

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Johnson Controls World Services, Inc.) ASBCA Nos. 51640, 51766,
) 52127, 52262
Under Contract No. DAKF04-95-C-0011)

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OPINION BY ADMINISTRATIVE JUDGE MOED

In these appeals, Johnson Controls World Systems (JCWS) seeks to recover interest penalties under the PROMPT PAYMENT clause for late payment of cost reimbursement invoices under this services contract. The contracting officer denied the claims on the ground that these were invoices for contract financing payments and, as such, could not generate interest penalties in the event of late payment. The parties have agreed to a decision based on a documentary record, without a hearing, pursuant to Rule 11. The decision relates only to entitlement.

FINDINGS OF FACT

1. These appeals relate to a contract awarded to JCWS on 24 July 1995 for installation support services at the U.S. Army National Training Center, Fort Irwin, CA (NTC). The contract was awarded for the period 1 March-30 September 1996. The Government exercised renewal options, extending the term of contract to 30 September 2000. The contract was awarded on a cost-reimbursement plus award fee (CPAF) basis. The fee was comprised of a base fee “for performing this contract” and an additional award fee payable on the basis of the contracting officer’s evaluation of the contractor’s performance in specified performance areas. (ASBCA No. 51640 R4, tab 1 at G-1, H-6)

2. Section C.1 of the Performance Work Statement (PWS), which was the contract specification, described the “overall scope” of the contract work as the furnishing of “all resources and management necessary to perform Installation Support Services at Fort Irwin,

[California] and other specified areas of responsibility.” The services consisted of functions at NTC which, historically, had been performed directly by the Government. Beginning in 1981, and continuously thereafter, these were performed pursuant to contract.

3. In Section B (“Supplies or Services and Prices/Costs”) of the contract, the services were listed under contract line items (CLIN) with functional titles as follows: CLIN 0001 - mobilization and phase-in; CLIN 0002 - project management; CLIN 0003 - public works; CLIN 0004 - range and airfield operations; CLIN 0005 - operation of the Training Support Center (TSC); CLIN 0006 - morale, welfare, and recreation activities; and CLIN 0007 - administrative support.

4. Under the standard FAR 52.246-5 INSPECTION OF SERVICES-COST REIMBURSEMENT (APR 1984) clause incorporated into the contract, the Government was entitled to “inspect and test all services called for by the contract, to the extent practicable, at all places and times during the term of the contract.” The contract contained an additional, special INSPECTION AND ACCEPTANCE clause (§ E.3), in part, as follows:

(a) The performance by the Contractor and the quality of work delivered, including services rendered, and any documentation or written material in support thereof, shall be subject to continuous inspection, surveillance, and review for acceptance by the Contracting Officer or his duly authorized representative.

5. The contract contains the FAR 52.216-7 ALLOWABLE COST AND PAYMENT (JUL 1991) clause. Para. (a) of the clause is as follows :

(a) *Invoicing.* The Government shall make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more often than once every two weeks, in amounts determined to be allowable by the Contracting Officer in accordance with Subpart 31.2 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

JCWS submitted public vouchers on Standard Form 1034 for reimbursement of costs and payment of fee every two weeks during the term of the contract (app. ex. A at 3). The

contract also contained the standard FAR 52.232-22 LIMITATION OF FUNDS (APR 1984) clause.

6. The vouchers submitted by JCWS bore the notation “cost reimbursable—provisional payment.” The following provisions of the ALLOWABLE COST AND PAYMENT (JUL 1991) clause are relevant:

(g) *Audit.* At any time or times before final payment, the Contracting Officer may have the Contractor’s invoices or vouchers and statements of cost audited. Any payment may be (1) reduced by amounts found by the Contracting Officer not to constitute allowable costs or (2) adjusted for prior overpayments or underpayments.

(h) *Final Payment.* (1) The Contractor shall submit a completion invoice or voucher, designated as such, promptly upon completion of the work, but no later than one year . . . from the completion date. Upon approval of that invoice or voucher, and upon the Contractor’s compliance with all the terms of this contract, the Government shall promptly pay any balance of the allowable costs and that part of the fee (if any) not previously paid.

7. The special INVOICING clause of the contract (§ G.5) required JCWS to submit copies of “invoices, SF 1034 [“Public Voucher for Purchases and Services Other Than Personal”] and supporting documentation” to the cognizant Defense Contract Audit Agency (DCAA) and to the contracting officer. JCWS was required to provide “complete labor cost documentation” as part of “supporting documentation.” The applicable Account Processing Code (APC) was one of the required elements of labor cost documentation.

8. The significance of the APCs was explained in the GOVERNMENT-CONTRACTOR BUDGET AND FUNDING INTERFACE clause of the contract (§ G-6), in part as follows:

An APC is a[n] . . . alphanumeric code used to identify transactions within the Government’s financial accounting system. . . . Numerous APCs are assigned to each of the areas of the contract.

* * * *

[I]t is extremely important that the labor charges for the individual employees are assigned to the correct APC. . . . When the Government is billed the employee’s labor , the

charges must be reflected on the appropriate APCs so that the Government has an accurate picture of what it costs to operate each area. The same is true for an employee who works at different tasks within the same area of the contract. For example, an employee works only in the Public Works area of the contract but spends half of the time performing grounds maintenance and half of the time performing miscellaneous maintenance. The correct APC must be charged so that the Government has an accurate picture of how much each type of maintenance costs.

9. Schedule B contains dollar amounts in the unit price and total amount columns for each CLIN. While these amounts are not described in the contract, as awarded, they are referred to as “estimated CLIN values” in connection with the re-issuance of Schedule B effected in contract Modification No. P00072 (ASBCA No.51640 R4, tab 4).

10. Attached to the public vouchers, as included in the record, were supporting data for the requested cost reimbursement and/or fee payments. Beginning with Public Voucher (PV) 97-34, dated 10 November 1997 (ASBCA No. 51766 R4, tab 11), through PV 98-15, dated 1 May 1998 (ASBCA No. 52127 R4, tab 31), the supporting documentation included a spreadsheet which appears to have been prepared by Government contract administration personnel after submission of the public voucher. The spreadsheets summarized the costs claimed in the voucher by APC. On the spreadsheets, as to each listed APC, there was a CLIN reference and a descriptive title of the function as to which costs were claimed.

11. The contract contains the standard FAR 52.232-25 PROMPT PAYMENT (SEP 1992) clause prescribed for all acquisitions other than construction. FAR 32.908(c).¹ The clause provides for payment of an interest penalty to the contractor for failure of the Government to make an “invoice payment” by the due date. The clause provides, however, that “[c]ontract financing payments shall not be assessed an interest penalty for payment delays.” FAR 52.232-25(b)(4).

12. For the purposes of the clause, “invoice payment” was defined as:

[A] Government disbursement of monies to a Contractor under a contract or other authorization for supplies or services accepted by the Government. This includes payments for partial deliveries that have been accepted by the Government and final cost or fee payments where amounts owed have been settled between the Government and the Contractor.

13. In regard to invoices for final cost or fee payments, ¶ (a)(5) of the clause provides as follows:

(5) An interest penalty shall be paid automatically by the Government, without request from the contractor, if payment is not made by the due date and the conditions listed in subdivisions (a)(5)(i) through (a)(5)(iii) of this clause are met, if applicable . . . :

* * * *

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

14. For the purposes of the clause, “contract financing payment” was defined as ¶ (b)(1)):

[A] Government disbursement of monies to a Contractor under a contract clause or other authorization prior to acceptance of supplies or services by the Government. Contract financing payments include advance payments, progress payments based on cost under the clause at 52.232-16, Progress Payments, progress payments based on a percentage or stage of completion (32.102(e)(1)) other than those made under the clause at 52.232-5, Payments Under Fixed-Priced Construction Contracts or the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, and interim payments on cost type contracts.

15. “Acceptance” is defined in OMB Circular No. A-125 as “acknowledgment by the Government that property and services received conform with the requirements of the contract.” 54 Fed. Reg. 52700 (Dec. 21, 1989). In this record, “interim payment” is defined only in the Defense Contract Audit Manual (DCAM). In the DCAM, at § 6-1004.c, that term is used in reference to payments subject to the provisions of ¶ (g) of the ALLOWABLE COST AND PAYMENT (JUL 1991) clause, namely, payments which are “provisional in nature and are subject to retroactive adjustment upon the determination of the allowability of costs claimed.” (Ex. G-10 at 2)

16. DCAM § 6-1007.a contains the following instruction:

Contractors are generally dependent upon prompt receipt of interim payments under cost-reimbursement type contracts to maintain a satisfactory position. Therefore, as an objective,

[vouchers for interim payments] will be reviewed and either (1) approved for payment and forwarded to the disbursing officer or (2) returned to the contractor for correction as quickly as possible, but not later than five working days after receipt.

(Ex. G-10 at 2, 3) In keeping with the above instructions, the practice of DCAA, under this contract, was to make only a “cursory check” of individual vouchers “to verify amounts and ensure the amounts claimed [did] not exceed allotted funds” (ex. G-9 at 5).

17. During the period April, 1996 - December, 1998, a total of 94 vouchers submitted by JCWS for reimbursement of costs under this contract were paid, in part or entirely, later than 30 days after the Government’s receipt of the voucher. (Joint Stipulation of Fact dated 10 September 1999). There is no contention or evidence that any of the lateness in payments was occasioned by defective or nonconforming services.

18. Para. (a)(5) of the PROMPT PAYMENT clause sets forth the conditions precedent to liability of the Government for an interest penalty. One of these is that “[a] *proper invoice* was received by the designated billing office” (emphasis added). Para. (a)(4) of the clause states the following:

(4) An invoice is the Contractor’s bill or written request for payment under the contract for supplies delivered or services performed. . . . A proper invoice must include the items listed in subdivisions (a)(4)(i) through (a)(4)(viii) of this clause.

19. Among the required contents of a proper invoice, as listed in ¶ (a)(4)(iv) of the PROMPT PAYMENT clause, is a “[d]escription, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed.” Para. (a)(6) of the clause, relating to the computation of interest penalties, provides, in part, that any such penalty “shall accrue daily on the invoice payment amount approved by the Government.”

20. The matter of prompt payment of invoices was not raised during the negotiations preceding award of this contract. Mr. Dale Tyler, who represented JCWS in these discussions, avers in a sworn statement, dated 20 October 2000, that the contractor “did not raise these issues because we had never had any problem with the Army paying invoices within the 30 days at any other contract.”

21. Beginning with PV 97-34, dated 10 November 1997 (ASBCA No. 51766 R4, tab 11) and ending with PV 97-48, dated 1 May 1998 (ASBCA No. 52127 R4, tab 30), most of the voucher submittals were accompanied by the following notice from JCWS:

If no notification of improper invoice is received, we expect payment within 30 days of receipt date. Any delays beyond 30

days will be in accordance with the prompt payment clause incorporated in [this] contract.

22. On 5 August 1997, JCWS submitted PV 97-26, in the amount of \$23,863.80, for interest penalties allegedly due under the PROMPT PAYMENT clause for late payment of listed vouchers, submitted by JCWS during the period 16 April 1996 through 28 April 1997, for reimbursement of costs and amounts of base fees and award fees. By letter dated 2 October 1997, the contracting officer refused payment of PV 97-26 based on the assertion that interest penalties under the PROMPT PAYMENT clause were not due for late payments under cost-reimbursement, incrementally funded contracts. This was supplemented by the contracting officer's letter to JCWS, dated 30 January 1998, stating that cost reimbursements under such contracts were contract financing payments under the PROMPT PAYMENT clause and, as such, did not qualify for interest penalties for late payment.

23. JCWS responded by letter dated 9 March 1998 disagreeing with the Government's positions and reiterating its contention that it was entitled to recover interest penalties for these late payments. The contracting officer denied the claim in its entirety in a written decision pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, dated 23 April 1998. The decision was timely appealed and thereafter docketed as ASBCA No. 51640. (ASBCA No. 51640 R4, tabs 37-42).

24. On 12 June 1998, JCWS submitted PV 98-17 in the amount of \$105,024.03 for interest penalties under the PROMPT PAYMENT clause by reason of late payment of vouchers for cost reimbursement and amounts of base fees and award fees which had been submitted by JCWS during the period 18 April 1996 through 12 June 1998. By letter of 18 June 1998, the contracting officer refused payment of PV 98-17 on the grounds previously asserted (finding 22).

25. On 16 July 1998, JCWS submitted a written claim, duly certified pursuant to the CDA, in the amount of \$105,024.03 which had been requested in PV 98-17. The contracting officer denied the claim in its entirety in a written decision pursuant to the CDA dated 31 August 1998. JCWS filed a timely appeal from that decision which was docketed as ASBCA No. 51766. (ASBCA No. 51766 R4, tabs 39-43).

26. By letter dated 12 January 1999, the contracting officer modified the written decisions which are the subjects of ASBCA Nos. 51640 and 51766 (findings 23, 25) to the extent of determining that JCWS was entitled to recover interest penalties for late payments of vouchered amounts of award and base fees in the total amount of \$4,043.37. On the basis that the contracting officer had "continue[d] to deny all other prompt payment interest claims," JCWS filed an appeal from the above modification of the contracting officer's decisions. The appeal was docketed as ASBCA No. 52127. (ASBCA No. 52127 R4, tabs 32, 33).

27. On 12 January 1999, JCWS submitted PV 99-06 in the amount of \$67,176.59 for interest penalties for late payment of vouchers submitted during the period 13 June 1998 through 31 December 1998. In a written decision pursuant to the CDA, dated 14 May 1999, the contracting officer denied the claim in its entirety (ASBCA No. 52262 R4, tab 34). Subsequently, by letter dated 23 June 1999, the contracting officer modified that decision, to the extent of determining that JCWS was entitled to to recover interest penalties for late payments of amounts of award and base fees included in the above vouchers. JCWS filed a timely appeal from the contracting officer's decision, as modified, which was docketed as ASBCA No. 52262.

Relevant Regulatory History

28. On 14 April 1989, OMB published, and solicited public comment on, a proposed revision of Circular No. A-125 in the Federal Register, 54 Fed. Reg. 15053 (1989). The primary purpose of the revision was to implement changes made by the Prompt Payment Act Amendments of 1988, Pub. L. No. 100-496, 102 Stat. 2455 (1988). OMB had been charged in the Prompt Payment Act with the responsibility for prescribing regulations for implementation of the statute. 31 U.S.C. § 3903(a). The proposed revisions included the following definition of "partial payment" to be newly inserted into Circular No. A-125:

k. partial payment -- payment made for partial delivery of accepted property or partial performance of accepted services. Under cost reimbursement contracts, periodic or interim payments are not covered by the interest provisions of the circular unless they are defined by the contract as partial payments for deliverable property or services.

29. The above definition of "partial payment" was omitted from the final version of Circular No. A-125 (Revised) published in the Federal Register on 21 December 1989. 54 Fed. Reg. 52700 (1989). The "Analysis of Comments" section of that publication states that comments had been received advocating payment of interest penalties on all late interim payments. OMB explained, however, that "[t]he intent of the proposed restriction was to prohibit payment of interest on contract financing payments." In place of the proposed definition of "partial payment," Circular No. A-125 (Revised) contains a newly-inserted definition of "contract financing payments," "based on the definition in the FAR," which includes "interim payments on cost-type contracts" and excludes invoice payments and "payments for partial deliveries."

30. On 6 May 1994, the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulatory Council (DARC) jointly published, in the Federal Register, proposed changes "implement[ing] the guidance published in OMB Circular No. A-125

(Revised).” 59 Fed. Reg. 23,776 (1994). FAR 1.201 provides that the DARC and CAAC shall be responsible for preparation and issuance of revisions to the FAR. This includes the submittal of information necessary for publication of a notice soliciting comments on a proposed revision to the FAR. FAR 1.201-1(e)(2).

31. Among the changes proposed on 6 May 1994 by the CAAC and DARC was the “clarif[ication of] policy on partial payments for partial performance by establishing coverage at FAR 32.102(d) and 32.903(f).” In pertinent part, proposed FAR 32.102(d) stated that:

When appropriate, contract statements of work and pricing arrangements shall be designed to permit acceptance and payment for discrete portions of the work, as soon as accepted (but see 32.903(f)(2)).

59 Fed. Reg. 23776 (1994)

32. A new ¶ (f) was proposed for FAR 32.903, as follows:

(f)(1) Contracting officers shall, when the nature of the work permits, write contract statements of work and pricing arrangements that allow contractors to deliver, and receive invoice payments for, discrete portions of the work as soon as completed and found acceptable by the Government (see 32.102(d)).

(2) Unless specifically prohibited by the contract, the contractor is entitled to payment for accepted partial deliveries of supplies or partial performance of services that comply with all applicable contract requirements and for which prices can be calculated from the contract terms.

(3) Under some types of contracts, such as many cost reimbursement contracts, partial payments cannot be made because the invoice price cannot be determined until after settlement of total contract costs and other contract-wide final arrangements. However, interim payments or contract financing payments may be made in accordance with the terms of the contract.

Supra, at 23777

33. A revised version of the PROMPT PAYMENT clause incorporated the existing definitions of “invoice payment” and “contract financing payments.” *Supra*, at 23782 The proposed regulations were approved *verbatim* for inclusion in the FAR in a final rule published on 17 March 1997 and made effective on 16 May 1997. 62 Fed. Reg. 12705, 12706 (1997)

DECISION

These are claims for interest penalties under the PROMPT PAYMENT clause for late payment of a total of 94 cost reimbursement vouchers submitted by JCWS. The contracting officer denied these claims on the basis that these vouchers were requests for contract financing payments and, for that reason, were ineligible for award of interest penalties (finding 22).

In these appeals, the Government specifies that the vouchers were requests for interim payments. We have found that such payments provide reimbursement of costs on a provisional basis, subject to later adjustment, with the purpose of enabling contractors to maintain a satisfactory financial position during performance of a cost-type contract (finding 16). The provisions of ¶ (g) of the ALLOWABLE COST AND PAYMENT (JUL 1991) clause define the conditions under which interim payments are made. Para. (g) provides that cost reimbursement payments made prior to final payment are subject to audit; to reduction “by amounts found by the Contracting Officer not to constitute allowable costs”; and to adjustment “for prior overpayments or underpayments” (finding 6).

JCWS acknowledged the provisional character of the payments by placing the notation “cost reimbursable—provisional payment,” on the cost reimbursement vouchers submitted under this contract (finding 6). On the part of the Government, based on the provisional nature of interim payments, DCAA auditors were instructed, by the DCAM, to process vouchers for such payments on an expedited basis (finding 16). Consonant with that instruction, the auditors assigned to this contract performed only a “cursory check” of interim payment vouchers “to verify amounts and ensure the amounts claimed [did] not exceed allotted funds” (finding 16).

JCWS does not deny that these were requests for interim payments. The definition of “contract financing payments,” in the PROMPT PAYMENTS clause, opens with the statement that these are disbursements to a contractor “prior to acceptance of supplies or services by the Government” (finding 14). JCWS asserts that the vouchers in respect of which interest penalties are claimed, were not contract financing requests but, instead, were requests for payment for services performed and accepted.

That assertion is grounded on the special INSPECTION AND ACCEPTANCE clause of the contract (§ E.3) which provides for “continuous inspection, surveillance, and review for acceptance” of services by the Government (finding 4). JCWS contends that pursuant to

that provision, inspection and acceptance of services by the Government occurred concurrently with performance so that the vouchers amounted to requests for payments for partial performance of services. As such, when payment was late, the vouchers were eligible for interest penalties (app. reply br. at 2).

JCWS relies on *Northrop Worldwide Aircraft Services, Inc. v. Dept. of Treasury*, GSBCA Nos. 11162-TD, 11184-TD, 92-2 BCA ¶ 24,765 to support that position. We wrote concerning the rationale of *Northrop in Technology for Communications International*, ASBCA Nos. 36265, 36841, 93-3 BCA ¶ 26,139 at 129,946 n.4, 129,950 n.7, regarding whether Prompt Payment Act interest was applicable in accordance with OMB Circular No. A-125 as it appeared post-1988. We suggested then that we might not follow *Northrop* as it related to post-1988 contracts. We now have such an appeal before us and do not find *Northrop* persuasive with regard to the post-1988 contract before us. The interim payments in this appeal were clearly contract financing and there has been no showing that the services were accepted within the meaning of the Prompt Payment Act.

The vouchers submitted by JCWS did not purport to request payment for particular services which had been accepted. They were simply requests for reimbursement of costs incurred “as work progresse[d],” as provided in ¶ (a) of the ALLOWABLE COST AND PAYMENT (JUL 1991) clause (finding 5). Although JCWS asserted entitlement to interest penalties in the event of late payment (finding 21), there was no contemporaneous assertion that the vouchers were requests for payment for partial performance of accepted services, as is now contended.

JCWS could not reasonably have understood the interim payments to be the prices of services performed. In ¶ (h), the clause specified that the price of the services would be established at a later time, namely, after completion of work upon submission and approval of a completion voucher setting forth the unpaid balances of allowable cost and fee (finding 6).

The establishment of a price for the accepted services allows the submission of a proper invoice for any balance due of costs and fees. This is expressly recognized in the PROMPT PAYMENT clause with the inclusion, as a type of invoice payment, of “final cost or fee payments where amounts owed have been settled between the Government and the Contractor.” Para. ¶ (a)(5) of the PROMPT PAYMENT clause elaborates on that description by providing that such an invoice must not be “subject to further contract settlement actions between the Government and the Contractor.” (Findings 12, 13)

The interpretation that interim payments for services qualify for interest penalties is precluded, also, by the need to give a strict construction to the PROMPT PAYMENT clause. This is necessary because that clause implements the waiver, in the Prompt Payment Act, of sovereign immunity against payment of interest by the Government. The only provision in the clause for assessment of interest penalties on late payment of cost reimbursement

vouchers on service contracts of this type relates to “final cost or fee payments where amounts owed have been settled between the Government and the Contractor.” (Finding 12) Such a provision “cannot be enlarged by implication or analogy.” *Bromley Contracting Co., Inc. v. United States*, 596 F.2d 448, 450 (Ct. Cl. 1979). This precludes an interpretation expanding the Government’s liability for interest penalties to include certain interim payments, as proposed by JCWS.

As of the date of award of this contract, the executive branch agencies responsible for issuing regulations implementing the Prompt Payment Act (findings 28, 30), had rejected the position espoused by JCWS that an interim payment could constitute a payment for partial deliveries accepted by the Government and, therefore, qualify for interest penalties. In issuing the revision of Circular No. A-125, which was promulgated on 21 December 1989, OMB withdrew a proposed provision which would have recognized certain interim payments as payments for partial deliveries and elected, instead, to consider all interim payments as contract financing (finding 29).

Revisions of the FAR Prompt Payment Act regulations proposed by the DARC and CAAC to implement the above revisions of OMB Circular No. A-125 were published for comment in the Federal Register in October, 1994, 59 Fed. Reg. 23776 (1994), prior to the award of this contract. These were adopted *verbatim* on 17 March 1997. 62 Fed. Reg. 12705 (1997). (Finding 33)

The proposed new FAR 32.903(f), included in these revisions, enunciated the basic entitlement of contractors to receive “payment for accepted partial deliveries of supplies or partial performance of services that comply with all applicable contract requirements and for which prices can be calculated from the contract terms.” Under the new FAR 32.903 (f)(3), however, partial payments would not be available for “many cost reimbursement contracts,” because “the invoice price cannot be determined until after settlement of total contract costs and other contract-wide final arrangements.” It would be permissible, however, to make “interim payments or contract financing payments . . . in accordance with the terms of the contract.” (Finding 32).

These revisions were proposed by the DARC and CAAC which had the responsibility under the FAR for preparing and issuing proposed changes to that regulation. These circumstances coupled with the fact that the stated purpose of these revisions was the “clarif[ication of] policy on partial payments for partial performance” makes it reasonable to view the proposed revisions “as valuable evidence of the thinking of knowledgeable persons in Government . . . as to a reasonable construction of the” existing FAR provisions. *Bell Helicopter Textron*, ASBCA No. 21192, 85-3 BCA ¶ 18,415 at 92,420. In that context, the proposed revisions support the interpretation that cost reimbursement payments under this contract were not eligible for interest penalties until final cost and fee amounts had been settled.²

CONCLUSION

The vouchers in respect of which interest penalties have been claimed were requests for interim payments which could not accrue interest penalties as a result of late

payment. On that basis, the denial of the claims was correct. Accordingly, the appeals are denied in their entirety.

Dated: 24 July 2001

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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

NOTES

¹ Also included was the FAR 52.232-27 PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (APR 1989) clause for application to the minor amount of construction work required. All references in the decision text to the "PROMPT PAYMENT clause" relate to the FAR 52.232-25 clause.

Section 1010 of the National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114 Stat. 1654 (2000), enacted on 30 October 2000, provides that effective 15 December 2000, pursuant to regulations prescribed by the Director of OMB:

[T]he head of an agency acquiring services from a business concern under a cost reimbursement contract requiring interim payments who does not pay the concern a required interim payment by the date that is 30 days after the date of the receipt of a proper invoice shall pay an interest penalty to the concern on the amount of the payment due.

On 15 December 2000, OMB issued an interim final rule making two significant changes to OMB Circular A-125 provisions (now codified in 5 C.F.R. pt. 1315 (2001)) for implementation of § 1010 of the FY 2001 Defense Authorization Act. The first of these modifies the definition of “contract financing payments” by adding the statement that for the purposes of those provisions “interim payments under a cost-reimbursement service contract are treated as invoice payments.” 65 Fed. Reg. 78403 at 78404-05 (2000), adding C.F.R. § 1315.9(b)(2). The introductory section of the interim final rule states that “[u]ntil now, interim payments under cost reimbursement service contracts have not been subject to PPA interest penalties.” 65 Fed. Reg. 78403 (Dec. 15, 2000). The second change adds the following to the regulations defining a proper invoice:

An interim payment request under a cost-reimbursement service contract constitutes a proper invoice for the purposes of this part if it correctly includes all the information required by the contract or by agency procedures.

65 Fed. Reg. at 78405

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 51640, 51766, 52127, and 52262, Appeals of Johnson Controls World Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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