

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Guarino Corporation) ASBCA Nos. 55015, 55028
)
Under Contract Nos. 1Z4078, 1Z407F)

APPEARANCE FOR THE APPELLANT: Mr. Angelo C. Guarino
President

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OPINION BY ADMINISTRATIVE JUDGE PAGE
ON WMATA'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

These appeals come to us by way of two, partially-denied claims for additional compensation together with prejudgment interest and time extensions. Following the filing of pleadings, the Washington Metropolitan Area Transit Authority (WMATA) moved for summary judgment with respect to those portions of appellant's complaints that seek compensation for WMATA's failure to pay appellant in a timely fashion for work done.¹ WMATA's motions maintain that even though the delay in paying the contractor was, in one instance, more than 19 years after the work was performed, the additional compensation sought amounts to prejudgment interest which is strictly prohibited by the contracts, no matter how appellant classifies the claims. The Board's jurisdiction arises pursuant to the contracts' Disputes clauses; the Contract Disputes Act

¹ In ASBCA No. 55028, WMATA also moved for summary judgment and appellant "agree[d] to remove its claim for unabsorbed overhead using the Eichley formula, [while maintaining] that it is entitled to a percentage markup for its corporate overhead" (WMATA mot. 55028 at 1; app. opp'n 55028 at 12, ¶ 36). Accordingly, we do not consider that aspect of WMATA's motion in ASBCA No. 55028 pertaining to unabsorbed overhead found in appellant's complaint. We strike those portions of appellant's complaint pertaining to unabsorbed overhead calculated using the Eichley formula.

with its provision for the payment of interest, 41 U.S.C. § 611, is not applicable to these appeals. For the reasons discussed below, we grant WMATA's motions.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

Contract Number 1Z4078

1. On 27 September 1985, WMATA awarded Guarino Corporation (Guarino) a fixed sum contract, number 1Z4078, for \$882,300.00. The contract required Guarino to furnish and install parking lot equipment at 17 WMATA parking lots. (ASBCA No. 55015, R4, tab 4 at 5, 21-22, 36 (55015, R4)).

2. The contract contains WMATA's General Provisions for construction contracts listed in Section 1. Of particular relevance to the motion in this appeal is Article 1.52 PRICING OF ADJUSTMENTS - INTEREST EXCLUDED, which reads as follows:

- a. When costs are a factor in any determination of a Contract price adjustment pursuant to the CHANGES article or any other provision of this Contract, such costs shall be in accordance with the contract cost principles and procedures in Subpart 31.1 of the Federal Acquisition Regulations (48 CFR 31.1).
- b. Notwithstanding any interpretation of the aforementioned Contract cost principles and procedures to the contrary, the Authority shall not be liable for interest, however represented, on or as a part of any claim, request, proposal or adjustment (including equitable adjustments) whether said claim, request, proposal or adjustment (including equitable adjustment) arises under the Contract or otherwise.

(55015, R4, tab 4 at 99) The applicable FAR provision at 48 CFR § 31.205-20 (1984, 1987) provided in relevant part that: "Interest on borrowings (however represented), bond discounts, costs of financing and refinancing capital (net worth plus long-term liabilities), . . . are unallowable. . . ." In addition, the contract contains a standard Changes clause and a Disputes clause pursuant to which the Board has jurisdiction of disputes "arising under" the contract (55015, R4, tab 4 at 78, 79).

3. On 4 October 1985, WMATA issued the notice to proceed (received by Guarino on 10 October 1985) (55015, R4, tab 6 at 1) with a performance period of 270 days (55015, R4, tab 4 at 1), which established a completion date of 7 July 1986 (55015, R4, tab 1 at 1).

4. The contract was suspended between December of 1985 and March of 1986 due to incomplete contract designs (55015, R4, tab 1 at 2, tabs 15, 20). Thereafter, the suspension was partially lifted; however, Pending Change Order (PCO) 001, which set out the new scope of work, was not issued by WMATA to Guarino until 9 May 1986 (55015, R4, tab 20). Eventually, the changes to the contract were finalized (55015, R4, tab 21) and Guarino submitted cost change proposals to reflect the changes (55015, R4, tabs 17, 19, 27, 32, 48, 50, 54-56, 59-61, 64-68, 76, 81, 82). According to the contracting officer's final decision, WMATA accepted the project as substantially complete on 18 September 1986 (55015, R4, tab 1 at 2; *see also* tabs 12, 13 at 1). The final report of Substantial Completion states that substantial completion (or beneficial occupancy) took place on 3 November 1989 (55015, R4, tab 14). The date of substantial completion is not at issue for purposes of these motions.

5. Guarino's third revision to proposal number 4, dated 26 June 1989 (corrected by a 27 June 1989 letter), seeks \$1,277,568.88. This amount includes \$63,431.19 “[i]nterest due to underpayments & late payments due to WMATA taking in excess of one (1) year to issue Contract Modification 001 and for non-payment of Proposal 4[,]” and \$16,695.66 described as an “[e]xpense to [f]inance PCO 001, Rev. 1.” (55015, R4, tab 81 at 2, tab 82)

6. After many years of unsuccessful negotiations, the contracting officer (CO) issued a unilateral final decision dated 6 May 2005. In the final decision, the CO referenced both the \$63,431.19 claim for interest due to underpayments and late payments, and the \$16,695.66 expense to finance PCO 001, Rev. 1 as prohibited claims under Article 1.52(b) of the contract's General Provisions which denies WMATA's liability for the payment of interest, however represented, as part of any claim, request, proposal or adjustment whether arising under the contract or otherwise. Accordingly, the CO denied the contractor's request for the \$63,431.19 interest payment and the \$16,695.66 expense to finance a contract change. (55015, R4, tab 1 at 10, ¶ 9, at 11, ¶ 10(E))

Contract Number 1Z407F

7. On 16 September 1988, WMATA awarded Guarino a fixed sum contract, number 1Z407F, for \$1,705,000.00 (55028, R4, tab 4 at 1). The contract requires Guarino to procure and install parking lot equipment at 15 WMATA parking lots (55028, R4, tab 4 at 12-13, 16). On 20 October 1988, Guarino received the notice to proceed with a performance period of 330 days, which established an overall completion date of 15 September 1989. (55028, R4, tabs 7, 8)

8. Contract No. 1Z407F also contains WMATA's General Provisions for construction contracts listed in Section 1 which, accordingly, included the identically

worded provision against interest as stated above in Article 1.52 PRICING OF ADJUSTMENTS – INTEREST EXCLUDED, ¶ (b) as well as the Changes and Disputes clauses (55028, R4, tab 4 at 203, 168, 171).

9. For reasons not relevant to deciding these motions, the project was delayed a total of 440 days (55028, R4, tab 1 at 1-2). By letter dated 4 April 1991, WMATA issued the Substantial Completion Inspection (SCI) Certificate indicating 29 November 1990 as the accepted SCI date (55028, R4, tab 28 at 2). By letter dated 1 September 1993, revised 3 September 1993, Guarino submitted a delay and impact claim which included \$36,121.66 described as “Imputed Costs for Delay of Payments, Changed Work, and Wrongful and Unreasonable Withholding of Retention” (“imputed costs”) (55028, R4, tab 56 at 4; 55028, compl., ¶ 6, tab 16 at 2, 7). By the time of appellant's 19 August 2005 complaint, this \$36,121.66 delay of payment claim was increased to \$129,151.00. The complaint explains the increase as follows:

3. Nineteen (19) years^[2] later, WMATA issued a unilateral change order and final decision finding that Guarino Corporation was entitled to \$129,151.

4. The latter amount constitutes a liquidated debt as of the date of the audit report. Interest is due Guarino Corporation on this liquidated debt from the date of the audit report until the date of payment at the legal rate.

(55028, compl., ¶¶ 6.3, 6.4).

10. After protracted and unsuccessful negotiations, the CO issued a unilateral final decision dated 6 May 2005. In the final decision, the CO referred to a portion of Guarino’s request totaling \$383,904 (this sum included \$36,121.66 “imputed costs”) as a claim for interest and informed Guarino that Article 1.52(b) of the contract's General Provisions denied WMATA's liability for payment of interest, however represented, as part of any claim, request, proposal or adjustment whether arising under the contract or otherwise. Accordingly, the CO denied the contractor's request for the \$36,121.66 (55028, R4, tab 1 at 4, ¶¶ 13, 17, tab 56 at 4).

² While it is unclear, from the complaint in ASBCA No. 55028, what seminal event forms the starting date for calculating nineteen years, from the complete record, it appears that the CO's final decision of 6 May 2005 was approximately thirteen years following the audit report dated 26 October 1992, and eleven years following the audit report dated 15 March 1994 (55028, R4, tabs 1, 50, 57).

APPEALS AND MOTIONS

11. From each of the CO's two final decisions, Guarino filed corresponding appeals. The appeal of the CO's final decision in Contract No. 1Z4078 was docketed as ASBCA No. 55015 on 19 May 2005, and the appeal from the CO's final decision in Contract No. 1Z407F was docketed as ASBCA No. 55028 on 27 May 2005.

12. After pleadings were filed, WMATA filed a motion for partial summary judgment in each of the appeals. The crux of WMATA's motions is that appellant's claim in ASBCA No. 55015 for \$63,431.19 in interest (increased to \$444,361 in appellant's complaint) due to underpayments and late payments as well as the \$16,695.66 characterized by the contractor as "expense to finance," and Guarino's claim in ASBCA No. 55028 for \$36,121.66 in "imputed costs" (increased to more than \$129,151 in appellant's relevant complaint) due to the delay in WMATA's making payment, must be denied as both contracts contain General Provisions, Article 1.52(b) which strictly denies WMATA's liability for interest as part of the pricing of adjustments to the contract. (WMATA memo. 55015 at 4-5, WMATA memo. 55028 at 6-7)

13. Appellant supports its opposition to the motions with affidavits from Guarino's president, Angelo C. Guarino. Regarding the circumstances of ASBCA No. 55015, Mr. Guarino avers:

14. On June 26, 1987, Guarino Corporation made minor revisions to PCO No. 1, Rev. 1, Proposal 4, including the addition of a small amount of overhead and interest costs. This latter revision sought an adjustment to the final contract value in the amount of \$1,277,574.

. . . .

16. Guarino Corporation established a bank loan solely to fund the performance of changed work on the Contract. The loan period was from July 31, 1986 to August 31, 1988. During this time period, Guarino Corporation incurred \$16,695.66 in interest expense. This expense was a cost of performing the changed work.

. . . .

19. WMATA rejected Guarino Corporation's actual interest expense in the amount of \$16,695.66. Guarino Corporation also contends that it is entitled to interest with

respect to the liquidated sum of \$238,895 that WMATA has withheld for no valid reason for 19 years. The latter amount totals \$507,791.70.

20. For reasons known only to WMATA, WMATA regularly failed to pay progress payments in full despite approval of the full amount. While this action may have permitted WMATA to meet other obligations, it required Guarino Corporation to finance performance with its own capital and constituted bad faith. Interest on these funds totals \$63,431.19.

(App. opp'n 55015 at 19-21, aff. of Angelo C. Guarino, dated 21 November 2005, ¶¶ 14, 16, 19, 20)

14. In support of its opposition to WMATA's motion in ASBCA No. 55028, Mr. Guarino stated the following:

37. Guarino Corporation had incurred interest losses in the amount of \$36,121.66 as a result of WMATA's regular bad faith failure to timely pay amounts from Guarino Corporation pay applications. In addition, Guarino Corporation also contends that it is entitled to interest on the liquidated sum of \$129,151 that WMATA has withheld for no valid reason for 11 years. The latter interest amount totals an additional \$188,485.71.

(App. opp'n 55028 at 29, aff. of Angelo C. Guarino, dated 28 April 2006, ¶ 37)

15. While the operative facts of each appeal and subsequent motion for partial summary judgment are not identical, they are sufficiently similar to address both motions in the same decision.

DECISION

WMATA's motion for partial summary judgment in ASBCA No. 55015 requests that the Board grant judgment on ¶¶ 10.2, 11 and 13.7 of appellant's complaint insofar as they demand more than \$444,361 in interest for alleged underpayment and non-payment for 19 years (WMATA memo. 55015 at 3, 8). WMATA argues two alternatives for judgment: "1) the clear language of the Contract between the parties prohibits the payment of interest in any form by WMATA; and 2) WMATA, as a sovereign entity, is

immune from payment of pre-judgment interest unless it specifically waives that immunity, which it did not” (WMATA mot. 55015 at 1).

WMATA's motion for partial summary judgment in ASBCA No. 55028 seeks judgment on ¶¶ 6, 11 and 13, “and all other sections of Guarino's Complaint asserting entitlement to recovery of pre-judgment interest against WMATA . . .” (WMATA mot. 55028 at 1). WMATA specifically seeks judgment on those portions of appellant's complaint wherein appellant claims, “\$129,151.00 in interest expenses plus markup of that amount at 0.87% for its bond (approximately \$1,123.61)” (WMATA memo. 55028 at 6). WMATA's motions argue that neither the contracts, nor the law, support the payment of prejudgment interest of any kind, again citing to contract Article 1.52(b) to deny liability for interest, and also claiming sovereign immunity from the payment of interest (WMATA memo. 55015 at 6-7; WMATA memo. 55028 at 6-9).

Appellant rests its opposition to the motions upon three theories: (1) the interest sought by appellant is not the sort described in Article 1.52(b), instead, it is equity capital used to finance additional work which has long been recognized by the courts as recoverable (app. opp'n 55015 at 6-9); (2) WMATA breached the contracts when it failed to pay Guarino in a timely manner and as such is not protected by the provisions of the contracts (app. opp'n 55015 at 9-11; app. opp'n 55028 at 13-15); and, (3) WMATA cannot claim sovereign immunity where the three government entities, which have joined to form WMATA, individually have elsewhere waived sovereign immunity for the payment of interest (app. opp'n 55015 at 11-13; app. opp'n 55028 at 15-17).

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to favorable judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); Fed. R. Civ. P. 56. A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Id.* at 255. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *Id.* at 249. More than mere assertions of counsel are necessary to counter a motion for summary judgment. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). The nonmovant may not rest on its conclusory pleadings, but must set out, in affidavit or otherwise, what specific evidence could be offered at trial. Failing to do so may result in the motion being granted. (*Id.*)

With respect to WMATA's first argument, the subject contracts are unambiguous in their exclusion of the payment of interest by WMATA on a claim. General Provisions Article 1.52 PRICING OF ADJUSTMENTS – INTEREST EXCLUDED states at (a) that any costs sought by a contractor under the contract's Changes clauses “shall be in accordance with the contract cost principles and procedures in Subpart 31.1 of the Federal Acquisition

Regulations (48 CFR 31.1).” That regulation prohibits “Interest on borrowings (however represented),” and has been applied against WMATA contractors as a “clear and concise” statement that “WMATA will *not* be liable for payment of interest *however represented under the contract or otherwise*, that in particular *interest on borrowings as a cost in contract price adjustments* under the *Changes, Suspension of Work and Differing Site Conditions clauses is unallowable.*” *Breda Transportation, Inc.*, ENGBCA No. 6239, 98-2 BCA ¶ 30,027 at 148,584 (emphasis in original). General Provisions Article 152(b) is equally clear that WMATA “shall not be liable for interest, however represented” as part of any claim. Guarino has provided no proof, nor raised a triable issue of fact, regarding these forthright and enforceable contract restrictions against WMATA’s payment of interest in any form, nor has it shown that the types of interest it seeks are eligible for payment.

The undisputed evidence shows that the contractor prepared claims for equitable adjustment which included costs in addition to those directly necessary to completing the contract: Guarino's complaints include \$444,361 in interest (compl. 55015, ¶¶ 10, 11, 13.7), and \$129,151 plus a 0.87% mark-up (\$1,123.61) for bonding on this amount, which Guarino describes as the “imputed costs” for WMATA's delay in payments, changed work, and wrongful and unreasonable withholding of retention (compl. 55028, ¶¶ 6, 13). We note that while the contractor did not account for the \$129,151 as interest *per se*, the character of the funds sought is in the nature of interest; if not, the amount is punitive in nature and we are unable to assess punitive damages against a sovereign entity such as WMATA. *Excavation Construction, Inc. v. WMATA*, 624 F.Supp. 582, 588 (D.D.C. 1984).

WMATA has met its burden in its motions for partial summary judgment by showing that the funds sought by appellant are in the nature of interest and, not only did the contracts not provide for the payment of interest on any claim for equitable adjustment, the contracts, at Article 1.52(b), encompass a comprehensive exclusion for WMATA's liability for the payment of interest. Having sustained WMATA’s motion on this basis, it is unnecessary to consider WMATA’s argument or appellant’s response pertaining to sovereign immunity.

In attempting to overcome WMATA's initial showing that summary judgment is appropriate, appellant has provided affidavits which detail the events of contract performance, as well as, the negotiations that followed Guarino's claims for equitable adjustment. However, these affidavits do not raise new evidence, nor do they show that there are material facts that are at issue for which a hearing is appropriate. *See Anderson*, 477 U.S. at 247-48, quoting Fed. R. Civ. P. 56(c). While the evidence shows that WMATA made unilateral decisions regarding Guarino's claims, and eventually paid the money to which WMATA admitted liability, this does not change the law. The issues presented in these motions are legal, not factual. Therefore, even if all of Guarino’s

allegations are taken as true, this does not change relevant precedent which holds that WMATA is not liable for the payment of interest on claims for equitable adjustment under this contract.

Guarino's argument in ASBCA No. 55015 that the interest described in Article 1.52(b) of the contract's General Provisions is not the same as the equity capital presented in appellant's claim, is without merit. Mr. Guarino's 21 November 2005 affidavit clearly categorizes the "equity capital" as interest (¶¶ 16, 19), and General Provisions Article 1.52(b) specifically states that WMATA is "not liable for interest, however represented."

We do not have jurisdiction to address Guarino's argument that WMATA cannot seek the protection against liability found in Article 1.52(b) because it breached the contracts. Guarino's argument centers on WMATA's failures to provide a final decision in a reasonable amount of time, as well as, WMATA's breach of an implied covenant of good faith and fair dealing to make timely payments (app. opp'n 55015 at 9-11; app opp'n 55028 at 13-14). The Board's jurisdiction over these appeals is, however, limited to disputes "arising under" the contract.

CONCLUSION

Therefore because we hold that WMATA has met its burden under the standards of a motion for summary judgment, and appellant has not persuaded us that there is a genuine issue of fact for which trial is appropriate, in either ASBCA No. 55015 or ASBCA No. 55028, we grant WMATA's motions for partial summary judgment. Accordingly, we deny the appeals as to those portions of appellant's claims, and subsequent complaints, which seek interest no matter how characterized by appellant in contravention of the contract (*see* compl. 55015, ¶¶ 10.2, 11, 13.7; compl. 55028, ¶¶ 6, 11, 13).

Dated: 23 October 2006

REBA PAGE
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. 55015, 55028, Appeals of Guarino Corporation, rendered in conformance with the Board's Charter.

Dated:

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