

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
South Carolina Public Service Authority) ASBCA No. 57826
)
Under Contract No. DACW60-77-C-0005)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

On 22 February 2002, the South Carolina Public Service Authority d/b/a Santee Cooper (hereinafter "Santee Cooper" or "the Authority") appealed a contracting officer's decision denying indemnification for Santee Cooper's costs incurred as a result of third party claims related to the captioned contract (hereinafter "Contract 0005"). In *South Carolina Public Service Authority*, ASBCA No. 53701, 04-2 BCA ¶ 32,651, decided 8 June 2004, we sustained the appeal on entitlement and returned the dispute to the parties for determination of quantum.

The parties having failed to agree, Santee Cooper has requested our decision on quantum and we have docketed that request as ASBCA No. 57826. For our decision on quantum, the parties have agreed that the record in the entitlement appeal (ASBCA No. 53701), appellant's Statement of Costs (SOC), the government's response (gov't resp.) to the SOC, and the parties' main and reply briefs on quantum are sufficient for our decision without further evidentiary proceedings (Bd. corr. ltr. dtd. 6 March 2012). On this record, Santee Cooper is entitled to recover \$234,865,797.11 with interest pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 7109, from 20 August 2001 until paid.

FINDINGS OF FACT

1. We incorporate by reference the Findings of Fact for Purposes of the Motions in our 8 June 2004 decision in ASBCA No. 53701 and supplement those findings with the findings below.

2. Santee Cooper's indemnification claim arises from the civil actions of landowners (the *Sauders* litigation) against Santee Cooper for the flooding of their property along the Santee River as a result of the Cooper River Re-diversion Project (the Project). The Project was designed, constructed and, at all times relevant herein, owned by the United States Government (the government). The purpose of the Project was to reduce shoaling in Charleston harbor by diverting water from the Cooper River to the Santee River by a "rediversion canal." The government constructed the rediversion canal and a hydroelectric generating plant on the canal at St. Stephen, South Carolina (the St. Stephen hydroplant). The purpose of the St. Stephen hydroplant was to compensate for the loss of power generating capacity in an existing Santee Cooper facility at Jefferies, South Carolina due to the reduction in the water to be discharged to the Cooper River. 04-2 BCA ¶ 32,651 at 161,589-91.

3. Before Contract 0005 was entered into, a supplement dated 17 December 1973 to the government's General Design Memorandum for the Project stated, among other things, that "[a]verage water levels in the Santee River and adjacent swamps and marshes will be raised approximately 14 feet at Lake Mattassee" (R4, tab C-2, ex. 10 at 18, 25), and that:¹

It is important that the [Santee Cooper] negotiation agreement be updated and that negotiation be completed as soon as possible in order to finally establish the Hydro Plan project cost. The Authority is adamant in its position that it be free from liability for all claims arising from post-project stream flows on the Santee and Cooper Rivers. The possibility of post-project litigation and the steps taken by the Corps to prepare for legal counteraction to claims are discussed in the next paragraph.

b. Post-project litigation. ... The primary items of litigation generated by the rediversion project are expected to be:

....

¹ Lake Mattassee was part of the Santee River below the planned outlet of the rediversion canal into the river.

2. Damage to Cooper and Santee Rivers flood plain lands by the Hydro Plan and Energy Replacement Plan.

....

3. ...In anticipation of these areas of post-project litigation, the District has instituted over a period of several years the following program for obtaining a pre-construction data base:

....

8. Determined the extend [sic] of litigation against [Santee Cooper] by landowners in the Santee River flood plain.

(R4, tab C-2, ex. 10 at 28-29)

4. On 30 August 1976, four months before entering into Contract 0005 with Santee Cooper, the government answered a landowner's inquiry about the effect of the Project on Santee River water levels. The government answer stated in relevant part:

Our records indicate that the present average water level at Jamestown is approximately two feet above mean sea level, and normally fluctuates between one and three feet above mean sea level. The normal water levels at Jamestown after rediversion are expected to be significantly affected by the proposed hydroelectric plant at St. Stephen, S.C. Since releases through the St. Stephen plant will be varied by the South Carolina Public Service Authority (Santee-Cooper) depending upon load conditions, availability of generating capacity and Marion-Moultrie Lake levels, water levels at Jamestown will vary considerably. During what we estimate to be a typical week when the plant is used as a peaking facility and operating at full capacity the water level at Jamestown will be approximately eleven feet above mean sea level with fluctuations normally plus or minus one foot. On weekends, when power loads are less, the water level will fall and fluctuate between six and eight feet. When the St. Stephen plant is operated at a lesser capacity but still as a peaking facility, the water level at Jamestown will drop to a correspondingly lesser elevation.

At times when the plant is operating at full capacity for long continuous periods (sometimes weeks), the water level at Jamestown is expected to reach a steady state condition with a water level of about 15 feet.

(R4, tab C-2, ex. 13 at 3)

5. Contract 0005 was entered into by the government and Santee Cooper on 27 December 1976. Section 2 of the contract required Santee Cooper among other things to (i) restrict its use and release of water into the Cooper River from its Jefferies hydroplant in accordance with limits specified by the government; (ii) maintain and operate the cooling water system to be constructed by the government; (iii) maintain project transmission lines, government meters on the Authority's premises, and such other facilities as may be mutually agreed upon; (iv) operate the St. Stephen hydroplant by remote control equipment provided by the government; (v) maintain the remote control equipment at government expense; and (vi) at Section 2.4:

Make the maximum use of the additional capacity resulting from the combined two-plant operation which the Authority deems economical and practical in light of water availability, load conditions, costs and other operating considerations. Credit the Government for the value of the increase in useful capacity of Jefferies and St. Stephen created by the Project, as determined pursuant to Section 6.

(R4, tab C-2 at 7-11) The foregoing services were essential services for the commercial operation of the Project. Sections 1.3, 2.14 and 3.2 of the contract provided that after 50 years of "commercial operation," the government would transfer title to the Project to Santee Cooper (*id.* at 5, 10, 11).

6. The concluding recital at the beginning of Contract 0005 states: "the parties desire that the Government be compensated for the Project's benefits to the Authority and that the Authority be compensated for the adverse effects of the Project" (R4, tab C-2 at 3). Consistent with that stated intent, the payment terms in Contract 0005 provide for a calculation of off-setting "credits" to each party based on the commercial operation of the Project with an annual "settlement" payment by one party to the other party having a net credit balance due (*id.* at 14-18).

7. The payment terms of Contract 0005 also state: "If either party shall fail to make any payment under this contract within 30 days of the date due, interest thereon shall accrue at a rate to be determined in accordance with the provisions of Section 8." Section 8 states:

SECTION 8. Interest on Delinquent Accounts.

Notwithstanding any other provision of this contract, unless paid within thirty (30) days of due date, all amounts that become payable under this contract shall bear interest from the date due until paid, at the interest rate in effect which has been established by the Secretary of the Treasury pursuant to Public Law 92-41; 85 Stat. 97.

(R4, tab C-2 at 18)

8. Contract 0005 also included the following provision on which Santee Cooper bases its claim for indemnification:

SECTION 9. Claims.

9.1 During the period the Government holds and retains title to the Project, the Government shall assume the risk of all claims arising from the construction and operation of said Project (including claims arising out of the discharges provided for in paragraphs 2.1 and 2.2), except those arising from the fault or negligence of the Authority or from failure to release water or operate the Project in accordance with Section 2.

(R4, tab C-2 at 19) Finally, Section 13 was a Disputes clause providing for appeals from contracting officer decisions to the Secretary of the Army or his duly authorized representative (R4, tab C-2 at 21).

9. When construction was completed and the Project put into operation, the flooding at issue occurred and the *Sauders* litigation began in a South Carolina State Court on or about 22 October 1993. Santee Cooper gave prompt notice of the start of the litigation to the government by letter dated 25 October 1993 (R4, tab C-2, ex. 15). The *Sauders* litigation was subsequently removed to the Federal District Court (hereinafter "the District Court").

10. The District Court bifurcated the issues of liability and damages. A jury trial on the issues of liability was conducted from 18 February through 6 March 1997. At the jury trial there was undisputed expert testimony that (i) under National Weather Service criteria a water level of 13 to 17 feet above mean sea level at Jamestown on the Santee River below the redirection canal entry point would cause "moderate" flooding and that (ii) the St. Stephen hydroplant on the redirection canal operating at its design capacity of

24,500 cfs would result in a water level of 15 feet above sea level at Jamestown. (R4, tab C-2 at 4; gov't resp., ex. 5, vol. IV at 21-22, 88-90)

11. There was also testimony about measures that Santee Cooper might have taken to reduce the flooding and that Santee Cooper did not consider the flooding effect on downstream landowners in its everyday operations of the St. Stephen hydroplant because in the words of a Santee Cooper vice-president "IT WAS THE CORPS' [government's] RESPONSIBILITY, NOT OURS" (gov't resp., ex. 7). There is, however, no evidence in the record that Santee Cooper at any time caused flooding by operating outside the operating parameters set in Contract 0005.

12. On 6 March 1997, the jury returned verdicts finding for the plaintiffs on the inverse condemnation and trespass causes of action and for Santee Cooper on the negligence cause of action (R4, tab C-2, ex. 18). On 12 March 1997, Santee Cooper notified the government of the jury verdicts on liability and tendered to the government "the continuing defense of this lawsuit as well as the payment of any compensation or damages to be due the plaintiffs in the damages phase of the case" (R4, tab C-2, ex. 16). The government did not accept the tender.

13. Santee Cooper's indemnification claim was hand delivered to the contracting officer on 20 August 2001. The claim was in the initial amount of \$576,437.98 for legal fees and expenses incurred through 31 December 2000 in defending the *Sauders* litigation. The damages phase of that litigation had not been concluded when the claim was submitted, but the claim letter expressly reserved the right "to claim additional amounts arising from the *Sauders* litigation (whether incurred as fees and expenses to defend itself, damages and costs, or otherwise) in the future." The claim letter also stated that the claim was being brought pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601 *et seq.* (now § 7101 *et seq.*), and the claim was certified as required by the Act.² (R4, tab C-1 at 1, 11)

14. When our 8 June 2004 entitlement decision was issued, the *Sauders* litigation in the District Court had not been concluded and was not concluded until a Final Order and Judgment on 23 August 2011 (SOC, ex. 43). On 28 November 2005, the government moved to intervene in the District Court and have the *Sauders* litigation removed on jurisdictional grounds to the Court of Federal Claims (SOC, ex. 33). The motion to intervene was denied as untimely and that decision was not appealed (SOC, ex. 34 at 33;

² Contract 0005 was entered into before the effective date of the CDA. However Section 16 of the CDA stated in relevant part "...Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter." Pub. L. No. 95-563, 1978, U.S.C.C.A.N. 92 Stat. 2391 (1978).

Souders [sic] et al. v. South Carolina Public Service Authority, 497 F.3d 1303, 1307 n.3 (Fed. Cir. 2007)).

15. On 31 October 2007, Santee Cooper increased the amount of its 20 August 2001 indemnification claim to \$1,396,809.23 for the \$820,371.25 of legal fees and expenses incurred after 31 December 2000 in defending the *Souders* litigation (SOC ex. 36; finding 13).

16. On 21 January 2009, the District Court entered judgment in the *Souders* litigation awarding (i) damages for the flooding of their property to five of the plaintiff landowners in the total amount of \$3,810,650 “plus 8% interest from the date of flooding to the date of this Order,” and (ii) damages for trespass to two of those five plaintiffs in the total amount of \$275,000 with no interest (SOC, ex. 8).³ Santee Cooper notified the government of this judgment on 23 January 2009 (SOC, ex. 39). Santee Cooper calculated the interest due under the 21 January 2009 Judgment at 8% interest compounded annually from 1 January 1993 to 21 January 2009, plus post-judgment interest to 6 February 2009. The total amount of damages and interest so calculated was \$13,432,712.44 and was paid by Santee Cooper to the plaintiffs on 6 February 2009. (SOC, ex. 9 at 11)

17. On 20 April 2009, Santee Cooper notified the government that it was proceeding with Court ordered mediation in the *Souders* litigation (SOC, ex. 41). Between 19 May and 10 November 2009, Santee Cooper paid a total amount of \$2,159,466.89 for settlement of the claims of nine plaintiff landowners in that litigation. The payments were made in nine different amounts on eight different days (SOC, exs. 19-27, 43 at ex. A).

18. On 5 February 2010, the District Court entered an Amended Judgment in the *Souders* litigation awarding damages for flooding their property to eight of the plaintiff landowners in the total amount of \$55,218,277.00 “plus 8% interest from the date of flooding to the date of this Order” (SOC, ex. 29). Santee Cooper notified the government of this judgment on 15 February 2010 (SOC, ex. 40). Santee Cooper calculated the interest due under the 5 February 2010 Judgment at 8% interest compounded annually from 1 January 1993 to 5 February 2010 plus post-judgment interest to 1 March 2010. The total amount of damages and interest so calculated was \$205,967,244.56 and was paid by Santee Cooper to the eight plaintiffs on 1 March 2010. (SOC, ex. 30)

19. On 30 March 2011, the District Court awarded the recovering plaintiff landowners \$10,283,294.60 for legal fees and expenses (SOC, ex. 31 at 20). On

³ In our 8 June 2004 entitlement decision we found that “the *Souders* trespass cause of action has not been shown by the government to be fault-based as a matter of fact or law.” 04-2 BCA ¶ 32,651 at 161,608.

8 August 2011, the District Court awarded an additional \$79,471.00 to those plaintiffs for legal fees and expenses (SOC, ex. 45 at 5). These two awards were paid by Santee Cooper on or about 31 August 2011 in the total amount of \$10,362,765.60 (SOC, ex. 44).

20. On 23 August 2011, the District Court issued a Final Order and Judgment in the *Sauders* litigation. This Final Order and Judgment contained a summary of the litigation, and stated in pertinent part as to the cause of the flooding:

Plaintiffs are a group of landowners with property on the Santee River. On multiple occasions between 1985 and 2003, Plaintiffs' land was flooded as a result of the water released into the Santee River by the St. Stephen hydroplant; the severity of the flooding may have varied among the different properties, but all of the Plaintiffs suffered some amount of flooding and resultant damage during this period. Santee Cooper operated the St. Stephen's hydroplant pursuant to a contract with the Army Corps of Engineers. In 1993, Plaintiffs captioned in that action above, filed a Complaint against Santee Cooper, alleging that the excessive flooding constituted negligence, inverse condemnation, and a trespass upon their land.

This Court bifurcated the issues of liability and damages, and this matter went to trial on the liability issues in 1997. *The jury returned a verdict in favor of Plaintiffs on both the inverse condemnation and the trespass claims, but returned a verdict in favor of Defendant on the negligence claim...*

....

On February 19, 2008, this Court entered an Order entitled "Settlement Agreement and Order to Mediate Damages." This Order recognized that Santee Cooper and each of the named Plaintiffs...agreed to resolve all claims asserted by all of the Plaintiffs in the lawsuits through mediation or, if mediation was unsuccessful, through a final non-appealable order from this Court....*Plaintiffs acknowledged that they were not entitled to any damages arising out of alleged negligence on behalf of Santee Cooper and the Plaintiffs in the 1997 and 2003/2005 lawsuits further stipulated that their ability to prove negligence or other fault*

by Santee Cooper in connection with the release of water from the St. Stephen hydroplant was highly doubtful....

On August 18, 2008, this Court issued legal rulings applicable to each of the Parties due to significant disagreements by the Parties as to the applicable law to determine damages for the trespass and inverse condemnation claims. *In the August 18, 2008 Order, this Court ruled that the injuries caused to Plaintiffs in this litigation were the ordinary results of the regular and routine operation of the St. Stephen hydroplant.... Under South Carolina law, the flooding caused by such operation was permanent and not abatable by Defendant. Indeed, in the 1997 trial, the jury's finding of liability for inverse condemnation and trespass was not based on any negligence or fault by Defendant in the operation of St. Stephen as it expressly ruled in favor of Santee Cooper on that matter.... [Emphasis added]*

(SOC, ex. 43 at 3-6)

21. The 23 August 2011 Final Order and Judgment of the District Court also included an approval of the settlement agreements as follows:

The Court finds that the settlement amounts reached in mediation (a summary of those damage amounts, including prejudgment interest, is attached hereto as a portion of Exhibit A) are reasonable and are in accordance with the Court's rulings with respect to damage issues and the amount of damages awarded by the Court to other Plaintiffs. The claims of the foregoing Plaintiffs, past, present and future, including, but not limited to, the above-captioned claims and arising out of damage caused by the flooding described herein to the real property and any and all personal injury, property damage or other claims relating to any and all properties owned or claimed by the foregoing Plaintiffs, their heirs and assigns, are hereby satisfied.

(SOC, ex. 43 at 9)

22. Exhibit A to the Final Order and Judgment lists the total amounts of the damages judgments, settlement agreements, post-judgment interest to date of payment, and plaintiffs' legal fees and expenses paid by Santee Cooper in compliance with the judgments and orders of the Court. The total amount is \$231,922,189.47. (SOC, ex. 43,

ex. A) In addition to the amounts in Exhibit A, Santee Cooper claims indemnification for (i) its own legal fees and expenses in the amount of \$2,943,607.64 for defending the *Sauders* litigation (SOC at 13-14, ex. 37 at 5) and (ii) \$7,473,745.20 in costs, as of 1 June 2012, for “commercial paper notes and bonds needed to pay the landowner judgments” (app. br. at 40, and ex. A-1, proposed finding of fact (PFF) ¶ 45). The government does not dispute that the above costs for which indemnification is claimed were incurred and paid by Santee Cooper in the amounts and for the purposes stated. The government does contend that indemnity for all of these costs is barred by the fault or negligence exception in Section 9.1 of the contract. The government also contends that indemnity for the commercial paper notes and bond costs is barred by regulations⁴ and that those costs are otherwise “subsumed” in the Section 8 interest provision of Contract 0005. (Gov’t resp. at 13, 18-22)

23. In addition to the claimed indemnification amounts (\$242,339,542.31), Santee Cooper claims compound interest under Section 8 of the contract for the government’s delayed payment of those amounts. Santee Cooper’s Section 8 interest computation starts on 21 September 2001 when the first of its eight indemnification claim items allegedly became due. The computation runs through 1 June 2012 for a total amount of \$14,894,409.42. (App. br. at 40-41, and ex. A-2) The government disputes the calculation of compound rather than simple interest (gov’t supp. br. at 28), and otherwise contends that there is no legal basis for Section 8 interest because: “[a]t the time when the Contract was executed, there was no statutory or regulatory authority in the government arena for the imposition of interest penalties for late payment of invoices” (gov’t reply br. at 49).

24. Santee Cooper also claims interest pursuant to the CDA, 41 U.S.C. § 7109(a), on the total amount found due in the appeal from 20 August 2001, the date it submitted its certified claim for indemnification, until the total amount found due is paid (*see* finding 13).

⁴ The government cites Treasury Decision 5000 and Armed Services Procurement Regulation (ASPR) § 15-205.17. Treasury Decision 5000 is a regulation for the determination of “excess profits” on contracts for the construction of naval vessels, army and navy aircraft. Internal Revenue Cumulative Bulletin 1940-2, July-December 1940 at 397, 401. The ASPR Section 15 cost principles are applicable to determining allowable costs for (i) cost reimbursement type contracts, (ii) negotiation of overhead rates, (iii) terminated contracts, (iv) price revision of fixed price incentive contracts, (v) redetermination of prospective and retroactive price redetermination contracts, and (vi) pricing changes and other contract modifications. ASPR § 15-102 (1 July 1976).

DECISION

A. Indemnification for the Judgments, Settlement Amounts, Awards of Plaintiffs' Legal Fees and Expenses, Post-Judgment Interest, and Santee Cooper's Legal Fees and Expenses in the *Sauders* Litigation

Pursuant to Section 9.1 of Contract 0005, the government expressly assumed the risk "of all claims arising from the construction and operation of said Project...except those arising from the fault or negligence of the Authority" (finding 8). It is not disputed that the claimed costs of the *Sauders* litigation set forth in Exhibit A to the Final Order and Judgment of the District Court and Santee Cooper's legal fees and expenses in that litigation arose from the flooding of the plaintiffs' property by the operation of the Project. Nor does the government dispute the calculation of those costs, or their payment by Santee Cooper. (Findings 20-22) In the CONCLUSION of its main brief on quantum, the government concedes that it may have some liability for the flooding that occurred.⁵ However, the government denies liability for the entire amount and argues for an equitable apportionment of the costs on the grounds that Santee Cooper was at fault and negligent in not taking any actions in its operation of the St. Stephen hydroplant that "might have" mitigated the downstream flooding.⁶ (Gov't br. at 98-99)

The testimony at the 1997 liability trial in the *Sauders* litigation cited by the government in support of its allegation that Santee Cooper was at fault and negligent in failing to consider the downstream effect of its operation of the St. Stephen hydroplant (gov't br. at 17-21), was not persuasive to the jury that heard it and returned a verdict in favor of Santee Cooper on the plaintiffs' count of negligence (findings 10-12). Moreover in the Final Order and Judgment in the *Sauders* litigation, the Court found that "the injuries caused to Plaintiffs...were the ordinary results of the regular and routine operation of the St. Stephen hydroplant" and "the flooding caused by such operation was permanent and not abatable by [Santee Cooper]" (finding 20).

On this record, and considering especially (i) that the government designed, constructed and owned the Project (finding 2); (ii) that the government was fully aware when it entered into Contract 0005 that the Project as designed and constructed would

⁵ "Respondent does not disclaim any liability flowing from the design and construction of the rediversion canal. The potential risks attendant to that enterprise, which was intended to ameliorate shoaling in Charleston Harbor, were known to both Appellant and Respondent." (Gov't br. at 98)

⁶ At one point the government denied liability for indemnity because it had a navigational servitude over the Santee River. The District Court acknowledged the navigational servitude and stated in its Final Order and Judgment that it: "only awarded damages for harm that occurred above the ordinary high water mark" (SOC, ex. 43 at 7).

cause the flooding that in fact occurred (findings 3, 4); (iii) that Contract 0005 required Santee Cooper to “make the maximum use” of the capacity of the St. Stephen hydroplant (finding 5); (iv) the jury verdict for Santee Cooper on the negligence count in the *Sauders* litigation (findings 10-12); and (v) the Final Order and Judgment of the District Court in that litigation (finding 20), we conclude that no amount of the damages, settlement amounts, plaintiffs’ legal fees and expenses and post-judgment interest in Exhibit A to the Final Order and Judgment of that Court, or any amount of Santee Cooper’s legal fees and expenses defending the *Sauders* litigation were the result of any fault or negligence of Santee Cooper. Further considering that the government does not challenge the amount or payment of the aforesaid costs for the purposes stated (finding 22), we conclude that Santee Cooper is entitled to indemnification by the government in the amount of \$231,922,189.47 for the payments set forth in Exhibit A to the Final Order and Judgment of the District Court and in the amount of \$2,943,607.64 for its own legal fees and expenses defending that litigation.

B. Indemnification for the Cost of Commercial Paper Notes and Bonds for Payment of the Landowner Judgments

The government contends that the costs of the commercial paper notes and bonds to pay the landowner judgments were “cost of borrowings” recovery of which was prohibited by Treasury Decision 5000 and ASPR § 15-205.17, and that these costs were otherwise “subsumed” in the claimed contract Section 8 interest on the same judgments (finding 22). The cited Treasury Decision and ASPR provision do not apply to the Indemnification clause (Section 9.1) of Contract 0005 (*see* finding 22 n.4). However, we agree that the commercial paper notes and bond costs were subsumed in the contract Section 8 interest provision. That provision was the exclusive remedy in the contract for the costs of financing delinquent contract debts. Accordingly, we deny any separate recovery of the claimed \$7,473,745.20 for commercial paper notes and bond costs.

C. Interest

Santee Cooper claims interest under both contract Section 8 and the CDA interest provision at 41 U.S.C. § 7109(a). Santee Cooper’s contract Section 8 interest claim is for compound interest on the eight indemnification claim items for the period 21 September 2001 to 1 June 2012 with interest on each item starting 30 days after notice to the government of the indemnification amounts due on the item (finding 23). Santee Cooper’s CDA interest claim is for simple interest on the total claimed indemnification amount from 20 August 2001, the date the indemnification claim was submitted to the contracting officer for decision, until the total amount is paid (finding 24). For all periods of time that Section 8 interest would run on any one or more of the eight indemnification items as they became due, CDA interest would run concurrently on the total amount of those same items starting from 20 August 2001.

At the Board's request, the parties have filed supplementary briefs on (i) whether the CDA was applicable to Contract 0005; (ii) if the CDA was applicable, did the CDA interest provision supersede the contract Section 8 interest provision; and (iii) does the contract Section 8 provision provide for simple or compound interest (Bd. ltr. dtd. 2 Oct. 2012). When Santee Cooper submitted its indemnification claim on 20 August 2001, it expressly elected to proceed and certified its claim under the CDA rather than the Disputes clause (finding 13). The government, however, contends that Contract 0005 is a cooperative agreement, not a procurement contract, and therefore not within the subject matter jurisdiction of the CDA (gov't supp. br. at 4-15). We do not agree. We have found above that the purpose of the Cooper River Re-diversion Project was to reduce shoaling in Charleston harbor by diverting water from the Cooper River to the Santee River (finding 2). The Project was for the benefit of the government in carrying out its responsibilities for maintaining navigable waterways. We have further found that under Contract 0005, Santee Cooper provided various services that were essential for the operation of the Project and was compensated for those services by the annual adjustment of "credits" in the operation of the Project and ultimately by transfer of title to the Project after 50 years of commercial operation (findings 5, 6). Notwithstanding the characterization of some provisions of a contract as outside the subject matter jurisdiction of the CDA, if a dispute arises over provisions in the contract for procuring services, the contract as to that dispute is within the subject matter jurisdiction of the CDA. See *Bonneville Associates v. United States*, 43 F.3d 649, 654-55 (Fed. Cir. 1994).⁷ We conclude that Santee Cooper's disputed claim for indemnification of losses suffered in connection with its operation for the government of the government-owned St. Stephen hydroplant is within the subject matter jurisdiction of the CDA.

The government also opposes Santee Cooper's CDA interest claim on the grounds that (i) the contracting officer had no contemporaneous knowledge of the merits and demerits of the landowner litigation prior to the first notice of disbursements in 2009; (ii) Santee Cooper was not a "traditional construction contractor, since it did not incur continuous costs while it continued to perform"; (iii) there was no administrative burden in determining the interest due because, apart from the legal fees and expenses, each of the claimed disbursements "is identified clearly both by date and amount"; and, (iv) CDA interest "in addition to [the] contractually-mandated compound interest [is] 'interest on compound interest' [and] finds no authorization in law" (gov't br. at 84).

With respect to the first objection, the record shows that the government anticipated in its Project design documents the flooding that occurred (finding 3). The

⁷ The government distinguishes *Bonneville* on the grounds that in *Bonneville* the contract expressly designated the provisions at issue to be subject to the CDA. That distinction is not decisive. Contract language does not confer jurisdiction. *Florida Power & Light Co. v. United States*, 307 F.3d 1364, 1370 (Fed. Cir. 2002).

record shows that when the *Sauders* litigation began in October 1993, the government was promptly notified (finding 9). The record shows that when the jury verdicts on liability were rendered in 1997, the government was again promptly notified and was offered the opportunity to defend the damages phase of the litigation (finding 12). Considering that the government knew on 12 March 1997 of the jury verdict finding inverse condemnation of the flooded properties, but no negligence by Santee Cooper, the government contention that it could not have determined the merits or demerits of the *Sauders* litigation, or the potential monetary scope of its liability for indemnity until the first damages award in 2009 is not credible.

The second and third grounds cited by the government are essentially the same, i.e. that the rule in *Servidone Construction Corp. v. United States*, 931 F.2d 860, 862-63 (Fed. Cir. 1991) and *Caldera v. J.S. Alberici Construction Co.*, 453 F.3d 1381, 1383 (Fed. Cir. 1998), is inapplicable to Santee Cooper's appeal because, in the government's opinion, there is no administrative inconvenience in calculating CDA interest on 12 different sums incurred on 11 different dates.⁸ While there is obviously a difference between Santee Cooper's indemnification claim and the construction contract differing site condition claims in *Servidone* and *Alberici*, with respect to determining when the costs were incurred for purposes of calculating interest, the difference is one of degree and not kind. On the basis of the congressional intent in the legislative history, the Court in *Servidone* set a single red letter date for computation of CDA interest, and the specified date was the date of submission of the claim to the contracting officer "without regard to when the contractor incurred the costs." *Servidone*, 931 F.2d at 862.

The government's fourth objection is moot because we conclude that Santee Cooper is entitled to recover only CDA interest and not contract Section 8 interest. When a claim is submitted under the CDA, the CDA interest provision at 41 U.S.C. § 7109(a) "supersedes the interest clauses in the contracts litigated under the act." *Essex Electro Engineers, Inc. v. United States*, 709 F.2d 998, 1003 (Fed. Cir. 1983). Santee Cooper's reliance on *Gaffny Corp.*, ASBCA No. 37693, 94-1 BCA ¶ 26,522 is misplaced. In *Gaffny*, pursuant to explicit statutory language, we awarded interest under the CDA and an interest penalty under the Prompt Payment Act (PPA), 31 U.S.C. § 3901 *et seq.*, on the same late payment debt (the contract balance of \$6,808). However, the PPA interest penalty did not continue to accrue on that debt after the CDA interest began accruing. Santee Cooper's contract Section 8 interest is not so limited. There is no time period for which Santee Cooper claims contract Section 8 interest that it is not also claiming CDA interest on the same indemnification debt.

⁸ Counting the settlement agreement disbursements, a total of 12 different disbursements on 11 different dates are "identified clearly by both date and amount" (see findings 17-20).

D. Conclusion

On this record, and for the reasons stated above, we conclude that Santee Cooper is entitled to indemnification in the amount of \$234,865,797.11 for the costs incurred as a result of the *Sauders* litigation. The appeal is sustained in that amount with interest pursuant to the CDA, 41 U.S.C. § 7109, from 20 August 2001 until paid.

Dated: 14 February 2013



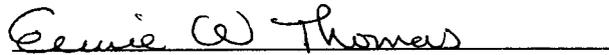
MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



MARK N. STEMPLER
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. 57826, Appeal of South Carolina Public Service Authority, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals