

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Freedom NY, Inc.) ASBCA No. 55466
)
Under Contract No. DLA13H-85-C-0591)

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OPINION BY ADMINISTRATIVE JUDGE JAMES
UNDER BOARD RULE 11

This appeal arises from the contracting officer's (CO) 14 March 2006 denial of Freedom NY, Inc.'s (FNY) 17 January 2006 claim under the captioned contract for \$390,848.04 in interest (plus interest on that interest) pursuant to the Contract Disputes Act of 1978 (CDA) and Prompt Payment Act (PPA). The Board has jurisdiction of this appeal under the CDA, 41 U.S.C. § 607. The parties elected to submit the appeal for decision on the record under Board Rule 11. The record includes the parties' Rule 4 documents and briefs, as well as the record in ASBCA No. 43965 (*Freedom II*), 01-2 BCA ¶ 31,585, *recon. denied*, 02-1 BCA ¶ 31,676, *aff'd in part, rev'd in part and remanded*, 329 F.3d 1320, *reh'g denied*, 346 F.3d 1359 (Fed. Cir. 2003), *cert. denied*, 541 U.S. 987 (2004), *on remand*, 04-2 BCA ¶32,775, *recon. denied.*, 05-1 BCA ¶ 32,934, *aff'd*, 182 Fed. Appx. 988 (Fed. Cir. 2006) (R.36). The Board is to decide entitlement only.

FINDINGS OF FACT

1. Contract No. DLA13H-85-C-0591 (the contract) for meals, ready to eat (MREs) was awarded on 15 November 1984 (R4, tab 5 at 1). The contract incorporated by reference Defense Personnel Support Center (DPSC) clause No. I04, "DAR 7-103.12(a) DISPUTES (1983 FEB)," which provided in ¶ (a): "This contract is subject to the Contract Disputes Act of 1978" and which "[r]eplace[d] Clauses 12 and 25 of SF 32, Apr 75" (R4, tab 3 at 2). Clauses 12 and 25 of Standard Form 32, April 1975, were entitled "DISPUTES" and "PAYMENT OF INTEREST ON CONTRACTOR CLAIMS," respectively (R4, tab 1 at F39, F33-A).

2. FNY submitted the following DD Form 250 invoices, *inter alia*, for MRE shipments under the contract (R4, tab 9; app. supp. R4, tab 3 at 4-8):

<u>DD 250 Invoice No.</u>	<u>Date</u>	<u>Amount</u>
0172	06/20/86	\$ 63,878.40
0244	09/3/86	63,878.40
0297	11/7/86	46,439.37
0298	11/7/86	58,610.65
0339	04/3/87	<u>14,139.75</u>
Total:		\$246,946.57

3. On 22 June 1987 the CO terminated the undelivered MREs portion of the contract for default, which decision was timely appealed and docketed as ASBCA No. 35671 ("*Freedom I*") (*Freedom I*, 96-2 BCA ¶ 28,328, finding 92).

4. FNY's 1 May 1991, certified, \$21,959,311 claim under the contract was composed of \$3,275,798 for adjusted increase in contract cost, \$2,227,544 for original contract profit, \$477,250 for profit on the 114,758 added MRE cases, \$375,436 for payments improperly offset and taken by the ACO, \$1,167,563 for designated equipment, tooling and facility improvements lost through insolvency, and \$14,435,720 for lost profits on future MRE procurements (R4, tab 7 at 1, 39). The claim stated, *inter alia*, that as of 5 November 1986 there was a \$1,242,544 balance owing and payable for the last portion of the 505,546, MRE-5 configured, "product delivered" (R4, tab 7 at 17). That claim included "failing to pay for product accepted," but did not claim "any right to a convenience termination settlement, or Prompt Payment Act (PPA) interest" (*Freedom II*, 01-2 BCA at 156,058-59, finding 121).

5. FNY's appeal of the CO's 7 October 1991 decision denying its 1 May 1991 claim was docketed as ASBCA No. 43965, with jurisdiction based on the CDA (*Freedom II*, 01-2 BCA at 156,058-59, finding 121).

6. The Board's 7 May 1996 decision in *Freedom I* sustained the appeal in ASBCA No. 35671 and converted the default termination of the contract to a termination for the convenience of the government (*Freedom I*, 96-2 BCA at 141,479¹). Appellant subsequently submitted a termination settlement proposal which it revised from time to time.

7. FNY's 29 September 1997 letter to respondent under the contract claimed \$95,398.95, or 5% of 34 allegedly unpaid invoices totaling \$1,907,979.05, among which were invoice Nos. 0172, 0244, 0297, 0298 and 0339 (R4, tab 9; *Freedom NY, Inc.*, ASBCA No. 52438, 00-1 BCA ¶ 30,873 at 152,431).

8. On 29 September 1997 the Board ordered FNY to file a more definite statement of its complaint in *Freedom II*, setting forth with particularity the amount of the adjustment or damages it claimed with respect to each allegedly compensable government act or omission (ASBCA No. 43965, 98-1 BCA ¶ 29,382 at 146,037, -40).

9. FNY's 18 May 1998 "MORE DEFINITE STATEMENT" of its complaint in *Freedom II* stated, *inter alia* (R4, tab 8 at 9, 11, 13, 20 of 21):

26. . . . On 16 May [1986] Appellant notified Respondent that \$3,600,000 was over due [sic] in DD250 payments.

. . . .

35. Respondent breached . . . Modification P00025 by: . . .
(b) failing and refusing to pay for MRE cases produced and delivered by Appellant, and accepted by Respondent thru DD250 invoices;

. . . .

44. . . . As of October 1986, with the Government . . . over \$1.9 million late in paying for DD 250 shipments of MRE cases. . . .

. . . .

¹ Partially vacated and corrected in *Freedom NY, Inc.*, ASBCA Nos. 35671, 43965, 96-2 BCA ¶ 28,502.

D. Interest accrued on monies claimed, from March 1986 and or May 1991 to present . . . \$16,848,470.29. . . .

10. On 27 October 1999 FNY appealed to this Board from the “deemed denial” of its 29 September 1997 claim (*see* finding 7), which was docketed as ASBCA No. 52438 (“*Freedom III*”). FNY’s complaint in *Freedom III* alleged, ¶ 28: “As part of that claim before the Board under ASBCA . . . No. 43965, Freedom had included its claim for the unpaid DD Forms 250s” Respondent moved to dismiss the appeal on the ground that the claim was already pending in ASBCA No. 43965. In April 2000 the Board dismissed *Freedom III* as duplicative of the unpaid DD 250 claim in *Freedom II*. (*Freedom III*, 00-1 BCA ¶ 30,873 at 152,431-32)

11. As of April 2000, FNY’s five invoices, Nos. 0172, 0244, 0297, 0298 and 0339, totaling \$246,946.57, were not paid or credited against unliquidated progress payments, although its other 28 invoices “had been ‘paid’ by ‘crediting’ or ‘recouping’ the invoiced amounts against unliquidated progress payments and other alleged FNY debts owed to respondent” (*Freedom II*, 01-2 BCA at 156,059, finding 122).

12. On 29 December 2000, the parties entered into a convenience termination settlement, memorialized in bilateral contract Modification No. A00004 (Mod. A00004), which resulted in a net payment of \$799,947 to FNY and stated (R4, tab 10 at 1-3):

(b) The parties agree to the following:

. . . .

(6) (i)

. . . .

(iii) The net payment of \$799,947.00 in subdivision (ii) above, together with sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor for the complete termination of the contract and all other demands and liabilities of the Contractor and the Government under the contract, except as provided in paragraph (7) below.

(7) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved:

(i) All rights and liabilities, if any, of the parties, as to matters covered by any renegotiation authority.

....

With respect to the paragraph at 7(i), a reservation is hereby incorporated for a re-negotiation and/or a re-computation of the loss ratio utilized in the agreement herein. Based upon the outcome of the contractor's ASBCA case #43965 it is possible that the contract price may be adjusted upward. If the Request for Equitable Adjustment of the contract price results in an increase in the contract price, and the increase is properly quantified as being an increase resulting from Government caused cost overruns, this settlement will be adjusted in accordance with a revised loss ratio. A re-computation of the loss ratio may result in an additional net payment to Freedom.

The attached settlement memorandum signed by both parties clarifies the basis on which the settlement was agreed to and provides detailed loss computations as to how the settlement was agreed to. That memorandum is hereby incorporated as part of this modification.

13. Mod. A00004 included a Memorandum of Agreement (MOA) which explained the costs proposed and negotiated by the parties in the convenience termination settlement, including the elements of the net payment of \$799,947 (R4, tab 10 at 5):

2. Freedom and the Government agree that the negotiated settlement finalizes the Contractor's entitlement for the following termination costs in the amounts set forth below as adjusted for loss in accordance with FAR 49.203 plus settlement expenses and credit adjustments.

	<u>Proposed</u>	<u>Negotiated</u>	<u>Notes</u>
Direct material	7,445,754	7,445,754	
Direct Labor	2,526,746	2,526,746	
Indirect Factory expense	7,032,904	7,032,904	
Other costs	862,316	862,316	
Gen. and Admin. Costs	4,679,213	3,593,672	1
Settlement with Subcontractor	64,318	64,318	2

Total costs	22,611,251	21,525,710	
Profit	3,359,493	0	3
Estimate to complete	1,499,489	1,435,171	4
Est. cost at completion	24,110,740	22,960,881	
Less contract price		-17,197,818	
Loss		5,763,063	
Loss ratio 5,763,043/22,960,881 = .251			5
Recovery rate = 1-.251 = .749			
Recovery rate X costs incurred	(.749)21,525,710 = \$16,122,756		
Line 9 of SF 1436 (incl. profit/ktr and adjusted for loss/			
Government	25,970,744	16,122,756	
Less previously invoiced	14,208,009		6
Less previously disbursed		14,315,451	6
		(38,612)	6
Total (line 11)	11,762,735	1,845,917	
Settlement expenses	300,000	226,113	7
Total	12,062,735	2,072,030	
Less unliquidated PP	1,310,138	1,634,083	8
Net payment	10,752,597	437,947	
Inventory disposal credit	116,527	116,527	9
Credit for seized progress payment inventory	275,000	151,614	10
Subtotal payment	11,144,124	706,088	
Payment of 5 invoices	246,947	246,947	6
Interest on the above 5 invoices	250,000	0	6
Credits to Government	0	146,088	11
		7,000	12
Total net payment:	11,641,071	799,947	

14. Note 6 to ¶ 2 of the MOA in Mod. A00004 first summarized the calculations resulting in a determination that FNY had received total compensation of \$15,910,921.24. It continued (R4, tab 10 at 7-8):

Freedom however has claimed that 33 invoices for shipments made were never paid during the contract's active life. That claim is pending at the ASBCA. The TCO maintains that the Government has a record of liquidation of progress payments covering 28 of the 33 invoices, 4 of which

were recouped at 95% and 24 of which were recouped at 100%. The records were provided to Freedom twice in 1999 by the TCO. Furthermore the records were submitted as evidence to the ASBCA. Freedom contends the timing of payments, and therefore the liquidations, are critical to possible liability for prompt payment interest. The Government maintains that liquidations of progress payments were effected during the active life of the contract and has submitted dated records of the liquidations and payments to validate this. The Government further maintains that the Contractor had received funds in excess of shipments approximating \$1.7 million and therefore whether or not a specific invoice was paid, liquidated against progress payments, or misplaced, that Freedom already had funds well in excess of amount of all invoices for shipped product. The Government maintains since the liquidation of 5 unpaid invoices would have been effected at 95% for one invoice and 100% for the other 4 invoices, Freedom would have received only \$3,163 on account of the 5 invoices, and the balance would have been applied to unliquidated progress payments at the time of payment. Freedom maintains that for all intents and purposes the invoices were never paid in that the liquidation was effected only recently for the purposes of this settlement. The parties also disagree as to the Government's right to liquidate at 100% when Freedom was not in default.

This settlement incorporates payment of the remaining 5 invoices for which the Government can not locate a record of either payment or liquidation against outstanding progress payments. As such this settlement adds an amount of \$246,947 to cover payment of invoices FNY 0172, FNY 0244, FNY 0247 [sic], FNY 0298 and FNY 0339. As consideration for the payment of the unpaid DD-250's within the net payment of \$799,947 Freedom agrees to withdraw its pursuit of the principal amount of these DD-250's, from its appeal at the ASBCA [*Freedom II*]. Freedom and the Government consider the demand for payment of the principal amount of these outstanding balances of DD 250's to be satisfied. This agreement does not affect Freedom's right to pursue its claim before the Board . . . specifically including but not limited to the right to recover interest, which Freedom claims resulted from the late payment of

invoices, including progress payment requests, or the recoupment of unliquidated progress payments by the Government. The agreement not to include interest as part of the recovery under this termination settlement does not negate Freedom's right to pursue interest in another forum, nor does it affect the Government's right to deny it.

15. Paragraphs 3 and 4 of the MOA in Mod. A00004 provided (R4, tab 10 at 10):

3. The net payment in the amount of \$799,947.00 in paragraph 1 above, together with the sums previously paid, constitutes payment in full and complete settlement of the amount due the contractor for the complete termination of the contract and all other demands and liabilities of the Contractor and the Government under the contract for termination costs and settlement expenses. The concept of full and complete settlement does not negate the rights of the parties, as specifically reserved herein, to pursue their various positions in ASBCA No. 43965 or in any appeal from a decision therein.

4. . . .

The items and elements settled here are explicitly compensated via the termination settlement. The intent of the parties is to avoid duplicate compensation under ASBCA docket 43965, for costs and elements of the settlement [for] the termination for convenience as directed by ASBCA docket # 35671.

16. By U.S. Treasury check dated 21 February 2001, respondent paid FNY's assignee, Bankers Leasing Association, Inc., at FNY's request, the sum of \$573,834.00. That amount was composed of \$326,887, billed in FNY's 4 January 2001 invoice No. FNY-TS #02 that stated: "Net Payment \$326,887 . . . For costs incurred of \$21,528,710.00 @ .748 (loss Ratio) with possible adjustment pending the outcome of ASBCA # 43965," and \$246,947, billed in FNY's 4 January 2001 invoice No. FNY-TS #03. Respondent paid the \$226,113 for termination settlement expenses directly to FNY. (R4, tab 12 at 15-18)

17. FNY's 23 February 2001 letter to Defense Finance and Accounting Service (DFAS), Columbus, requested PPA penalty interest on \$246,947 for the five previously unpaid invoices (app. supp. R4, tab 7).

18. On 26 February 2001, in *Freedom II* FNY moved for PPA interest on the \$799,947 received by virtue of the parties' 29 December 2000 convenience termination settlement (*Freedom II*, 01-2 BCA at 156,061).

19. On 28 August 2001, *Freedom II* dismissed FNY's 26 February 2001 motion for PPA interest for lack of ASBCA jurisdiction to adjudicate such issue, since FNY's 1 May 1991 claim had no allegation seeking PPA interest, held that Mod. A00004 resolved FNY's entitlement to payment of \$246,947, the amount of the five unpaid invoices (finding 122), on which amount the Board did not award CDA interest, and granted FNY a recovery of \$5,907,654 plus CDA interest thereon (*Freedom II*, 01-2 BCA at 156,061, 156,064).

20. FNY's 29 September 2004 letter to DFAS, Columbus, stated (R4, tab 12 at 1):

. . . In Mod A4, the Government agreed to pay Freedom a total of \$799,947 to settle a portion of Freedom's claim arising from the termination of Contract No. DLA13H-85-C-0591 . . . that Freedom submitted to the Contracting Officer on May 6, 1991. Although Freedom was entitled to receive Prompt Payment Act interest and Contract Disputes Act Interest in the amount of \$390,848.04 on the Mod A4 payment, no interest payment has ever been made to Freedom.

21. The Board's 14 October 2004 decision in ASBCA No. 43965 on remand from the Federal Circuit Court of Appeals "eliminate[d] the \$2,936,707 recovery found in [*Freedom II*] for claim items (1), (4), (5) and (6), and reduce[d] FNY's total recovery to \$2,970,947, plus CDA interest on such amount, from 6 May 1991 until the date of payment" (04-2 BCA at 162,072).

22. FNY's 17 January 2006 certified claim under the contract sought CDA and PPA interest "in the amount of \$390,848.04 (plus interest on that unpaid amount through the date of payment)" on the following basis:

The basis for Freedom's computation of interest is summarized on the "Interest Summary" spreadsheet attached to this letter as Exhibit 2 The analysis . . . is straightforward. The total Mod A4 payment (\$799,797.00 [sic]) consisted of three components: (1) \$326,887.00 in contract costs and subcontractor settlement costs; (2) \$246,946.57 for five unpaid DD250s for product delivered to

and accepted by the Government . . . and (3) \$226,113.00 in settlement expenses.

FNY’s “Exhibit 2” set forth its CDA and PPA interest claims which we summarize as follows:

Mod A00004 <u>Undisputed Costs</u>		<u>CDA Interest</u>	<u>PPA Interest</u>
Contract costs	\$262,569	\$168,522.54	0
Subcontractor settlement	\$ 64,318	\$ 41,280.70	0
Unpaid DD250 invoices	<u>\$246,947</u>	<u>\$158,495.73</u>	<u>\$ 22,549.07</u>
Totals:	<u>\$573,834</u>	<u>\$368,298.97</u>	<u>\$ 22,549.07</u>

FNY claimed no interest on the \$226,113 payment for settlement expenses, and broke down its claimed PPA interest claim as follows:

<u>Five DD 250s</u>	<u>PPA 1-year limit</u>	<u>PPA Interest</u>
Invoice # 0172	6/30/86-6/29/87	\$ 6,496.05
Invoice # 0244	9/13/86-9/12/87	\$ 5,646.79
Invoice # 0297	11/17/86-11/16/87	\$ 4,105.19
Invoice # 0298	11/17/86-11/16/87	\$ 5,181.12
Invoice # 0339	4/13/87-4/12/88	<u>\$ 1,119.92</u>
Total:		<u>\$22,549.07</u>

FNY calculated simple CDA interest from 6 May 1991 (the ASBCA’s deemed date of receipt of FNY’s 1 May 1991 claim, *Freedom II*, 01-2 BCA at 156,068) through 10 January 2001, when FNY thought it received the \$799,947 principal payment (FNY later corrected that date to 21 February 2001 (*see* finding 16)), and compound PPA interest for one year for each of the five DD 250s. (R4, tab 21 at 1-3, ex. 2)

23. The CO’s 14 March 2006 letter to FNY denied its 17 January 2006 claim for \$390,848.04 (R4, tab 22). On 9 June 2006 FNY timely appealed that decision to the Board, which docketed the appeal as ASBCA No. 55466.

24. FNY has corrected the amount of its claim to reflect payment on 21 February 2001. The claimed amount now is \$394,957.24. In addition, FNY seeks CDA interest on that \$394,957.24 for the period from 21 February 2001 until payment. As of 31

March 2007, FNY calculated the additional interest as \$117,092.65. (Thomas decl. dated 2 April 2007 at 6-7)

POSITIONS OF THE PARTIES

Appellant argues that: (1) the principal amounts here in issue – \$326,887 in contractor costs and subcontractor settlement costs and \$246,946.57 for unpaid DD 250s – were elements of its 1 May 1991 CDA claim, were disputed and eventually were resolved in FNY’s favor in Mod. A00004 (app. br. at 4, 7-8; reply br. at 1); (2) PPA interest became due in 1986 and 1987 on the five unpaid DD 250s automatically in accordance with the PPA (app. br. at 9); (3) in the Mod. A00004 convenience termination settlement of 29 December 2000 FNY reserved the right to PPA and CDA interest on such principal claim elements (*id.* at 5, 9, 13); (4) respondent paid FNY such principal amounts on 21 February 2001 (*id.* at 7); (5) after repeated requests for CDA and PPA interest on such principal amounts, the issue was plainly in dispute, the CO eventually denied liability to pay such interest, and FNY timely appealed such denial to this Board (*id.* at 9-11); and (6) FNY is entitled to CDA interest from the time the CO received its initial certified claim (6 May 1991) to February 2001, and to interest resulting from the Government’s failure to pay interest from February 2001 until such interest is paid (*id.* at 15).

Respondent argues that: (1) the release provision in Mod. A00004 “waived” FNY’s claims, with the “single limited reservation” of the “unpaid invoice component,” pursuant to the MOA, ¶ 2, note 6 (gov’t br. at 9-10); (2) *Freedom II* held that this Board had no jurisdiction to adjudicate FNY’s (PPA) interest claims in Mod. A00004 (*id.* at 10); (3) the ASBCA has no jurisdiction of FNY’s CDA interest claim because it submitted no disputed claim to the CO (*id.* at 11), FNY’s May 1991 claim included no demand for payment of invoices, FNY was unaware of the five unpaid invoices in May 1998 when it filed its More Definite Statement or in October 1999 when it filed *Freedom III*, and FNY first learned of the five unpaid invoices during a 1999 government audit of the 33 unpaid invoices, and thereafter included those five invoices in its convenience termination settlement proposal (*id.* at 12-13); (4) the settlement expenses and “contractor costs and subcontractor settlement” components were not parts of FNY’s certified May 1991 claim, the Board held in *Freedom II* that it lacked jurisdiction over the settlement expenses and they were not claims under the CDA because FNY’s convenience termination settlement proposal was not an element of FNY’s May 1991 claim and it never ripened into a claim (*id.* at 14); (5) all FNY’s monetary claims were settled long before it submitted its certified 17 January 2006 claim for interest, so there was no underlying CDA claim (*id.* at 15); (6) the PPA grants the Board no independent jurisdiction to entertain a PPA interest claim, no PPA penalty interest accrued on the five unpaid invoices because their payment was “disputed,” there was no PPA interest element in FNY’s May 1991 claim, and FNY’s 17 January 2006 certified claim for PPA

interest lacks any underlying monetary claim (*id.* at 15-16); and (7) FNY miscalculated PPA interest on the “payment invoiced” rather than on the lesser “payment due” prescribed by the PPA, since FNY “would have actually received [\$3,163] during the performance of the contract” had those five invoices been liquidated at 95% or 100% against progress payments, and the PPA precludes compound interest (*id.* at 16-17).

DECISION

I. CDA Interest

CDA section 12, 41 U.S.C. § 611, provides:

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the [CO] receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof.

Accordingly, “a necessary predicate to entitlement to [CDA] interest is the submission of a claim.” *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1581 (Fed. Cir.), *cert. denied*, 506 U.S. 953 (1992); *Nab-Lord Associates v. United States*, 682 F.2d 940, 943-44 (Ct. Cl. 1982) (“In order for a contractor to receive interest *under the act* [CDA § 12] there must be an underlying claim for quantum which is governed by the act” (emphasis in original)). The contractor, FNY, has the burden of proving the existence of an underlying claim governed by the CDA.

Appellant seeks CDA interest on two amounts: \$326,887, which corresponds to its invoice No. FNY-TS #02, and \$246,947, which corresponds to its invoice No. FNY-TS #03 (finding 16).

We address first the \$326,887 amount. Assuming, *arguendo*, that such amount was an element in FNY’s May 1991 claim (appellant points to no evidence to substantiate such allegation), and that FNY prevailed on such element by virtue of the Mod. A00004 termination settlement and payment thereafter (findings 13, 16), FNY did not reserve from its releases in ¶ (b)(6)(iii) of Mod. A00004 or ¶ 3 of the MOA that \$326,887 claim or its constituents, the \$64,318 subcontractor settlement or the \$262,569 (plug-in) derived mathematically by subtracting from the \$799,747 total net payment the amounts identified in Mod. A00004 (\$246,947 for DD250s, \$226,113 for settlement expenses, and \$64,318 for subcontractor settlement) (finding 22). Mod. A00004 ¶ (b)(7)(i) reserved FNY’s right to re-compute the loss ratio based on the outcome of *Freedom II* (finding 12). Note 6 to ¶ 2 of the MOA reserved FNY’s “right to recover interest, which Freedom claims resulted from the late payment of invoices” (finding 14), which we address below. Nothing in the appeal record correlates the \$326,887 amount

with a late payment of any FNY invoice. Therefore, we hold that in Mod. A00004 appellant released respondent from liability for payment of interest on that \$326,887.

We next address the \$246,947 amount. The record shows the individual amount of each of the five unpaid DD 250s and their total of \$246,946.57, and the dates on which FNY submitted each such DD 250 to respondent, all of which were after 29 May 1986, when the parties executed Mod. P00025 (see *Freedom II*, 01-2 BCA at 156,056, finding 95). The unpaid DD 250s allegation was an element of FNY's claim in *Freedom II* (findings 4, 7, 9-10), was an item in the 29 December 2000 convenience termination settlement in Mod. A00004 (finding 13) and \$246,947 was paid to FNY's assignee on 21 February 2001 (finding 16). In Mod. A00004 FNY reserved the right to claim CDA interest on the \$246,947 for the five DD 250s (finding 14), as respondent concedes (gov't br. at 9-10).

The fact that the principal amount of the unpaid DD 250s allegation was included in the 29 December 2000 convenience termination settlement did not nullify the fact that such claim was an element of FNY's May 1991 claim submitted to the CO under 41 U.S.C. § 605(a), and hence was eligible for CDA interest under 41 U.S.C. § 611. See *Brookfield Construction Co. v. United States*, 661 F.2d 159, 168-69 (Ct. Cl. 1981). We hold that FNY is entitled to recover simple CDA interest on the unpaid DD 250s cost element from 6 May 1991, when the contracting officer received FNY's certified claim, until 21 February 2001, when FNY received the \$246,947 principal payment. However, we reject FNY's claim for further CDA interest after 21 February 2001. 41 U.S.C. § 611; *Central Mechanical, Inc.*, ASBCA No. 29193, 85-2 BCA ¶ 18,004 at 90,270-71 (once principal amount is paid, no CDA § 12 "interest on unpaid interest" is recoverable).

II. Prompt Payment Act Interest Penalty

PPA interest, to be appropriate for resolution by the Board, must be the subject of a separate claim under the CDA. See 31 U.S.C. § 3907; *Randolph and Company*, ASBCA Nos. 52953 *et al.*, 03-1 BCA ¶ 32,080 at 158,586; *Allstate Products Co.*, ASBCA No. 52014, 00-1 BCA ¶ 30,783 at 152,019 (PPA provides that if the interest is not paid automatically by the government if the statutory conditions are met, then the contractor may file a claim for the interest under the CDA). Moreover, if the contractor prevails on such PPA interest claim, it is entitled to receive CDA interest thereon. See *Hettich and Co. GmbH*, ASBCA No. 38781, 93-1 BCA ¶ 25,442 at 126,698; *JEM Development Corp.*, ASBCA No. 42872, 92-1 BCA ¶ 24,709 at 123,344-45.

FNY claimed PPA interest on the \$246,947 principal amount of the five unpaid DD 250s in 2000, in the course of proposing and settling its convenience termination claim, as stated in Mod. A00004's MOA, ¶ 2, note 6. Though the TCO declined to pay FNY any PPA interest in the 29 December 2000 convenience termination settlement,

FNY reserved the right to claim such interest “in another forum.” (Finding 14) FNY’s 17 January 2006 certified claim to the PCO sought the following PPA interest (finding 22):

<u>Five DD 250s</u>	<u>PPA 1-year limit</u>	<u>PPA Interest</u>
Invoice # 0172	6/30/86-6/29/87	\$ 6,496.05
Invoice # 0244	9/13/86-9/12/87	\$ 5,646.79
Invoice # 0297	11/17/86-11/16/87	\$ 4,105.19
Invoice # 0298	11/17/86-11/16/87	\$ 5,181.12
Invoice # 0339	4/13/87-4/12/88	\$ 1,119.92
Total:		<u>\$22,549.07</u>

Respondent contends that PPA interest is payable only on the “payment due,” which it asserts was \$3,163 if those five invoices had been liquidated at 95% or 100% against progress payments, not on the “payment invoiced” of \$246,947. We agree. *Freedom II* held that respondent’s liquidation of progress payments at the originally prescribed 95% liquidation rate was proper, and respondent’s order on or about 29 October 1986 to liquidate FNY’s progress payments at 100% was authorized by ¶ (c)(ii) of the Progress Payment clause. *Freedom II*, 01-2 BCA at 156,063. Indeed, FNY’s 29 September 1997 “claim” sought payment of 5% of the five unpaid invoices, *i.e.*, at a 95% liquidation rate (finding 7). Accordingly, during the time period for which appellant claims PPA interest (1986-88), appellant was only entitled to payment of the net amount due after applying the liquidation in effect at the time of each invoice.

Respondent argues that payment on the five invoices was disputed, so the PPA did not require interest. The legal precedents interpreting the PPA, 31 U.S.C. § 3907(c), require that a disagreement over the amount of payment invoiced be an objectively discernable dispute raised in good faith at the time the government retained the disputed payments. *See Asbestos Free, Inc.*, ASBCA No. 50805, 98-1 BCA ¶ 29,488 at 146,333 (good faith, objectively discernable dispute about liability to pay bond premium). The record contains no evidence that respondent disagreed with the five invoices on the dates stated in finding 2, when it retained the payments. The fact that the five invoices were unpaid was not known until 1999. Section 3907(c) is inapplicable.

We hold that FNY is entitled to recover PPA interest on the net amount of the five unpaid DD 250s after their liquidation at the rate applicable on each date of submission of such invoices, and CDA interest on such PPA interest from date of receipt of the January 2006 claim until paid. Since this decision is on entitlement only, we intimate no views on the validity of FNY’s PPA computations or respondent’s calculation of the \$3,163 liquidated balance of the five DD250s.

We have considered all other contentions of the parties and conclude that their factual premises are invalid or they are without merit or both.

CONCLUSION

We sustain the appeal insofar as FNY is entitled to recover (i) CDA interest on the five unpaid DD 250s from 6 May 1991 through 20 February 2001 and (ii) PPA interest on the net amount of the five unpaid DD 250s after their liquidation at the rate applicable on each date of submission of such invoices for a period of one year thereafter, plus CDA interest on such PPA interest from date of receipt of appellant's 17 January 2006 claim until paid, and deny the balance of the appeal. We remand the appeal for resolution of quantum by the parties.

Dated: 14 December 2007

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 No. 55466, Appeal of Freedom NY, Inc., rendered in conformance with the Board's Charter.

Dated:

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