



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 4, 2010

CBCA 1554, 1579

THUNDERHOOF RANCH,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Wayne L. Kucera, Thunderhoof Ranch, Roundup, MT, appearing for Appellant.

Gerald R. Moore, Office of the Solicitor, Department of the Interior, Billings, MT, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SOMERS**, and **SHERIDAN**.

SOMERS, Board Judge.

These appeals arise from three contracts for the removal and construction of fencing. Appellant, Thunderhoof Ranch, contends that the Department of the Interior, Bureau of Land Management (BLM), should pay appellant liquidated damages for late payment of invoices under the contract. These appeals are submitted for decision on the record under Board Rule 19 (48 CFR 6101.19 (2009)). For the reasons set forth below, we deny the appeals.

Background

BLM entered into a series of contracts with Thunderhoof Ranch. The contracts required appellant to remove barbed wire fencing and to construct new fences around property near Malta, Montana. The parties entered into the first contract on September 10, 2007. That contract required appellant to build what is referred to as the “Flat Creek Fence” for \$5883, later increased to \$6294 by contract modification.

On May 15, 2008, the parties entered into a second contract, which required appellant to remove and rebuild the “Black Creek Coulee Fence” for \$53,864, later increased to \$55,509. On July 25, 2008, the parties entered into a contract requiring appellant to remove and rebuild the “North Willow Creek Boundary Fence” for \$11,063, later increased to \$11,094.

Each of the three contracts required the contractor to deliver fencing materials to the designated site and to erect a barbed wire fence with those materials. Each contract incorporated by reference the clause found in the Federal Acquisition Regulation (FAR) at section 52.232-27, entitled “Prompt Payment for Construction Contracts (SEP 2005).” Each contract also incorporated by reference FAR 52.232-25, “Prompt Payment.” The two clauses are similar. The Prompt Payment clause requires payment of proper contract invoices within thirty days of receipt from the contractor. The Prompt Payment for Construction Contracts clause also requires payment of final invoices within thirty days, but it has a provision requiring progress payments to be made within fourteen days. BLM applied the Prompt Payment for Construction Contracts clause to these contracts.

Appellant submitted claims for liquidated damages arising for late payments on invoices under the three contracts. In CBCA 1554, appellant appealed the contracting officer’s February 25, 2009, final decision, denying appellant’s claim of \$29,470.83 for liquidated damages for late payments arising under the Black Creek Coulee Fence contract. CBCA 1579 arises from the contracting officer’s March 4, 2009, final decision, which denied appellant’s claims of \$8912.52 for liquidated damages for late payments under the Flat Creek Fence contract and of \$18,815.32 for late payments under the North Willow Creek Boundary Fence contract.

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Appellant received progress payments under the contract based upon invoices submitted to the contracting officer’s representative (COR). The COR would forward the invoices to the contracting officer. Upon approving the amount to be paid, the contracting officer would forward the approved voucher to the National Operations Center in Denver,

Colorado, which paid the vouchers by electronic funds transfer to the account designated by Thunderhoof Ranch. The parties agree that four payments under this contract were late under the terms of the contract. The record indicates that the Government added interest to each of the late payments as required by the Prompt Payment Act, 31 U.S.C. §§ 3901-3907 (2006).¹

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The Flat Creek Fence contract called for one final payment to the contractor upon completion of the work. On July 10, 2008, BLM received appellant's invoice for final payment for \$6294. However, appellant had not submitted its payrolls as required by the contract, so payment could not be made for the full amount. Rather than reject the request for payment, BLM treated the request as one for a progress payment and paid appellant \$5670, the amount owed minus a 10% retainage to be held until the required payroll paperwork had been submitted. BLM paid the \$5670 within the time period required by the contract. Once appellant submitted the payroll information and invoice on July 18, 2008, BLM began processing the final payment of \$624. Payment did not occur until September 19, 2008, which was thirty-two days beyond the thirty days set by FAR 52.232.27. BLM paid a total of \$672.33, the amount due plus \$51.33 in interest under the Prompt Payment Act. Appellant acknowledged receipt of the interest payment.

Under the second contract in CBCA 1579, the North Willow Creek Boundary Fence contract, BLM paid three progress payments to appellant, and each payment was late. Accordingly, BLM paid interest pursuant to the Prompt Payment Act on each of those payments. The first invoice, submitted on October 8, 2008, called for payment of \$9893. BLM paid that amount plus interest of \$42.78 on November 21, 2008. The second invoice sought final payment of \$1201, which included an amount owed on the original contract and an additional amount of \$31 owed under a modification to the contract. BLM paid appellant \$1170 plus \$6.67 in interest calculated in accordance with the Prompt Payment Act. BLM sent a separate payment of \$31 to appellant for the modification. It apparently did not pay interest because the amount owed was less than \$1.

¹ The Government mistakenly underpaid appellant \$10 on the final payment due under the contract. The Government ultimately corrected the error, paid appellant the \$10, but did not pay interest, which had accrued to the *de minimis* amount of \$.13.

Discussion

Appellant contends that it should have been paid damages calculated under the Liquidated Damages clause of the contract, rather than interest calculated under the Prompt Payment Act. The terms of the Liquidated Damages clause, however, do not support appellant's argument. The Liquidated Damages clause states as follows:

52.211-12 Liquidated Damages - Construction

(a) If the Contractor fails to complete the work within the time specified in the contract, the Contractor shall pay liquidated damages to the Government in the amount of \$247.57 for each calendar day of delay until the work is completed or accepted.

(b) If the Government terminates the Contractor's right to proceed, liquidated damages will continue to accrue until the work is completed. These liquidated damages are in addition to excess costs of repurchase under the Termination clause.

Appeal File, Exhibits 11, 14 at 8, 9. The clause provides relief to the Government should a contractor fail to perform work within the time designated in the contract. Nothing in the clause suggests that the contractor would be entitled to liquidated damages from the Government under any circumstance.

A contractor has a remedy when the Government fails to pay in a timely fashion. The Prompt Payment Act provides that when a business concern provides a property or service to a government agency, it presents an invoice to the agency for payment. The agency must make payment by the "required payment date," which is "30 days after a proper invoice for the amount due is received," unless another date is provided by contract or by statute for the particular kind of property or service provided. *Delta Air Lines, Inc. v. General Services Administration*, CBCA 1306, 09-1 BCA § 34,052, at 168,407, citing 31 U.S.C. ¶ 3903(a)(1)-(6)). If the agency does not make payment by the required payment date, it must pay the contractor not only the principal amount due, but also an interest penalty. Interest begins to run on the date after the required payment date; it ceases to run when the first of the following events occurs: payment is made, a claim for interest is filed under the Contract Disputes Act, 41 U.S.C. §§ 610-613, or one year passes from the required payment date. 09-1 BCA at 168,407-08 (citing 31 U.S.C. §§ 3902(a), (b), 3907(b)).

In this case, the Government paid interest on the late payments. Appellant has not alleged nor has it provided evidence suggesting that the Government did not properly

calculate the interest paid under the Prompt Payment Act. It simply alleges that it should be paid more using the formula set forth in the Liquidated Damages clause in the contracts. The Liquidated Damages clause does not address the situation at issue in these appeals, however. It requires payment from the contractor to the Government, and only when the contractor fails to complete work within a specified time. Appellant seeks payment from the Government to it, and timely completion of work is not at issue.

Because we find that appellant's position is not supported by the contract or the law, we deny the appeals.

Decision

_____ The appeals are **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

PATRICIA J. SHERIDAN
Board Judge