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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-219337 **DATE:** December 30, 1985

MATTER OF: Department of the Interior: Timeliness of claims by former licensees of the American Revolution Bicentennial Administration

DIGEST:

1. The Department of the Interior may carry out its agreement to resolve claims by former licensees of the American Revolution Bicentennial Administration consistent with its earlier resolution of a test case, notwithstanding the fact that the remainder of claims were not formally filed with the agency until 7 years after the termination of applicable license agreements. The agreement in the test case did not constitute a "settlement", as that term is ordinarily used by this Office to refer to the determination of legal liability on the part of the Government. Instead, the Department's actions apparently involved a determination that equitable factors favored payment, and an agreement to award compensation to the claimant only as specifically provided by Congress. Similar action in the present case would not be barred by limitations otherwise applicable to determination of legal liability.

2. Administrative adjudication of breach of contract claims by six former licensees of the American Revolution Bicentennial Administration, asserted against the Department of the Interior as successor agency, may not be time-barred, even when filed 7 years after contract termination, if cognizable under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613. Under the Act, the period of limitation of judicial review commences only upon final agency adjudication. No determination was ever made whether contracts in question are procurements under the Act.

The Acting Assistant Secretary, Fish and Wildlife and Parks, U.S. Department of the Interior, asks whether breach of

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contract claims by six former licensees of the American Revolution Bicentennial Administration (ARBA) are barred by the running of the statute of limitations. Those claims are now asserted against the Department of the Interior as the successor agency to ARBA.

The Department, in letters dated February 5, and March 4, 1985, informed the legal representatives of the six claimants that their claims were time-barred "because of the running of the applicable statute of limitations on breach of contract actions against the United States." As discussed in detail below, it is the view of this Office that the claims in question may still be considered for resolution by the Department.

BACKGROUND

The American Revolution Bicentennial Administration was established by the Act of December 11, 1973--

> "* * * to coordinate, to facilitate, and to aid in the scheduling of events, activities, and projects * * * in commemoration of the American Revolution Bicentennial." Pub. L. No. 93-179, 87 Stat. 697, 698 (1973).

The statute required ARBA to provide for the distribution and sale of commemorative materials and objects for the bicentennial. Id., § 4(b)(4), 87 Stat. 700. In accordance with this mandate, ARBA engaged in a direct marketing program for commemorative medallions, the profits from which were used to fund other program activities. See B-200962, May 26, 1981. In addition, ARBA solicited (and subsequently entered into) a number of agreements with private companies for the use of ARBA's logo on commemorative items intended for private sale. These latter agreements are the subject of the claims at issue here.

In 1975 and 1976, ARBA entered into a number of "licensing" agreements, under which participating companies agreed to produce and market specific types and amounts of commemorative items using ARBA's logo. Licensees would retain profits from sales (although prices were required to be approved by ARBA), and would pay ARBA royalties (generally 2 1/2 - 5 percent of net sales). Licensees were required at the time of contract execution to pay ARBA a "non-returnable" advance on royalties, which, according to claimants, was ordinarily set at $10,000 per product (although this figure appears to have frequently been lowered). The agreements

required prior approval by ARBA of product design, packaging, advertising, pricing, production, and distribution. The contracts also specified production quantities and schedules. The licenses could be terminated by ARBA for convenience or for cause (the latter including failure to produce commemorative items in accordance with the schedule set out in the contract). If terminated for cause, ARBA could require the licensee to destroy all unsold items, or to deliver them to the Government without compensation. Most of the agreements in question expired by their own terms on April 30, 1977, but were extended by ARBA to June 30, 1977.

According to the claimants, ARBA officials induced their participation in the program by orally agreeing to take a number of actions to promote the value of the licenses (in particular, to publicize the logo, to develop marketing outlets, and to prevent non-licensees from using the ARBA logo). Claimants allege that these oral representations constituted part of the overall agreements, and that ARBA's failure to meet these commitments constituted a breach of contract. Claimants have alleged that ARBA's actions (or, rather, omissions) caused significant damages to licensees through the overproduction of commemorative items.

Under its authorizing legislation, ARBA terminated on June 30, 1977, and its powers and functions were transferred to the Secretary of the Interior. E.O. 12001, June 29, 1977. According to claimant Limited Editions Collectors Society, Inc., a number of former ARBA licensees first approached the Interior Department in 1977 and again in 1978 about filing claims, but were informed that the Department had no jurisdiction to consider claims arising from contracts with ARBA. Several licensees continued discussions with the Department in late 1979. The contents of these 1979 discussions, according to the claimants, played a crucial role in determining how and when their claims were presented, and consequently are of special relevance to the question of whether these claims are time-barred.

On June 25, 1979, several ARBA licensees, representing themselves and other licensees, together with their attorney, met with officials of the Interior Department and several representatives of the Small Business Administration's (SBA) Office of the Chief Counsel for Advocacy. A synopsis of the meeting, made by one of the Interior Department's representatives, indicates that the Interior representatives were provided a written "list of licensees and losses being claimed," identifying 32 claimants (including all 6 companies involved in the present case), their license numbers, and, for each,

estimates of losses to that date (totalling $3,247,550). According to this same report, the participants agreed--at Interior's suggestion--that the licensees' attorney would select one or two of "his best cases" for formal filing, "with the idea that the handling and disposition of those could serve as precedent for handling the others." According to the SBA, this special arrangement was intended "to determine statutory authority and procedures for handling all such claims." See letter dated November 26, 1979, from Acting Administrator Mauk to Senator Gaylord Nelson.[1]/

Subsequent to the June 1979 meeting, the licensees' attorney selected the claim of the Amerecord Corporation as the "test" case, and filed a formal claim with the Department on December 31, 1979. The Amerecord claim included detailed factual information, and presented arguments based upon both breach of contract and tort theories. In apparent response to the Department's previous refusal to acknowledge jurisdiction, the claim addressed the jurisdictional issue in some detail,

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1/ Claimants allege that in the June 1979 meeting, and in subsequent meetings in 1980 and 1983, Interior officials not only agreed that the Department would use the selected "test" case as precedent for handling all other claims, but also urged claimants not to file claims--with Interior or in the Court of Claims--until after the test case had been resolved. Interior, in its submission to this Office, denies the accuracy of that allegation. No direct evidence has been presented that would either support or refute such a statement.

particularly the Interior Department's role as successor agency to ARBA.[2]/

Several months later, on March 28, 1980, the Small Business Administration's Office of the Chief Counsel for Advocacy filed a position paper in support of the Amerecord claim. The filing solely addressed the jurisdictional question, and dealt with two principal aspects of the question: whether Interior was in fact the successor in interest to ARBA, and whether the claimant was entitled to an administrative forum at all. With regard to this latter issue, the SBA argued that the claim was entitled to administrative adjudication under the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613). The SBA acknowledged that the Act was limited to claims relating to contracts (express or implied) "for the procurement of property (other than real property), services, and for other enumerated purposes." The SBA argued, however, that the claims in question arose in the context of a contract for the procurement of services, the latter being "the service of preparing quality Bicentennial commemoratives" to ARBA's specification, in return for ARBA's promise to create a "vast distribution network." The SBA also contended that while the contract in question pre-dated the effective date of the Contract Disputes Act, Interior nonetheless had the discretion to

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2/ On the same day, a separate "claim for damages under the Federal Tort Claims Act" was filed on behalf of 11 other ARBA licensees (including all but 1 of the 6 claimants in the present case). This second claim included little detail concerning the relevant factual background; instead it stated that it was submitted to toll the running of the 2-year statute of limitations for the filing of tort claims against the Federal Government, 28 U.S.C. § 2401(b), and that detailed allegations would be presented later. It did not include the requisite statement of a "sum certain." See Allen v. United States, 517 F.2d 1328 (6th Cir. 1975). No further action appears to have been taken on the claim.

In addition to these claims, on August 31, 1982, licensee Limited Editions filed a claim, through a different attorney, pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613. As discussed in more detail infra, the Department has acknowledged that this claim was timely filed with the agency, but concludes that it is no longer cognizable due to the claimant's failure to appeal the agency's inaction on the claim to an appropriate Federal court.

consider the claim in light of the specific objectives of the Act.

On August 5, 1980, the Department officially announced that the review of claims arising from ARBA license agreements "is a matter within the authority of this Department * * *." The Department stated that "[o]ur initial review will be of the claim filed * * * on behalf of Amerecord Corporation." See letter of August 5, 1980, from Secretary Andrus to Representative Whitehurst.

The Amerecord test case was denied on its merits by the contracting officer on January 18, 1982. It was then appealed to the Interior Board of Contract Appeals, which, on June 25, 1982, ruled that (1) the claimant had failed to comply with the Board's procedural requirements; (2) the claim was not cognizable under the Contract Disputes Act as it arose from a contract pre-dating the Act; and (3) the Board had no other authority to consider claims for breach of contract. The Board thus issued an order to show cause why the claim should not be dismissed on jurisdictional grounds. There is no evidence that the claim was actually dismissed, however, and on August 20, 1983, the Department, without admitting liability, agreed to pay the claimant $750,000 in settlement. That settlement agreement was entirely contingent upon the appropriation by the Congress of funds "specifically for the purpose of satisfying the terms and conditions" of the agreement. Those funds were provided on November 4, 1983, within the lump sum appropriated to the National Park Service in the fiscal year 1984 Interior Department appropriation act, according to the joint explanatory statement of the bill managers, as revised. See, e.g., 129 Cong. Rec. S14166 (daily ed. Oct. 19, 1983). Actual payment was made in January, 1984.

Claimants allege that they were informed by Department officials that the Amerecord claim was settled on "equity" or "policy" grounds, and that the rest of the claims would be similarily settled, regardless of any limitations (including time limitations) on legal liability. We have not, however, been provided specific documentation to support these allegations, or to establish the actual basis of the Amerecord settlement. In any event, after the settlement, the Department indicated its readiness "to resolve the remainder of those claims that have been timely and properly filed." See, e.g., letter dated July 18, 1984, from Assistant Secretary Ray Arnett to Senator John East. In July and August of 1984, six breach of contract claims were filed with the Department on behalf of Limited Editions, Tut Taylor Music, Inc., Ann Arbor Circuits, Inc., Coach House Game Sales and Promotions, Inc.,

World Sales Organization, Inc., and Teagle and Little, Inc. As indicated previously, these six claims were dismissed by the Department in February and March of 1985 as being barred by the applicable statute of limitations. Those dismissals, by Acting Assistant Secretary Potter, stated:

> "* * * I appreciate that it was our mutual intention when the Amerecord claim was filed in 1980 to treat the Amerecord claim as a 'test case' to be followed by consideration of other claims by ARBA licensees. However, what was not anticipated was the length of time necessary to settle the Amerecord claim and the time at which subsequent claims were formally filed, after the running of the statute of limitations. The running of the statute of limitations deprives us of authority to settle these claims absent specific legislation on the subject."

Mr. Potter suggested that the claimants instead seek compensation from the Congress through private relief legislation.

DISCUSSION

The facts as presented raise two separate legal issues: (1) whether there is any legal impediment that would prevent the Department from fulfilling its acknowledged agreement to resolve the remainder of claims by ARBA licensees on the same basis as the Amerecord test case; and, (2) if the Department cannot (or will not) resolve the claims under such a basis, whether the claims are otherwise barred by the applicable statute of limitations. As discussed in detail below, it is our view that: (1) there is nothing that would prevent the Department from resolving the remainder of claims in accordance with its earlier agreement; and (2) even if the Department does not choose to honor that agreement, the licensees have asserted claims that may still be entitled to administrative, or judicial, resolution.

According to the Department, the six claims in

question[3]/ are barred by 28 U.S.C. § 2401(a), described in the Department's submission as "the applicable six year statute of limitations for breach of contract actions against the United States." The Department states that the claimants, by failing to take judicial action within 6-years of the termination date of their license agreements with ARBA (June 30, 1977), are barred from recovery. The Department also cites 31 U.S.C. § 3702(b)(1) as rendering the claims "invalid." That provision sets a 6-year timeliness requirement on claims within the settlement jurisdiction of this office.

The limitations statutes specified by the Department are certainly relevant to the question of whether the claims described in its submission may still be asserted to establish a legal basis for liability on the part of the Government. They are addressed in further detail later on in this discussion. As a preliminary matter, however, our review of the Amerecord "settlement" leads us to conclude that the Department's authority to resolve outstanding claims in a manner similar to its actions in that case would not be affected by the statutory limitations raised by the Department.

A. Resolution of claims consistent with Amerecord settlement. All parties to the dispute appear to agree that Department officials, as early as 1979, agreed to resolve the Amerecord "test" case first, and to resolve the remainder of claims in a consistent manner. In determining the Department's authority to implement that agreement, it is first necessary to review the action taken by the Department in the Amerecord case.

As used in the context of administrative claims resolution, the term "settlement" has been construed by this Office to refer to the administrative process of establishing the legal validity of a particular claim, and determining the specific amount of the Government's liability therefor. 20 Comp. Gen. 573 (1941). Unless specific authority exists otherwise, claims settlement must be based on legal, and not equitable or moral principles. See 42 Comp. Gen. 124, 142 (1962); B-201054, April 27, 1981. An agency, in exercising

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[3]/ Although the Department's submission concerns only six claims, the discussion herein may be applicable to other former licensees similarly situated. For example, we understand that Bicentennial Indian Designs, Inc. of Albuquerque, New Mexico, has made similar allegations to those described above.

its claims settlement authority, must assert any applicable legal defense. 42 Comp. Gen. 142, supra. Thus, GAO's Policy and Procedures Manual for Guidance of Federal Agencies specifies that agencies may not pay claims subject to the 6-year time limitations of 28 U.S.C. § 2401(a), or similar statutory restrictions. See 4 GAO § 57.

With these principles in mind, it is evident from our review of the Department's Amerecord settlement agreement that it did not in fact constitute a "settlement" as that term is ordinarily used by this Office. The agreement did not establish or acknowledge any measure of legal liability on the part of the Government, and did not specifically overrule the earlier holdings of the Interior Board of Contract Appeals that the Amerecord claimant had failed to assert a legal cause of action cognizable by the agency.4/ Instead, according to the claimants, the agreement was based upon the Department's recognition that the equities of the case favored compensation. Unlike related cases in which this Office has struck down proposals to base legal liability (and thus to authorize payment) on such equitable grounds, it appears that the Department merely agreed that an equitable basis existed for payment and, in effect, consented to apply to the Congress on behalf of the Amerecord claimants in an attempt to secure compensation. The Department agreed to pay only to the extent that the Congress provided specific funding authority. Compare B-201054, April 27, 1981 (agencies have no authority to authorize payment of claims on equitable grounds).

In our view, the action taken by the Department in the Amerecord case, contingent as it was upon approval by the Congress through the appropriations process, was not subject to the same limitations (including time limitations) that would otherwise apply to an agency's authority to settle and pay claims based upon legal liability. Indeed, the Amerecord settlement was not concluded until August 20, 1983, over 6-years from the termination date of the ARBA/Amerecord licensing agreement, and thus was subject to the same arguments now being asserted by the Department against other ARBA licensees.

Similarly, we cannot agree with the Department that any efforts at comparable action on behalf of the remainder of ARBA licensees would be subject to the limitations ordinarily attached to the administrative establishment of legal liabil-

4/ As indicated below, our own views on this issue do not necessarily correspond to those of the Board.

ity and authorization of payment (i.e. the ordinary claims settlement process). Thus, it is our conclusion that there is no legal obstacle to the Department's execution of its agreement to resolve the remainder of ARBA claims in the same manner as the Amerecord claim: the Department may consider each claim under the same equitable principles applied to the Amerecord case, may recommend an appropriate basis of compensation (including zero, if the circumstances of a particular case dictate it), and may agree to provide payment to the extent that funds are specifically provided for such purposes by the Congress.

B. Authority to adjudicate legal claims of ARBA licensees. Having concluded, as a preliminary matter, that the Department of Interior is not prohibited from resolving the remainder of the ARBA claims under procedures similar to those used in the Amerecord case, the question remains as to whether the claimants may still establish, either in an administrative or judicial forum, a legal (rather than equitable) basis for Government liability. As discussed below, it is our view that the claims in question may still be adjudicated if found to be cognizable under the Contract Disputes Act, 41 U.S.C. §§ 601-613. The Department has not yet made such a determination in the case of these particular claims.

As stated previously, the Department's principal reason for dismissing the claims is that they are barred by 28 U.S.C. § 2401(a). That provision states that, except as provided under the Contract Disputes Act, civil actions against the United States must be asserted within 6 years of the time that they accrue. It is well settled that that provision applies only to a commencement of judicial, and not administrative proceedings. Crown Coat Front Co. v. United States, 386 U.S. 503, 510 (1967); Oppenheim v. Campbell, 571 F.2d 660, 663 (D.C. Cir. 1978). Nonetheless, agencies as a general rule will not consider claims for which a judicial remedy is no longer available, except where a longer period for administrative review is specifically authorized by law. Indeed, as indicated earlier, our own Policy and Procedures Manual specifies that agencies may not pay claims that are asserted after a judicial time limitation has passed. 4 GAO § 57.

We agree with the Department that if 28 U.S.C. § 2401(a) is the applicable statute of limitations, the claims in question would be considered barred from judicial review. Under the body of court decisions construing that statute of limitations, claims for breach of contract have long been considered

to be barred after 6 years from the time of breach. These decisions are based on the fact that breach claims (except, as discussed below, where now cognizable under the Contract Disputes Act) are not considered subject to prior administrative adjudication. See Mulholland v. United States, 361 F.2d 237, 243-4 (Ct. Cl. 1966). In contrast, claims "under" the contract (i.e., subject to administrative adjudication under the "disputes" clause) are considered to accrue upon final agency action. See Crown Coat Front Co. v. United States, 386 U.S. 503, 513-14 (1967). The claims in the present case, which are for breach of contract, would thus be considered barred from judicial review under 28 U.S.C. § 2401(a) regardless of the status of any administrative proceeding. As Interior notes, the statutory bar could not be waived by officials of the applicable agency. Munro v. United States, 303 U.S. 36 (1938).

However, this rule is no longer applicable to claims cognizable under the Contract Disputes Act of 1978. The statute of limitations of 28 U.S.C. § 2401(a) specifically excepts from its application claims under the Contract Disputes Act. That Act provides separate judicial review requirements for certain categories of contract claims. In contrast to 28 U.S.C. § 2401(a), time limitations for judicial review of all claims cognizable under the Contract Disputes Act (whether for breach, or arising "under" the contract) are measured from the date of final administrative action.

Thus, if the claims in the present case are cognizable under the Act, the timeliness question would turn on whether the claims were timely filed with the agency for adjudication. Although the Act itself is silent on the initial time required for filing with the contracting officer, the court decisions that established the "time of accrual" standard that the Act was intended to codify provide useful guidance. The timeliness standard specified in Nager Electric Co. v. United States, 368 F.2d 847 (Ct. Cl. 1966) (cited favorably by the drafters of the Act), is one based on the terms specified in the contract, or if not specified, based on a reasonableness test. See H.R. Rep. No. 1556, 95th Cong., 2d Sess. 17 (1978). Under such a test, the claimants' delays in filing might not be considered unreasonable in light of the factual background described previously.

We noted earlier that the Department has not specifically addressed the question of whether the six claims at issue here are cognizable under the Contract Disputes Act. Because of this omission, we consider the Department's denial of legal liability on timeliness grounds to have been premature. The

only aspect of Contract Disputes Act applicability addressed by Interior (and then not specifically with regard to these six claims) was the statement of the Interior Board of Contract Appeals, in the Amerecord test case, that the Act was not applicable to pre-Act claims. We question, however, that conclusion in view of the election procedures available to pre-Act contractors under 41 U.S.C. § 601 note. A more serious question with regard to Contract Disputes Act applicability, in our view, is whether the claims here arise from contracts that fall within the description, in 41 U.S.C. § 602, of contracts covered by the Act. These issues should be specifically addressed by the Department before reaching a final conclusion on the legal cognizability of claims in this case.5/

Finally, should the Department determine that the claims here are cognizable under the Act, we suggest that the Department specifically reconsider the claim asserted by Limited Editions Collectors Society, Inc. Of all ARBA licensees, that claimant has been the most diligent in pursuing its claim, with two filings in 1979 and one in 1982. The latter filing, as described earlier, was specifically termed a claim under the Contract Disputes Act. The Department has acknowledged that even under its restrictive interpretation of the applicable statute of limitations, the 1982 filing was timely. It concluded, however, that under 41 U.S.C. § 605(c)(5), the Department's failure to respond within 60 days constituted a rejection of the claim, and further concluded that the claimant's failure to appeal this "rejection" within the time limitations specified in the Act constituted a bar to recovery. We cannot agree.

5/ We note in addition that there may be other types of claims arising from the circumstances detailed in the Department's submission that may still be asserted against the Department. For example, claimant Limited Editions has argued that there was an implied contract between Department officials and the claimants that, in return for their forbearance in filing suit against the agency, the licensees would be granted settlements in accordance with that reached in the Amerecord test case. While we express no view as to the merits of this argument, any such implied contract could not have been considered breached until February and March of this year, when claimants were officially notified by the Department that their claims would not be considered for settlement.

According to 41 U.S.C. § 605(c)(5), a failure by a contracting officer to issue a decision on a contract claim "within the period required" will be deemed to be a decision by the contracting officer denying the claim and "will authorize" the commencement of appeal or suit by the contractor. It is not apparent to us that the permissive language of section 605(c)(5) (authorizing appeal or suit) should be read to require that suit be commenced within the period that would otherwise only commence with definitive action by the agency. Nonetheless, even if interpreted in this light, the term "within the period required" must be construed in light of subsection (c)(2) of the same provision (which requires a contracting officer to render a decision within 60 days from receipt of the claim, or to notify the contractor of the time period in which a decision will be made), and in light of subsection (c)(3) (which requires that the contracting officer's decision be issued "within a reasonable time"). This language indicates that "the period required" refers to the 60 days specified or any longer period of time (within "reasonable" time limits) set by the agency and communicated to the claimant. Interior's own Board of Contract Appeals regulations, in fact, use this standard for claims over $50,000, permitting a contractor to file an appeal if the contracting officer has failed to issue a decision "within a reasonable time." 43 C.F.R. § 4.102(d) (1984).

In the case of Limited Editions, the claimant alleges that, after its claim was filed with Interior, it was orally informed by Assistant Secretary Arnett that its submission would not be adjudicated until after the Amerecord test case was resolved. Although this statement is unsupported by written evidence, it appears to be consistent with Interior's own description of the "mutual understanding" between the parties, as well as with the absence of any formal action on the claim by Interior. Consequently, we do not agree with Interior that the claim was deemed to be denied after 60 days without action by the contracting officer. We thus reject Interior's conclusion that the claim was time-barred because of the claimant's failure to appeal the agency's inaction on its claim.

CONCLUSION

Based on the foregoing, it is our conclusion that the six claims in question were dismissed by the Department prematurely. The statutory limitations cited by the Department would not preclude it from resolving the remainder of ARBA claims in the same manner as in the Amerecord test

case. In addition, the claims, if cognizable under the Contract Disputes Act, may still be considered for formal legal adjudication and settlement by the Department.

for Milton J. Socolar
Comptroller General
of the United States