ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Gosselin World Wide Moving NV	)	ASBCA No. 55365
	)	
Under Contract No. DAJA16-01-D-0018	)	

APPEARANCE FOR THE APPELLANT: Reed L. von Maur, Esq.
Glashuetten, Germany

APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA
Chief Trial Attorney
CPT Christopher L. Krafchek, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING
ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Gosselin World Wide Moving NV (Gosselin) appeals from the failure of a contracting officer (CO) to issue a decision on its claim for interest penalties under the Prompt Payment Act (PPA), 31 U.S.C. §§ 3901-3907. The government moves to dismiss on the basis that we lack jurisdiction over a claim for transportation services, and over all payments, including Prompt Payment Act interest penalties, based on a transportation services-based contract.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

The Surface Deployment and Distribution Command (SDDC) services the United States European Command (EUCOM) by soliciting rates from Transportation Service Providers (TSPs) for the movement of Department of Defense (DoD) service members' personal property (mot., ¶ 1).

SDDC invites TSPs to submit rates under a solicitation announcement. If an initial response to the solicitation announcement is acceptable, the TSP is advised that it is eligible to submit rates to SDDC. Once rates have been submitted, the TSP is given the opportunity to verify them before they are posted on SDDC's website. At the conclusion of the rate-verification period, the TSP rates are posted on the website and each individual shipping office within EUCOM must contact the TSP directly to offer shipment under the Tender of Service Rate. If the TSP accepts the offer, the shipping

office at the particular installation will issue a Government Bill of Lading (GBL) to ship the personal property of DoD service members. (Mot., ¶ 2)

A Tender of Service Agreement (TOS) has pre-established terms, conditions, and rates. The TOS is designed to provide the various shipping offices throughout the EUCOM area a list of approved TSPs and to establish a framework under which orders are issued as a GBL. (Mot., ¶ 3)

Section 8-2 of the TOS (1 April 2006 edition) entitled "TSP APPEALS PROCEDURES" provides at subparagraph E:

> This tender of service shall be construed and interpreted in accordance with the substantive laws of the United States of America. By the execution of this TOS, the TSP expressly agrees to waive any rights to invoke the jurisdiction of local nation courts where this TOS is performed and agrees to accept the exclusive jurisdiction of the Defense Office of Hearing and Appeals (DOHA) and the United States Court of Federal Claims for hearing and determination of any and all disputes that may arise under the Disputes clause of this tender of service.

(Reply at 2, ¶ 14; mot., attach. 2 at 18, 19 of 56)[1] As will be discussed in the following paragraphs, this provision is not consistent with the decisions of the Federal Circuit and this Board.

Upon execution of the necessary documents, a TOS came into effect between Gosselin and SDDC on 1 October 2000. The TOS was renewed annually. (Mot., ¶ 4)

By letter dated 14 December 2005, Gosselin submitted a "certified claim under the Contract Disputes Act" for € 151.503,41 and "requested that you [SDDC] forward the claim and supporting data to a contracting officer designated by SDDC capable of executing a final written decision under the CDA if you believe . . . you lack the requisite authority to issue the decision." Gosselin's letter attached a list of invoices allegedly paid late and alleged that it is entitled to "the interest claimed under the Prompt Payment Act." The letter requests a "final written decision on the claim within 60 days of your receipt of this letter and Enclosure." (Mot., attach. 5) On 23 February 2006, Gosselin through its attorney filed with the Board pursuant to 41 U.S.C. § 605(c)(5) a notice of appeal from

[1] The parties have not provided prior editions of the TOS. It is assumed that the quoted language has not changed materially.

failure of the contracting officer to issue a decision. The Board docketed the appeal as ASBCA No. 55365.

CONTENTIONS OF THE PARTIES

In lieu of filing an answer to Gosselin's complaint, the government filed a motion to dismiss for lack of subject matter jurisdiction. The motion contends that Gosselin is a common carrier, and "when a common carrier is seeking payment from the government for charges owed on a GBL contract for transportation, the applicable statute is the ICA [Interstate Commerce Act]." Relying on *Dalton v. Sherwood Van Lines, Inc.*, 50 F.3d 1014 (Fed. Cir. 1995), *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357 (Fed. Cir. 2002) and *AIT Worldwide Logistics, Inc.*, ASBCA No. 54973, 06-1 BCA ¶ 33,267, the government contends that since the ICA does not "grant the ASBCA subject matter jurisdiction over actions between a common carrier and the government for the payments owed on their agreement," the appeal must be dismissed for lack of jurisdiction. (Mot. at 4-5)

Gosselin's opposition contends that the government's motion missed the point of its claim. According to Gosselin, it is undisputed that Gosselin has fully performed its contractual obligations, and the government has fully paid Gosselin under each GBL/delivery order issued under the relevant TOS. Gosselin says that its claim does not involve "transportation services," and no such claim was ever presented to the CO. Gosselin says that the only claim "involved prior to and in this appeal is Gosselin's claim for the payment of interest penalties under the provisions of the Prompt Payment Act." It argues that the fact that its PPA interest claim may relate to "contracts for transportation" or to GBLs does not affect the Board's subject matter jurisdiction. (App. opp'n at 3) Gosselin says that the government's motion overlooks the PPA and its implementing regulations, 5 C.F.R. Part 1315, on which its claim and appeal were based (app. opp'n at 1).

Because the government's motion did not address the PPA issue Gosselin raised in its opposition, the government was given the opportunity to reply. In its reply, the government says there is no evidence that Gosselin timely and properly submitted its invoices to the appropriate billing office, or that Gosselin fully performed its services in accordance with the TOS and GBL. The government acknowledged, however, that "[a]ppellant is seeking alleged interest penalty payments." (Reply at 2, ¶ 13)

As for whether we have jurisdiction, the government argues that *Dalton* is applicable because Gosselin "is a common carrier that provided transportation services to a government agency under the Transportation Act," and "the agreement between the parties is based on a TOS agreement and use of GBLs." The government maintains that

since the issue of whether Gosselin is owed PPA interest "arose from those [transportation services] transactions, thus, the appropriate forum to settle that dispute is the GSA [General Services Administration]." (Reply at 4)

Citing the Federal Circuit decision in *Inter-Coastal*, the government argues that in holding that "the Transportation Act covers actions between a common carrier and the Government . . . for payments owed on their agreement,"[2] it follows that "if the ASBCA does not have jurisdiction to adjudicate the underlying claim for payment, it does not have jurisdiction to review any other claim, including claims brought under the Prompt Payment Act." (Reply at 4-5)

Quoting from our 2006 decision in *AIT*, the government argues that we intentionally used broad language in our holding to apply the rule of law from *Dalton* and *Inter-Coastal*, and "did not leave room for an exception for claims seeking interest payments under the Prompt Payment Act" (reply at 5). The holding the government refers to states "Therefore, in light of the fact that this appeal involves a claim for transportation services, and the fact that the ICA, not the CDA, governs appellant's right to seek payment, we dismiss this appeal for lack of subject matter jurisdiction." 06-1 BCA at 164,860.

With respect to the PPA regulations Gosselin cited in its opposition -- 5 C.F.R. § 1315.16, Relationship to other laws -- the government argues that this section of the regulation "gives an Appellant the right to file a claim under Section 6 of the CDA. However, there is nothing in the CDA that grants the ASBCA exclusive jurisdiction to hear these appeals." The government says that 5 C.F.R. § 1315.16 "simply requires the reviewing Board of Contract Appeals, be it the ASBCA, GSBCA, or the Interior Board of Contract Appeals, to follow the procedural *framework* outlined in 41 U.S.C. § 605." (Reply at 6-7)

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[2] The holding the government relies upon is set out at 296 F.3d at 1369:

> Accordingly, we hold that the ICA, including its three-year filing period, applies to actions seeking to recover the "charges" or "payments" allegedly owed on contracts with the government for transportation services. Our holding today does not extend to contracts that involve services or property other than (or in addition to) transportation services.

DECISION

The government has acknowledged that Gosselin is seeking interest penalty payments under the PPA in this appeal. We therefore begin our discussion with the application of that statute and the implementing regulations to the appeal before us. Congress passed the PPA in 1982.[3] The purpose of the original PPA was to provide an incentive for the government to pay its bills on time and to compensate the contractor for delays in government payments.[4] The PPA provides that, under regulations prescribed by the Office of Management and Budget (OMB), "the head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due." 31 U.S.C. § 3902. The PPA provides that the term "agency" has the same meaning given that term in section 551(1) of title 5. 31 U.S.C. § 3901(a)(1).

Five C.F.R. § 1315.2 (2006), implementing the PPA, defines "*Agency*" as follows:

> (c) *Agency* includes, as defined in 5 U.S.C. 551(1), each authority of the United States Government, whether or not it is within or subject to review by another agency, excluding the Congress, the United States courts, governments of territories or possessions, the District of Columbia government, courts martial, military commissions, and military authority exercised in the field in time of war or in occupied territory. *Agency* also includes any entity that is operated exclusively as an instrumentality of such an agency for the purpose of administering one or more programs of that agency, and that is so identified for this purpose by the head of such agency. The term *agency* includes military post and base exchanges and commissaries.

DoD is an executive agency within the meaning of 5 U.S.C. § 551(1). The SSDC is a Command within DoD charged with entering into transportation service arrangements with TSPs for the movement of DoD service members' personal property from various military installations or posts. Therefore, we conclude that SSDC is covered by the PPA and its implementing regulations.

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[3] The PPA of 1982, Pub. L. No. 97-177, 96 Stat. 85 (1982), *codified as amended at* 31 U.S.C. §§ 3901-07 (2003).

[4] *See* legislative history of Pub. L. No. 97-177, 1982 U.S.C.C.A.N. (96 Stat. 85) 111-126.

As we read 5 C.F.R. § 1351.1, "Application," it provides no exemption for contracts for the procurement of transportation services. We are reinforced in this view because 5 C.F.R. § 1315.1(b) "*Vendor payments"* applies to "All Executive branch vendor payments" with the following specific exceptions: "Contract Financing Payments;" "Payments related to emergencies;" "military contingency operations;" and "release or threatened release of hazardous substances" under 5 C.F.R. § 1315(b)(1)and (2), and "*Utility payments*," and "*Commodity Credit Corporation payments*" under 5 C.F.R. § 1315.1(c) and (d). There is no indication that Congress intended to exempt payments arising out of or in connection with transportation services from PPA coverage.

Moreover, the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (CDA), figures prominently and specifically in the PPA interest penalty claim resolution scheme. The PPA provides that a claim for an interest penalty not paid may be filed under section 6 of the CDA, 41 U.S.C. § 605, and that an interest penalty does not continue to accrue after a claim for a penalty is filed under the CDA or for more than one year. 31 U.S.C. § 3907.

Implementing this section of 31 U.S.C. § 3907, 5 C.F.R. § 1315.16, "Relationship to other laws" provides, in part:

> (a) *Contract Disputes Act of 1978 (41 U.S.C. 605).*
> (1) A claim for an interest penalty (including the additional penalty for non-payment of interest if the vendor has complied with the requirements of § 1315.9) not paid under this part may be filed under Section 6 of the Contract Disputes Act.
> (2) An interest penalty under this part does not continue to accrue after a claim for a penalty is filed under the Contract Disputes Act or for more than one year. Once a claim is filed under the Contract Disputes Act interest penalties under this part will never accrue on the amounts of the claim, for any period after the date the claim was filed. This does not prevent an interest penalty from accruing under Section 13 of the Contract Disputes Act after a penalty stops accruing under this part. Such penalty may accrue on an unpaid contract payment and on the unpaid penalty under this part.

Based on the foregoing, we conclude that the PPA applies to DoD and thus SSDC; that it applies to contracts for transportation services; and that the CDA is the designated statute for resolution of disputes relating to a claim for an interest penalty under the PPA.

We turn next to a discussion of *Dalton*, *Inter-Coastal* and *AIT*, the three cases the government relies upon in arguing that we lack jurisdiction. In *Dalton*, the contractor was a freight-forwarding common carrier that transported household goods for service members pursuant to GBLs. After paying the service members who had filed claims for damaged property, the government sought reimbursement from the carrier. The carrier refused to pay and this led the government to setoff its claim against sums owed the carrier. The carrier appealed to this Board where the government moved to dismiss for lack of jurisdiction. The Board sided with the carrier on the basis that it had jurisdiction pursuant to the CDA.

On appeal, the Federal Circuit held that the CDA did not apply to a contract for transportation services with the government when the parties' contract consisted solely of a GBL. *See Dalton*, 50 F.3d at 1015. The Court reasoned that Congress did not intend to have the general provisions of the later-enacted CDA supplant the earlier, more specific provisions of the Transportation Act of 1940, as amended, 31 U.S.C. § 3726 (the Transportation Act). *Id.* at 1018. In reaching its decision, the Court observed that the Federal Acquisition Regulation expressly exempted transportation services obtained under a GBL from the CDA, and that the GBL signed by the parties indicated that the Transportation Act, not the CDA, would govern the parties' agreement. *Id.* at 1019. Also important is the fact that the Court found two separate remedial schemes for adjudicating contract disputes: the more general administrative review provisions of the CDA on the one hand, and, on the other hand, the older, more specific, two-tiered procedure (GSA or a designated agency with appeal to the Comptroller General) for addressing disputes over transportation charges which carriers still routinely invoked for GBL transactions. After reviewing the two administrative review schemes, the Court concluded that they could not be regarded as "complementary." *Id.* at 1018. In so holding, the Court limited the application of *Dalton* to cases in which the government obtains transportation services from a common carrier pursuant to 49 U.S.C. § 10271, and in which the GBL constitutes the contract between the parties. The Court left cases in which transportation services are obtained under a binding, long-term contract for "[a] different analysis." *Id.* at 1021.

In *Inter-Coastal*, decided seven years later, the Court addressed the question left open in *Dalton*. In *Inter-Coastal*, the Defense Logistics Agency (DLA) entered into a three-year tender agreement with Inter-Coastal. A dispute arose about when the government did and did not owe holdover charges in addition to the standard delivery rate it undisputedly owed and was paying. The dispute involved an interpretation of the

ICA. Notwithstanding the fact that the tender agreement involved was more complex than a GBL, the Court concluded that "Congress intended to have the ICA govern all actions seeking the payment of money for the charges owed on contracts for transportation services between common carriers and the government." 296 F.3d at 1366. The Court said:

> The statute draws no distinction between transportation services governed by a Government Bill of Lading on the one hand and a long-term contract on the other. It draws no distinction between a transportation-services contract requiring one delivery only, *e.g.*, a "spot movement," and one requiring all the deliveries an agency may need over an extended period of time.

Id. at 1366. In holding that the ICA applies "to actions seeking to recover the 'charges' or 'payments' allegedly owed on contracts with the government for transportation services," the Court again looked to the "administrative-dispute framework set up by the Transportation Act [which is a part of the ICA]." *Id.* at 1367, 1369. Significantly, we note that the *Inter-Coastal* Court refers to actions to recover transportation charges or payments "on" contracts as opposed to "relating to," "arising out of," or "as a result of" contracts with the government.

In *AIT*, the government awarded the contractor a contract to provide various logistical functions including installation transportation services. During the course of the contract, the contractor contacted appellant, a carrier based in Virginia Beach, Virginia, to provide 100 trucks to transport materials from Fort Lee, Virginia, to Jacksonville, Florida. After a number of trucks were provided, the contractor advised the carrier that the government would not issue the necessary GBLs for the trucks. Subsequent to this incident, the carrier asserted a claim for the trucks and after-hour emergency man hours provided. Not satisfied with the government's response, the carrier submitted a certified CDA claim to the CO. The CO denied the claim on the basis that the contractor had no authority to contract for the government, and therefore no contract existed between the government and the carrier. At the Board, the government initially moved to dismiss the carrier's appeal on the ground that there was no contract between the carrier and the government. The Board directed the parties to address the impact of the Federal Circuit's decision in *Inter-Coastal*. Despite the carrier's argument of the existence of an implied contract, we held, in light of *Inter-Coastal*, that we have no jurisdiction to "consider and determine appellant's entitlement, if any, to its alleged costs for providing the trucks, and for its fee for after hours emergency man hours, regardless of the theory on which it relies in asserting its claim," because "this appeal involves a claim for transportation services, and the fact that the ICA, not the CDA, governs

appellant's right to seek payment, we dismiss this appeal for lack of subject matter jurisdiction." 06-1 BCA at 164,860.

The common thread that ran though *Dalton* (setoff for property damage), *Inter-Coastal* (charges for unscheduled holdovers) and *AIT* (charges for trucks and emergency man hours) is that the claim asserted in each of those cases was on the performance of the underlying contract or GBL for transportation services. In contrast, there is no claim filed with respect to the performance of the underlying transportation services contract or GBL in the appeal before us. Indeed, as Gosselin emphatically stated, "the ***only*** claim – involved prior to and in this appeal is Gosselin's claim for the payment of interest penalties under the provisions of the Prompt Payment Act" (app. opp'n at 3). Because of this distinction, we conclude that *Dalton, Inter-Coastal,* and *AIT* do not control the jurisdiction question presented here.

We mentioned earlier that *Dalton* and *Inter-Coastal* turned, in part, on the Court's conclusion that the administrative review schemes created by the ICA and the Transportation Act are not "complementary" with the administrative review provisions of the CDA. *Dalton,* 50 F.3d at 1016-17; *Inter-Coastal,* 296 F.3d at 1363. There is nothing in the transportation "Claims and Appeal Procedures" in 41 C.F.R. § 102-118.450 to 41 C.F.R. § 102.118.675 (2006) that provides for resolution of PPA claims arising out of transportation services contracts or GBLs. With the CDA designated as the statute for resolution of PPA interest penalty disputes, there is no inconsistency in the remedial schemes of the sort that the Court found in *Dalton* and *Inter-Coastal*. Indeed, the separate remedial schemes set out for resolution of transportation services claims on the one hand, and of PPA interest penalty claims on the other hand, are fully "complementary."

The government argues that while 5 C.F.R. § 1315.16 gives an appellant the right to file a claim under Section 5 of the CDA, "there is nothing in the CDA that grants the ASBCA exclusive jurisdiction to hear these appeals" (reply at 6). The government says that 5 C.F.R. § 1315.16 "simply requires the reviewing Board of Contract Appeals, be it the ASBCA, GSBCA, or the Interior Board of Contract Appeals, to follow the procedural *framework* outlined in 41 U.S.C. § 605" (*id*. at 6-7).

It is true that under the CDA, in lieu of appealing to an agency board, a contractor may bring an action directly in the United States Court of Federal Claims. *See* 41 U.S.C. § 609(a)(1). 41 U.S.C. § 607(d) provides, however, that "[e]ach agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to *a contract made by its agency*" (emphasis added). The TOS involved here was a contract made by a component (SDDC) of DoD. The ASBCA is the designated agency board for DoD. Gosselin has not elected to bring an action in the Court of Federal Claims, but has

chosen to appeal the lack of a CO decision on its claim to the ASBCA. Under the circumstances, the ASBCA has exclusive jurisdiction over the appeal.

CONCLUSION

Because Gosselin's appeal does not involve the performance of the underlying contract for transportation service (TDS or GBL) but involves interest penalties under the PPA, and because the PPA applies to DoD, and designates the CDA as the statute for resolving PPA interest penalty disputes, we hold that the ASBCA, as the agency board designated for resolution of DoD CDA appeals, has jurisdiction to decide this appeal.

The government's motion to dismiss for lack of jurisdiction is therefore denied.

Dated: 25 October 2006

PETER D. TING
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 No. 55365, Appeal of Gosselin World Wide Moving NV, rendered in conformance with the Board's Charter.

Dated:

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