

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Cavalry Security Group, LLC) ASBCA No. 56864
)
Under Contract No. W914NS-04-D-0119)

APPEARANCES FOR THE APPELLANT: Robert K. Huffman, Esq.
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APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
MAJ Carla T. Peters, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PEACOCK
ON GOVERNMENT MOTION FOR SUMMARY JUDGMENT

This timely appeal involves a claim by Cavalry Security Group, LLC (appellant or CSG) for interest penalty under the Prompt Payment Act (PPA), 31 U.S.C. § 3901 *et seq.*, for allegedly late payments made by the government under the referenced contract to provide police equipment and supplies in Iraq. The government has filed a motion for summary judgment. We are proceeding under the Contract Disputes Act. We deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 7 May 2004, Defense Contracting and Consulting, LCC (DCC) was awarded the referenced indefinite-delivery, indefinite-quantity (IDIQ) contract by the Coalition Provisional Authority-Contracting Activity (CPA), Republican Presidential Compound, Baghdad, Iraq. Under the contract, DCC was to supply equipment and supplies for the use of Iraqi police forces. (R4, tabs 1, 99) U.S. Joint Contracting Command – Iraq/Afghanistan (“the government”) subsequently took over administration of the contract from CPA. Pursuant to a novation agreement executed by the parties on 12 June 2008, the government recognized CSG as successor-in-interest to the contract (R4, tab 98).

2. As awarded, Section E of the contract provided that inspection and acceptance would take place at the point of delivery at either of two warehouses in Baghdad (R4, tab 99). Section G stated, “Invoices are to be submitted to the contracting officer for approval and submission to the DFAS Indianapolis-Vendor Pay Office in conjunction with the receiving report (DD Form 250)” (*id.* at 5).

3. Delivery order (DO) 30, bearing an effective date of 30 June 2005 and executed by both parties, made various changes to the contract. Pertinent to this dispute, inspection and acceptance was to be “conducted by DCMA QAR” at a third Baghdad warehouse and Section G was revised to state, “Invoices are submitted to the contracting officer, end user for approval certification and submission to the USACE Finance Center [in Tennessee] in conjunction with the receiving report (DD250).” (Supp. R4, tab 39)

4. The contract incorporated FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (OCT 2003) (the Commercial Items clause) which stated in pertinent part (R4, tab 99 at 7):

(a) Inspection/Acceptance. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price....

....

(g) Invoice.

(1) The Contractor shall submit an original invoice and three copies (or electronic invoice, if authorized) to the address designated in the contract to receive invoices....

....

(2) Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) prompt payment regulations at 5 CFR part 1315.

5. With respect to DD Form 250, the contract also incorporated DFARS 252.246-7000, MATERIAL INSPECTION AND RECEIVING REPORT (MAR 2003) which stated in part (*id.*):

252.246-7000 Material Inspection and Receiving Report (Mar 2003).

(a) At the time of each delivery of supplies or services under this contract, the Contractor shall prepare and furnish to the Government a material inspection and receiving report in the manner and to the extent required by Appendix F, Material Inspection and Receiving Report, of the Defense FAR Supplement.

6. The pertinent OMB regulations referenced in the Commercial Items clause and implementing the PPA state in part at 5 C.F.R. § 1315.4(b) (2010):

Receipt of invoice. For the purpose of determining a payment due date and the date on which interest will begin to accrue if a payment is late, an invoice shall be deemed to be received :

(1) On the later of:

(i) For invoices that are mailed, the date a proper invoice is actually received by the designated agency office if the agency annotates the invoice with date of receipt at the time of receipt. For invoices electronically transmitted, the date a readable transmission is received by the designated agency office, or the next business day if received after normal working hours; or

(ii) The seventh day after the date on which the property is actually delivered or performance of the services is actually completed; unless—

(A) The agency has actually accepted the property or services before the seventh day in which case the acceptance date shall substitute for the seventh day after the delivery date; or

(B) A longer acceptance period is specified in the contract, in which case the date of actual acceptance or the date on which such longer acceptance period ends shall substitute for the seventh day after the delivery date;

(2) On the date placed on the invoice by the contractor, when the agency fails to annotate the invoice with date of receipt of the invoice at the time of receipt (such invoice must be a proper invoice); or

(3) On the date of delivery, when the contract specifies that the delivery ticket may serve as an invoice.

7. 5 C.F.R. §§ 1315.4(c)-(g) and (i) (2010) state in part:

(c) *Review of invoice.* Agencies will use the following procedures in reviewing invoices:

(1) Each invoice will be reviewed by the designated agency office as soon as practicable after receipt to determine whether the invoice is a proper invoice...;

....

(2) When an invoice is determined to be improper, the agency shall return the invoice to the vendor as soon as practicable after receipt, but no later than 7 days after receipt, (refer also to paragraph (g)(4) of this section regarding vendor notification and determining the payment due date.) The agency will identify all defects that prevent payment and specify all reasons why the invoice is not proper and why it is being returned. The notification to the vendor shall include a request for a corrected invoice, to be clearly marked as such;

(d) *Receipt of goods and services.* Agencies will ensure that receipt is properly recorded at the time of delivery of goods or completion of services....

(e) *Acceptance.* Agencies will ensure that acceptance is executed as promptly as possible. Commercial items and services should not be subject to extended acceptance periods. Acceptance reports will be forwarded to the

designated agency office by the fifth working day after acceptance....

(f) *Starting the payment period.* The period available to an agency to make timely payment of an invoice without incurring an interest penalty shall begin on the date of receipt of a proper invoice (see paragraph (b) of this section)....

(g) *Determining the payment due date.* (1) Except as provided in paragraphs (g)(2) through (5) of this section, the payment is due....:

....

(iv) 30 days after the start of the payment period as specified in paragraph (f) of this section, if not specified in the contract....

....

(i) *Late payment.* When payments are made after the due date, interest will be paid automatically....

(1) except as provided in paragraphs (g)(2) through (5) of this section, the payment is due either:

(i) On the date(s) specified in the contract;

(ii) In accordance with the discount terms when discounts are offered and taken (see § 1315.7);

(iii) In accordance with Accelerated Payment Methods (see § 1315.5); or

(iv) 30 days after the start of the payment period as specified in paragraph (f) of this section, if not specified in the contract, if discounts are not taken, and if accelerated payment methods are not used.

8. FAR 52.232-25, PROMPT PAYMENT (OCT 2003), although not incorporated in the contract, is relied on by the government and states in part:

(a) Invoice payments—(1) Due date. (i) Except as indicated in paragraphs (a)(2) and (c) of this clause, the due date for making invoice payments by the designated payment office is the later of the following two events:

(A) The 30th day after the designated billing office receives a proper invoice from the Contractor (except as provided in paragraph (a)(1)(ii) of this clause).

(B) The 30th day after Government acceptance of supplies delivered or services performed. For a final invoice, when the payment amount is subject to contract settlement actions, acceptance is deemed to occur on the effective date of the contract settlement.

(ii) If the designated billing office fails to annotate the invoice with the actual date of receipt at the time of receipt, the invoice payment due date is the 30th day after the date of the Contractor's invoice, provided the designated billing office receives a proper invoice and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

....

(4) Interest penalty. The designated payment office will pay an interest penalty automatically, without request from the Contractor, if payment is not made by the due date and the conditions listed in paragraphs (a)(4)(i) through (a)(4)(iii) of this clause are met, if applicable. However, when the due date falls on a Saturday, Sunday, or legal holiday, the designated payment office may make payment on the following working day without incurring a late payment interest penalty.

(i) The designated billing office received a proper invoice.

(ii) The Government processed a receiving report or other Government documentation authorizing payment, and there

was no disagreement over quantity, quality, or Contractor compliance with any contract term or condition.

(iii) In the case of a final invoice for any balance of funds due the Contractor for supplies delivered or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(5) Computing penalty amount. The Government will compute the interest penalty in accordance with the Office of Management and Budget prompt payment regulations at 5 CFR part 1315.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor, Government acceptance is deemed to occur constructively on the 7th day (unless otherwise specified in this contract) after the Contractor delivers the supplies or performs the services in accordance with the terms and conditions of the contract, unless there is a disagreement over quantity, quality, or Contractor compliance with a contract provision. If actual acceptance occurs within the constructive acceptance period, the Government will base the determination of an interest penalty on the actual date of acceptance. The constructive acceptance requirement does not, however, compel Government officials to accept supplies or services, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(ii) The prompt payment regulations at 5 CFR 1315.10(c) do not require the Government to pay interest penalties if payment delays are due to disagreement between the Government and the Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. The Government and the Contractor shall resolve claims involving disputes and any interest that may be payable in accordance with the clause at FAR 52.233-1, Disputes.

....

(7) Additional interest penalty. (i) The designated payment office will pay a penalty amount, calculated in accordance with the prompt payment regulations at 5 CFR part 1315 in addition to the interest penalty amount only if–

(A) the Government owes an interest penalty of \$1 or more;

(B) The designated payment office does not pay the interest penalty within 10 days after the date the invoice amount is paid; and

(C) The Contractor makes a written demand to the designated payment office for additional penalty payment, in accordance with paragraph (a)(7)(ii) of this clause, post-marked not later than 40 days after the invoice amount is paid.

9. FAR 32.904, Determining payment due dates, states in part:

(b) Payment due dates.... [T]he due date for making an invoice payment is as follows:

(1) The later of the following two events:

(i) The 30th day after the designated billing office receives a proper invoice from the contractor (except as provided in paragraph (b)(3) of this section).

(ii) The 30th day after Government acceptance of supplies delivered or services performed.

....

(B) for the sole purpose of computing an interest penalty that might be due the contractor–

(1) Government acceptance is deemed to occur constructively on the 7th day after the contractor delivers supplies or performs services in accordance with the terms and conditions of the contract, unless there is a disagreement

over quantity, quality, or contractor compliance with a contract requirement;

(2) If actual acceptance occurs within the constructive acceptance period, the Government must base the determination of an interest penalty on the actual date of acceptance;

....

(4) Except for a contract for the purchase of a commercial item, including a brand-name commercial item for authorized resale (e.g., commissary items), the contracting officer may specify a longer period for constructive acceptance in the solicitation and resulting contract, if required to afford the Government a reasonable opportunity to inspect and test the supplies furnished or to evaluate the services performed. The contracting officer must document in the contract file the justification for extending the constructive acceptance period beyond 7 days. Extended acceptance periods must not be a routine agency practice and must be used only when necessary to permit proper Government inspection and testing of the supplies delivered or services performed.

10. FAR 32.905, Payment documentation and process, states in part:

(a) General. Payment will be based on receipt of a proper invoice and satisfactory contract performance.

....

(c) Authorization to pay. All invoice payments, with the exception of interim payments on cost-reimbursement contracts for services, must be supported by a receiving report or other Government documentation authorizing payment (e.g., Government certified voucher). The agency receiving official should forward the receiving report or other Government documentation to the designated payment office by the 5th working day after Government acceptance or approval, unless other arrangements have been made. This period of time does not extend the due dates prescribed in this

section. Acceptance should be completed as expeditiously as possible.

11. FAR 32.907, Interest penalties, states in part:

(a) Late payment. The designated payment office will pay an interest penalty automatically, without request from the contractor, when all of the following conditions, if applicable, have been met:

(1) The designated billing office received a proper invoice.

(2) The Government processed a receiving report or other Government documentation authorizing payment, and there was no disagreement over quantity, quality, or contractor compliance with any contract requirement.

....

(c) Failure to pay interest. (1) the designated payment office will pay a penalty amount, in addition to the interest penalty amount, only if—

....

(iii) The contractor makes a written demand to the designated payment office for additional penalty payment in accordance with paragraph (c)(2) of this section, postmarked not later than 40 days after the date the invoice amount is paid.

....

(d) Disagreements. (1) The payment office will not pay interest penalties if payment delays are due to disagreement between the Government and contractor concerning—

(i) The payment amount;

(ii) Contractor compliance; or

(iii) Amounts temporarily withheld or retained in accordance with the terms of the contract.

(2) The Government and the contractor must resolve claims involving disputes, and any interest that may be payable in accordance with the Disputes clause.

(e) Computation of interest penalties. The Government will compute interest penalties in accordance with OMB prompt payment regulations at 5 CFR part 1315.

12. FAR 32.908, Contract clauses, states in part:

(c) Insert the clause at 52.232-25, Prompt Payment, in all other solicitations and contracts, except when the clause at 52.212-4, Contract Terms and Conditions–Commercial Items, applies, or when payment terms and late payment penalties are established by other governmental authority (e.g., tariffs).

(1) As authorized in 32.904(b)(1)(ii)(B)(4), the contracting officer may modify the date in paragraph (a)(5)(i) of the clause to specify a period longer than 7 days for constructive acceptance, if required to afford the Government a reasonable opportunity to inspect and test the supplies furnished or to evaluate the services performed, except in the case of a contract for the purchase of commercial item, including a brand-name commercial item for authorized resale (e.g., commissary items).

13. During performance of the contract, the contractor invoiced and delivered supplies and equipment under numerous delivery orders issued by the government. The parties have not joined issue on the details of these orders and relevant dates associated with appellant's claim. However, appellant has identified possible factual disputes related to appellant's entitlement under the PPA, which have not been challenged by the government for purposes of this motion.

14. On 13 August 2008, CSG submitted a certified claim to the contracting officer in the amount of \$196,639.53 alleging that the government owed it PPA interest penalty for late payments for deliveries made under the contract. The claim seeks solely interest penalty that is payable "automatically" under the pertinent regulatory provisions implementing the PPA. (R4, tab 3)

15. By final decision dated 16 April 2009, the contracting officer denied the claim (R4, tab 8) and this timely appeal followed on 29 June 2009).

DECISION

Summary judgment is only appropriate where the movant is entitled to judgment as a matter of law. *E.g., Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). In this case, the government position is based on the incorrect contract clause. Moreover, it misinterprets that clause. Because the central premise of, and foundation for, the government's motion is flawed, the motion is without merit.

Citing ¶ (a)(1)(i)(B) of the Prompt Payment clause, the government primarily contends that payments were timely issued within 30 days of actual acceptance of the supplies and, therefore, appellant is not entitled to additional interest penalty under the PPA. It maintains that all equipment delivered by appellant was required to be inspected by a DCMA QAR prior to acceptance and, only upon the QAR's execution of the DD250 receiving report, did acceptance occur. According to the government, the 30 day PPA payment period did not commence until the date of the QAR's completion of the form for each of the deliveries in dispute. The government asserts that payments generally were made within 30 days of the actual acceptance/signature dates indicated in the DD250 forms.

The government's reliance on ¶ (a)(1)(i)(B) of the Prompt Payment clause is misplaced. As indicated in FAR 32.908(c), the Prompt Payment clause is not to be inserted when the Commercial Items clause is applicable as in this case. The government ignores the provisions of the actual contract clause and OMB regulations as well as the "constructive acceptance" provisions of the Prompt Payment clause on which it relies. Under this contract's Commercial Items clause (SOF ¶ 4) and the applicable OMB regulations (SOFs ¶¶ 6, 7) referenced therein, actual acceptance is not a prerequisite for commencement of PPA interest penalty when it occurs after the prescribed (for this contract) seven-day period following delivery absent exceptions not pertinent here. The OMB regulations establish as a general rule that PPA interest penalty begins to accrue 30 days following the later of the date of actual receipt of the invoice if annotated or seven days after delivery of the supplies ordered, or the invoice date if not annotated, absent circumstances and exceptions not germane to disposition of the present motion. The actual acceptance date is relevant to the extent that it occurs prior to the end of the "constructive acceptance" period of seven days for this contract. (*See* finding 6)

The same criteria for accrual of PPA interest penalty would apply even under the Prompt Payment clause and related FAR provisions. The government's interpretation of the Prompt Payment clause ignores ¶ (a)(5)(i) of that clause which states that "acceptance is deemed to occur constructively on the 7th day (unless otherwise stated in this contract)

after the Contractor delivers the supplies....” Although FAR 32.908(c)(1) and FAR 32.904(b)(4) authorize extension of the seven day “constructive acceptance” period if justified, no such modification of the date was specified here or permitted for this Commercial Items contract. The “constructive acceptance” provision in the clause is reiterated in FAR 32.904. *See also* DFARS 232.905(1). Of course, the government is entitled to take reasonable and appropriate actions to ensure conformance of the delivered supplies with contractual requirements. However, inspection delays extending beyond the prescribed seven days do not postpone accrual of interest penalty where there are no disagreements regarding quantity, quality or contractor compliance with contractual requirements.

In further reliance on the Prompt Payment clause, the government contends that appellant has failed to comply with the requirement in ¶ (a)(7) that it demand payment of interest penalty not later than 40 days after payment of the underlying invoice. The cited provision concerns prerequisites for payment of “additional” interest penalties. Appellant is not seeking “additional” penalty interest. It seeks solely the interest penalty to which it is automatically entitled under the PPA to the extent warranted by the operative facts associated with each of the deliveries in dispute. *See Dick Pacific/GHEMM, JV*, ASBCA No. 55829, 08-2 BCA ¶ 33,937 at 167,942 (detailing various factors for consideration in determining entitlement to PPA interest penalty).

The parties have not joined issue to determine whether there are factual disputes associated with individual delivery orders and the timing of the government’s payments for the delivered supplies. Drawing all inferences in favor of appellant, its opposition establishes there are such disputes.

In summary, the government has misidentified and misconstrued the pertinent legal provisions governing appellant’s entitlement to interest penalty under the PPA. The premise for the government motion is unsound. Accordingly, the motion is denied.

Dated: 15 June 2010

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
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. 56864, Appeal of Cavalry Security Group, LLC, rendered in conformance with the Board's Charter.

Dated:

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