

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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U.S. General, Inc. ) ASBCA No. 52041  
)  
Under Contract No. N68711-90-C-0105 )

APPEARANCE FOR THE APPELLANT: Denver C. Snuffer, Esq.  
Nelson, Snuffer, Dahle & Poulsen, PC  
Sandy, UT

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.  
Navy Chief Trial Attorney  
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San Bruno, CA

OPINION BY ADMINISTRATIVE JUDGE TING  
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This appeal involves the Navy's right to condition the payment of amounts undisputedly owed to U.S. General, Inc. (USG) upon the submission of certain payment documentation and/or releases. USG filed a Motion to Compel, for Sanctions, and for Summary Judgment. By a separate ruling issued on 12 January 2000, we have denied USG's Motion to Compel and for Sanctions. The Navy requests that we decide the motion in its favor on the record before us. We treat the Navy's request as its cross motion for summary judgment. A decision on this appeal was originally issued on 23 February 2000. That decision is hereby vacated and the instant decision issued in lieu thereof.

STATEMENT OF UNDISPUTED FACTS

A. Prior Decisions

1. In September 1992, the Naval Facilities Engineering Command (the "Navy") awarded a contract to USG which required USG to demolish an existing timber pier and to construct a new pier supported by concrete piles over an existing underwater Electro-Magnetic Roll (EMR) garden at the Magnetic Silencing Facility, Point Loma Naval Station, San Diego, California.

2. During construction, a dispute arose as to whether USG was entitled to an equitable adjustment in several instances where the concrete pile locations had to be changed. In June 1994, USG submitted a differing site conditions claim. The Contracting Officer (CO) denied the claim (over and above what had already been paid under unilateral Modification No. P00011) and USG timely appealed. After a two-day hearing in January 1997, the Board issued its decision on 22 July 1997. Rejecting USG's differing site conditions claim, the Board nonetheless held that USG was entitled to an equitable adjustment under the contract "Changes" clause. Of the \$47,143 claimed at the hearing -- revised from \$57,871 -- the Board found that USG was entitled to \$14,981.39. Because USG had already been paid \$10,694 of this amount through unilateral Modification No. P00011, the Board sustained the appeal in the amount of \$4,287.39 (\$14,981.39 - \$10,694), with Contract Disputes Act interest on the amount found due running from 11 July 1994. *See U.S. General, Inc.*, ASBCA No. 48528, 97-2 BCA ¶ 29,136.

3. USG did not move for reconsideration. Nor did it appeal to the Federal Circuit. By an undated application, received by the Board on 19 March 1998, USG sought payment under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, of its attorney's fees and expenses incurred in connection with the adjudication of its appeal in the amount of \$35,423.90. Based on certified return receipts indicating that both parties received a certified copy of the Board's decision on 28 July 1997, the Board found that its decision became final on 25 November 1997. Accordingly, the Board dismissed USG's EAJA application as untimely by decision issued on 26 June 1998. *See U.S. General, Inc.*, ASBCA No. 48528, 98-2 BCA ¶ 29,867.

#### B. Contract Payment Clauses

4. The contract incorporated the "PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACT (APR 1989)" clause, FAR 52.232-5 (the "Payments" clause). Subparagraph (h) of this clause provides, in part:

- (h) The Government shall pay the amount due the Contractor under this contract after -
- (1) Completion and acceptance of all work;
  - (2) Presentation of a properly executed voucher; and
  - (3) Presentation of release of all claims against the Government arising by virtue of this contract, *other than claims, in stated amounts, that the contractor has specifically excepted from the operation of the release. . . .* [Emphasis added]

5. The contract also incorporated the “PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (APR 1989)” clause, FAR 53.232-27 (the “Prompt Payment” clause). This clause provides:

Notwithstanding any other payment terms in this contract, the Government will make invoice payments and contract financing payments under the terms and conditions specified in this clause.

The clause identifies two types of invoice payments which may occur under the contract. FAR 52.232-27 (a)(1)(i) identifies invoice payments relating to progress payments. FAR 52.232-27(a)(1)(ii) identifies invoice payments as relating to final payments:

(ii) Final payments based on completion of all work and *presentation of release of all claims* against the Government arising by virtue of the contract. . . . [Emphasis added]

FAR 52.232-27(a)(1)(i)(A) of the clause relating to progress payments provides:

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

The clause provides further at FAR 52.232-27 (a)(3):

(3) 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.

. . . .

(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) The interest penalty shall be at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) . . . .

A “proper invoice” required, among other things, compliance with FAR 52.232-27(a)(2)(i) through (ix). FAR 52.232-27(a)(2)(ix) required compliance with “Any other information or documentation required by the contract.”

C. Payment Impasse

6. After the contract was 100 percent complete, USG forwarded its Invoice No. 18, dated 9 July 1996, in the amount of \$9,400 (compl., ex. 1). At the time this invoice was submitted, USG had already submitted its \$57,871 claim (dated 22 June 1994) which was the subject of ASBCA No. 48528, and that claim was pending before the Board (*see* finding 29, ASBCA No. 48528, 97-2 BCA at 144,965).

7. The Government did not accept Invoice No. 18. It returned the invoice with the following remarks:

Your Invoice Number 18 dated July 9, 1996 is hereby returned for the following reason(s): your final payment is incomplete, final release missing. I left you a voice mail on July 15, 1996. Please re submit invoice with all necessary documents.

(Compl., ex. 2)

8. Six months later, by Federal Express package dated 18 December 1996, USG resubmitted Invoice No. 18. The cover letter forwarding the invoice stated that USG was billing for 99.99 percent (*i.e.* \$9,000) leaving \$400.00 in the contract “to keep it open until such time as the claims are settled.” The letter went on to say:

Please do not delay in processing this payment! We will be providing the Government a final release pending the outcome of the up coming [sic] trial at that time we will bill for the final amount due in the contract.

(Compl., ex. 3) The 18 December 1996 invoice was received on 19 December 1996. It was not paid.

9. Over five months later, USG submitted Invoice No. 18, Revised, on 16 May 1997, via overnight couriers. Its cover letter again stated that it was billing for 99.99 percent (*i.e.* \$9,000) and was leaving \$400.00 in the contract “to keep it open until such time as the claims are settled.” The rest of the letter stated:

All warranty and punch list items have been completed. Please do not delay in processing this payment! We will be providing the Government a final release pending the outcome of the trial, at that time we will bill for the final amount due in the contract.

(Compl., ex. 4) This invoice was not paid.

10. On 14 July 1998, USG’s Vice President called the Navy’s contract specialist. USG’s Vice President recorded the telephone conversation which was subsequently transcribed and attached as an exhibit to USG’s complaint (compl., ex. 5).<sup>1</sup> The conversation revealed that the Government did not pay Invoice No. 18 because USG was unwilling to sign a release. The Navy contract specialist was given to understand that the \$4,287.39 award should not be paid pending resolution of the EAJA application. Neither USG’s Vice President nor the Navy’s contract specialist was aware that the Board’s decision dismissing USG’s EAJA application had been issued, and received by their respective representatives 12 days before the telephone call.<sup>2</sup> USG’s Vice President was concerned about releasing USG’s right to attorney’s fees. He said during the call:

Yeah, well I’d like to get it settled too, but, you know, I’m not willing to sign a release and not get my attorney’s fees and if I sign a release that releases an unconditional release and if that’s [the government attorney’s] position on the thing, I guess we just have to go forward and see what the judge says on it from there.

(Compl., ex. 5 at 3)

11. By letter dated 6 October 1998, USG through its attorney, submitted a “claim” to a Navy Resident Officer in Charge of Construction (ROICC). The letter referred to the invoices submitted on 9 July and 18 December 1996, and 16 May 1997. The letter also referred to ASBCA No. 48528 and stated that “even after a decision of the Board [the Navy] has continued and continues now to refused [sic] to pay those sums over to U.S. General, despite the fact they had been earned” (R4, tab 12 at ¶ 7).<sup>3</sup> USG’s claim letter also stated that it “is entitled to be paid the remaining contract balance, entitled to an award of interest for withholding of funds by the Navy, and entitled to costs and attorney’s fees incurred in compelling payment of these amounts.” (R4, tab 12 at ¶ 9)

The letter did not specify an amount for costs and attorney's fees. Nor did it detail what work was done. According to the CO, who eventually received the claim letter on 3 November 1998, USG sent the "claim" to "an unknown individual at a location that has not been in use by this command for over three years." Because USG could have ascertained the right individual to whom to send the claim, we find the claim letter was received by the CO on 3 November 1998.

12. FAR 33.201 defines "claim" to mean "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 . . .*" (Emphasis added)

13. On 2 November 1998, the Navy contract specialist forwarded to USG's Vice President by certified mail, return receipt requested, an invoice package consisting (1) contractor's invoice for \$14,894.14, (2) contractor's release, and (3) invoice certification. The \$14,894.14 included \$9,400 in unpaid contract balance, \$4,287.39 in award from the Board's decision in ASBCA No. 48528, and \$1,206.75 in Contract Disputes Act interest running from 11 July 1994 through 31 December 1997. USG's Vice President received the package on 9 November 1998. (R4, tab 1) On 10 November 1998, USG's Vice President advised the Navy contract specialist that USG's attorney was checking to see if the interest computation was correct.

14. Not having heard back from USG, the CO issued his decision by letter dated 7 January 1999. With respect to the \$4,287.39 granted by the Board in ASBCA No. 48528, the CO found that the Navy had issued unilateral Modification No. P00025 in the amount of \$4,287.39 plus interest in the amount of \$1,206.75 (from 11 July 1994 through 31 December 1997), and had sent it to USG. He also found that USG never submitted an invoice against the modification. Accordingly, he decided that since USG "never submitted an invoice for payment of this amount . . . [it] is therefore not entitled to recovery of any additional interest on it." (R4, tab 8) The \$4,287.39 the Board found due by decision issued 22 July 1997, has never been paid.

15. The CO decision found that Invoice No. 18, Revised, in the amount of \$9,000, dated 16 May 1997, and rejected by the Navy on 30 May 1997 "was a proper invoice that should have been paid in accordance with the terms of the contract." He found that the invoice was "inappropriately rejected due to an internal, government miscommunication." He found that the date on which Invoice No. 18 would have been paid, if properly processed, would have been 5 June 1997. He calculated that Prompt Payment Act (PPA) interest penalty for the period 6 June 1997 through 15 January 1999<sup>4</sup> on the invoice to be \$910.76. (R4, tab 8)

16. With respect to costs and attorney's fees "incurred in compelling payment of these amounts," the CO found USG's attorney was only involved in the submission of the

claim. Citing Federal Acquisition Regulation (FAR) 31.205-47, he concluded that such fees and costs were not allowable. (R4, tab 8)

17. The decision found that the “total current remaining unpaid contract balance through modification P00027, including interest, is \$15,804.90 [\$4,287.39 + \$1,206.75 + \$910.76 + \$9,400].” (R4, tab 8)

18. On the same day the CO issued his decision, the Navy contract specialist by certified mail, return receipt requested, forwarded to USG’s Vice President, a final payment invoice package. This package included (1) USG’s Invoice No. 18 for \$15,804.90, (2) contractor’s release, and (3) invoice certification. (R4, tab 6) On the same day, the Navy contract specialist also issued Modification No. P00027 for \$910.76 “for [Prompt Payment Act] interest owed from 6 June 1997 to 15 January 1999 in accordance with the Contract Disputes Act [sic] on the unpaid [amount] of Invoice #18 of 6 May 1998 in the amount of \$9,000 for improper rejection.” (R4, tab 7)

19. On 28 January 1999, the Navy contract specialist reached USG’s Vice President by telephone and inquired about the status of the final payment invoice package, and advised him that the Navy was concerned about the possibility of losing project funds. USG’s Vice President indicated that he had not heard from his attorney and would contact his attorney and get back in touch the following week. (R4, tab 10) On 10 February 1999, the Navy contract specialist called USG’s Vice President again and questioned the status of the final invoice package. The Vice President indicated that he had not received a response from his attorney and would contract the attorney and get back in touch. (R4, tab 10) On 24 February 1999, the Navy’s contract specialist contacted USG’s Vice President again to “confirm that he will not be forwarding the final invoice package.” This time, USG’s Vice President indicated that his attorney had “taken other actions, and he would not be signing the invoice package.” (R4, tab 11) By letter dated 9 February 1999, USG, through its attorney, filed the instant appeal with the Board.

20. Based on Navy counsel’s status report of 25 October 1999 that the case was ready for hearing, the Board by letter dated 9 November 1999, scheduled a one-day hearing to take place in February 2000. By letter dated 15 November 1999, USG’s counsel filed its Motion to Compel, for Sanctions and for Summary Judgment. He requested that no hearing be scheduled until the motion is decided.

21. Because the Navy had conceded that it owed (1) \$4,287.39 plus CDA interest on ASBCA No. 48528, and (2) \$9,400 unpaid contract balance plus PPA interest, the Board urged the parties to settle. Two conference calls were held with counsel for the parties, one on 22 November 1999, and a second one on 15 December 1999. The parties could not reach agreement. In his letter of 16 December 1999 to USG’s counsel (with a copy to the Board), Navy counsel stated that, after a review of USG’s Motions to Compel,

for Sanctions and for Summary Judgment, he had decided to waive filing a reply and asked the Board to decide the appeal. We treat Navy counsel's request as its cross motion for summary judgment.

### DECISION

Summary judgment is properly granted where there are no disputed issues of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-92 (Fed. Cir. 1987). This principle also applies to cross motions for summary judgment. On cross motions, "counsel are deemed to represent, that all relevant facts are before the [Board] and a trial is unnecessary." *Aydin Corp. v. United States*, 669 F.2d 681, 689 (Ct. Cl. 1982).

#### The \$9,000 Invoice

The parties' long-running dispute centered around whether USG was required to execute a release in order to receive payment of the contract balance (\$9,400). In this regard, both the "Payments" clause and the "Prompt Payment" clause required that a request for final payment on a contract be accompanied by a release (findings 4, 5). In this case, after USG's 9 July 1996 Invoice No. 18 for the contract balance (\$9,400) was rejected, it resubmitted the invoice on 18 December 1996 for less than the contract balance (\$9,000), and resubmitted Invoice No. 18, Revised, on 16 May 1997 for \$9,000. Both the 18 December 1996 invoice and the 16 May 1997 invoice left \$400 to keep the contract open (findings 8, 9). Neither the 18 December 1996 invoice nor the 16 May 1997 invoice sought final payment. Therefore, neither request for payment required a release. We conclude that USG's 18 December 1996 invoice was a proper invoice and payment should have been made on that invoice.<sup>5</sup>

Under the "Prompt Payment" clause, the designated billing office has 14 days after receipt of a proper invoice to make a progress payment (finding 5). Because USG's 18 December 1996 invoice was sent by Federal Express, we have found that the Navy received the invoice on 19 December 1996 (finding 8). We conclude that the Navy had until 2 January 1997 to make payment without incurring PPA interest penalty. Since interest penalty under the PPA does not continue to accrue "for more than one year" (*see* 31 U.S.C. §3907 (b)(1)(B)), we conclude PPA interest on USG's 18 December 1996 invoice ceased to accrue on 2 January 1998. We have found that the CO received USG's present claim on 3 November 1998 (finding 11). Accordingly, interest on the \$9,000 invoice plus the accrued PPA interest penalty will run from 3 November 1998 until paid. 41 U.S.C. § 611

#### ASBCA No. 48528 Award

We turn next to the \$4,287.39 we awarded in our decision issued on 22 July 1997. In that decision, we specified that CDA interest was to run from 11 July 1994 until paid. According to the CO, following the Board's decision, the Navy issued unilateral Modification No. P00025 in the amount of \$4,287.39, plus CDA interest in the amount of \$1,206.75 and sent it to USG.<sup>6</sup> USG never invoiced against it. The parties' dispute centers around whether the Navy is obligated to pay a Board award without an invoice from USG. Although contractors may typically invoice against a modification, the Navy has not shown us any regulation which would prohibit the payment of a "Board award" absent an invoice. Neither the "Payments" clause nor the "Prompt Payment clause" requires. It was not necessary for the Navy to lump this award together with the \$9,400 contract balance as a part of the contract's final payment procedure and thereby invoking the contract provisions relating to the submission of an invoice and release. Accordingly, we conclude that USG is entitled to the \$4,287.39 award with CDA interest running from 11 July 1994 until paid.

#### Attorney's Fees

With respect to USG's cost and attorney's fees incurred in compelling payment," notwithstanding the CO's decision denying such costs and fees on the basis of FAR 31.205-47<sup>7</sup> no valid claim was submitted because USG made no demand for payment of money in a sum certain. See FAR 33.201 (finding 12). Accordingly, we have no jurisdiction over such costs and fees.<sup>8</sup> In this regard, the CO cannot confer CDA jurisdiction by rendering a decision on a submission that does not meet the CDA requirements for a "claim." *Paul E. Lehman, Inc. v. United States*, 673 F.2D 352 (Ct. Cl. 1982) (there can be no valid CO decision absent a valid claim); *Logus Mfg. Co.*, ADBCA No. 26436, 82-2 BCA ¶ 16,025 (submission of an unquantified request for equitable adjustment not a claim within the meaning of section 6(a) of the CDA).

#### CONCLUSION

With respect to the \$9,000 USG invoiced on 18 December 1996, we hold USG is entitled to the \$9,000 with PPA interest running from 2 January 1997, for one year, until 2 January 1998. CDA interest on the \$9,000 plus accrued PPA interest penalty will run from 3 November 1998 until paid.

With respect to the \$4,287.39 awarded in ASBCA No. 48528, CDA interest on the amount is to run from 11 July 1994 until paid.

With respect to USG's purported claim for costs and fees to compel payment of the amounts owed, we dismiss for lack of jurisdiction.

Dated: 22 March 2000

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PETER D. TING  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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ALEXANDER YOUNGER  
Administrative Judge  
Acting Vice Chairman  
Armed Services Board  
of Contract Appeals

NOTES

- 1 According to USG, the telephone call originated from USG's offices in Draper City, Utah, and Utah law permits the recording of telephone conversations under Utah Code Section 76-9-403(1)(a) by "the sender or the receiver . . . ."
- 2 The Board's certified return receipt shows that both parties received the Board's EAJA dismissal decision on 2 July 1998.
- 3 The Board has not been advised as to why the Judgment Fund was not used to pay this award.
- 4 Apparently, the CO was unaware of the one year limit on PPA interest penalty contained in 31 U.S.C. § 3907 (b)(1)(B).
- 5 Even though the CO decision considered the 16 May 1997 Invoice No. 18, Revised, as the proper invoice, we find no distinction between that invoice and the

18 December 1996 invoice, both of which requested less than the contract balance (findings 8, 9).

<sup>6</sup> USG has not explained why it did not seek payment of the award through the Judgment Fund, 41 U.S.C. § 612 (b) and (c), in which case neither an invoice nor a release would be required.

<sup>7</sup> FAR 31.205-47(f)(1) provides that “Costs . . . are unallowable if incurred in connection with . . . the prosecution of claims or appeals against the federal Government (see 33.201).”

<sup>8</sup> By this limited analysis we do not mean to imply that we are holding that the claim would otherwise be proper.

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. 52041, Appeal of U.S. General, Inc., rendered in conformance with the Board's Charter.

Dated:

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