

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Dick Pacific/GHEMM, JV) ASBCA No. 55829
)
Under Contract No. DACA85-02-C-0004)

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OPINION BY ADMINISTRATIVE JUDGE SCOTT

Appellant Dick Pacific/GHEMM, JV (DP/G), has appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the contracting officer's (CO's) final decision denying its claim for Prompt Payment Act interest penalties upon payment amounts withheld under its contract with the U.S. Army Corps of Engineers, Alaska District (Corps), to construct the Bassett Hospital Replacement at Fort Wainwright, Alaska. The Corps has moved to dismiss the appeal for failure to state a claim upon which relief can be granted and for lack of jurisdiction. We treat the former motion as one for summary judgment and grant it in part, and we grant the motion to dismiss for lack of jurisdiction to the extent of striking the portions of the complaint that seek or pertain to the release of liquidated damages and other payment withholdings and that seek damages and costs based upon alleged breach of duty, contract breach, cardinal or other contract change, and constructive termination for convenience principles.¹

¹ This appeal has been consolidated for disposition with other of appellant's appeals under the same contract. A copy of what has been represented to be the complete contract, and other documents pertinent to this appeal, were filed in ASBCA No. 55826, to which we cite as necessary. Unless otherwise indicated, citations to the Rule 4 file are to that submitted in the instant appeal, No. 55829.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

Contract Provisions

The Corps awarded the subject contract to DP/G on 19 February 2002 (ASBCA No. 55826 (55826), R4, tab 163 at 846). The contract includes the Federal Acquisition Regulation (FAR) 52.243-4, CHANGES (AUG 1987) and 52.233-1, DISPUTES (DEC 1998) clauses (R4, tabs 9, 10), and the following FAR clauses, among others:

52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997) (Payments clause), which provides in part:

(e) Retainage. If the [CO] finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the [CO] shall authorize payment to be made in full. However, if satisfactory progress has not been made, the [CO] may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved. When the work is substantially complete, the [CO] may retain from previously withheld funds and future progress payments that amount the [CO] considers adequate for protection of the Government and shall release to the Contractor all the remaining withheld funds.

(R4, tab 7 at 28-29);

52.232-16, PROGRESS PAYMENTS (MAR 2000) (Progress Payments clause), which provides in part:

The Government will make progress payments to the Contractor when requested as work progresses...in amounts...approved by the [CO], under the following conditions:

(a) Computation of amounts. (1) Unless the Contractor requests a smaller amount, the Government will compute each progress payment as 80 percent of the Contractor's total costs incurred under this contract whether or not actually paid, plus financing payments to subcontractors..., less the sum of all previous progress payments....

....

(c) Reduction or suspension. The [CO] may reduce or suspend progress payments, increase the rate of liquidation, or take a combination of these actions, after finding on substantial evidence any of the following conditions:

(1) The Contractor failed to comply with any material requirement of this contract....

(2) Performance of this contract is endangered by the Contractor's (i) failure to make progress....

(55826, supp. R4, tab 321 at 82-84 of 131); and

52.232-27, PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (MAY 2001) (Prompt Payment clause), which is derived from the Prompt Payment Act (PPA), 31 U.S.C. §§ 3901-3907, and provides in part:

(a) Invoice payments. (1)...there are several types of invoice payments that may occur under this contract, as follows:

(i) Progress payments...based on [CO] approval of the estimated amount and value of work or services performed....

(A) The due date for making such payments shall be 14 days after receipt of the payment request by the designated billing office....

(B) The due date for payment of any amounts retained by the [CO] in accordance with the [Payments clause] shall be as specified in the contract, or if not specified, 30 days after approval for release to the Contractor by the [CO].

....

(3) Interest penalty. An interest penalty shall be paid automatically by the designated payment office, without request from the Contractor, if payment is not made by the due date and the conditions listed in subdivisions (a)(3)(i) through (a)(3)(iii) of this clause are met, if applicable....

(i) A proper invoice was received by the designated billing office.

(ii) A receiving report or other Government documentation authorizing payment was processed and there was no disagreement over quantity, quality, Contractor compliance with any contract term or condition, or requested progress payment amount.

(iii) In the case of a final invoice for any balance of funds due the Contractor for work or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

....

(4) Computing penalty amount. The interest penalty shall be at the rate...under section 12 of the [CDA] (41 U.S.C. 611) that is in effect on the day after the due date....

....

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the [Disputes clause]....

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and the Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the [Disputes clause].

....

(6) Additional interest penalty. (i) If this contract was awarded on or after October 1, 1989, a penalty amount, calculated in accordance with subdivision (a)(6)(iii) of this clause, shall be paid in addition to the interest penalty amount if the Contractor-

- (A) Is owed an interest penalty of \$1 or more;
- (B) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and
- (C) Makes a written demand to the designated payment office for additional penalty amount, in accordance with subdivision (a)(6)(ii) of this clause, postmarked not later than 40 days after the date the invoice amount is paid.

....

(iii)(A) The additional penalty shall be equal to 100 percent of any original late payment interest penalty, except-

(1) The additional penalty shall not exceed \$5,000....

(R4, tab 8 at 30-33)

The contract also includes the Special Contract Requirement (SCR)-3, LIQUIDATED DAMAGES – CONSTRUCTION (SEP 2000) (FAR 52.211-12) clause, which provides that the contractor shall pay liquidated damages to the government of \$8,300.00 for each calendar day of delay past the contract’s completion date until the work is completed or accepted (55826, supp. R4, tab 321 at 800-1).

The contract’s SCR-20, CONTRACTOR-PREPARED NETWORK ANALYSIS SYSTEM (NAS) clause provides in part:

4. The Contractor shall submit...specified reports at the initial and every monthly update throughout the life of the project....

....

c. Cost or Earned value Report: This report shall compile the Contractor’s total earned value on the project from the Notice to Proceed [NTP] until the most recent monthly progress meeting based on agreed progress between the Contractor and the [CO]. Provided that the Contractor has submitted a complete schedule update, this report shall serve as the basis for determining Contractor payment.

....

5. [At monthly meetings the] following shall be addressed:

....

c. The earned value for each activity started but not completed. Payment shall be based on cost of completed activities plus cost to date of in-progress activities.

(55826, supp. R4, tab 321 at 800-175, -176)

Specification § 01271, MEASUREMENT, PAYMENT, AND CONTRACT COST BREAKDOWN, provides in part:

3.1 CONTRACT COST BREAKDOWN

The Contractor shall furnish within 30 days after the date of [NTP], and prior to the submission of its first partial payment estimate, a breakdown of its lump-sum pay item or items which will be reviewed by the [CO] as to propriety of distribution of the total cost to the various accounts. Any unbalanced items as between early and late payment items or other discrepancies will be revised by the [CO] to agree with a reasonable cost of the work included in the various items. This contract cost breakdown will then be utilized as the basis for progress payments to the Contractor.

(55826, supp. R4, tab 321, § 01271 at 3)²

Contract Course and Payment Withholdings

DP/G received the NTP on 14 March 2002. The original contract completion date was 17 June 2006. Contract modifications extended it to 14 July 2006. (55826, R4, tab 129 at 645-47, tabs 152, 155)

² In certain correspondence and in its complaint appellant refers to specification § 01026. By amendment the specification was apparently renumbered § 01271. Paragraph 3.1 is the same in each case. (See 55826, supp. R4, tab 321, § 10126 at 2, § 01271 at 2-3)

By letter to Administrative Contracting Officer (ACO) Rolf O. Ness dated 19 June 2006, entitled “Notification of Impact-Pay Estimate No. 52,” DP/G protested Corps withholdings from progress payments as reflected in pay estimate No. 52, for which the Corps had received DP/G’s invoice on 12 June 2006 (R4, tab 6; app. opp’n, aff. of project manager Nickolas Florez, ¶¶ 1, 2, ex. 1). DP/G stated that, by agreement, progress payments had been based upon the earned value of performed work, in accordance with SCR-20, such that any retainage based upon lack of progress would be unreasonable. DP/G contended that retainage under the Payments clause was limited to 10 percent of a monthly progress payment and could not occur without cause. It asserted that SCR-20 superseded the Progress Payments clause, which was based upon costs incurred. DP/G added that, in any case, the CO could only reduce payments under the latter clause based upon substantial evidence and it had received no such evidence or findings by the CO.

The challenged withholdings were: (1) “Retainage for Unsatisfactory Progress,” \$72,574.75; (2) “Unapproved Schedule,” \$100,000; (3) “Resubmittal and Delinquents,” \$128,750; (4) “Proposal, Delinquent Response,” \$288,000; (5) “[Corps] Deficiency Tracking Items,” \$1,475,545; (6) “As-Buil[t] Drawings,” \$57,795; and (7) “Pay Estimate Adjustment,” \$200,000 (R4, tab 6 at 24-26).³

DP/G described the withholdings as arbitrary, punitive and unjustified under the contract and opined that they were in retaliation for its prior notice to the Corps of administrative delay in timely processing its May 2006 progress payment. DP/G complained of the Corps’ lack of response to time extension requests, defective contract documents, numerous contract changes that the Corps had not administered properly, and Corps actions and/or inactions that had hindered its progress. DP/G declared that the continued unsubstantiated withholdings of its progress payment earnings had a serious adverse impact upon it, its subcontractors, and contract completion; it considered the unjustified withholdings to be a contract breach; and it reserved the right to pursue all associated damages. DP/G concluded: “We look forward to your immediate release of all monies due [DP/G] within 10 days” (R4, tab 6 at 26). The letter was not certified as a CDA claim, *see* 41 U.S.C. § 605(c)(1).

On or about 26 June 2006 the Corps approved pay estimate No. 52A to release \$77,574.75 in unsatisfactory progress retainage and the \$288,000 withheld for alleged delinquent proposal responses, for a total of \$365,574.75. DP/G received payment in that amount on 6 July 2006. (App. opp’n, Florez aff., ex. 2, ex. 3 at 2 of 2)

³ Pay estimate No. 52 actually reported unsatisfactory progress retainage as \$77,574.75 and withholding for pay estimate adjustment as \$100,000 (app. opp’n, Florez aff., ex. 1). Resolution of these discrepancies is not necessary for our decision.

By letter to ACO Jacqueline Fabrizzio dated 10 August 2006, entitled “Pay estimate 53 withholdings,” DP/G contested nine alleged excessive withholdings under pay estimate No. 53 as inequitable, arbitrary, contrary to contract requirements, and/or unjustified: (1) unapproved NAS schedule, \$100,000; (2) resubmittals and delinquents, \$135,500; (3) as-built drawings, \$825,000; (4) pay estimate adjustment, \$100,000; (5) “NTS” testing room, \$325,000; (6) installed equipment protection, \$90,000; (7) commissioning, \$60,000; (8) training, \$40,000; and (9) deaerators, \$200,000 (R4, tab 5; *see also* R4, tab 13 at 70). DP/G concluded:

FAR 52.232-5(e) only authorizes the [CO] to retain a maximum of 10% from the amount of payment from each invoice. Since our payment on invoice 53 was for \$614,457 the maximum amount of retainage you are authorized to take would be \$61,446. Therefore, we are demanding payment in the amount of \$1,813,554 to be paid immediately. DP/G JV retains the right to request an equitable adjustment for delays and impacts associated with improper retainage at a later date.

(R4, tab 5) The letter was not certified as a CDA claim. The Corps did not respond (compl. and answer ¶ 263).

By letter to ACO Fabrizzio of 19 September 2006, entitled “Excessive withholdings,” DP/G protested the withholding of \$2,381,493 from pay estimate No. 54 and requested an explanation for each component of the withholding, stating that the Corps had not responded to its prior objections to withholdings and to its demands for explanation and justification. It inquired how to accomplish the release of each withholding. DP/G claimed that excessive withholdings had affected its progress, increased its costs, and created financial hardships for its subcontractors. It reserved its rights to pursue all resultant damages. The letter was not certified as a CDA claim. (R4, tab 4; *see also* R4, tab 13 at 71-72)

The government accepted the project as substantially complete on 2 October 2006 (R4, tab 1 at 5).

Claim, CO’s Decision, Appeal and Complaint

By letter to ACO Fabrizzio dated 19 October 2006, entitled “Claim for excessive withholdings,” DP/G cited the contract’s Disputes, Payments, and Prompt Payment clauses, specification § 01271, ¶ 3.1, and its 19 June, 10 August, and 19 September 2006 letters, and stated “please find the below certified claim in the amount of \$444,845.34” (R4, tab 3 at 14). DP/G elaborated:

Entitlement is established in the attached correspondence. The Government has not provided a response to any of the correspondence, emails and many discussions regarding the authority by which such excessive retainage has been withheld nor the rational [sic] by which the retainage was calculated nor the mechanism by which the retainage could be released. The actions are arbitrary, capricious and completely redundant in light of the fact that the project is 100% bonded. We consider the Government in breach of the contract and acting without [sic] impunity. Such actions have left us with no recourse but to submit a claim for damages.

(R4, tab 3 at 14)

DP/G stated: “In summary, the claim can be broken down into two parts” (R4, tab 3 at 14). Part one was for \$236,674.30 in interest penalties and additional interest penalties under the Prompt Payment clause, based upon retainage withheld from invoice Nos. 43 through 54 said to exceed the 10 percent maximum allowed under the Payments clause. DP/G alleged that retainage in excess of 10 percent of the progress payment amount was improper and an abuse of the CO’s authority. It stated that the calculation of “the damages due in the amount of \$236,674.30” was “assuming payment for the excess withholdings is received by Jan 1, 2007” (R4, tab 3 at 14). Part two referred to unilateral modifications directing work to proceed in advance of negotiated pricing. DP/G alleged that the Corps was negligent and had delayed in definitizing the modifications that would have allowed DP/G to invoice for the work, resulting in the constructive withholdings of payments due. DP/G claimed \$181,171.04 in interest penalties and additional interest penalties under the Prompt Payment clause based upon the “late payments” and stated that the calculation was “assuming payment were to be received on January 1, 2007” (R4, tab 3 at 15).

DP/G concluded:

This claim only includes excessive withholdings to date and only experienced by DPG. We reserve the right to claim for additional withholdings on future invoices including withholdings for potential liquidated damages as well as for similar claims submitted by subcontractors for the same or similar reasons as we have provided.

(R4, tab 3 at 15) DP/G requested a CO’s final decision and included a standard CDA certification covering “the amount requested” (*id.*).

Thereafter, apparently based upon an invoice received on 23 October 2006, the Corps issued what the record identifies as pay estimate No. 70, which reflects that \$647,400 for 78 days of liquidated damages was being withheld from pay estimate No. 55 (*see* 55826, R4, tab 158 at 830-31).⁴

On 19 January 2007 CO Donna L. West issued her final decision denying DP/G's claim, concluding "[DP/G's] allegations regarding excessive withholdings by the Government are inaccurate and their claim for prompt payment interest and additional penalty is not proper under the terms of the contract" (R4, tab 1 at 7).

By notice filed with the Board on 21 March 2007, DP/G appealed from the CO's decision denying its claim.

In its complaint, DP/G alleges, *inter alia*, that the Corps' withholdings were excessive, arbitrary and capricious and violated the Payments clause and specification § 01026 (compl. ¶ 3); they were a material contract breach (*id.* ¶ 4); they were a cardinal change (*id.* ¶ 5); and they were used to coerce and/or punish DP/G vindictively (*id.* ¶ 6). DP/G further alleges that the withholdings were unjustified; increased, reduced or eliminated without explanation, sometimes when there had been no change in the status of the underlying matter; and duplicative. It also alleges that the Corps withheld monies based upon lack of a proposal when matters had already been closed. (*Id.* ¶¶ 22-24, 30, 44, 87, 157, 168-69, 172-73, 224-25, 243-47, 250, 252-53) DP/G raises numerous questions about the propriety of deductions from payment application Nos. 43-55, including some bearing upon whether matters were in *bona fide* dispute (*id.* ¶¶ 25-285). DP/G alleges that the Corps' approval of pay application Nos. 53 and 54 without assessing liquidated damages, after accepting a schedule showing completion after the then due date, constitutes acceptance of a revised completion date and waiver of the Corps' right to assess liquidated damages for the period extended (*id.* ¶¶ 276, 290). DP/G further alleges that the Corps constructively withheld funds by failing timely to definitize contract modifications after notice to proceed with the work had issued, such that DP/G could not invoice for the work, resulting in a contract breach, or alternatively a contract change, and that, if the constructive withholdings of payments were found to be improper, the payments were late, entitling DP/G to interest penalties and additional interest penalties under the Prompt Payment clause (*id.* ¶¶ 291-315). Lastly, DP/G alleges that the Corps materially breached the contract and effectively terminated it for convenience, entitling DP/G to full compensation under termination for convenience principles (*id.*, ¶ 317).

⁴ The pay estimate copies in the Rule 4 file in this appeal and in ASBCA No. 55826 are unsigned, undated and apparently misnumbered (*see* R4, tab 13). Appellant included copies of two signed, dated, estimates, with estimate numbers corrected (Nos. 52 and 52A), in its opposition to the Corps' motions.

The complaint's prayer for relief seeks:

\$444,845.34, or such other amount as may be established at hearing, representing the interest and penalty amounts due on invoices where either actual or constructive withholdings were improperly made, together with interest from the date that the certified claim was submitted, award of the contract amounts wrongfully being withheld as liquidated damages and other improper withholdings.

(Compl. at 53) DP/G also seeks attorney fees, costs and consultant expenses and notes that the \$444,845.34 amount stated in its claim assumed payment of actual or constructive withholdings by 1 January 2007 and that it would increase depending upon when payment was made and modifications were definitized (*id.*).

DP/G further alleges in its prayer for relief:

Alternatively, DP/G submits that the cumulative actions regarding the improper withholdings of payment and other improper conduct by the Government constitute a material breach of duty by the Government and its agents, a material breach of the Contract, and a cardinal change in the nature of the Contract and the conditions under which it was to be performed, entitling DP/G to award in an amount to be established at hearing sufficient to reimburse it for all costs and expenses incurred in connection with the Project, together with reasonable mark-up for overhead and profit thereon....

(*Id.*) DP/G again seeks attorney fees, costs and expenses (*id.*).⁵

DISCUSSION

The Parties' Contentions

The Corps assumes, *arguendo*, that appellant's invoices were proper. However, the Corps essentially contends that this appeal must be dismissed because appellant allegedly concedes that all of the Corps' delayed payments involve disagreements over

⁵ Although the Corps has not moved to strike the attorney fees and expenses requests, they are premature. *Rig Masters, Inc.*, ASBCA No. 52891, 01-2 BCA ¶ 31,468.

the amount due or issues of contract compliance and thus it has failed to state a claim for which relief may be granted under the PPA as implemented in the Prompt Payment clause. The Corps seems to contend that the very fact that appellant has challenged the withholdings is an acknowledgement that the payments in question were disputed, such that PPA interest penalties and additional interest penalties do not apply. The Corps further alleges that appellant's constructive withholding claim fails to state a cognizable cause of action because PPA interest penalties apply to invoiced payments only and not to the time period between the issuance of an unpriced change order and final definitization.

The Corps also contends that the Board does not have jurisdiction over appellant's claim for PPA interest penalties and additional penalties on the ground that such a claim cannot stand independent of the underlying withholdings, and further contends that the Board does not have jurisdiction to entertain appellant's request in its complaint for payment of amounts allegedly wrongfully withheld, because it did not submit a CDA claim for those amounts. The Corps asserts that appellant did not submit a certified written demand to the CO in a sum certain for the withheld amounts; it reserved its right to claim damages later; it did not request a CO's final decision on the withholding issue; and there has been no such decision or deemed denial.

The Corps further alleges that appellant's request in its complaint for the return of liquidated damages duplicates its request for release of liquidated damages in ASBCA No. 55826 and should be dismissed to avoid a double recovery.

With regard to the Corps' motion to dismiss for failure to state a claim, appellant alleges that, to avoid PPA interest penalties and additional interest penalties, the Corps must show that its refusal to pay was based upon a good faith, *bona fide*, dispute. Appellant asserts that it has demonstrated that there was no legitimate dispute that withheld amounts were due, citing radical fluctuations in withholding amounts or their release without change in the underlying matter's status. Appellant alleges that the withholdings were arbitrary and capricious and taken in bad faith.

Appellant contends that it has stated a claim for contract breach due to the Corps' violation of the Payments clause's retainage limitations and that PPA interest is not its cause of action but rather a quantum issue and merely one damage element.⁶ It states, alternatively, that its complaint seeks recovery of all of its project costs and expenses on

⁶ Incongruously, appellant contends that quantum is not before the Board and that consideration of the Corps' motion to dismiss would be inappropriate. Appellant appealed from the entirety of the CO's final decision, which, like appellant's claim, addressed liability and quantum. We thus have jurisdiction over both. Whether we ultimately decide liability and quantum together is irrelevant.

the ground that the Corps' pervasive disregard of the contract, its withholdings, and its contract breaches and other conduct are tantamount to a cardinal contract change.

Concerning alleged constructive withholdings, appellant contends that the Corps issued unilateral modifications with definitization schedules but failed to comply with them and that the basis of entitlement stems from the contract's Changes clause.

Regarding the Corps' motion to dismiss for lack of jurisdiction, appellant asserts that it submitted claims and sought a CO's final decision not merely on the PPA interest penalties and additional penalties issues but on its allegations of contract breach and its demands for the payments wrongfully withheld. Appellant alleges that: these were nonroutine demands for payment that qualify as CDA claims; its final certified demand and request for a CO's decision incorporated, attached, and restated its earlier demands and qualifies as a CDA claim; and the Board has jurisdiction to determine if the Corps breached the contract.

Concerning liquidated damages, appellant alleges that it seeks their recovery in the instant appeal and in ASBCA No. 55826 based upon different legal theories and causes of action, which the CDA allows, and that consolidation of the appeals avoids any duplicate recovery, which it does not seek.

The Corps supports its motions with the complaint and the exhibits thereto, appellant's certified claim to the CO, and the CO's sworn declaration. Appellant relies upon the complaint and exhibits, its claim, and Mr. Florez' affidavit and attached exhibits, which include documents said to have been obtained in discovery.

Motion to Dismiss for Failure to State Claim (Motion for Summary Judgment)

A dismissal for failure to state a claim, which is on the merits, will not be granted unless it appears beyond doubt that appellant cannot prove any set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Gould, Inc. v. United States*, 67 F.3d 925, 929 (Fed. Cir. 1995). If the parties present matters outside the pleadings that the Board does not exclude, the motion typically is treated as one for summary judgment. *Great Lakes Dredge and Dock Co.*, ASBCA Nos. 53929, 54266, 04-1 BCA ¶ 32,518 at 160,862; *see also* FED. R. CIV. P. 12(b). Because the parties have presented matters outside the pleadings, and there has been ample opportunity for discovery, we treat the Corps' motion for dismissal for failure to state a claim as one for summary judgment.

It is established that summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. A disputed fact is only material if it might make a difference in the appeal's outcome.

There is a genuine issue of material fact if the evidence is such that a reasonable fact finder could find in favor of the non-movant. In deciding a summary judgment motion, we do not resolve factual disputes but ascertain whether there is a genuine issue of material fact. The movant must show that there is an absence of evidence to support the nonmovant's case. The nonmovant cannot rest upon conclusory pleadings or assertions of counsel but must respond with facts demonstrating that there is a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). We are to draw all reasonable inferences against the movant. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Prompt Payment Interest

Under the contract's Prompt Payment clause, PPA interest is to be paid automatically if a proper invoice was received; payment was not made by the due date; government documentation authorizing payment was processed; there was no disagreement over quantity, quality, contractor compliance with the contract, or the requested progress payment amount; or, in the case of a final invoice, the amount was not subject to further contract settlement actions. FAR 52.232-27(a)(3). Interest is not required on payment delays due to disagreement between the government and the contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the contract. Claims involving disputes, and any interest that may be payable, are to be resolved in accordance with the Disputes clause. FAR 52.232-27(a)(4)(iv).

To avoid PPA interest, "there must be, at the time payment of an invoice is delayed, a 'present basis for delaying payment which is related to an objective discernible dispute.'" *Ross & McDonald Contracting, GmbH*, ASBCA Nos. 38154 *et al.*, 94-1 BCA ¶ 26,316 at 130,894 (citation omitted). All that is required to raise a *bona fide* dispute concerning contract compliance is that the government's questions be raised in good faith. That a contractor may ultimately prevail on the merits does not defeat an otherwise proper payment withholding if there is such a good faith dispute. *Id.*

As set forth in its claim and its complaint in various non-conclusory pleadings, appellant has presented genuine issues of material fact regarding whether there was any *bona fide* dispute over whether at least some of the invoiced payments were due it. We do not read appellant's challenge to the withholdings as a concession that the payment amounts were disputed. Moreover, the government has not shown, example by example, how each of the questioned withholdings was allegedly in *bona fide* dispute, or otherwise was exempt from the application of PPA interest penalties and additional interest penalties. Thus, we cannot conclude, on the record currently before us, that the government is entitled to summary judgment regarding any actual withholding.

Accordingly, the Corps' motion for failure to state a claim upon which relief may be granted, which we have treated as one for summary judgment, is denied with respect to PPA interest penalties and additional interest penalties on the actual withholdings at issue in appellant's claim.

However, there is nothing in the PPA or the Prompt Payment clause that would apply the PPA to alleged constructive withholdings based upon a contractor's stated inability to invoice under modifications that have not been definitized. *See Onan Corp.*, ASBCA No. 41925, 93-1 BCA ¶ 25,261 at 125,830; *Ricway, Inc.*, ASBCA No. 30205, 86-1 BCA ¶ 18,539 at 93,137 (PPA "is not the vehicle for compensating a contractor for Government delays in acting on contractor's proposals for contract price increases or adjudicating change orders"). Accordingly, we grant the Corps' summary judgment motion with respect to PPA interest penalties and additional interest penalties alleged to be due based upon constructive payment withholdings.

Motion to Dismiss for Lack of Jurisdiction (Motion to Strike)

The Corps contends in this appeal that appellant did not submit a certified CDA claim to the CO seeking a final decision concerning the release of alleged improper withholdings and liquidated damages and that, therefore, the Board lacks jurisdiction to decide these aspects of appellant's complaint. We consider this to be a motion to strike portions of the complaint for lack of jurisdiction.

The CDA and implementing regulations incorporated into the Disputes clause require that contractor claims be submitted to the CO in writing for a decision, that money claims be in a sum certain, and that money claims exceeding \$100,000 be certified. 41 U.S.C. §§ 605(a), (c); FAR 2.101 (formerly FAR 33.201). This is a prerequisite to our jurisdiction under the CDA to entertain a contractor's appeal from the CO's denial, or deemed denial, of its claim. *ACEquip Ltd.*, ASBCA No. 53479, 03-1 BCA ¶ 32,109 at 158,767. The allegations in a complaint do not imbue the Board with jurisdiction. *See Hibbitts Construction Co.*, ASBCA No. 35224, 88-1 BCA ¶ 20,505.

Appellant's claim, as self-described, was a "certified claim in the amount of \$444,845.34" divided into two parts (R4, tab 3 at 14). Part one was for \$263,674.30⁷ in interest penalties and additional interest penalties under the Prompt Payment clause, based upon the Corps' alleged wrongful withholdings of certain invoiced payments. Part two was for \$181,171.04 in interest penalties and additional interest penalties under the

⁷ The claim letter referred to \$236,674.30 but the accompanying table 1 itemized the PPA interest penalty and additional penalty at \$263,674.30. The latter figure, plus the \$181,171.04 in PPA interest and additional penalty claimed with regard to alleged constructive withholdings equal the \$444,845.34 amount claimed.

Prompt Payment clause, based upon the Corps' alleged wrongful constructive withholdings of payments due to its delay in definitizing modifications (R4, tab 3 at 14-15). This was clearly a cognizable CDA claim and we have jurisdiction to consider it regardless of whether appellant submitted a qualifying CDA claim for the underlying withheld amounts.

The letters appellant referenced in its claim as the basis for its entitlement to PPA interest penalties and additional interest penalties each involved total withholdings well in excess of \$100,000. They were not themselves certified as CDA claims. The complete absence of a certification is not a defect that can be corrected under the CDA, 41 U.S.C. § 605(c)(6). *Eurostyle Inc.*, ASBCA No. 45934, 94-1 BCA ¶ 26,458 (granting government's motion to strike complaint allegations concerning contractor's entitlement to delay damages; contractor's reference in time extension claim to uncertified correspondence seeking delay damages was not valid CDA claim for those damages). Because appellant's claim did not include any certified request for the release of payment withholdings, including liquidated damages, or for damages due to the Corps' alleged breach of duty (which we infer to be the implied contractual duties of good faith and fair dealing and cooperation), material contract breach, cardinal or other contract change, or constructive termination for convenience, we do not have jurisdiction to consider those matters.

Therefore, the Board strikes the following paragraphs of the complaint: 4 (contract breach), 5 (cardinal change), 276 and 290 (waiver of right to assess liquidated damages), and 317 (material breach and termination for convenience entitling DP/G to full compensation). The Board also strikes the portion of the complaint's prayer for relief seeking "award of the contract amounts wrongfully being withheld as liquidated damages and other improper withholdings" (compl. at 53), and the portion of the prayer stating that:

Alternatively, DP/G submits that the cumulative actions regarding the improper withholdings of payment and other improper conduct by the Government constitute a material breach of duty by the Government and its agents, a material breach of the Contract, and a cardinal change in the nature of the Contract and the conditions under which it was to be performed, entitling DP/G to award in an amount to be established at hearing sufficient to reimburse it for all costs and expenses incurred in connection with the Project, together with reasonable mark-up for overhead and profit thereon.

(*Id.*)

Liquidated Damages

Finally, the Corps alleges that appellant previously filed a claim based upon alleged delay and disruption; it is seeking the return of liquidated damages as part of its subsequent appeal from the CO's deemed denial of that claim, ASBCA No. 55826; and it should not be allowed a duplicate recovery of such damages.

We have stricken appellant's demand for the return of liquidated damages from its complaint because we lack jurisdiction to consider it in this appeal. Also, we recently issued a decision denying appellant's motion in ASBCA No. 55826 for the release of liquidated damages, *Dick Pacific/GHEMM, JV*, ASBCA No. 55826 (slip op. 28 July 2008). There, appellant's claim for delay and disruption and a 308-calendar day extension had sought "release from all potential liquidated damages" before any had been assessed, although by the time of appellant's appeal and motion, the Corps had set off liquidated damages against progress payments. (Slip. op. at 5-6) We have no information to date that appellant has submitted a separate, affirmative, certified, qualifying CDA claim for the release of liquidated damages actually withheld. In any event, we foresee no danger of double recovery of liquidated damages.

DECISION

The government's summary judgment motion is granted with respect to PPA interest penalties and additional interest penalties alleged to be due based upon constructive payment withholdings under undefinitized modifications and is otherwise denied. The government's motion to strike portions of the complaint for lack of CDA jurisdiction is granted to the extent set forth above.

Dated: 8 August 2008

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55829, Appeal of Dick Pacific/GHEMM, JV, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals