

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
The Swanson Group, Inc. ) ASBCA No. 53496  
 )  
Under Contract No. N62472-90-D-0840 )

APPEARANCE FOR THE APPELLANT: Mr. Johnny Swanson, III  
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.  
Navy Chief Trial Attorney  
Chuck Kullberg, Esq.  
Senior Trial Attorney  
Engineering Field Activity Chesapeake  
Washington, DC

OPINION ON THE GOVERNMENT'S MOTION TO DISMISS  
BY ADMINISTRATIVE JUDGE TODD

The government moved to dismiss the appeal asserting that no issues remain before the Board and the appeal is moot. The government states that it has made proper payment of all quantum. Appellant opposes the motion and requests that the matter be set for hearing. Appellant argues that the Board has not yet determined the amount due on the claim, that it has been unable to verify the allocation and payment of funds to the Department of Labor (DOL) and the Internal Revenue Service (IRS), that it did not authorize the payments to be made, and that the government's unilateral withholding and disbursement of funds was an unconstitutional violation of its due process rights. We treat the motion as one for summary judgment since it refers to matters outside the pleadings.

STATEMENT OF FACTS

On 30 January 1995, the Board held appellant entitled to an equitable adjustment for wage increases for guard services performed during the option periods of the subject contract and remanded the dispute to the contracting officer to negotiate the amount of the adjustment with appellant. *Swanson Group, Inc.*, ASBCA No. 47676, 95-1 BCA ¶ 27,472, *modified on recons.*, 95-2 BCA ¶ 27,708. Appellant's claim for the wage adjustment, dated 30 March 1994, had been received by the contracting officer on 31 May 1994 (R4, tab 13).

On 26 May 1995, appellant submitted an invoice in the amount of \$60,268.75 for payment of its claim pursuant to the contract and the Board's decision. Appellant calculated the amount of \$41,295.60 for the wage adjustment, including mark-ups for FICA and

unemployment taxes. The government agreed to the wage adjustment in Contract Modification No. P00009, effective 18 December 1995. The modification included interest due under the Contract Disputes Act (CDA), 41 U.S.C. § 611, in the amount of \$4,995.78, stated to have been calculated for the period 4 April 1991, which was not the date the contracting officer received appellant's claim, to 31 December 1995. The total contract price increase was \$46,291.38. In its invoice appellant requested mark-ups for general and administrative (G & A) costs and interest at a rate of seven percent a year, which the government did not include in its price adjustment. (R4, tab 5; compl., tab A)

A DOL Order following McNamara-O'Hara Service Contract Act (SCA) investigations of appellant directed release of a total of \$25,273.75 from funds remaining on the contract. IRS sent the government notices of levy requiring that it turn over to IRS money obligated to be paid to appellant for taxes that appellant owed (R4, tabs 3, 8). Modification No. P00010, effective 9 April 1997, provided that \$25,273.75 would be paid to DOL. The government anticipated that the balance of the contract price increase in Modification No. P00009 of \$21,017.63 would be payable to IRS. (R4, tabs 7 through 9)

On 25 April 1997, the government paid DOL the amount of \$25,273.75 pursuant to the DOL Order, as evidenced by cancelled check from the U.S. Treasury (R4, tab 10).

On 11 August 2001, appellant notified the Board that the government had allegedly failed to amend the subject contract to provide payment pursuant to the Board's entitlement decision and requested that the Board determine quantum, including damages and interest. The Board docketed appellant's notice as the subject appeal ASBCA No. 53496.

The government moved to strike portions of appellant's complaint seeking payment for IRS interest and penalties and damages for corporate losses. Appellant filed objections to the motion and demanded proof of payment by the government to the IRS. On 19 March 2002, the Board issued its decision limiting the issues to the portions of the complaint concerning wage increases that were the subject of the entitlement proceeding. The Board granted the government's motion. *Swanson Group, Inc.*, ASBCA No. 53496, 02-1 BCA ¶ 31,800.

The government provided a price adjustment in Modification No. P00011, effective 28 March 2002, as a "settlement" pursuant to the Board's decision, dated 19 March 2002 (R4, tab 14). The modification provided for payment of \$31,840.26 to the IRS. The amount included \$21,017.63, which was the contract balance in Modification No. P00009 after payment to the DOL, and CDA interest in the amount of \$10,822.63 calculated for the period 31 March 1994 to 29 March 2002. (R4, tab 14)

On 12 April 2002, the government paid IRS \$31,840.26. The contracting officer had the payment sent to an IRS office in Fredericksburg, Virginia to the attention of Mr. R. Crocker, IRS agent, for appellant's account. The payment was made in accordance with the

IRS Notice of Levy, dated 9 December 1996. (R4, tabs 6, 16). It is evidenced by cancelled check from the U.S. Treasury (R4, tab 18).

### DECISION

When the basis for a motion to dismiss is factual and relies on materials other than the pleadings, the motion is treated as one for summary judgment. Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. The burden is upon the movant, but when it has supported its motion with evidence that would establish its right to judgment, the non-movant must proffer countering evidence sufficient to create a genuine factual dispute. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, summary judgment in favor of the moving party is proper. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971, *motion for recons. denied*, 03-1 BCA ¶ 32,130; *Swanson Group, Inc.*, ASBCA No. 53254, 02-1 BCA ¶ 31,838.

Appellant objects that the Board did not determine the amount due on its claim, but has not disputed the amounts that the government paid to DOL and the IRS. The issues remaining in appellant's complaint after the Board's prior decision in this appeal were whether appellant is due an amount for G & A and interest other than the compensation that has been made. The contract provision plainly provides that a wage increase adjustment shall not include any amount for G & A, overhead, or profit. FAR 52.222-43. There is no set of facts which would entitle appellant to G & A costs. Similarly, there is no set of facts which would entitle appellant to recover interest at the rate claimed in its invoice. Allowance of interest on a claim against the government requires an explicit waiver of sovereign immunity, either by way of a specific statute or express contract provision. *Fidelity Construction Company v. United States*, 700 F.2d 1379 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 826 (1983); *Caterpillar Tractor Company*, ASBCA No. 30186, 86-1 BCA ¶ 18,538. Appellant points to no basis for recovery of interest, and we have found none other than the CDA, which the government has applied in making payment of the claim. Under the CDA, a contractor is entitled to interest on amounts found due on claims at rates established by the Secretary of the Treasury, which the government has calculated. Appellant has not disputed the amount of CDA interest paid.

Appellant alleges that it was unable to verify the allocation and payment of funds to the DOL and the IRS, but has failed to present any facts that would invalidate the government's cancelled checks that document payment. Appellant alleges that it did not authorize the payments to be made. Appellant asserts that the government cannot "allocate funds as it desires" (app. reply at 2) and interfere in the operation of a contractor's business. A contractor's authorization of payments required by DOL to be made for violations of the SCA is immaterial. Similarly, an IRS levy requiring collection of money owed by a taxpayer does not necessitate authorization from the delinquent taxpayer. Appellant alleges an

unconstitutional violation of its due process rights, but offers no facts to challenge the government's compliance with federal statutes in transferring money owed to appellant to DOL and the IRS.

Where an amount claimed is paid and the contractor fails to object to the compensation provided, it is proper for the Board to dismiss the appeal as moot. *Tri Industries, Inc.*, ASBCA Nos. 47880, 48140, 48491, 99-2 BCA ¶ 30,529 at 150,764; *see Godwin Equipment, Inc.*, ASBCA No. 51939, 01-1 BCA ¶ 31,221 at 154,108.

Accordingly, the government's motion is granted, and the appeal is dismissed.

Dated: 23 October 2003

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LISA ANDERSON TODD  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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. 53496, Appeal of The Swanson Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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