ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeals of -- | ) | |
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| Innovative Refrigeration Concepts | ) | ASBCA Nos. 48625 and 49475 |
| | ) | |
| Under Contract No. DABT01-94-C-0117 | ) | |

APPEARANCE FOR THE APPELLANT: Sam Zalman Gdanski, Esq.
Suffern, NY

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Richard J. Sprunk, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE COLDREN

Innovative Refrigeration Concepts (appellant) seeks to recover money allegedly due under a contract to supply cooling towers to the Army (Government). It seeks an equitable adjustment for being required to furnish controllers and sensors necessary for the automatic operation of the cooling towers. It also seeks interest under the Prompt Payment Act for the allegedly late payment of its invoice for payment of the contract price after appellant allegedly completed contract performance. It further seeks other miscellaneous relief discussed *infra*. Jurisdiction arises under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. A one day hearing was held. Only entitlement is before us.

FINDINGS OF FACT

1. On 7 September 1994, appellant was awarded a contract to furnish two cooling towers at the Army hospital at Fort Rucker, Alabama. The contract required that the towers be field-assembled by appellant in accordance with the "Minimum Salient Characteristics Requirements" set forth in the contract. The contract incorporated by reference, *inter alia*, Federal Acquisition Regulation (FAR) 52.233-1 DISPUTES (MAR 1994), and Department of Defense FAR Supplement (DFARS) 252.211-7001 INVOICE AND PROMPT PAYMENT—COMMERCIAL ITEMS (MAY 1991) (the Prompt Payment clause) and DFARS 252.211-7004 INSPECTION AND ACCEPTANCE—COMMERCIAL ITEMS (MAY 1991). (R4, tab 1 at B-1, I-1, I-3)

2. In relevant parts, the Prompt Payment clause provided that the Government would automatically pay an "interest penalty" for late payment of invoices if the Government did not pay "on or before the 30th day following receipt of a proper invoice," DFARS 252.211-7001(b)(1). The clause also provided that interest would continue to accrue until payment (as determined by the date on the payment check) for up to one year or until the filing of a

claim (*id*.). However, the interest penalty would not accrue during periods where there was a "disagreement" between the parties concerning "contract compliance" issues. Claims involving disputes, including the payment of interest, will be resolved in accordance with the Disputes clause. (*Id*. at (b)(3)(iv)) Also, under the clause, the contractor could submit its invoice "upon execution by an authorized Government official of a DD Form 250 . . . ." (*id*. at (c)(3)). The clause also required payment of a "penalty amount" upon written demand within 40 days after payment of an invoice if any owed interest penalty was not paid within ten days after invoice payment (*id*. at (b)(5)).

3. The contract specification relative to each tower's motor and controls required that:

> C2.6 Motors shall be 20 HP (maximum), TEFC, all cast iron, 1.15 service factor, and specially insulated for cooling tower duty. The speed and electrical characteristics shall be variable speed (frequency), 480 volt 3–phase, high efficiency. Provide a variable frequency drive control package that includes integral bypass.

(R4, tab 1, § C, ¶ C2.6)

4. It further provided for appellant to startup the cooling towers and then train Government personnel in their operation but only after the Government connected utilities to at least one of the cooling towers as specified at Section C of the contract specification:

> C1. . . . The Government shall provide labor, materials, and equipment to set the towers onto the existing concrete curbs and to reconnect piping and electrical. The Contractor shall provide startup and operational training following the connection of the first tower by the Government. . . .
>
> . . . .
>
> C3. TRAINING. The Contractor shall provide four (4) hours of training to the Directorate of Public Works Hospital maintenance personnel. The training shall commence within two days upon notification by the government. The training will follow the completion of the connections on the first tower by the Government and will not be repeated for the second tower. The operating and maintenance characteristics of variable speed equipment should be emphasized.

(R4, tab 1, § C at C-1)

5. The contract required that the contractor furnish a "commercial warranty." "The warranty provided shall be the manufacturer's STANDARD COMMERCIAL WARRANTY." (R4, tab 1, § C, ¶ C4)

6. The contract's original completion date was 27 October 1994. After belated ordering and delivery of the towers, bilateral Modification No. P00001, for which appellant provided $500 in consideration, extended the completion date to 5 December 1994 (Supp. R4, tabs 15, 16; *see also* tab 2). Unilateral Modification No. P00002 extended the completion date to 17 December 1994 because the Government was not ready to perform its obligations under the contract (R4, tab 3; tr. 20-23). Bilateral Modification No. P00003 extended the contract completion date to 12 January 1995 (R4, ab 4).

7. The record does not reveal the precise date that the tower manufacturer, Marley, delivered the towers to the "Government receiving office." Along with the towers, Marley delivered installation instructions, a standard commercial warranty, and "associated things." (Tr. 40-41) There is no evidence that the contracting officer was personally aware of the delivery of the warranty with the tower. Appellant began on-site work on 13 December 1994 and continued with that effort until 22 December 1994 (tr. 59, 61-63; ex. G-1). It resumed work at the site on 6 January 1995 (tr. 64; ex. G-1).

8. Shortly before the end of the contract performance period, a dispute arose as to whether appellant was obligated to provide temperature controllers and sensors as part of the variable speed control package under ¶ C2.6 of the specification. Appellant took the position that the contract did not require the furnishing of the temperature controllers and sensors but was directed by the contracting officer to supply them at a meeting held with all concerned parties on 11 January 1995. (Tr. 71, 75-76, 89-90, 144-46; supp. R4, tab 17)

9. A manual control for the cooling towers being furnished under the contract is needed to set the temperature and the automatic control system is required so that that temperature can be maintained (tr. 126-28, 147-48, 155). The temperature controllers are thermostats which control the variable frequency drives which in turn operate the fans on the cooling towers to change the water temperatures (tr. 131-32, 135-36, 138-41). The sensors are located in the intake condenser water piping for the towers to detect changes in the water temperature to cause the temperature controllers to run the variable frequency drives to adjust the fans to alter the water temperatures in the cooling towers (*id*.).

10. The Government provided and installed the electrical wiring between the variable frequency drive and the fans on the cooling towers as well as between the temperature controllers, sensors in the condenser water piping, and the variable frequency drive (tr. 133-34, 142-43, 146, 148).

11. Although appellant's president acknowledged at the hearing that temperature controllers and sensors were necessary components of an automatic variable speed control package, he allegedly did not include those items in appellant's bid based upon his

interpretation of the specification's ¶ C2.6 (supp. R4, tabs 20, 29; tr. 38-40, 76-78, 171). Testifying as to his interpretation of the specification at ¶ C2.6, appellant's president stated that "the paragraph should have been about the control system, not the control package." He also asserted that under his interpretation all that was required was capability to manually adjust the speed of the fan motors and that details describing the temperature controllers and sensors should have been provided in the contract if an automatic system was contemplated by the contract. (Tr. 76-80)

12. A Government maintenance mechanic, with almost 25 years experience in air conditioning and heating, interpreted the description of a "variable frequency drive control package" in ¶ C2.6 as including anything required for the automatic adjustment of the speed of the fan, rendering unnecessary the need for the word "automatic" in front of the language "variable frequency drive control package" in ¶ C2.6 (tr. 155-57, 159, 161; supp. R4, tab 28). He further opined that the failure to include the temperature controllers and sensors would defeat the purpose for having the variable frequency drive (tr. 145). A Government mechanical engineer also agreed that the specification requirement for a "variable frequency drive control package" at least "implied" that "temperature controllers and sensors" were required (R4, tab 6). We find this testimony persuasive.

13. Appellant ordered the variable speed drive and components which comprise the integral bypass before 17 December 1994 (tr. 58-59). However, these components were contained in one of the electrical boxes originally furnished with the tower (tr. 38, 132, 164-65). These components did not include the temperature controller and sensors needed for the cooling system to automatically adjust to a preset temperature (*id.*). Appellant's president testified that appellant did not initially provide the temperature controllers and sensors because the contract specification did not describe the kind or characteristics of these components (tr. 38-39). After attending the meeting concerning the disputed temperature controller and sensors on 11 January 1995, appellant ordered them from the manufacturer in California and had them shipped overnight to the project site (tr. 40, 145, 172-73). Appellant then provided these disputed items to the Government at 9:00 a.m. on 12 January 1995, the day after being directed to furnish them (tr. 39, 146, 173).

14. The Government's maintenance mechanic for the cooling towers testified that the Government installed the temperature controllers and sensors and then started up the cooling towers immediately upon appellant's furnishing them (tr. 143-44). However, the contracting officer admitted that the Government had not wired these temperature controllers and sensors when appellant's employees left on 13 January 1995, the day after the contract completion date of 12 January (supp. R4, tab 27 at ¶ 3) More importantly, the Government had not completed either the high voltage wiring for the towers nor the low voltage control wiring containing the temperature controllers and sensors by the end of the contract completion period on 12 January (tr. 24-26, 28, 70-73, 77, 168-69; supp. R4, tabs 38, 40; *but see*: tr. 153, 175-77). Thus, the wiring had not been completed by the Government in time for appellant to perform startup or training regarding these items during either the contract performance period or even the day after as the Government

engineer for this project admitted (tr. 25; supp. R4, tab 24 at ¶ 2). In addition, the record contains no evidence that the contracting officer or any other Government official requested appellant's assistance with this wiring during the contract performance period or even until appellant's president departed the project site on 13 January. In addition, the record contains no evidence that the contracting officer ever directed appellant to return to perform these or any other startup or training tasks.

15. Appellant had completed the installation of the cooling towers, checking for leaks, programmed the temperature controllers, and all other startup work not requiring the wiring to be completed before it left the project site (tr. 25-26, 170; supp. R4, tab 27 at ¶ 3). It also demonstrated that the cooling tower pump was running, the tower basin was not leaking, and the locations of the fill valves, access panel, gear box, and oil sight glass (tr. 150-51). At the time of leaving, appellant's president estimated that it would take the Government 3 or 4 days to complete the electrical hookup necessary to perform full startup and training (tr. 170).

16. Appellant offered the Government startup and training on 12 January 1995; however, the Government refused to accept, because the Government was too busy trying to complete its connection of the utilities for the cooling towers (tr. 28, 174). The Government's procurement office drafted and typed a letter for appellant's president's signature wherein appellant agreed to provide the training of Government personnel at no additional cost on the day after the contract performance period which was on 13 January 1995 (tr. 29-31, 74-75; ex. A-1). Appellant's president signed and delivered the letter to the Government (*id.*).

17. The Government completed the wiring and started up the towers including the temperature controllers and sensors after appellant left on 13 January 1995 (tr. 34, 143, 150). The Government was unable to get the control system to work properly to maintain a uniform temperature (tr. 150-51, 176). Because appellant had left, Government personnel had to study the manual for the temperature controllers, talk to manufacturers of these controllers, and its own electrical engineer in an attempt to make the control package work (tr. 150). It then hired a local firm to assist with the connection and operation of the control package (tr. 151-53). By telephone, appellant's president advised the Government maintenance mechanic that the control package manual would provide this information (tr. 152-53).

18. The contract does not specifically require the furnishing of a wiring diagram showing how to electrically connect the control system for the cooling towers. However, the Government mechanic testified that it was standard in the industry to provide such a wiring diagram (tr. 162-63). He specifically testified that he did not remember whether appellant's president hand drew a wiring diagram before he left the project site or if he furnished one subsequently (tr. 163). By a fax dated 28 February 1995, appellant sent the contracting officer a copy of a wiring diagram of the control system for the cooling towers

(ex. G-3).[1] The drawing was made by appellant's president, and bears an origination date of 22 December 1994 (*id*.). This origination date was before the contracting officer directed that appellant furnish these items at the 11 January 1995 meeting concerning whether the contract required the furnishing of the temperature controllers and sensors, and we infer that appellant would not have prepared this diagram had it not intended to furnish these items at a time prior to the contracting officer's directive (finding 13).

19. Appellant provided telephone assistance in running these cooling towers which its president described as "application assistance" (tr. 31-32, 48). This assistance took over a week when startup by appellant would have been about a day or a day and a half (tr. 48). No training was provided with respect to the temperature controllers and sensors because appellant's forces had departed from the project site before the Government had wired these items (tr. 152-53; supp. R4, tab 27 at ¶ 3).

20. On 13 January 1995, appellant sent Invoice No. IE01IK75 to the Government with an amount due of $59,488, representing the full contract price minus the $500 consideration that appellant had given with the initial modification. The invoice is not date-stamped by the agency to show when it was received. (Supp. R4, tab 18)

21. A "MATERIAL INSPECTION AND RECEIVING REPORT" (DD Form 250) was signed by the Government mechanical engineer on 17 January 1995 (supp. R4, tab 19). This DD Form 250 was for acceptance of all of the work under the contract since it indicated that it was for the full contract price (*id*.). Michael K. Coon, the authorized Government contract quality assurance representative, also signed the DD Form 250 on 23 January 1995 stating "[a]cceptance of listed items has been made by me or under my supervision and they conform to contract, except as noted herein or on supporting documents" (id.). No exceptions were noted on the form. Under the terms of the contract, acceptance is "conclusive, except for patent defects, latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract." (R4, tab 1, at I-1 (incorporating DFARS 252.211-7004))

22. The contracting officer was displeased that the Government mechanical engineer had signed the DD Form 250 (tr. 96-97, 106). She referred this matter to the Army Criminal Investigation Division (CID) (tr. 97). No evidence was included in the record that any criminal investigation resulted in a finding of any wrong doing. In addition, no evidence was included in the record that the Government ever attempted either to revoke the DD Form 250 or Government acceptance of the work under the contract. Further, the contracting officer never made a CDA claim for any contract performance problem after this acceptance was made through the signing of the DD Form 250.

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[1] The Government filed a motion seeking permission to add the wiring diagram to the evidentiary record after the hearing, but before briefs were filed. Appellant filed no opposition to this motion. We treat the motion as being uncontested and admit the wiring diagram as Government's exhibit G-3.

23. By letter dated 20 January 1995, appellant submitted Invoice No. IE01IK76, dated 13 January 1995, in the amount of $760 for the controllers and sensors. Appellant's letter asserted that the controllers and sensors "were not called out in the specifications." (Supp. R4, tab 20)

24. Early in February 1995, a Government mechanic found a blown fuse for one of the towers (tr. 153; R4, tab 6). This mechanic discovered that the motor windings had been improperly grounded to the motor frame (tr. 153-54; R4, tab 6). During trouble shooting, the tower motor was removed and the mechanic discovered that the motors provided were standard ones rather than the high efficiency ones required by the contract (tr. 154-55; R4, tab 6; supp. R4, tab 24 at ¶ 6). The cooling tower manufacturer Marley admitted that it had furnished appellant the low rather than the high efficiency motors (tr. 34; supp. R4, tab 25).

25. By a letter dated 15 February 1995, the contracting officer requested that appellant submit a proposal to reduce the contract price by the value of the start-up tasks allegedly not accomplished (supp. R4, tab 21).

26. By a fax dated 17 February 1995, appellant sent a copy of the cooling tower manufacturer Marley's standard 5 year limited warranty for the cooling towers to the contracting officer (R4, tab 7).

27. On 21 February 1995, appellant responded to the request for a contract price reduction. Appellant stated that "start up is not an elaborate procedure requiring several days to complete" and provided "a detailed explanation of the start up work we performed on each tower." Appellant also stated that it had offered and provided "additional startup and applications services," and requested "urgent attention" to payment of its contract invoice. (Supp. R4, tab 22)

28. In response to a contracting officer's request that he "review, evaluate, and provide a recommendation with respect to" appellant's response of 21 February, a Government mechanical engineer essentially conceded that appellant was correct in all of its assertions (supp. R4, tabs 23, 24).

29. On or before 16 March 1995, a local subcontractor came to the project work site to replace the low efficiency fan motors with the high efficiency ones which Marley had shipped for this purpose (tr. 35; supp. R4, tabs 25, 26). In addition, Marley employees came to the site to correct the vibration problems with the cooling towers which appellant's president claimed would have been corrected had appellant been able to perform the startup when appellant's personnel were at the job site (tr. 35, 37). Marley clearly indicated in its 16 March 1995 letters to the contracting officer and appellant that Marley felt that the cooling towers met the requirements of the Government, and that the Government was satisfied with these towers (supp. R4, tabs 25, 26).

30. On 3 April 1995, stating that "all warranty work" that had arisen since its submission of an invoice in January had been "taken care of," appellant submitted a certified claim for $59,488. Appellant also requested Prompt Payment Act interest. Appellant further stated, "[a] failure to remit payment, we consider a breach under the contract." (R4, tab 9)

31. After a conversation with a Government attorney, the contracting officer wrote a memorandum for the record, dated 4 April 1995. In it, she wrote that she had been told by Marley, the tower manufacturer, that appellant had bought the two towers delivered to the Army for an overseas shipment. According to the memo, Marley stated that "the difference of overseas shipment and here is Marley doesn't warranty [sic], supervise tower construction and start up." (R4, tab 10) Appellant's purchase order for the towers clearly shows that they were intended for the hospital at Fort Rucker (supp. R4, tab 14).

32. On 5 April 1995, the contracting officer responded to appellant's 3 April claim, stating that the "claim" was "being treated as a request for payment" with no further indication as to why the Government had concluded that it did not meet the requirements of a claim. The contracting officer also wrote that two items were needed in order for appellant to comply "with all terms and conditions of the contract:"

> a. An original manufacturer's warranty issued specifically for the two towers you installed.
>
> b. A statement from the manufacturer stating that start-up and tower erection was [sic] in compliance with it's [sic] recommended guidelines.

(R4, tab 11) The letter further stated that a partial payment would be made after "an original warranty [was] provided and accepted" and that, after "final resolution of all outstanding issues [was] achieved," a final payment would be made (*id*.). The letter does not identify either a contractual basis for the items needed or any other "outstanding issues."

33. Appellant's counsel filed an appeal on 13 April 1995, stating that appellant considered the Government's letter of 5 April to be "a deemed denial" (R4, tab 12). That appeal was docketed as ASBCA No. 48625.

34. By letter dated 10 April 1995, the Government denied appellant's 20 January request for $760 for the sensors and controllers. The basis for the denial was that controllers and sensors were mandatory components of the contractually-mandated variable speed (frequency) drive control with an integral bypass; therefore, no additional funds were necessary. The letter was not identified as a contracting officer's decision. (Supp. R4, tab 29)

35. On 19 May 1995, appellant responded to the Government's 5 April letter. Appellant enclosed "the original warranty issued specifically for the two towers." In regard to the demand for a statement from the manufacturer that the start-up and tower erection had been done in compliance with its guidelines, appellant merely stated that "factory representatives" had been on-site "on several occasions to take care of warranty[-]related repairs to the Government's satisfaction." (Supp. R4, tab 30)

36. On 12 July 1995, the Government issued a check in the amount of $59,488 to appellant which cashed the check without reservation on 21 July 1995 (supp. R4, tab 31). The record contains no evidence that appellant submitted a written demand for payment of any penalty due to the Government's failure to pay penalty interest. The Board became aware of the payment of $59,488 to appellant in October. On 10 October 1995, we clarified that there were two remaining issues before us: appellant's entitlement to CDA interest on the 3 April 1995 request for $59,488 and to Prompt Payment Act interest on its invoice in the same amount. We also noted that while the complaint had asked that we "'find bad faith, loss of profits, anticipatory profits and other damages[,]' the record contain[s] no evidence of such claims being filed with the contracting officer." We allowed each party to provide "notice of the issues deemed before the Board" within 20 days. (Supp. R4, tab 34) Neither party provided notice of any other issues, or further raised them at hearing or in briefs. We find that those issues raised in the complaint (*i.e.*, bad faith, loss of profits, anticipatory profits and other damages) are not before us in ASBCA No. 48625.

37. In mid-August 1995, appellant submitted a Material Inspection and Receiving Report, DD Form 250, which requested "INTEREST PAYMENT ON INVOICED AMOUNT OF $59,488 FOR THE PERIOD FROM 2/13/95 TO 7/21/95 (157 DAYS)." By letter dated 5 September 1995, the request was returned "without action." (Supp. R4, tab 33)

38. By letter dated 30 October 1995, appellant submitted another claim to the contracting officer. This second claim sought $760 for the controllers and sensors, CDA interest on the 3 April 1995 request for $59,488, "Prompt Payment Penalty Interest" on the $59,488, attorney's fees in the amount of $13,500, and "other damages" totaling $16,200. In its itemization of the "other damages" sought, appellant stated, among other things, that because of the CID investigation, "IRC had to research suitable legal counsel, compile chronologies of events and associated supporting documents, file and pursue FOIA requests for CID findings, etc." which, according to appellant, "amounted to direct losses arising from the long and stressful, though ultimately meaningless ordeal." Appellant also seeks damages for "overall time consumed" which "often caused us to lose other potentially lucrative contract opportunities." Finally, appellant includes "loss of financial credibility with" and "additional losses and irreparable damage to our business relationship with" the tower manufacturer. (Supp. R4, tab 35)

39. On 15 December 1995, the contracting officer issued a final decision on the second claim, denying it in its entirety. The contracting officer stated that appellant had provided no evidence that the controllers and sensors were not required by the contract

specification. She pointed out that CDA interest is only payable if appellant receives a favorable decision on its appeal. The contracting officer declared that Prompt Payment Act interest was not due because "the contract was not completed when the invoice was presented for payment." As to the final portion of appellant's claim, the contracting officer pointed out that, in addition to having produced no evidence that the costs were even incurred, there was no proof that they were incurred under or related to the contract. (Supp. R4, tab 36) On 11 January 1996, appellant timely appealed that final decision (supp. R4, tab 37). We docketed that appeal as ASBCA No. 49475.

40. Appellant's president was questioned at the hearing about the $13,500 for attorney's fees and the $16,200 for "other damages" sought in its 30 October 1995 claim. He conceded that other than providing copies of three checks which indicated payments totaling approximately $5,000 to appellant's counsel, appellant had provided no proof whatsoever of having incurred $29,700 in fees and damages. He also conceded that one of the checks had been presented during the same time that appellant had the same counsel representing it in another appeal involving the Defense Logistics Agency. (Tr. 80-85) We find no evidence that any of the "other damages" sought were incurred in connection with contract performance or contract administration.

## DECISION

### I. PRELIMINARY MATTERS.

Before turning to the merits, we dispose of preliminary matters regarding the admissibility of the two sworn statements of the Government mechanical engineer which were given to an agent of the Army's Criminal Investigation Command. Appellant made no attempt to show his unavailability to testify, and Government counsel pointed out that he would have no opportunity to cross-examine the declarant. The Government did concede the authenticity of the statements. The Board took the exhibits into evidence as A-2 and A-3, while reserving a final ruling on their admissibility. (Tr. 115-21)

We admit the statements into evidence. Federal Rules of Evidence (FRE) 801 states that a statement is not hearsay if it "is offered against a party and is . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . ."; it is "an admission by party-opponent." FRE 801(d)(2) The statements clearly relate to the Government engineer's duties. The Government's objection is overruled; the statements are admitted into evidence.

### II. THE MERITS

#### A. ASBCA No. 48625

The Prompt Payment Act (PPA) directs that agencies pay proper invoices on time or pay interest when payments, otherwise due and owed, are paid late. 31 U.S.C. §§ 3901-

3907. As pertains to the present dispute, the PPA is incorporated into the parties' contract by DFARS 252.211-7001, the Prompt Payment clause (finding 1).

Under that clause, appellant would be entitled to an interest penalty if the Government did not make payment within 30 days "following receipt of a proper invoice" (finding 2). The Government does not dispute that appellant's invoice for $59,488 was a proper invoice. Under the present circumstances, an interest penalty would continue to accrue until the date appearing on the payment check (*id.*). Appellant was entitled to submit an invoice "upon execution by an authorized Government official of a DD Form 250" (*id.*). However, under the terms of the same clause, for purposes of determining the interest penalty, two periods of time, *inter alia*, are not to be included, *i.e.*, when there is a disagreement between the parties concerning contract compliance issues, or after the filing of a claim for such penalty under the Disputes clause (*id.*). *See also* 31 U.S.C. § 3907(c); House Report No. 97-461 at 15, 1982 U.S.C.C.A.N. 125; *Arkansas Best Freight System, Inc. v. United States*, 20 Cl. Ct. 776, 778 at n.2 (1990).

Therefore, appellant cannot recover any PPA penalty interest on invoice No. IE01IK75 while there was a *bona fide* dispute, raised in good faith, between itself and the Army concerning appellant's compliance with the terms of the contract, or appellant's completion of its performance obligations. In order to meet the requirement that there be a disagreement between the parties, there must be "an objectively discernible dispute." *Donohoe Constr. Co.*, ASBCA Nos. 47310 *et al.*, 98-2 BCA ¶ 30,076, at 148,840. Since it is the Government which advances the existence of disputes as a defense to avoid the interest penalty, the Government bears the burden of persuasion.

The Government asserts that disputes existed over whether appellant had completed start-up and other training tasks required under the contract and concerning the provision of a wiring diagram, the warranty, and the manufacturer's assurances concerning the towers' installation and operation. Therefore, two questions are presented: first, whether genuine disputes existed, and second, if so, on what dates were these matters resolved?

The Government had not completed either the high voltage or the low voltage control wiring needed to operate the cooling towers by the end of the contract performance period (finding 14). Its maintenance mechanic testified that the Government could have immediately started up the cooling towers as soon as appellant furnished the temperature controllers and sensors (*id.*). Further, it is clear that the wiring was not complete when appellant's forces left the next day (*id.*). Thus, the Government prevented the appellant from performing startup or training concerning these controllers and sensors during the contract performance period as well as the additional day appellant stayed at no cost to provide training. The Government never required appellant to return and complete any remaining start-up tasks or training (finding 14). However, appellant did provide no cost telephone assistance to the Government (finding 19). Thus, the Government bears the responsibility for any delinquency in appellant's performance. Moreover, the Government has waived both the startup and training portion of the dispute when it accepted appellant's

performance by executing the DD Form 250 and never revoking that acceptance (findings 21, 22).

The Government had difficulty wiring and starting up the controllers and sensors after appellant had departed from the job site (finding 17). Appellant did not provide the contracting officer with a wiring diagram concerning the controllers and sensor until 28 February 1995 (finding 18). However, the Government formally accepted performance under the contract without requiring the wiring diagram, never revoked that acceptance, or made a Disputes Act claim concerning this wiring diagram (findings 21, 22). Thus, the furnishing of the wiring diagram never became a discernible dispute.

The only remaining issues possibly in dispute were the Government's insistence, in its 5 April 1995 letter, that appellant (1) furnish a manufacturer's warranty issued specifically for the two cooling towers; and (2) provide a statement from the manufacturer Marley that the towers were erected and started up in compliance with Marley's recommended guidelines (finding 31).

Neither of these demands was a requirement of the contract. The warranty required by the contract was the standard one, not one specially issued for these towers (finding 5). Furthermore and conclusive as to the warranty issue, the warranty provided by appellant was the standard one Marley sent with these towers when they were delivered to the Army (finding 7). Therefore, there is no objective basis for concluding that a dispute existed between the parties regarding appellant's provision of the towers' warranty.

The Government has advanced no contractual basis for requiring a non-contract party to certify that one of the contracting parties had properly performed its contract effort (finding 31). Nevertheless, Marley did send representatives to the project site to correct certain problems, and wrote the contracting officer that it thought the cooling towers were operating in accordance with the Government requirements and to the Government satisfaction (finding 29).

We conclude that all good faith issues involved in the alleged disputes were resolved by 23 January 1995, and that as of that date, the Government had accepted the supplies and services required under the contract, and received the benefit of its bargain. As of that date, the payment period had begun to run. That 30-day period ran until 22 February 1995. The next day penalty interest began to accrue, and continued to accrue for 40 days until appellant filed its claim for penalty interest, *i.e*., 3 April 1995. At that point, the interest accrued under the CDA until the payment date of 12 July 1995, *i.e*., a period of 100 days (findings 2, 35).

B. ASBCA No. 49475

Appellant seeks $760 as the costs incurred to provide the temperature controllers and sensors necessary to operate the cooling towers automatically. The contract required

that appellant furnish a "variable frequency drive control package that includes integral bypass" (finding 3). It also required that the training for the operation of the cooling towers emphasize "[t]he operating and maintenance characteristics of variable speed equipment" (finding 4).

Appellant alleges that it intended to furnish only the "variable frequency drive" and claimed that as furnished it could be manually controlled. However, this argument ignores the language indicating that a "control package" was also required and that training was required for that package. Accordingly, we hold that the temperature controllers and sensors furnished by appellant were that "control package" required by the contract.

We also conclude that appellant originally took the position that the temperature controllers and sensors were required before this dispute arose. The actions of the parties before the controversy commenced can be used to determine the intent of the parties. *See, e.g., Macke Co. v. United States*, 199 Ct. Cl. 552, 467 F.2d 1323 (1972). Appellant's president prepared a wiring diagram showing how to install the disputed temperature controllers and sensors on 22 December 1994 before the contracting officer directive to furnish these items was made on 11 January 1995 (findings 7, 18). It would not have had any reason to prepare this wiring diagram had it not intended to furnish these items. Thus, we hold that, prior to the dispute, appellant interpreted the contract the same as the Government; *i.e.*, that controllers and sensors were required. Appellant's claim for $760 for sensors and controllers is denied.

In its claim, appellant also seeks recovery for expenses consisting of $13,500 in attorney's fees and $16,200 in "other damages' relating to the CID investigation.

With respect to attorney's fees, appellant may not recover expenses which are not related to contract performance or administration but instead are costs related to prosecuting or defending claims against the Government which are barred by FAR 31.205-47(f) (1). *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1549 (Fed. Cir 1995), *overruled in part on other grounds, Reflectone, Inc. v. Dalton*, 60 F.3d 1549 (Fed. Cir. 1995) (*en banc*); *see also Information Systems & Networks Corp.*, ASBCA No. 42659, 00-1 BCA ¶ 30,665, *reconsid. denied*, 00-1 BCA ¶ 30,886. Appellant has failed to offer any evidence which shows that these claimed expenses are related to either contract performance or administration.

Appellant's claimed expenses related to the CID investigation are likewise not recoverable. Under the circumstances here present, the "investigation was undertaken by the government in its sovereign, law-enforcement capacity"; therefore, it was not acting in a contractual capacity. *Orlando Helicopter Airways, Inc.*, ASBCA No. 45778, 94-2 BCA ¶ 26,751, at 133,080, *aff'd,* 51 F.3d 258 (Fed. Cir. 1995).

Finally, appellant claims damages for the loss of potentially lucrative contract opportunities, "loss of financial credibility," and damage to its business relationships.

Appellant has failed to prove any nexus between any Government action or inaction and these losses.

## CONCLUSION

Appellant is entitled to Prompt Payment Act penalty interest on its invoice for $59,488 for a period of 40 days. Appellant is entitled to CDA interest on the same amount for a period of 100 days and on the penalty interest until paid. In all other aspects, the appeals are denied. The matter is remanded to the parties for determination of quantum.

Dated: 11 January 2001

JOHN I. COLDREN, III
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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. 48625 and 49475, Appeals of Innovative Refrigeration Concepts, rendered in conformance with the Board's Charter.

Dated:

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