ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Raytheon Company	)	ASBCA No. 54907
	)	
Under Contract No. DAAH01-96-C-0114	)	

APPEARANCES FOR THE APPELLANT:	Karen L. Manos, Esq. Christyne K. Brennan, Esq. Gibson, Dunn & Crutcher LLP Washington, DC
APPEARANCES FOR THE GOVERNMENT:	E. Michael Chiaparas, Esq. Chief Trial Attorney Lawrence S. Rabyne, Esq. Trial Attorney Defense Contract Management Agency Arlington Heights, IL
APPEARANCES FOR NATIONAL DEFENSE INDUSTRIAL ASSOCIATION: AS *AMICUS CURIAE*	Terry L. Albertson, Esq. Linda S. Bruggeman, Esq. Crowell & Moring LLP Washington, DC

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON MOTION FOR RECONSIDERATION

Raytheon Company (appellant) timely seeks reconsideration of our decision, *Raytheon Company,* ASBCA No. 54907, 07-2 BCA ¶ 33,655, granting the government's summary judgment motion and denying appellant's cross-motion. Appellant seeks oral argument, and also seeks referral of the motion to the Board's "senior deciding group" (SDG). The Board's decision held that appellant failed to timely effect current period adjustments of pension costs as of the date of segment closing for two closed business segments, as required by CAS 413.50(c)(12), and appellant owed the government interest on these adjustments, compounded daily, in accordance with the CAS statute and CAS clause. The National Defense Industrial Association (NDIA) has filed a brief as *amicus curiae.* The NDIA concurs with appellant's motion for reconsideration but takes no position on referral to the SDG. The government has filed in opposition to appellant's motion for reconsideration and opposes referral to the SDG.

The Chairman has declined to refer appellant's motion to the SDG. Appellant's request for oral argument is denied. Familiarity with our prior decision is presumed.

Appellant has not shown any error in the Board's interpretation of CAS 413.50(c)(12), the relevant provisions of the "Preamble to Amendments of CAS 412 and 413, 3-30-95" or the relevant case law cited in the Board's decision, all of which uniformly require that the subject pension cost adjustment be a *current period adjustment,* and which we reaffirm here. Our decision on CAS noncompliance was predicated upon our conclusion (07-2 BCA at 166,656) that appellant did not make current period adjustments for the two payments made in 2004. Upon reconsideration however, we believe that our decision was not based upon stipulated or undisputed facts but upon factual inferences drawn from a record that was not altogether clear on this point. An equally plausible factual inference was that appellant's payments were in fact allocated to the relevant current cost accounting periods by virtue of prior period adjustments. The record was silent and unclear on the accounting treatment of these payments. Summary judgment should have been denied to allow for further record development.

However we see no need to reinstate the appeal for these purposes or to address the government's other arguments regarding CAS noncompliance because we conclude that the government in any event is not entitled to recover interest under the circumstances for reasons stated below. We agree with appellant and the *amicus curiae* that the CAS statute, 41 U.S.C. § 422(h), and the relevant CAS clause, FAR 52.230-2, contemplate that the government is entitled to a contract price adjustment plus interest for a contractor's failure to comply with cost accounting standards or failure to follow a cost accounting practice consistently. We agree that this contract price adjustment must reflect increased costs paid by the United States caused by such failures based upon an analysis of relevant contracts impacted by the noncompliance.

The contract price or cost adjustment to which the government was entitled under CAS 413.50(c)(12) was an adjustment due the government by virtue of the segment closing and the resultant calculation made as of the date of segment closing. This contract price or cost adjustment did *not* result from a CAS violation or from a failure to follow a cost accounting practice consistently, which is what the CAS statute and CAS clause require in order for appellant to be liable for a contract price adjustment and interest under these provisions. In effect, the CAS statute and CAS contract clause posit a cause and effect relationship between the contract price adjustment, the CAS violation and any resulting increased costs paid by the government.

Upon reconsideration, we believe that the government failed to establish such a cause and effect relationship, and it is appropriate to correct our error on reconsideration.

See BAE Systems Information & Electronic Systems Integration, Inc. (formerly Lockheed Martin IR Imaging Systems, Inc., and Loral Infrared and Imaging Systems, Inc.), ASBCA No. 44832, 03-1 BCA ¶ 32,193 at 159,115 (Thomas, concurring). *See also Dan Rice Construction Co.*, ASBCA No. 52160, 05-1 BCA ¶ 32,825. We conclude that the contract price adjustment and related interest provisions under the CAS statute and CAS clause have no application under the facts of this case. Accordingly, the government is not entitled to interest under the CAS statute and the CAS clause.

We also conclude that the government is not entitled to interest under the Interest clause of the contract. The Interest clause, FAR 52.232-17 (JAN 1991) to which the parties have stipulated, provides in pertinent part as follows:

> INTEREST (JAN 1991)
>
> (a) Notwithstanding any other clause of this contract, all amounts, except amounts that are repayable and which bear interest under a Price Reduction for Defective Cost or Pricing Data clause, that become payable by the Contractor to the Government under this contract . . . shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. . . .
>
> (b) Amounts shall be due at the earliest of the following dates:
>
> (1) The date fixed under this contract.
>
> (2) The date of the first written demand for payment consistent with this contract, including any demand resulting from a default termination.

We believe (b)(2) governs here. It is undisputed that appellant paid these two pension adjustments within 30 days of the government's first written demand for payment, and hence owes no interest under the clause. We are not unmindful of the years of elapsed time between the dates of the segment closings and the payments in this case, but the government was not without contractual remedy. It could have made prompt written demands for payment and/or promptly filed CDA claims to move matters forward and/or to seek interest on the amounts claimed. It chose to do neither in these cases.

CONCLUSION

For reasons stated, we conclude that the government is not entitled to recover interest under the circumstances of this case. We grant appellant's motion for reconsideration and enter summary judgment for appellant.

The appeal is sustained.

Dated: 28 April 2008

JACK DELMAN
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. 54907, Appeal of Raytheon Company, rendered in conformance with the Board's Charter.

Dated:

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