs charged at hourly rates, is “consistent with DOE’s intent as expressed in its [Request for Proposals],” in which DOE is alleged to have stated that “[a] single, fixed rate, fixed fee, level of effort, task assignment, term type contract, with performance incentives is contemplated,” but with DOE “reserv[ing] the right to award any type of contract deemed appropriate.” *Id.* ¶ 10 (citing Exhibit 1 at 1). SMARTECH cites to the “Fixed Fee” clause incorporated by reference into its contract from Federal Acquisition Regulation (FAR) 52.216-8 (Mar 1997), which provides that “[t]he Government shall pay the contractor the fixed fee specified in the Schedule.” *Id.* ¶ 14 (quoting 48 CFR 52.216-8 (2003)).

The contract also incorporated by reference the contract clause at FAR 52.232-7, “Payment under Time-and-Materials and Labor Hour Contracts (Feb 2002),” *see* Exhibit 8 at 47, which provided that “[t]he Government will pay the Contractor as follows upon the submission of invoices or vouchers approved by the Contracting Officer:” (a) the hourly rate for direct labor, including “wages, indirect costs, general and administrative expenses and profit,” and (b) “the total cost to the Government for the performance of this contract.” 48 CFR 52.232-7. Clause H.14, titled “Payment (Jul 1991),” provided that the Government would make payments pursuant to the clause at FAR 52.232-7.

The contract’s billing instructions, set forth in clause G.2, outlined the procedure by which SMARTECH was to submit invoices under the payment provisions of the contract. Complaint ¶ 22; Exhibit 8 at 26-27. Those billing instructions did not explicitly identify a deadline by which SMARTECH was to submit invoices. Complaint ¶¶ 22, 26. SMARTECH invoiced DOE using a DOE-provided sample form, which SMARTECH alleges DOE instructed it to follow. *Id.* ¶ 22. The sample invoice form called for the invoicing of fee amounts at a percentage of the costs charged through each invoice, rather than at the full amount of the fee. *Id.* SMARTECH alleges that, in reliance on the DOE-supplied form, it did not contemporaneously invoice all of the fixed fee amounts due under the contract. *Id.*

appeal relating to the first base year. Complaint ¶ 23.

SMARTTECH further alleges that “neither the Contract nor the invoicing instructions provided by DOE required that any remaining fee would or should be invoiced by contract year.” Complaint ¶ 26. Instead, the DOE billing instructions suggested that any portions of the fixed fees not previously billed “could appropriately be invoiced as part of a final voucher ‘upon completion, termination, or expiration’ of the Contract.” *Id.* (quoting Exhibit 72 at 10). SMARTTECH alleges that, pursuant to clause H.9(a) of the contract, the “term” of the contract was “defined as the total contract period, including all exercised options.” *Id.* ¶ 20 (quoting Exhibit 8 at 33) (emphasis in appellant’s complaint). It asserts that it performed work under the contract “from the onset of performance [in 2003] until March 31, 2008.” *Id.* ¶ 21.

On March 6, 2008, DOE advised SMARTTECH by letter that it had awarded a new contract for document review services to another entity, that DOE did not expect to issue further work to SMARTTECH, and that SMARTTECH should take all necessary steps to complete phase-out of the contract by March 31, 2008. Complaint ¶ 32. Nevertheless, although DOE did not subsequently assign SMARTTECH any additional tasks under the contract, DOE never terminated it, and the contract expired by its own terms on September 29, 2008. *Id.* ¶¶ 39, 40.

Two years later, on September 29, 2010, SMARTTECH submitted a request for equitable adjustment (REA) in the amount of \$1,268,270.74, which accompanied SMARTTECH’s final release. Complaint ¶ 41. In that REA, SMARTTECH, for the first time, sought payment of the unpaid portions of its fixed fees under the contract. *Id.* ¶ 42. On May 18, 2011, the contracting officer for the first time indicated that DOE would not pay the remaining unpaid fixed fees. *Id.* ¶ 43.

On March 28, 2014, SMARTTECH submitted a certified claim for \$788,303.29 alleging entitlement to additional payment under the contract as follows: (1) unpaid fixed fees totaling \$722,236.79; (2) reimbursement for private office space in the amount of \$8436.61; (3) interest on unpaid fixed fees of \$54,602.94; and (4) interest on withheld retainage of \$3026.95.

On May 22, 2014, the contracting officer issued a decision denying SMARTTECH’s claim in its entirety, a decision that SMARTTECH appealed to this Board. In its answer to SMARTTECH’s complaint, DOE asserted the CDA six-year statute of limitations as an affirmative defense. DOE’s motion to dismiss SMARTTECH’s claim for fixed fees for all years other than option year four is now pending.

Discussion

I. The Post-*Sikorsky* Standard of Review

The CDA provides that “[e]ach claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim.” 41 U.S.C. § 7103(a)(4)(A); *see* 48 CFR 33.206(a) (implementing CDA limitations period). Although Congress enacted the CDA in 1978, it did not add this six-year limitations period for submitting a claim until 1994, when it enacted the Federal Acquisition Streamlining Act (FASA). “Prior to 1994, no statute of limitations applied to the presentment of claims to the contracting officer.” *Arctic Slope Native Association, Ltd. v. Sebelius*, 699 F.3d 1289, 1295 (Fed. Cir. 2012).

Applying its long-standing view of the CDA as “a statute waiving sovereign immunity, which must be strictly construed,” *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982), the Court of Appeals for the Federal Circuit originally interpreted this six-year limitations period to be jurisdictional. *See, e.g., Systems Development Corp. v. McHugh*, 658 F.3d 1341, 1345 (Fed. Cir. 2011); *Arctic Slope Native Association, Ltd. v. Sebelius*, 583 F.3d 785, 792-93 (Fed. Cir. 2009). Accordingly, as it would with any jurisdictional question, a tribunal faced with a challenge to the timeliness of a contractor’s CDA claim submission would have to accept as true any undisputed allegations of fact made by the non-moving party, but could consider relevant evidence to resolve any disputes over jurisdictional facts. *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 747 (Fed. Cir. 1988). Ultimately, the party seeking to invoke the tribunal’s jurisdiction would have to establish by a preponderance of the evidence the factual predicate for jurisdiction. *Id.* at 748; *CB&I Federal Services LLC v. Department of Homeland Security*, CBCA 3112, et al., 14-1 BCA ¶ 35,550, at 174,209.

The Federal Circuit recently changed this framework in *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315 (Fed. Cir. 2014), after holding that the Supreme Court, in *Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817 (2013), had effectively overruled the Federal Circuit’s prior decisions as to the jurisdictional nature of the CDA’s six-year limitations period. *Sikorsky*, 773 F.3d at 1320-21. Reconsidering the jurisdictional issue in light of *Auburn Regional*, the Federal Circuit determined that “§ 7103 ‘does not speak in jurisdictional terms’ or refer in any way to . . . jurisdiction,” *id.* at 1321 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)), and does “not suggest, much less provide clear evidence, that the provision was meant to carry jurisdictional consequences.” *Id.* (quoting *Henderson v. Shinseki*, 562 U.S. 428 (2011)). It therefore “conclude[d] that § 7103 is not jurisdictional.” *Id.* at 1322.

Although “prior decisions of a panel of the [Federal Circuit] are binding precedent on subsequent panels unless and until overturned *in banc*,” *Newell Cos. v. Kenney Manufacturing Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988), “[i]t is established that a later panel can recognize that the court’s earlier decision has been implicitly overruled as inconsistent with intervening Supreme Court authority.” *Troy v. Samson Manufacturing Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014). Given the *Sikorsky* panel’s finding that the Supreme Court had “effectively overruled” the Federal Circuit’s prior decisions finding the CDA limitations period to be jurisdictional, *Sikorsky*, 773 F.3d at 1320-21, the *Sikorsky* panel’s decision is plainly binding upon us. See *Combat Support Associates*, ASBCA 58945, slip op. at 1-2 (Mar. 16, 2015) (vacating prior jurisdictional dismissal order in light of *Sikorsky*).³

The transformation of the CDA’s six-year statute of limitations from jurisdictional to non-jurisdictional changes how we must approach a motion to dismiss a case for failure to meet that deadline. No longer can the Government, through a motion to dismiss, challenge the factual allegations that the contractor has made in its complaint and require the contractor to prove jurisdictional facts by a preponderance of the evidence. Instead, the CDA’s six-year statute of limitations is now an affirmative defense that the Government must plead in its answer to the appellant’s complaint. See Fed. R. Civ. P. 8(c)(1) (identifying “statute of limitations” as affirmative defense); CBCA Rule 6(c), 48 CFR 6101.6(c) (requiring respondent to plead affirmative defenses in answer). “[F]ailure to plead an affirmative defense . . . in a timely fashion generally results in the waiver of that defense.” *Rock Creek Associates K Limited Partnership v. General Services Administration*, GSBCA 11333, 93-1

³ After *Sikorsky*, the Supreme Court issued another decision, *United States v. Wong*, Nos. 13-1074, et al., 2015 WL 1808750 (U.S. Apr. 22, 2015), in which it expanded upon the ruling that the panel in *Sikorsky* cited. The Supreme Court, in deciding that the statute of limitations in the Federal Tort Claims Act, 28 U.S.C. § 2401(b), is non-jurisdictional, held that “the Government must clear a high bar to establish that a statute of limitations is jurisdictional.” *Wong*, 2015 WL 1808750, at *5. Consistent with the Federal Circuit’s discussion in *Sikorsky*, the Supreme Court stated that, “[i]n recent years, we have repeatedly held that procedural rules, including time bars, cabin a court’s power only if Congress has ‘clearly state[d]’ as much.” *Id.* (quoting *Auburn Regional*, 133 S. Ct. at 824 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006))). “[A]bsent such a clear statement,” the Supreme Court held, “courts should treat the restriction as nonjurisdictional.” *Id.* (quoting *Auburn Regional*, 133 S. Ct. at 824 (quoting *Arbaugh*, 546 U.S. at 516)). “[W]e have made plain,” the Court indicated, “that most time bars are nonjurisdictional.” *Id.* To the extent that the *Sikorsky* panel’s reliance upon *Auburn Regional* as the basis for overturning the prior panel decisions in *Systems Development* and *Arctic Slope* raised any concerns, the *Wong* decision provides no basis for questioning the result in *Sikorsky*.

BCA ¶ 25,351, at 126,271 (1992). In addition, the burden is on the Government, not the appellant, to prove its affirmative defense that the contractor's claim is time-barred. *See Shell Oil Co. v. United States*, 751 F.3d 1282, 1297 (Fed. Cir. 2014) (“defendant has the burden of pleading and proving any affirmative defense that legally excuses performance”); *Lynchval Systems Worldwide, Inc. v. Pension Benefit Guaranty Corp.*, CBCA 3466, 14-1 BCA ¶ 35,792, at 175,068 (party asserting affirmative defense bears burden of proving it). Further, because the statute of limitations issue is no longer jurisdictional, the party seeking to enforce the limitations period must do so using the same procedural rules that the Board applies to other non-jurisdictional issues: motions for failure to state a claim, summary relief procedures, and, if there are genuine issues of material fact relating to the statute of limitations issue, a hearing or record submission to resolve competing versions of the facts.

Here, the agency seeks to dismiss SMARTTECH's appeal for failure to state a claim. In considering any such motion, “we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant.” *Kiewit-Turner, a Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 14-1 BCA ¶ 35,705, at 174,847 (quoting *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991))). “If the allegations” in the complaint “show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim.” *Jones v. Bock*, 549 U.S. 199, 215 (2007). Nevertheless, “[d]ismissal for failure to state a claim should not be granted unless it appears beyond doubt that the appellant cannot prove any set of facts in support of its claim that would entitle it to relief.” *Kiewit-Turner*, 14-1 BCA at 174,847 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

The Federal Circuit has recognized (in considering another non-jurisdictional statute of limitations) that “plaintiff[s] [are] not required to negate an affirmative defense in [their] complaint.” *ABB Turbo Systems AG v. Turbousa, Inc.*, 774 F.3d 979, 985 (Fed. Cir. 2014) (quoting *La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 845-46 (11th Cir. 2004) (brackets in original)); *see* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357, at 708-10 (3d ed. 2004) (“the complaint is also subject to dismissal under Rule 12(b)(6) when its allegations indicate the existence of an affirmative defense that will bar the award of any remedy, but for this to occur, the applicability of the defense has to be clearly indicated and must appear on the face of the pleading to be used as the basis for the motion”). “Dismissal at the pleading stage on statute-of-limitations grounds,” the Federal Circuit has said, “ordinarily is improper unless it is ‘apparent from the face of the complaint that the case is time-barred.’” *ABB Turbo*, 774 F.3d at 985 (quoting *La Grasta*, 358 F.3d at 845-46). *But see* 5B Charles Alan Wright & Arthur R. Miller, *supra*, § 1357, at 714 (“A complaint showing that the governing statute of limitations has run on the plaintiff's claim

for relief is the most common situation in which the affirmative defense appears on the face of the pleading and provides a basis for a motion to dismiss under Rule 12(b)(6).”).

In its motion, the agency does not cite to SMARTECH’s complaint, but instead focuses exclusively upon, and cites to, provisions of the contract between DOE and SMARTECH. That omission does not necessarily defeat the agency’s motion. In considering a motion to dismiss for failure to state a claim, “materials attached to a complaint may be considered as exhibits that are part of the complaint for determining the sufficiency of the pleadings.” *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334, 1342 n.4 (Fed. Cir. 2006); see Fed. R. Civ. P. 10(c) (“A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.”). In addition, a tribunal “must consider . . . documents incorporated into the complaint by reference, and matters of which a [tribunal] may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). “Even where a document is not incorporated by reference, the [tribunal] may nevertheless consider it where the complaint ‘relies heavily upon its terms and effect,’ which renders the document ‘integral’ to the complaint.” *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (quoting *International Audiotext Network, Inc. v. American Telephone & Telegraph Co.*, 62 F.3d 69, 72 (2d Cir. 1995)); see *Perry v. New England Business Service, Inc.*, 347 F.3d 343, 345 n.2 (1st Cir. 2003); *Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). Here, although SMARTECH did not attach the contract to its complaint, it repeatedly cites to, quotes from, and relies upon the contract in its complaint, rendering it integral to the complaint. Accordingly, we can look to the terms of the contract in considering the agency’s motion to dismiss without converting it into one for summary relief.

II. Whether Any of SMARTECH’s Claims are Time-Barred

A claim against the United States first accrues on “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.” 48 CFR 33.201. “Therefore, where a claim is based upon a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract.” *Oceanic Steamship Co. v. United States*, 165 Ct. Cl. 217, 225 (1964).

DOE contends that SMARTECH’s claims accrued under the terms of the contract at the end of each annual or bi-annual performance period and that, because five of the six performance periods at issue in this appeal ended more than six years before SMARTECH’s claim submission, SMARTECH’s appeal for those five periods – those for the second base year and the first three option periods – is untimely. There is some historical support for DOE’s position. In *Nager Electric Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966),

in which the Court of Claims considered accrual under the statute of limitations applicable to the Tucker Act, now located at 28 U.S.C. § 2501 (2012), the Court recognized that, as a general rule, a claim accrues as soon as services are performed or goods are delivered, which is the point at which the contractor can demand payment from the Government:

For contract cases, in the era before use of “disputes” clauses (or like devices for administrative determination), the general principle was . . . that normally the cause of action first accrues, and the statute begins to run, when the work is completed or the items delivered (and accepted), or the services rendered, or (if the contract was never completed) when the breach became total. That was considered to be the time when the contractor could ordinarily demand his money and bring his suit if payment was not made. Voluntary efforts thereafter to obtain compensation through executive channels or by negotiation would not defer or toll limitations.

Id. at 851-52; *see Battelle v. United States*, 7 Ct. Cl. 297, 300-301 (1871) (“We think the claim ‘*first accrued*,’ in the language and meaning of the statute, when the right to demand the price for the property sold first vested in the petitioner,” since “[t]he purpose of a statute of limitation requires that it should not leave the time at which it is to attach at the control of the creditor”). Under that general rule, a claim can accrue before the contractor ever submits an invoice to the Government. Nevertheless, the Court of Claims in *Nager Electric* further “recognized that this is not a rigid rule – that, in the contract field as in others, a particular agreement, or a special statute, can establish some other pre-condition for liability or an unusual time for demanding payment.” *Nager Electric*, 368 F.2d at 852. Accordingly, although identifying what it viewed a general rule for accrual, the Court of Claims determined that, because of the variety of circumstances applicable to and contract terms used in government contracts, “there is no single inexorable principle of limitations for contract litigation.” *Id.* Instead, to determine an accrual date, “the individual terms, conditions, and practices must always be studied.” *Id.* at 852-53.

If, as the Government seems to suggest here, Congress had “intended definitely to fix the time when the claim should accrue in every case, [the statute creating the limitations period] would simply have provided that every suit should be commenced [or, as relevant here, every claim should be submitted] within six years after the service was rendered or the articles called for were furnished.” *Manufacturers Aircraft Association, Inc. v. United States*, 77 Ct. Cl. 481, 523 (1933) (considering statute of limitations language in Tucker Act). The general rule in *Nager Electric* only applies “[w]here . . . a call for performance” – for example, an invoice requesting payment – “is not an essential element of the cause of action.” *Nyhus v. Travel Management Corp.*, 466 F.2d 440, 453 (D.C. Cir. 1972), *cited in Hurst v. United States*, 220 Ct. Cl. 616, 617 (1979). Conversely, “[w]here a demand is

necessary to perfect a cause of action, the statute of limitations does not commence to run until the demand is made.” *Id.* at 452; *see Wright v. United States*, 221 Ct. Cl. 913, 914 (1979) (plaintiffs’ cause of action for payment of claims under alleged contract involving mining rights “did not accrue until demand for payment was made and refused”); *Manufacturers Aircraft*, 77 Ct. Cl. at 523 (“In this case there was no breach and the royalties claimed did not accrue and become payable under the agreement until reports had been made and invoices or bills rendered.”).

The prerequisite acts necessary for a claim to accrue, then, are entirely dependent on the language of the government contract at issue. *Nager Electric*, 368 F.2d at 852-53; *see Oceanic Steamship*, 165 Ct. Cl. at 225 (“Of course, in determining when money becomes due and payable under a contract, it is necessary to ascertain the nature of the agreement that the parties have made on this point.”); *Manufacturers Aircraft*, 77 Ct. Cl. at 522 (“[o]rdinarily a cause of action accrues when the service [provided pursuant to the contract] is rendered or the articles are furnished and the obligation to pay therefor arises, but this is not a hard and fast rule and whether the cause of action in a particular case accrues at such time depends upon the agreement or arrangement between the parties.”); *see also United States v. Cocoa Berkau, Inc.*, 990 F.2d 610, 613 (Fed. Cir. 1993) (“to determine when the entry bond was breached,” at which point the claim would accrue, “we look to the language of the bond stipulating the relevant obligations of the bond principal and its surety” (emphasis added)).

In arguing that its March 28, 2014, claim was timely, SMARTECH cites to the “Payments under Time-and-Materials and Labor-Hour Contracts” clause in its contract, which provides for the Government’s payment after the contractor’s submission of vouchers:

The Government will pay the Contractor as follows upon the submission of vouchers approved by the Contracting Officer or the authorized representative.

48 CFR 52.232-7. SMARTECH argues that, because it had to submit its voucher for payment as a prerequisite to DOE’s obligation to pay under the contract, the limitations period did not begin to run until it submitted a payment request for the unpaid fixed fees. It also alleges that its contract did not require it to submit invoices by a specific deadline each year, and it identifies a contract provision, clause H.9(a), that defines the contract as a single multiple-year unit, including the option periods, that concludes only at the end of the multi-year contract performance period. Exhibit 8 at 33 (defining the “term” of the contract “as the total contract period, including all exercised options” (quoted in Complaint ¶ 20)). Based upon this language, SMARTECH alleges that it was entitled to include previously unbilled costs from the entirety of its contract performance from 2003 through 2008 in its final contract wrap-up invoice and that such an invoice would be timely.

The situation that SMARTTECH alleges exists here is similar to that in *Parsons-UXB Joint Venture*, ASBCA 56481, 09-2 BCA ¶ 34,305, in which the Government asserted that the contractor's claim for reimbursement of general excise taxes was untimely. The taxes at issue had been assessed and paid in 1998, but the contractor did not submit an invoice for reimbursement under the Allowance Cost and Payment clause until August 2007. After denying the reimbursement request, the Government argued that a reasonably prudent contractor would have submitted an invoice for reimbursement in 1998, but the board found that, since the contract did not affirmatively require the contractor to have done so and since payment was not due until "requested," there was no breach that would cause the statute of limitations to begin to run until the Government denied a contractor-submitted invoice:

Appellant claims a breach of the Allowable Cost and Payment clause. That clause provides that "[t]he Government shall make payments to the Contractor when requested as work progresses." There was no breach until appellant requested payment and the government rejected the request. Hence, the claim is timely.

Id. at 169,459 (emphasis added); see *Todd Pacific Shipyards Corp.*, ASBCA 55126, et al., 11-1 BCA ¶ 34,759, at 171,087 ("there can be no breach of that [payment] clause, and therefore no claim accrual from which the limitation period is measured, until the contractor requests payment and the government fails to pay"); see also *Continental Insurance Co. v. Coyne International Enterprise Corp.*, 700 F. Supp. 2d 207, 213 (N.D.N.Y. 2010) ("[w]hat counts, for statute of limitations purposes, are the date[] that invoices were sent . . . for premiums due and [the date that the recipient of the invoices] declined to pay" (quoting *Potomac Insurance Co. of Illinois v. Richmond Home Needs Services, Inc.*, No. 04-CV-4335, 2006 WL 2521283, at *2 (S.D.N.Y. Aug. 30, 2006))).

Had the contract required SMARTTECH to submit invoices for all costs by a particular date each year, the statute of limitations likely would have started to run, depending on the contract language, on or soon after each year's contractual deadline for invoicing. See *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 900-01 (9th Cir. 2006) (where contract required that invoice be sent "at the conclusion of the project," statute of limitations began to run well before contractor submitted invoice for payment two-and-a-half years after project conclusion). Further, if the contract language did not require any invoice or other action by the contractor to perfect the Government's obligation to pay, the limitations period might commence, again depending on the contract language, upon the Government's failure to pay by the due date – that is, by the date of the Government's breach. See *Cannon v. United States*, 146 F. Supp. 827, 830 (Ct. Cl. 1956) (Government's failure to make payment "when due" starts the running of the statute of limitations). Here, though, neither the complaint nor DOE identifies any specific deadline for submitting the

necessary invoice for the fixed fees. On a motion to dismiss for failure to state a claim, where we make all reasonable inferences in the nonmovant's favor, DOE has failed to meet its burden of establishing that SMARTECH's claim for fixed fees accrued at some point more than six years before March 28, 2014, when SMARTECH submitted the claim.⁴

We recognize that, if taken to its extreme, SMARTECH's theory – that the limitations period does not start to run under its contract until the contractor submits an invoice and the Government denies it – would be untenable. Under its theory, SMARTECH presumably could have waited ten or twenty years to submit its invoice and, by so doing, deferred accrual of its fixed fee claim. Yet “it cannot be true that one who has a claim against another which he can perfect and make actionable by acts within his own power can keep the claim alive indefinitely by merely refraining from doing those acts.” *Duhame v. United States*, 135 F. Supp. 742, 744 (Ct. Cl. 1955). “[W]here a preliminary step is required before suit is begun, a reasonable time will be granted therefor but only a reasonable time.” *Dawnic Steamship Corp. v. United States*, 90 Ct. Cl. 537, 579 (1940). Here, though, we need not decide how long SMARTECH could have waited to submit either an invoice or its claim. SMARTECH submitted the claim within six years of the contract completion date, which, at least based upon the current record and making all reasonable inferences in SMARTECH's favor, satisfies the CDA six-year statute of limitations.⁵

⁴ Even if the contract did not suggest that the Government's denial of or failure to pay an invoice commences the running of the statute of limitations under this particular contract, SMARTECH has alleged in its complaint that clause H.9(a) of the contract defines the contract, including any exercised options, as a single multiple-year unit. *See* Exhibit 8 at 33 (quoted in Complaint ¶ 20). Without contractual deadlines expressly requiring payment of the fixed fee annually or bi-annually, there is no reason to believe that the statute of limitations started to run on any fixed fee until performance of the single unit contract was complete. *See Johnson*, 437 F.3d at 900-01. SMARTECH submitted its claim to the contracting officer within six years of the 2008 contract completion date, precluding any argument that the claim submission was untimely.

⁵ DOE also argues that the “fixed fee” aspect of SMARTECH's contract was not truly a fixed fee, but instead was intended to represent a profit markup of eight percent upon hourly direct costs incurred as part of contract performance. It appears that, based upon that argument, DOE believes that SMARTECH was required to invoice that “fixed fee” profit markup at the same time that it submitted invoices for its direct costs, most of which were submitted more than six years before SMARTECH's certified claim. In support of its argument, DOE cites to a document that, although a part of the appeal file that DOE submitted to the Board, is not identified in SMARTECH's complaint. Because DOE's

Decision

For the foregoing reasons, respondent's motion to dismiss for failure to state a claim is **DENIED**.

HAROLD D. LESTER, JR.
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

H. CHUCK KULLBERG
Board Judge

argument is dependent upon material from outside of the appellant's complaint, we cannot consider it on a motion to dismiss for failure to state a claim. *Payne Enterprises v. Department of Agriculture*, CBCA 2899, 13 BCA ¶ 35,261, at 173,082.