

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Allstate Products Company ) ASBCA No. 52014  
 )  
Under Contract No. DAKF06-96-D-0008 )

APPEARANCE FOR THE APPELLANT: Thomas M. Sullivan, Jr., Esq.  
Denver, CO

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA  
Chief Trial Attorney  
MAJ Robert Clark, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE LIPMAN  
ON MOTION TO DISMISS  
PURSUANT TO RULE 12.3

This is an appeal from a contracting officer's deemed denial of appellant's request to recover amounts withheld by the Department of the Army pursuant to a Department of Labor (DOL) request, as well as interest, under the Prompt Payment Act (PPA), on the amounts withheld. Appellant has elected to proceed pursuant to Rule 12.3.

The Army moved to dismiss, asserting that the Board does not have jurisdiction to decide a dispute concerning money being withheld at the request of DOL. The parties have advised the Board that DOL and appellant have reached a settlement on the labor issues and that the Army has paid appellant the amount withheld. The motion to dismiss is, therefore, moot on that issue.

The sole issue remaining in this appeal is whether appellant may recover interest under the PPA. The Army seeks dismissal on the ground that appellant never submitted a claim for PPA interest to the contracting officer. We deny the motion.

FINDINGS OF FACT

1. On 12 June 1996, the Government, by the Department of the Army, awarded appellant the captioned contract to replace windows in various buildings at Fort Carson, Colorado. The contract was a firm fixed price, indefinite delivery, indefinite quantity contract with a guaranteed minimum price of \$1.5 million. The contract period was for twenty-four months from the date of award. (R4, tab 1) Four delivery orders were issued under the contract (R4, tabs 4, 5, 8, 9).

2. The contract incorporated by reference the following relevant FAR clauses: 52.222-4 CONTRACT WORK HOURS AND SAFETY STANDARDS ACT - OVERTIME COMPENSATION (JUL 1995); 52.222-6 DAVIS-BACON ACT (FEB 1995); 52.222-7 WITHHOLDING OF FUNDS (FEB 1988); 52.222-14 DISPUTES CONCERNING LABOR STANDARDS (FEB 1988); 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989); 52.232-27 PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (MAR 1994); 52.233-1 DISPUTES (OCT 1995); and 52.222-7 WITHHOLDING OF FUNDS (FEB 1988).

3. Appellant submitted to the Government Progress Payment #5 under Delivery Order 0001, dated 17 March 1997, in the amount of \$53,275; Progress Payment # 7 for Delivery Order 0003, dated 18 July 1997, in the amount of \$23,543.38, and Progress Payment # 7 under Delivery Order 0004, dated 23 June 1997, in the amount of \$36,000 for the balance of payments allegedly due on these delivery orders (compl. & answer at ¶¶ 8, 14, 18).

4. By letter dated 5 November 1997, the Army requested DOL to perform a labor standards investigation of appellant and to notify the Army of any violations discovered under the Davis-Bacon Act, and the Contract Works Hours and Safety Standards Act. (Gov't br., enc. 4)

5. Appellant submitted to the Government Progress Payment # 8 under Delivery Order 0003, dated 23 February 1998, in the amount of \$7,512.74; Progress Payment # 7 under Delivery Order 0001, dated 3 March 1998, in the amount of \$2,639.37; and Progress Payment # 8 under Delivery Order 0004, dated 3 March 1998, in the amount of \$6,000, for the balance of payments allegedly still due on these delivery orders (compl. & answer at ¶¶ 10, 15, 19). These amounts total \$16,152.11.

6. In a 6 March 1998 letter, the Army advised appellant that DOL had determined that a detailed labor investigation was warranted and that the Army, at DOL's recommendation, would withhold further payments to appellant pending a DOL investigation report. The letter informed appellant that \$16,152.11, the unpaid balance on delivery orders 0001, 0003, & 0004, would be withheld until further notice. (Gov't br., enc. 6).

7. In February through April 1998, appellant filed eight claims for alleged changes, etc., under the contract unrelated to the issues in this appeal (R4, tabs 142-48, 163), appellant appealed from contracting officer decisions denying the claims, (R4, tabs 151-153, 155, 156, 162, 168), and the appeals were docketed as ASBCA Nos. 51627-51633 and 51647.

8. On 20 April 1998, appellant sent the Army the following letter:

I have sent you four progress payment request [sic]: D.O.#1 \$2,639.37, D.O.#2 \$2,865.00, D.O.#3 \$7,512.74 and D.O.#4 \$6,000.00. As of this date these payments have not been received. We demand prompt payment act interest from the date of invoice on all these payments. At this time we will not sign a release of claims on any of the above delivery orders because of claims pending.

Please make payment as soon as possible. Enclosed please find copies of the progress payment requests.

(R4, tab 157) In its complaint, appellant indicated that “[a]ll payment issues relating to Delivery Order #2 have been resolved by other docketed appeals” (compl. & answer at ¶ 11).

9. The contracting officer responded by letter dated 24 April 1998, stating that payments would not be made “pending the results of the labor standards investigation by the Department of Labor . . .” (R4, tab 160).

10. By letter dated 5 June 1998 to the Army, DOL stated: that it had determined that appellant had been involved in labor violations resulting in back wages found due; that the investigation was ongoing and that the back wage amount could be revised; that DOL and appellant had not reached an agreement for the payment of back wages found due; and that, in order to protect the interests of the Government and the affected employees, it requested that \$25,395.16 be withheld from contract payments due appellant. (Gov’t br., enc. 7). DOL subsequently quantified appellant’s Davis-Bacon Act violations at \$23,348.19 (Gov’ br., enc. 9).

11. By letter dated 8 September 1998, appellant informed the contracting officer that it disputed “the entire \$23,000+ amount of the DOL proposed withholding.” Appellant requested the contracting officer to “(1) issue a final decision with regard to this matter, advising us of our rights to appeal this to an administrative board; and (2) provide a copy of this response to the DOL investigators.” The letter did not make any reference to the PPA or to any payment of interest.

12. The Army responded by letter dated 16 September 1998 and stated that FAR 22.406-9 required it to withhold funds upon request by DOL, and that “[a]ny disputes contended by [appellant] regarding these withheld funds should be resolved through the

Department of Labor, who can authorize release of the funds, or the Department of Justice.”

13. The parties settled ASBCA Nos. 51627-51633 and 51647 on 23 November 1998. The settlement agreement provided for payment of the claims, acknowledged that the Army was required to withhold \$7,196.08 to satisfy the DOL withholding requirement, and continued, in pertinent part:

2. The Government acknowledges that as a result of the withholding described in paragraph one above, the Government will have withheld, pursuant to a Department of Labor finding, twenty three thousand, three hundred and forty eight dollars and nineteen cents otherwise due to the Appellant. The Government agrees that it will continue to hold this money until the Appellant’s appeal with the Department of Labor is resolved or as otherwise required by law or regulation. The Government agrees that if the Department of Labor, or other federal deliberative body with appropriate jurisdiction, subsequently decides that the Appellant is due some or all of the monies withheld, those amounts specified to be released to the Appellant by Department of Labor or other federal deliberative body with appropriate jurisdiction will be paid to the Appellant by the Government. The Contractor expressly reserves the right to file a claim and appeal for Prompt Payment Act interest on these withheld amounts. The Government expressly reserves the right to deny the applicability of the Prompt Payment Act and any payments to be made thereby.

(Gov’t br., enc. 1 at 4) (emphasis added)

14. In its notice of appeal and complaint, appellant stated that it was appealing “the deemed denial of its claim filed on September 8, 1998 disputing the proposed DOL withhold of \$23,348.19 and asserting a right to interest on all withheld amounts payable under the Prompt Payment Act.” Appellant requested the Board to issue an order awarding appellant the \$23,348.19 being withheld by the contracting officer, as well as compound interest under the PPA on the \$2,639.37 not paid under Delivery Order 0001 computed from 17 March 1997, the date of the original final invoice for this delivery order; the \$7,512.74 not paid under Delivery Order 0003 computed from 18 July 1997; and the \$6,000 not paid under Delivery Order 0004 computed from 23 June 1997. Appellant also requested compound interest under the Prompt Payment Act on the \$7,196.08 being withheld by the contracting officer from the settlement payment for

ASBCA Nos. 51627-51633 and 51647 computed from 23 November 1998, the date of the settlement agreement.

15. The parties have advised the Board that DOL and appellant reached a settlement on the labor issues, the Army has paid appellant the amount withheld, and that issue is no longer in dispute.

### DECISION

The sole issue remaining in this appeal is whether appellant is entitled to recover the interest penalty under the PPA. In moving to dismiss, the Government argues that the Board has no jurisdiction to decide that issue because appellant has not filed a Contract Disputes Act of 1978 (CDA) claim for the PPA interest penalty with the contracting officer.

The contract's FAR 52.232-27 "PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (MAR 1994)" clause provides that an interest penalty shall be paid automatically by the Government if payment is not made by the due date on a proper invoice if specific conditions are met. The PPA, 31 U.S.C. §§ 3901 *et seq.*, provides that if the interest penalty is not paid, the contractor may file a claim for the interest penalty under the Contract Disputes Act of 1978 (CDA). The CDA, at 41 U.S.C. § 605(a), and the contract's FAR 52.233-1 "DISPUTES (OCT 1995)" clause require a contractor to submit a claim in writing to the contracting officer for decision. In order for the Board to have CDA jurisdiction, the contractor must submit an independent claim for PPA interest to the contracting officer. *International Business Investments, Inc.*, ASBCA No. 38639, 91-2 BCA ¶ 23,899. While the CDA does not define "claim," the Disputes clause defines it as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain . . . ."

Appellant, in its notice of appeal and complaint, stated that it was appealing "the deemed denial of its claim filed on September 8, 1998 disputing the proposed DOL withhold of \$23,348.19 and asserting a right to interest on all withheld amounts payable under the Prompt Payment Act." The \$23,348.19 included the \$16,152.11 withheld from progress payment requests associated with delivery orders 0001, 0003, and 0004, as well as the additional \$7,196.08 withheld from the settlement payment. Appellant's 8 September 1998 letter did not mention the PPA or claim any interest, and was clearly not a claim for an interest penalty under the PPA.

Although appellant makes no such allegation, we look to determine whether appellant's letter of 20 April 1998 letter to the contracting officer constituted a valid CDA claim. Our findings reflect that the letter made a "demand" for payment of PPA interest on specified unpaid invoices and, in view of the information contained in the letter and the provisions of the PPA, the demand was for an amount which was easily calculable,

and which was, therefore, a “sum certain.” See *United Technologies Corporation, Pratt & Whitney Group, Government Engines and Space Propulsion*, ASBCA Nos. 46880 *et al.*, 96-1 BCA ¶ 28,226. In addition, in the context of the series of unpaid invoices, appellant’s letter was implicitly requesting the issuance of a contracting officer’s decision if the response to its claim were negative. We conclude, further, that the language in the parties’ settlement agreement reserving appellant’s right to submit a PPA claim is not a sufficient basis to invalidate what we determine to be an earlier, valid claim.

Appellant’s 20 April 1998 letter was a valid CDA claim for PPA interest penalty on the \$16,152.11 withheld at that time. We note that, in reaching that conclusion, we are making no determination on the merits of the issue as to whether appellant is entitled to its claimed PPA interest penalty.

Finally, in its notice of appeal and complaint, appellant also sought interest under the PPA on the \$7,196.08 being withheld from the settlement payment for ASBCA Nos. 51627-51633 and 51647 from 23 November 1998. Appellant never submitted a CDA claim for the interest sought to the contracting officer and we have no jurisdiction to consider the issue.

### CONCLUSION

Appellant submitted a valid claim to the contracting officer seeking payment of PPA interest penalty as discussed above, and we therefore have jurisdiction in this appeal. The Government’s motion to dismiss is, therefore, granted in part and denied in part.

Dated: 15 February 2000

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RONALD JAY LIPMAN  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signature continued)

I concur

PETER D. TING  
Administrative Judge  
Acting 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. 52014, Appeal of Allstate Products Company, rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals