ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Cubic Transportation Systems, Inc.	)	ASBCA No. 57770
	)	
Under Contract No. C44444	)	

APPEARANCE FOR THE APPELLANT: David A. Jenkins, Esq.
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Cubic Corporation

APPEARANCES FOR THE AUTHORITY: Carol B. O'Keeffe, Esq.
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OPINION BY ADMINISTRATIVE JUDGE CLARKE ON WMATA'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Cubic Transportation Systems, Inc. (Cubic) disputes Washington Metropolitan Area Transit Authority's (WMATA) offset of $27,595.96 from a milestone payment. The offset amount represents that amount of interest that a financial institution would have paid on funds in an escrow account had two milestone payments by WMATA been made on time. WMATA filed a motion to dismiss or in the alternative a motion for summary judgment. WMATA contends that the Disputes clause does not confer jurisdiction upon the Board over breach of contract disputes. It also contends that it is protected from liability for pre-judgment interest based on contract provisions and sovereign immunity. Cubic opposed the motion. We conclude that we have jurisdiction over breach of contract disputes based on the Disputes clause. We also conclude that WMATA is protected from paying the interest Cubic claims by both the Pricing of Adjustments clause and the No Waiver of Sovereign Immunity clause in the contract. We agree with WMATA that Cubic's Second Cause of Action based on the D.C. Code's Quick Payment Provisions does not apply to WMATA.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 31 July 2003, WMATA awarded Contract No. C44444 (C44444) to Cubic in the amount of $11,952,429 for the development and installation of automatic fare collection (AFC) software to upgrade WMATA's AFC system (R4, tab 10).

2. The C44444 contract included Supply and Service Contract General Provisions (R4, tab 10). Among the provisions are the Changes and Payments clauses that read in pertinent part:

> **2. CHANGES (Revised 09/14/94)**
>
> a. The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this Contract, in any one or more of the following....
>
> ....
>
> **8. PAYMENTS**
>
> a. The Contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as specified.

(*Id.* at 1-1, 1-4)

3. The Disputes clause reads in pertinent part:

> **11. DISPUTES (Revised 11/22/00)**
>
> a. Except as otherwise provided in this Contract, any dispute concerning a question of fact arising under or *related to* this Contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his/her decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within thirty (30) calendar days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written notice of appeal addressed to the Authority Board of Directors....The Armed Services Board of Contract Appeals is the

authorized representative of the Board of Directors for finally deciding appeals to the same extent as could the Board of Directors.

b. This DISPUTES article does not preclude consideration of question [sic] of law in connection with decisions provided for in Section a. above. Nothing in the Contract, however, shall be construed as making final the decisions of the Board of Directors or its representative on a question of law.

(*Id.* at 1-5) (Emphasis added)

4. The Pricing of Adjustments clause, General Provision No. 37 (GP37), reads in pertinent part:

37. PRICING OF ADJUSTMENTS

a. When costs are a factor in any determination of a *Contract price adjustment pursuant to the CHANGES AND CHANGED CONDITIONS article* or any other provision of this Contract, such costs shall be in accordance with the Subpart 31.1 of the Federal Acquisition Regulations (48 CFR 31.1).

b. Notwithstanding any interpretation of the aforementioned contract cost principles and procedures to the contrary, the Authority will not be liable for interest, however represented, on or as a part of any claim, request, proposal or adjustment, including equitable adjustments, whether said claim, request, proposal or adjustment, including equitable adjustments, arises under the Contract or otherwise.

(R4, tab 10 at 1-23, 1- 24)

5. On 23 August 2006 the parties signed Modification No. 03 increasing the scope of work and contract price to $23,789,327 (R4, tab 11). Among the provisions included in Modification No. 03 was a provision creating an interest bearing escrow account with the following pertinent provisions:

INTEREST BEARING ESCROW ACCOUNT

I WMATA and Cubic Joint Interest Bearing Escrow Account

WMATA and Cubic shall mutually agree upon a financial institution accredited and insured by Federal Deposit Insurance Corporation for the creation of a joint account in the names of both WMATA and Cubic.... Neither WMATA nor Cubic shall have the right or authority to withdraw any of such deposited sums in that account, or any interest earned thereon, without the express agreement and acquiescence of the other. The joint account so established shall be deemed an 'Interest Bearing Escrow Account.'

II Milestone Payments

Payment Milestones are separately specified. At the (i) due date for each and every scheduled milestone payment, and (ii) upon the condition that all work activities associated with that milestone have been approved and/or accepted by WMATA; *WMATA shall tender into the previously referenced 'Interest Bearing Escrow Account' the sum of the scheduled interim payment*.... WMATA shall notify Cubic promptly of such transfers to the 'Interest Bearing Escrow Account.' The initial transfer or deposit of Interim Payment No. 1, and all subsequent transfers and payments associated with the completion of interim milestones as well as the final payment, including any and all accrued interest, shall remain in such account until WMATA takes 'Beneficial Use' of all work. Beneficial Use is understood to occur at the Full Roll Out / Installation Milestone. At that point, 90% of the escrowed amount, including interest on that 90% portion, will be released to Cubic....

III Release to Cubic of Escrowed Payments for Timely Performance

.... If Cubic completes all elements associated with the proper design, implementation, testing, and certification of Cubic's Single Platform Solution on or before the conclusion of the seven hundred eightieth (780^{th}) calendar day, WMATA agrees to release to Cubic all interim payments, and accrued

interest thereon, contained in the escrowed account in accordance with Paragraph II above....

....

WMATA shall endeavor to tender all due and owing payments to Cubic in a timely manner; however, WMATA shall not be subject to interest, of any nature or kind, resulting from the untimely transfer of such payments.

....

IV Release to Cubic of Escrowed Payments for Un-Timely Performance

....

V Release to Cubic of Escrowed Payments Prior to Final Acceptance

....

VI No Waiver of Sovereign Immunity

The interest bearing escrow account established hereunder shall not be construed as a waiver by WMATA of its sovereign immunity from pre-judgment interest. WMATA expressly reserves its sovereign immunity from pre-judgment interest and by establishing an interest bearing escrow account the parties do not intend to change the provisions of the contract which bar the payment of interest, however represented. *Additionally, Cubic expressly waives any and all rights, if any, to claim interest, EXCEPT for interest actually accrued in the escrow account.*

(R4, tab 11, Supp. Special Provisions at 4-6) (Emphasis added)

6. By letter dated 27 March 2007, Cubic notified WMATA that it was delinquent in its payments that were to be deposited into the interest bearing escrow account. Cubic cited two payments each in the amount of $425,405.00. Cubic advised WMATA that it was entitled to $61.19 per day in "lost" interest that would have accrued in the escrow account for each payment had it been made on time. (R4, tab 3)

7. By letter dated 29 June 2007, Cubic noted that the two payments had been made on 15 June 2007 and that it was entitled to $27,595.96 in interest that would have accrued in the escrow account had the payments been made on time (R4, tab 4). The letter included an invoice for the $27,595.96 (*id.*). On 26 September 2007, WMATA transferred the $27,595.96 into the escrow account (R4, tab 1, WMATA final dec. ¶ 7).

8. By letter dated 17 February 2011, Cubic requested payment into the escrow account of $850,810.00 related to completion of milestone SP 09 (R4, tab 5). By letter dated 28 February 2011, WMATA notified Cubic that it had erroneously paid the $27,595.96 interest claim and was deducting it from the SP 09 payment (R4, tab 6). By letter dated 21 March 2011, Cubic acknowledged receipt of WMATA's 28 February 2011 letter and requested an explanation why the payment of $27,595.96 was considered erroneous (R4, tab 7). By letter dated 24 March 2011, WMATA notified Cubic that according to Modification No. 03, sections III and IV it was not liable for the claimed interest (R4, tab 8).

9. By letter dated 19 April 2011, Cubic requested a contracting officer's final decision concerning the deduction of $27,595.96 from the invoiced $850,810.00 amount (R4, tab 9). WMATA issued its final decision on 2 August 2011 (R4, tab 1). On 29 August 2011 Cubic appealed to the WMATA Board of Directors as required. WMATA forwarded the appeal to this Board on 7 September 2011. Cubic's timely appeal was docketed by the Board as ASBCA No. 57770 on 9 September 2011.

10. Cubic filed its complaint on 6 October 2011. The complaint asserted two causes of action, "Breach of Contract" and "For Failure to Pay Late Payment Interest Under the Quick Payment Provisions of the District of Columbia Code [Section 2-221.01 *et seq.*]." On 1 November 2011, WMATA filed a motion to dismiss or in the alternative a motion for summary judgment. Cubic filed its opposition to WMATA's motion on 6 December 2011. WMATA replied on 20 December 2011.

DECISION

WMATA's Motion to Dismiss or in the Alternative Motion for Summary Judgment contends that the Board does not have jurisdiction over breach of contract claims and in any event it is immune from payment of pre-judgment interest. Cubic filed an opposition. We consider WMATA's contentions in order.

Jurisdiction Under the WMATA Disputes Clause

The "FIRST CAUSE OF ACTION" in Cubic's complaint is breach of contract (compl. at 4). Cubic argues that WMATA breached the contract by deducting $27,595.96 in interest that had been "duly paid to Appellant"[1] (*id.*). Cubic claims

[1] Cubic alleges that the two payments were 243 and 206 days late (compl. ¶ 19).

$27,595.96 in interest that would have been paid by the financial institution into the interest bearing escrow account had WMATA's payments been on time. WMATA attacks this cause of action based on jurisdictional grounds. WMATA correctly points out that the Board's jurisdiction is governed by the Disputes clause in WMATA's contract and not the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109 (mot. at 1). WMATA then cites *WMATA v. Buchart-Horn, Inc.*, 886 F.2d 733, 736 (4th Cir. 1989); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 407-408 (1965); and *Guarino Corp.*, ASBCA Nos. 55015, 55028, 07-1 BCA ¶ 33,473 for the proposition that the language in WMATA's Disputes clause does not support jurisdiction over claims based on breach of contract (mot. at 1, 2).

Cubic responded to WMATA's jurisdictional argument by correctly pointing out that the Disputes clause in the C44444 contract differs from the Disputes clause in the cases cited by WMATA (opp'n at 3). The critical language in the earlier clause read, "[a]ny dispute concerning a question of fact *arising under* this contract which is not disposed of by agreement shall be decided by the contracting officer." *WMATA v. Buchart-Horn, Inc.*, 886 F.2d at 735 (emphasis added). The same sentence in the Disputes clause in the C44444 contract includes the additional words "or related to" – "[e]xcept as otherwise provided in this Contract, any dispute concerning a question of fact *arising under or related to* this Contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his/her decision to writing and mail or otherwise furnish a copy thereof to the Contractor" (SOF ¶ 3) (emphasis added). Citing the Merriam-Webster Dictionary, Cubic argues "'related to' on its face covers a much broader set of potential claims under the contract..." (opp'n at 3).

In its reply to Cubic's opposition, WMATA maintains its position that the Board lacks jurisdiction over breach of contract claims. WMATA again relies upon *Guarino Corp.*, 07-1 BCA ¶ 33,473, and adds a new cite, *KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc., A Joint Venture*, ASBCA Nos. 54613, 54614, 09-1 BCA ¶ 34,089, *aff'd,* 736 F. Supp. 2d 171, 186 (D.D.C. 2010), *aff'd,* 443 Fed. Appx. 561 (D.C. Cir. 2011). However, these cases, as with all of the cases WMATA relies upon, involved a different version of the Disputes clause that did not include the "related to" language.

In a 22 February 2012 letter to the parties, the Board offered WMATA another opportunity to address the critical language in the Disputes clause in supplemental briefing. On 26 March 2012, WMATA submitted its Supplemental Brief in Support of the Motion to Dismiss. It argued that the CDA does not apply to WMATA – we agree. It opined that the interpretation of the Disputes clause in the contract was a case of first impression – we agree. It concluded that it was "difficult to conclude that the inclusion of 'or related to' in the WMATA Disputes clause equates to expanding jurisdiction to be co-existent with that of the CDA...." (supp. br. at 4) – we disagree. We are guided by the inclusion of similar language, "relating to a contract," in the CDA, 41 U.S.C. § 7103(a)(1) "SUBMISSION OF CONTRACTOR'S CLAIMS TO CONTRACTING OFFICER –

Each claim by a contractor against the Federal Government *relating to a contract* shall be submitted to the contracting officer for a decision" (emphasis added).

In *KiSKA Construction,* 09-1 BCA ¶ 34,089 at 168,562 this Board wrote:

> Prior to the CDA, the law was well settled that the jurisdiction of a board of contract appeals, as the representative of the procuring federal agency to decide disputes under the Disputes clause of a government contract, was limited to those disputes that could be resolved under a contract clause providing the remedy sought by the contractor. As noted in *KiSKA II*, this limitation was also adopted by the courts to define and limit the jurisdiction of boards under the Disputes article in WMATA procurements. [Citations omitted]

This limitation on jurisdiction was changed by the inclusion of the language "relating to a contract" in the CDA. FAR SUBPART 33.2 – DISPUTES AND APPEALS provides in FAR 33.203 APPLICABILITY, subparagraph (c):

> This part applies to all disputes with respect to contracting officer decisions on matters "arising under" or "relating to" a contract. Agency Boards of Contract Appeals (BCA's) authorized under the Act continue to have all of the authority they possessed before the Act with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The clause at 52.233-1, Disputes, recognizes the "all disputes" authority established by the Act and states certain requirements and limitations of the Act for the guidance of contractors and contracting agencies.

The CDA grants the Boards "all disputes" authority as a result of the language "relating to a contract" in the Act. It is now well settled that under the CDA this Board has jurisdiction to consider breach of contract claims. *D.J. Miller & Associates, Inc.*, ASBCA No. 55357, 11-2 BCA ¶ 34,856 at 171,467. We see no reason why the addition of "related to this contract" in the WMATA Disputes clause would not have the same effect as the almost identical language in the CDA. WMATA's Disputes clause is now an "all disputes" clause that provides new authority for the Board to consider breach of contract claims in WMATA contracts. This does not mean that the CDA applies to WMATA's contracts, it does not. It simply means that WMATA's revised Disputes clause confers authority on the Board to consider "all disputes" including breach of contract. To conclude otherwise would render the additional words "related to this contract" meaningless, a result that is inconsistent with the law of contract interpretation. *NVT Technologies v. United States,* 370 F.3d 1153, 1159 (Fed. Cir. 2004)

("An interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous.").

The Breach of Contract Claim

Having concluded that the Board has jurisdiction to consider a dispute involving breach of contract, we turn to the alleged breach. Pursuant to Modification No. 03, Interest Bearing Escrow Account, paragraph II, Milestone Payments, WMATA was to "tender" into the escrow account predetermined milestone payment amounts for work associated with the milestones that had been accepted by WMATA (SOF ¶ 5). These payments were not made directly to Cubic. Cubic received nothing until funds were "released" to it from the escrow account pursuant to paragraphs III, IV and V of the Interest Bearing Escrow Account agreement (SOF ¶ 5). Cubic notified WMATA that two milestone payments were late resulting in the loss of $27,595.96 in escrow interest that would have accrued had the milestone payments been timely made (SOF ¶¶ 6, 7). WMATA initially agreed and transferred the $27,595.96 into the escrow account (SOF ¶ 7). WMATA later took the position that the transfer was mistaken and offset that amount from another milestone payment (SOF ¶ 8). In its complaint Cubic characterizes the breach as the offset, "Respondent's action of offsetting the amount which had already been duly paid to Appellant under Section 8(a) constitutes a breach of the Contract" (compl. ¶ 22). However, the offset could only be a breach if Cubic was entitled to the escrow interest in the first place. We therefore consider the alleged late payments as the fundamental breach issue in dispute.

Cubic asserts that the two milestone payments were 243 and 206 days late (compl. ¶ 19; SOF ¶¶ 6, 7). Nowhere in its contemporaneous correspondence or pleadings does WMATA contest the allegation that its milestone payments were late. Indeed, WMATA's initial transfer of the funds into the escrow account indicates that WMATA agreed that the transfers were late and the calculation of the lost interest was accurate. Such late payments violate paragraph II Milestone Payments of the Interest Bearing Escrow Account agreement in Modification No. 03.[2] Accordingly, we conclude that WMATA breached its obligation under this clause to make timely milestone payments into the escrow account. The natural and foreseeable consequence of this breach is the loss of escrow interest that would have "accrued" in the account through payments by the financial institution. Accordingly, we must consider if the protections against the payment of interest in the contract and/or WMATA's sovereign immunity protect it from liability for damages caused by its breach.

[2] Although the relevant clauses do not specify a time period for payment, a delay of 243 and 206 days would be unreasonably late.

WMATA's Defenses

As explained above, under the Disputes clause WMATA subjected itself to litigation of breach of contract claims at the Board. However, through its contract provisions WMATA has steadfastly maintained its sovereign immunity protections against liability for interest. WMATA relies on three contract provisions in its defense of liability for the damage caused by its late payments: (1) Subparagraph b. of the Pricing of Adjustments clause, GP 37 (SOF ¶ 4); (2) Paragraph III of the Interest Bearing Escrow Account clause of Modification No. 03 (SOF ¶ 5); and (3) Paragraph VI of the Interest Bearing Escrow Account clause of Modification No. 03 (SOF ¶ 5). Because we consider the Pricing of Adjustments clause and Paragraph VI of the Interest Bearing Escrow Account clause dispositive, we do not address Paragraph III of that clause.

Subparagraph b. of the Pricing of Adjustments Clause GP37

In its motion, WMATA states the "interest bearing escrow account did not 'change the provisions of the contract [GP37b.] which bar the payment of interest, however represented'" (mot. at 5) – we agree. GP37b. provides that WMATA "will not be liable for interest, however represented, on or as a part of any claim, request, proposal or adjustment, including equitable adjustments, whether said claim, request, proposal or adjustment, including equitable adjustments, arises under the Contract or otherwise" (SOF ¶ 4). This is very broad language and protects WMATA form Cubic's claim for interest.

Modification No. 03, Interest Bearing Escrow Account ¶ VI

Paragraph VI is entitled, "No Waiver of Sovereign Immunity" (SOF ¶ 5). In its opposition Cubic states, "Cubic readily concedes that WMATA is not liable for prejudgment interest" (app. opp'n at 6). Cubic argues that the interest that is paid by the financial institution on funds in the escrow account is not pre-judgment interest (*id.*). We need not decide if this interest is pre-judgment interest or not because of the last sentence in Paragraph VI, "[a]dditionally, Cubic expressly waives any and all rights, if any, to claim interest, EXCEPT for interest actually accrued in the escrow account" (SOF ¶ 5). Like the language in the Pricing of Adjustments clause (SOF ¶ 4), the language in paragraph VI is very broad. The last sentence begins with "additionally" that can only be interpreted to apply to the interest accruing in the escrow account separate and distinct from the protection against "pre-judgment interest" in the first part of paragraph VI. The $27,959.96 in interest claimed was not "actually accrued in the escrow account." Therefore, paragraph VI protects WMATA from the interest claimed by Cubic.

District of Columbia Code § 2-221.01 *et seq.*

In its complaint Cubic's Second Cause of Action asserts that WMATA, as an agency of the District of Columbia (D.C.), is obligated by D.C. Code § 2-221.01 *et seq.*

to pay interest on its late payments into the escrow account (compl. at 5). WMATA responds in its motion that it is not an "agency of the District of Columbia" and cites cases for the proposition that D.C. Code § 2-221.01 *et seq.* is not binding on WMATA (mot. at 2-3). Cubic responds that all of the signatories, D.C., Virginia and Maryland, have similar "prompt payment" statutes and that WMATA is indeed subject to the D.C. Code (app. opp'n at 5). WMATA responds citing cases that stand for the proposition that one jurisdiction cannot impose its laws on an "interstate compact" such as WMATA (resp. reply at 2).

Jurisdiction

There is no evidence that the D.C. Code issue was submitted to the contracting officer for decision. Consequently, in the same 22 February 2012 correspondence cited above, the Board requested that the parties comment on the significance of that fact on the Board's jurisdiction. Both parties take the position that this issue is a question of law based on the same operative facts considered by the contracting officer, that there was no obligation to submit the D.C. Code issue to the contracting officer, and that the Board has jurisdiction to consider the parties' arguments. We agree. *Nova Group, Inc.*, ASBCA No. 55408, 10-2 BCA ¶ 34,533 at 170,323 (Under the CDA: "The test for what constitutes a 'new' claim is whether the 'claims are based on a common or related set of operative facts. If the [Board] will have to review the same or related evidence to make its decision, then only one claim exists.' *Placeway Construction Corp. v. United States,* 920 F.2d 903, 908 (Fed. Cir. 1990). A new legal theory or argument, when based upon the same operative facts, does not constitute a new claim. *See Lockheed Martin Aircraft Center,* ASBCA No. 55164, 07-1 BCA ¶ 33,472 at 165,934; *Contel,* 02-1 BCA ¶ 31,809 at 157,149."). We have jurisdiction.

D.C. Code §§ 2-221.02 to 2.221-06 Quick Payment Provisions

Article XVI: General Provisions of the WMATA Compact (an interstate compact between the District of Columbia, Maryland and Virginia) includes the following:

> **Liability for Contracts and Torts**
>
> The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agents committed in the conduct of any proprietary function, *in accordance with the law of the applicable signatory (including rules on conflict of laws),* but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing

> contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit.

(Emphasis added) The "signatories" are the District of Columbia, Maryland and Virginia. WMATA Compact Article I: Definitions, does not define "applicable signatory." The location of the work may be used to determine the "applicable signatory." *KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc., A Joint Venture*, ASBCA Nos. 54613, 54614, 06-1 BCA ¶ 33,244 at 164,770 ("WMATA's liability under this contract is to be determined by the law of the 'applicable signatory' of the WMATA Compact. As far as our record shows, this contract was awarded through the WMATA office in the District of Columbia, and the contract work was performed in the District of Columbia. We believe the District of Columbia is the 'applicable signatory' under the circumstances, and we shall apply the law of the District of Columbia in addressing this motion.") (footnotes omitted). Contract C44444 required the update of the automatic fare collection systems throughout WMATA's system, i.e., performance in D.C., Maryland and Virginia – all three signatories. Accordingly, we conclude that the District of Columbia is the "applicable signatory" because that is where the contract was awarded (R4, tab 10 at 2).

D.C. Code § 2-221.01. Definitions includes:

> (3) "District agency" means any office, department, division, board, commission, or other agency of the District government including, unless otherwise provided, an independent agency, required by law or by the Mayor or the Council to administer any law or any rule adopted under the authority of a law. For the purposes of this definition, the term "independent agency" means any agency of government not subject to the administrative control of the Mayor and includes but is not limited to the Superior Court of the District of Columbia, District of Columbia Court of Appeals, Council of the District of Columbia, Board of Elections and Ethics, Armory Board, Zoning Commission, Convention Center Board of Directors, District of Columbia Board of Education and Public Services Commission.

The "Quick Payment Provisions" of D.C. Code apply to "District agencies" (D.C. Code § 2-221.02). WMATA is not a "District agency" within the meaning of the D.C. Code "Quick Payment Provisions." *KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc. v. WMATA*, 167 F.3d 608, 612 (D.C. Cir. 1999) (WMATA is not an agency within the meaning of the DC-APA and not subject to the disclosure

requirements of the DC-FOIA.).[3] Therefore, although under this set of facts WMATA is subject to D.C. law, it is not subject to the D.C. Quick Payment provisions.

WMATA Paid The $27,595.96

In its opposition Cubic argues that nothing in the contract authorized WMATA to unilaterally offset the $27,595.96 it had paid into the escrow account from another milestone payment and that the offset was a breach (app. opp'n at 7-8). WMATA responds that the inadvertent payment does not establish that WMATA waived the protections against its liability for interest in the contract (resp. reply at 4). We agree with WMATA. The fact that WMATA paid the $27,595.96 is immaterial.

CONCLUSION

The Disputes clause in WMATA's contract bestows jurisdiction upon the Board to consider breach of contract claims. WMATA breached the contract by making two late payments into the escrow account causing Cubic to lose escrow account interest. However, WMATA is protected from paying the interest Cubic claims by both the Pricing of Adjustments clause and the No Waiver of Sovereign Immunity clause in the contract. There is also no liability under the Quick Payment Provisions of the D.C. Code. For this reason we grant WMATA's motion for summary judgment. The appeal is denied.

Dated: 1 June 2012

CRAIG S. CLARKE
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

[3] We need not address WMATA's immunity argument.

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. 57770, Appeal of Cubic Transportation Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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