

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
LABAT-Anderson, Inc.) ASBCA Nos. 54904, 54905
) 54906
Under Contract No. SP0710-02-D-7005)

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OPINION BY ADMINISTRATIVE JUDGE JAMES ON
PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

These appeals arise from the contracting officer's (CO) final decision that denied appellant's three claims under the captioned contract for materiel distribution services at San Diego, CA. Claim No. 1, for \$5,962,848.34 under line item (CLIN) 0002, was for preservation, packaging, packing and marking (PPP&M) of materiel performed in Building 66 for off-base transshipments (ASBCA No. 54904). Claim No. 2, for \$73,366, was for alleged performance of CLIN 0011 work (ASBCA No. 54905). Claim No. 3, for \$135,503.18, was for Prompt Payment Act (PPA) interest on those portions of LABAT's invoices that the government declined to pay (ASBCA No. 54906). The Board has jurisdiction of the appeals under the Contract Disputes Act of 1978, 41 U.S.C. § 607.

On 12 and 15 May 2006 respondent and LABAT, respectively, moved for summary judgment. On 1 and 5 June 2006, respondent and LABAT, respectively, filed oppositions to the opposing motions. Briefly, respondent contends as to Claim No. 1 that the PPP&M in question was to be performed and paid pursuant to CLIN 0001, not

CLIN 0002, and that LABAT misconstrues the term “each” in CLIN 0002. As to Claim No. 2, respondent contends that LABAT did not complete CLIN 0011 on time and, therefore, should recover no payment therefor. Finally, respondent contends no PPA interest is due on reduced and withheld payments on the foregoing issues. LABAT maintains the opposite of those positions.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE MOTIONS

1. As amended on 20 October 2000, Defense Supply Center, Columbus (DSCC) Solicitation No. SPO700-00-R-7007 (the RFP) requested: (a) a “UNIT PRICE PER LINE” for CLIN 0001:

REQUIREMENTS

NOTE: See Clause B02 for Illustration of Payments
The Performing Activity [*i.e.*, contractor] shall provide materiel Distribution Service performed at the Defense Distribution Depot San Diego, California (DDDC) as defined in the Performance Work Statement (PWS), [§] C, [¶¶] C-5.1 through C-5.4, and . . . C-5.5.2.1, C-5.5.2.3, and C-5.5.4 of this [RFP].

Minimum Estimated Quantity –
2,239,778 Line Items Received and Issued
over the Base Period of 36 Months

and forecast 2,980,117 “lines”; (b) unit and total prices for CLIN 0002, “SPECIAL FUNCTIONS: Para. C-5.5.1.1 PPP&M for COSIS [Care of Supplies in Storage],” and forecast 1,766 undefined “units”; (c) unit and total prices for CLIN 0003, “SPECIAL FUNCTIONS: Para. C-5.5.1, 5.5.1.2, 5.5.1.3 PPP&M and Container Fabrication,” under sub-items 0003AA Bin, 0003AB Medium Bulk, and 0003AC Heavy Bulk, for which DSCC forecast 99,663, 65,032 and 21,837 undefined “units”; and (d) a total price for CLIN 0011, “INVENTORY ACCURACY IMPROVEMENT PLAN (IAIP): C-1.3.2,” with “Improvement to APL(s) [Acceptable Performance Level] to be completed within 12 months of the beginning of full performance” (R4, tab 19 at 1, 4-5, see also R4, tab 1 at 31).

2. LABAT’s 3 November 2000 response to the RFP proposed the following prices: CLIN 0001, \$13,346,631; CLIN 0002, \$65,163; CLIN 0003, \$4,830,775 and CLIN 0011, \$68,623. LABAT projected 16,609 hours, or 12.2% of CLIN 0003 hours, for sub-CLIN 0003AA, 43,354 hours, or 31.8%, for sub-CLIN 0003AB, and 76,429 hours, or 56%, for sub-CLIN 0003AC. (R4, tab 48A at 2, 30) On 25 April 2001

LABAT proposed prices of \$3.37 each per bin item (0003AA), \$17.99 each per medium bulk item (0003AB), and \$65.37 each per heavy bulk item (0003AC) (R4, tab 50 at 14).

3. By Amendment No. 0019 on 21 May 2002, the RFP: (a) revised CLINs 0001 and 0002 as follows, including combining CLIN 0003 with former CLIN 0002:

CLIN 0001 is to be priced as a fixed unit price per line.

0001 DISTRIBUTION SERVICES:

C-1 thru C-6, unless noted below

Minimum Estimated Quantity: 1,985,864

Line Items Received and Issued over the Base Period of 36 Months

NOTE: See Clause B02 for Illustration of Payments for CLIN 0001.

CLINs 0002, 0003, 0004 and 0005 are to be priced [sic] as a fixed unit price per each.

0002 PPP&M:

C-5.5.1

(b) forecast 2,643,720 “lines” for CLIN 0001; (c) forecast 165,085 eaches for CLIN 0002; and (d) did not revise CLIN 0011 (R4, tab 31 at 1, 7-8).

4. LABAT’s 1 July 2002 offer on the RFP proposed the following prices: CLIN 0001, \$5.87 unit price per “line,” times 2,643,720 forecast, total \$15,518,636; CLIN 0002, \$25.34 unit price per “each,” times 165,085 forecast, total \$4,183,254; and CLIN 0011, total \$73,366 (app. supp. R4, tab 35 at 5-7).

5. DSCC awarded Contract No. SPO710-02-D-7005 (the contract) to LABAT on 9 August 2002 at the unit prices LABAT proposed on 1 July 2002 for CLINs 0001, 0002 and 0011, on an indefinite delivery, indefinite quantity (IDIQ) basis under which the government issued delivery orders to LABAT for the 36-month base period. The base period began on 1 March 2003 upon completion of the transition period. (R4, tab 1 at 1, 4, 331-32, tabs 37-41)

6. The contract included § C, Performance Work Statement (PWS). PWS § C-2, Definitions, defined “Off-base Transshipment” as “[m]aterial received by the distribution

depot from the customer with a request for the materiel to be packed and shipped to another destination” (R4, tab 1 at 28). PWS § C-5, Specific Tasks, contained numerous paragraphs describing the work. With respect to CLIN 0001: (a) PWS ¶ 5.4 dealt generally with the “issue” process, (b) Technical Exhibit (T.E.) 1.1, ¶ 5.4, stated historical workloads of 29,428, 28,674, 101,525, 71,085 and 53,744 “Off-base Transshipments,” respectively, for fiscal years 1997 through 2001 and (c) T. E. 1.2, ¶ 5.4, projected workloads of 73,193, 70,235, 67,596, 66,144 and 64,785 “Off-Base Transshipments,” respectively, for the first five contract performance periods (PP) (R4, tab 1 at 83-84, 124, 137).

7. As issued on 15 August 2000, the RFP PWS included the following provisions relating to CLIN 0001:

5.2.1.1.10 . . . “G” condition materiel shall be processed as transshipment . . . Materiel receipted . . . shall be inducted into PPP&M as non-accountable work order materiel for packing and transshipment.

. . . .

5.4.1 REQUIREMENTS

The PA shall perform issue process including selection of stock from storage, issues from receiving, releases of materiel to transportation or direct delivery to the customer . . . transactions may include . . . off-base transshipments. . . .

. . . .

5.4.1.3 Packing and packaging shall be accomplished to minimum military requirements IAW . . . MIL-STD-2073-1 . . . The PA shall provide packing and shipping supplies . . . [and] containers required to support the packing requirements. . . . Section C-5.5.1, PPP&M, addresses packing requirements for repairable items with G & F condition codes needing minimum military packing, and all items needing above minimum military packing.

. . . .

5.4.1.6 Off-Base Transshipments may include the packaging and labeling of materiel upon customer request. The PA shall

ship the materiel by processing the transaction into DSS [Distribution Standard System].

....

5.4.1.8 Shipping includes shipping for all off-base issue/transshipments transactions;

(R4, tab 12 at 27, 52, 70-71, 73)

8. As awarded, the contract included the essential terms of C-5.2.1.1.10 (in re-numbered C-5.2.1.b), C-5.4.1 and C-5.4.1.3, but C-5.4.1.6 and C-5.4.1.8 were revised to state:

5.4.1.6 Off-base Transshipments are materiel received by the PA for non-local customers which require further packaging and/or labeling of materiel. The PA shall ship the materiel by processing the transaction into DSS as on [sic] off-base transshipment record. . . .

....

5.4.1.8 Shipping for all off-base issue/transshipments transactions;

(R4, tab 1 at 58, 83-84)

9. With respect to CLIN 0002, the contract's PWS ¶ C-5.5.1 PRESERVATION, PACKAGING, PACKING AND MARKING (PPP&M) provided:

The PA shall perform PPP&M . . . on Materiel received . . . Materiel in storage . . . Materiel to be shipped, off-base transshipments, MTIS [Materiel Turned In To Shore], and for special packaging support, to include non-routine COSIS . . . from organic repair facilities [Naval Ammunition Depot] or commercial vendors Container fabrications in support of the PPP&M operations are currently performed in Bldg [sic] 36, 66 and 656. The applicable levels of protection are Level A, Level B and Minimum Military packing . . . [in accordance with] MIL-STD-2073-1C

....

PPP&M requirements shall be performed prior to transshipments of non-accountable materiel. The PA shall . . . process PPP&M off-base transshipments for expedited packing and shipping based on customer needs.

....

Materiel requiring a level of PPP&M exceeding the above requirements . . . are [sic] to be performed in accordance with Section C-5.5.3, Customer Specified PPP&M [CLIN 0007].

(R4, tab 1 at 91-93) Further, PWS ¶ C-5.5.1.7, Standards, described the “MEASUREMENT UNIVERSE” as “Number of items received within one calendar month” (R4, tab 1 at 97).

10. For CLIN 0002, under ¶ 5.5.1, “PPP&M and Container Fabrication,” T.E. 1.1 set forth the following historical workloads:

PPP&M Transshipments (Bldg. 36)

<u>Pack</u>	<u>FY99</u>	<u>FY00</u> <u>Estimated</u>
<u>Bin</u>	<u>898</u>	<u>863</u>
<u>Medium Bulk</u>	<u>5,092</u>	<u>4,893</u>
<u>Bulk</u>	<u>680</u>	<u>653</u>
<u>Total</u>	<u>6,670</u>	<u>6,409</u>

....

PPP&M Container Fabrication (Bldg. 36)

....

<u>Transshipments</u>	<u>5,008</u>	<u>4,812</u>
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(R4, tab 1 at 137-38) and T.E. 1.2 projected “PPP&M Transshipments” workloads for the first five contract Performance Periods (PP), without identifying any DDDC buildings:

	PP1	PP2	PP3	PP4	PP5
<u>Bin</u>	651	625	601	588	576
<u>Medium Bulk</u>	3,905	3,748	3,607	3,529	3,457
<u>Heavy Bulk</u>	521	500	481	471	461
<u>Subtotal</u>	5,077	4,873	4,689	4,588	4,496

....

Container Fabrication . . . in support of PPP&M

Transshipments

<u>Bin/Medium Bulk</u>	3,254	3,123	3,006	2,941	2,881
<u>Heavy Bulk</u>	521	500	481	471	461
<u>Subtotal</u>	3,775	3,623	3,487	3,412	3,342

(R4, tab 1 at 146-47)

11. With respect to CLIN 0011, PWS § C-1.3.2 provided:

1.3.2 INVENTORY ACCURACY IMPROVEMENT PLAN

The PA shall utilize the information on inventory population and accuracy rates provided in [T.E.] 1.1 in order to determine if the PA will need to bring any or all of the inventory accuracy rates up to the APLs specified in paragraph C-5.3.3. If so, the PA shall develop and submit an Inventory Accuracy Improvement Plan (IAIP) as part of the QC/CSP. At a minimum, this IAIP shall address the actions, resources and schedule for improving the deficient inventory accuracy rate(s) to the APL(s) within twelve months of the beginning of full PA performance. If the Overall Inventory Accuracy Rate, during transition differs by more than 5% from the most recent rates included in [T.E.] 1.1, the Plan shall be revised and renegotiated as appropriate.

PWS ¶ C-5.3.2 required the contractor to “maintain inventory accuracy for stock warehoused at DDDC IAW Section C-5.3.3,” which required monthly surveys of materiel “Location Accuracy” to a 99% APL, and semi-annual surveys of Categories A, B, C, and D inventory to a 95% APL. (R4, tab 1 at 13-14, 72-74)

12. CO Cairo-Iocco's 14 April and 3 November 2004 letters to LABAT stated that three of four random statistical samples of its inventory failed to meet the specified APL and the "next sample inventory . . . will be conducted during August 2004 [February 2005 in the second letter]. The Government expects the results of the next inventory will be in compliance with the APLs" She requested LABAT "to submit a detailed plan of action . . . identifying the specific steps being taken to improve your inventory accuracy" by a designated date. Neither letter mentioned whether the CO based her statements on contract ¶ C-1.3.2 or ¶ C-5.3.3. (R4, tabs 104, 114)

13. Respondent received LABAT's invoice for its March 2003 CLIN 0002 work on 9 April 2003, and on the same day notified LABAT of its reduction from 42,271 to 10,583 PPP&M units, and from \$1,100,314.13 to \$275,475.49 for payment under CLIN 0002, due to its disagreement with billing off-base transshipment PPP&M work performed at Building 66 as CLIN 0002 work. On 9 April 2003 respondent also received LABAT's invoice for an incremental portion of CLIN 0011 work, and advised that such invoice would not be paid until the inventory APLs were met in accordance with the contract. These reductions and disallowances continued in succeeding monthly invoices. (App. supp. R4, tab 17; R4, tabs 64-67).

14. LABAT's 24 August 2004 claims to the CO sought: (1) \$5,962,848.34 for PPP&M of off-base transshipments in Building 66 under CLIN 0002, (2) \$73,366 for payment under CLIN 0011, Inventory Accuracy Improvement Plan, and (3) \$135,503.18 for PPA interest penalties on the foregoing amounts LABAT invoiced under the contract but respondent did not pay (R4, tabs 105, 106). The CO's 13 December 2004 final decision denied LABAT's 24 August 2004 claims (R4, tab 121).

The foregoing facts are not genuinely disputed. LABAT cites evidence to show that it genuinely disputes facts material to respondent's motion, addressed in the following additional SOFs.

15. Items "transshipped" are "non-accountable" items (see SOF, ¶ 9). Non-accountable items simply pass through to another location, are not stored in DDDC warehouses and are not "mission stock." (App. mot., Statement of Uncontroverted Facts (ASUF), ¶ 23, to which respondent did not object) The contract defined "Mission stock" as:

Stocks owned by the DoD or other government entities, which are stored at distribution depots, held for sale or issue in wholesale and retail inventory accounts. All items are maintained . . . to properly *account* for materiel used to support military activities [emphasis added].

(R4, tab 1 at 27-28)

16. LABAT's proposed costs for packing or packaging in the price of CLIN 0001 *excluded* packing off-base transshipments, but its proposed CLIN 0002 PPP&M price *included* packing off-base transshipments (W. S. Malinowski depo., app. ex. 10 at 406-12, 415-16, 420).

17. T.E. 1.2 forecast the PPP&M workload in terms of numbers of "items coming through PPP&M" (Wagner depo., app. ex. 7 at 36).

18. Respondent interpreted the CLIN 0002 term "each" in four different ways: (a) Administrative CO Renee Cairo-Iocco deposed that "each" was not defined in the contract but "each" meant to her an "individual item" or "container" packaged in accordance with PPP&M requirements (app. ex. 4 at 90-91, 108-10); (b) CO Deborah Raita deposed that "each" was not defined in the contract (app. ex. 12 at 45), and meant to her each PPP&M "action" (app. ex. 1 at 34) or "container" which terms she viewed as "synonymous," or an "exterior" or "final container" if there were multiple containers within it (app. ex. 12 at 201-02); (c) CO's representative Greg Mednick deposed that "each . . . refers to each item that received PPP&M to include an individual exterior container. These items all come in bare items" (app. ex. 3, at 67-68); and (d) Rose Snavely, principal drafter of respondent's RFP, deposed that "each" is "the final container for the item" or "NSN" (app. ex. 13 at 77).

19. Contract ¶ C-6.1.3 required LABAT to perform in accordance with DoD 4100.39-M, June 96, Federal Logistics Information System (R4, tab 1 at 116), which defined "EA" or "each" as a "numeric quantity of one item of supply" (app. supp. R4, tab 8 at 4) and "the unit of issue . . . indicates the count, measurement, container, or form of an item of supply. It is the minimum quantity of an item that may be ordered." (ASUF, ¶ 52, to which respondent did not object)

The following additional SOFs address evidence respondent cites to show that it genuinely disputes facts material to LABAT's motion for summary judgment.

20. CO Raita deposed that an "off-base transshipment" would be a "mission issue" (gov't ex. AC at 367).

21. LABAT's 14 June 2002 letter advised DSCC of LABAT's plan to perform "PPP&M at the National City location in Buildings 66, 322, 3304, 3322 and at other locations as may be dictated by the requirement" (R4, tab 53 at 8, 16). Respondent asserts that the phrase, "as may be dictated by the requirement," made LABAT's plan to use Building 66 conditional and uncertain (gov't opp'n at 22).

22. LABAT's 24 June 2002 letter stated in response to DSCC's question about conflicts between the C-5.5.1 workload projections and the volume and number of packing supplies LABAT proposed: "Our assumptions relating to Bin, Med Bulk, and Heavy Bulk sizes are for each bare item and are not intended to be a total exterior pack for shipping or storage purposes" (R4, tab 54 at 2).

23. LABAT's 4 August 2001 proposal revision allocated the PPP&M costs of transshipments to CLIN 0001 (gov't opp'n at 25; R4, tab 51 at 18). In December 2002, LABAT advised DCAA that its costs to pack transshipments would be recovered under CLIN 0003, later re-numbered CLIN 0002 (app. supp. R4, tab 4 at 1001). Respondent asserts that notice to DCAA cannot be imputed to DSCC's CO (gov't opp'n at 24, n.4).

CONTENTIONS OF THE PARTIES

Regarding ASBCA No. 54904 (LABAT's claim for processing and packing of off-base transshipments under CLIN 0002 PPP&M), respondent argues that the contract clearly required minimum military packing and packaging of material "issues" under CLIN 0001 and off-base transshipments were "issues" included in the CLIN 0001 price, citing PWS ¶¶ 5.4.1, 5.4.1.3, 5.4.1.6 and 5.4.1.8; ¶ C-5.4.4 listed Building 66 as a facility used for packing and shipping under CLIN 0001; and to interpret CLIN 0002's term "each" as "each item" as LABAT does results in "absurd" or "ridiculous" results when LABAT packed several items in one container (gov't mot. at 1-2, 116-17, 153-54, opp'n at 20-21). Regarding ASBCA No. 54905 (LABAT's claim for payment under CLIN 0011, Inventory Accuracy Improvement Plan), respondent argues that LABAT did not achieve the specified inventory accuracy rates within 12 months of beginning full contract performance, but rather achieved them pursuant to ¶ C-5.3.3, and hence is not entitled to payment of the CLIN 0011 price (gov't mot. at 144-51, 154). Regarding ASBCA No. 54906 (LABAT's claim for PPA interest penalties on non-paid items on invoices) the unpaid items were and are in dispute, and thus are excluded from PPA requirements by 31 U.S.C. § 3907(c), and respondent has recently identified additional defects in the invoices (gov't mot. at 152, 154-55).

LABAT argues regarding ASBCA No. 54904, that:

(1) The plain language in ¶ C-5.5.1 requires packing of off-base transshipments to the "applicable levels of protection," including "Minimum Military packing" in DDDC's Building 66, in which "Container fabrications in support of the PPP&M operations" were being performed, so such work is payable under CLIN 0002 (app. opp'n at 1; app. mot. at 14-21).

(2) LABAT interpreted the RFP and contract to require the receipt, storage and issuance of “mission stock” requiring no PPP&M under CLIN 0001, and to perform PPP&M on “non-accountable material” under CLIN 0002 (app. opp’n at 4-6).

(3) LABAT informed respondent before contract award that it planned to provide PPP&M services in Building 66, and its costs to pack transshipments would be recovered under CLIN 0003, later re-numbered CLIN 0002 (app. mot. at 22-23).

(4) Respondent’s interpretation that off-base transshipments are payable only under CLIN 0001 pursuant to ¶ C-5.4.1.3 conflicts with the plain language of ¶ C-5.5.1 and the § B provision that CLIN 0001 activities were those not specifically excluded by PWS paragraphs to which other CLINs referred, namely ¶ C-5.5.1 to which CLIN 0002 referred; ¶ C-5.4.1.3 treats packing of “mission stock,” which excludes “non-accountable material,” such as off-base transshipments; and ¶ C-5.4.1.3 does not limit ¶ 5.5.1 *only* to levels A and B except for G and F conditions codes needing minimum military packing since ¶ C-5.5.1.1 requires minimum military packing for “COSIS (Exceeding Minor Repair)” (app. opp’n at 1-3, app. mot. at 19, 24-26).

5) LABAT’s interpretation of “each” as “each item or component” for CLIN 0002 is reasonable, based on the contract language and references such as DoD 4100.39-M that defined “each” as commonly referring to a “unit of issue” which is “a numeric quantity of one item of supply,” and comports with respondent’s workload forecast based “per item” (app. opp’n at 1, 17, mot. at 27-28); it proposed packing labor within the CLIN 0001 price which excluded off-base transshipments (app. opp’n at 14, n.7); ¶ C-5.5.1.7 measured PPP&M activity by the number of items received, without regard to their level of protection or how many items shared protection in a box; before contract award LABAT notified respondent of its “per each item” basis for pricing CLIN 0002 PPP&M, to which respondent voiced no objection, and LABAT invoiced, and respondent paid, for the undisputed portion of CLIN 0002 PPP&M on a per each item basis (app. mot. at 15-17, 29-30).

(6) Respondent advanced four different and inconsistent interpretations of “each” -- “items,” “actions,” “containers” and “final containers” -- that lead to different CLIN 0002 counts (app. opp’n at 1, 17-21).

(7) Respondent’s “absurd results” argument is misleading because it overlooks the level pricing of CLIN 0002 required by RFP Amendment No. 19, instead of the prior discrete sub-item prices for the solicited sub-item quantities and sizes of items, on which LABAT proposed prices of \$3.37 each per bin (0003AA), \$17.99 each per medium bulk (0003AB), and \$65.37 each per heavy bulk (0003AC) (app. opp’n at 16, 22-25).

(8) If contract ¶¶ C-5.4.1.3 and C-5.5.1 with respect to packing of off-base transshipments are deemed to be ambiguous, such ambiguity was latent because there is no facial inconsistency in LABAT's interpretation of such terms and the doctrine of *contra proferentem* resolves such ambiguity (app. opp'n at 32; app. mot. at 30-32).

LABAT argues regarding ASBCA No. 54905 that the CO waived CLIN 0011's 12-month deadline to complete inventory accuracy improvement to specified APLs by her April and November 2004 letters to LABAT stating that respondent expected that the results of subsequent inventories would comply with those APLs and requesting LABAT's further efforts to submit a detailed plan of action to improve its inventory accuracy, which it did, and LABAT's inventory accuracy was again tested and found in compliance with the APLs in February 2005 (app. opp'n at 1, 35-36; app. mot. at 32-35).

LABAT argues regarding ASBCA No. 54906 that its invoices were proper for payment, respondent did not identify newly discovered defects, such as double billings and items not packed, in LABAT's invoices within seven days of the invoice submissions under the PPA, LABAT was prejudiced by such noncompliance, the PPA is designed to prevent just such stale allegations, which are outside of the PPA exception for disputed payments, and movant has not borne the burden of proving that the controversy over payment for off-base transshipments under CLIN 0001 or 0002 was an objectively discernable, bona fide dispute raised in good faith (app. opp'n at 1-2, 36; app. mot. at 36-39).

DECISION

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *U. S. Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001). Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The fact that both parties move for summary judgment and assert that there are no genuine issues of material fact, does not relieve the tribunal of its duty to evaluate each motion on its merits and decide whether summary judgment is appropriate. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

I. ASBCA No. 54904

The words in the provisions of the RFP and the resulting contract awarded to LABAT with respect to CLINs 0001 and 0002, off-base transshipments, PPP&M services and applicable levels of protection of materials shipped, are not disputed (SOF, ¶¶ 1, 3, 5-10). Whether those terms entitled LABAT to be paid for PPP&M work on off-

base transshipments in DDDC Building 66 under CLIN 0001 or 0002, and what the term “each” in CLIN 0002 meant are the two major issues in ASBCA No. 54904.

Considering the complexity of the contract terminology and the uncertainty of the parties’ interpretations and explanations in the appeal record reflected above, we conclude that the parties genuinely dispute the material facts with respect to whether the contract, especially ¶¶ C-5.4.1.3 and C-5.5.1, requires PPP&M services for off-base transshipments to be performed and paid under CLIN 0001 or CLIN 0002, and what the term “each” in CLIN 0002 means. We hold that neither party is entitled to receive summary judgment on ASBCA No. 54904.

II. ASBCA No. 54905

The parties agree that LABAT did not attain the specified APL level for inventory accuracy improvement within 12 months after beginning full contract performance, as required by contract ¶ C-1.3.2. The parties genuinely dispute whether the CO’s April and November 2004 letters to LABAT waived ¶ C-1.3.2’s 12-month deadline by allowing LABAT 12 more months to comply with the specified APL level, thereby entitling LABAT to payment of the CLIN 0011 price, as LABAT contends, or directed performance of periodic inventory accuracy surveys required by contract ¶ C-5.3.3, as respondent contends, since her letters did not identify on which contract provision she based her directions (SOF, ¶ 12). Accordingly, neither party is entitled to summary judgment on ASBCA No. 54905.

III. ASBCA No. 54906

The PPA in effect in August 2002 provided in 31 U.S.C. § 3907(c):

Except as provided in section 3904 of this title [which is inapplicable to this appeal], this chapter does not require an interest penalty on a payment that is not made because of a dispute between the head of an agency and a business concern over the amount of the payment or compliance with the contract. A claim related to the dispute, and interest payable for the period during which the dispute is being resolved, is subject to the [CDA] of 1978.

Likewise, the contract’s FAR 52.232-25 PROMPT PAYMENT (FEB 2002) clause provided in ¶ (a)(5)(ii):

The prompt payment regulations at 5 CFR 1315.109(c) do not require the Government to pay interest penalties if payment

delays are due to disagreement between the Government and the Contractor over the payment amount or other issues involving contract compliance The Government and the Contractor shall resolve claims involving disputes and any interest that may be payable in accordance with the clause at FAR 52.233-1, Disputes.

31 U.S.C. § 3907(c) tolls the period for payment of PPA interest. In order to determine that there was a “dispute” excusing payment of interest within the meaning of § 3907(c) and the FAR 52.232-25 PROMPT PAYMENT clause, ¶ (a)(5)(ii), a tribunal must find that there was a present basis for delaying the payment related to an objectively discernable dispute. *See Donohue Construction Co.*, ASBCA Nos. 47310 *et al.*, 98-2 BCA ¶ 30,076 at 148,840 (construing substantially identical disputed payment provision in FAR 52.232-27 construction contract clause); *Arkansas Best Freight Systems, Inc. v. United States*, 20 Cl. Ct. 776, 779 (1990).

Respondent argues that the issues in ASBCA Nos. 54904 and 54905 were disputed, and so it is not liable to pay LABAT any PPA interest in ASBCA No. 54906. Appellant argues:

The determination as to whether LABAT is entitled to [PPA] interest on the disputed invoices is inexorably intertwined with the merits of the underlying claims, and cannot be decided in a vacuum. Furthermore . . . the Government has not met its burden of establishing that any disagreement between the [parties] constitutes a . . . good faith dispute. Accordingly, summary judgment on this issue in isolation is inappropriate.

(App. opp’n at 36) We hold that the factual uncertainties with respect to the proper interpretation of such contract and PWS terms as CLIN 0001 v. CLIN 0002 for PPP&M of off-base transshipments and the meaning of “each” under CLIN 0002, and of the CO’s letters regarding inventory accuracy improvement, as analyzed in the foregoing portions of this decision, do not enable the Board to determine from the present record that respondent’s reductions and non-payments of portions of LABAT’s invoices were an objectively discernable dispute as a matter of law.

Therefore, the issue of PPA interest is not appropriate for resolution by summary judgment. Hence, we need not decide the distinct issues raised by appellant of preclusion of allegedly belated additional grounds for nonpayment of appellant’s invoices for failure to specify the reasons why the invoices were not proper within seven days of their receipt, and the burden of proof to establish the inaccuracy or insufficiency of such

invoices (app. mot. at 36). The motions for summary judgment on ASBCA No. 54906 are denied.

Dated: 21 July 2006

DAVID W. JAMES, JR.
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
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 Nos. 54904, 54905, 54906, Appeals of LABAT-Anderson, Inc., rendered in conformance with the Board's Charter.

Dated:

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