



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON AUGUST 2, 2018

MOTION FOR PARTIAL SUMMARY RELIEF GRANTED: July 12, 2018

CBCA 5846

UNITED LIQUID GAS COMPANY d/b/a
UNITED PACIFIC ENERGY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Matthew C. Addison, Sarah A. Ferguson, and Philip Mannelly of McDonald Carano LLP, Reno, NV, counsel for Appellant.

Tyler J. Mullen and Stephen T. O'Neal, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **SHERIDAN**, and **KULLBERG**.

SHERIDAN, Board Judge.

In September 2002, United Pacific Energy (UPE) entered into a multiple award schedule (MAS or schedule) contract with the General Services Administration (GSA) to provide propane gas at prices set forth in the schedule. Fort Irwin Contracting Command (Ft. Irwin) issued four task orders against the schedule contract for propane gas during fiscal year (FY) 2011, 2012, 2013, and 2014, which UPE fulfilled. In 2016, GSA determined that UPE overbilled Ft. Irwin on the task orders and Ft. Irwin over paid invoices submitted under the task orders. A GSA administrative contracting officer (ACO) issued a final decision seeking

to recover a total of \$3,321,946.62 for the overpayments. These matters were docketed as CBCA 5846.

UPE moved for partial summary relief with respect to \$279,029.64 in overpayments that allegedly occurred prior to 2011. It argues that this portion of the claim is untimely under the Contract Disputes Act (CDA) statute of limitations, 41 U.S.C. § 7103(a)(4)(A) (2012). GSA opposes the motion. For the reasons set forth below, we grant UPE's motion.

Background

The facts important for purposes of this decision are undisputed. GSA awarded MAS contract GS-07F-0532M under the Federal Supply Schedule (FSS) program to UPE on or about September 17, 2002, for the general purpose of purchasing propane gas during the period covering September 20, 2002, through September 19, 2007. The contract included an option clause pursuant to which GSA exercised two five-year option periods extending the contract through September 19, 2017. As with most FSS contracts, a GSA ACO was responsible for issuing, administering, and monitoring the MAS contract, and a purchasing contracting officer (PCO) assigned at the ordering agency, in this case Ft. Irwin, was responsible for issuing task orders.

The contract, which incorporated by reference Federal Acquisition Regulation (FAR) 52.216-1, Type of Contract, is defined as a "fixed-priced with an economic price adjustment, indefinite delivery, indefinite quantity contract" against which the Government could issue task orders for propane gas at a cost of \$1.32 per gallon.¹

GSA conducted a contractor assisted visit (CAV)² in 2010 to review UPE's performance under the schedule contract. The findings of this CAV were reported to a GSA

¹ The schedule contract also contained clauses for per gallon price increases.

² In GSA FSS contract parlance, CAVs are now referred to as industrial operations analyst visits. They are conducted by an industrial operations analyst and are intended to educate schedule contract holders on proper contract management. These visits occur anywhere from twice during a five-year contract period to annually. Typically, a visit will be scheduled mid-term of the five-year contract period, and prior to a contract extension. The purpose of the visit is to ensure schedule contract holders are properly administering their contract and are in compliance with schedule contract requirements. The industrial operations analyst will review a schedule contract holder's system for tracking and reporting sales, invoices, and general compliance with the terms and conditions of the contract. See <http://gsa.federalschedules.com/services/gsa-contract-management/gsa-contractor-assessment>.

industrial operations analyst (IOA), and summarized in a report finalized on May 18, 2010.³ The report advised that UPE was not charging Ft. Irwin the schedule contract price and recommended corrective action by the ACO: “Review with contractor what was the actual approved GSA price during the time period of August 2008 through September 2009 and further evaluate the total amount of overcharges, if any.”

On November 8, 2010, the Ft. Irwin PCO issued task order W9124B-11-F-0002 (task order 1) against the MAS contract to purchase gas during FY 2011. Citing the contract, task order 1 noted that Ft. Irwin would order up to 2,600,000 gallons of gas at a unit price of \$1.44 per gallon for a total amount of \$3,744,000. UPE provided the gas between October 2010 and March 2011, submitting approximately 144 invoices for payment under task order 1. Ft. Irwin began paying those invoices on January 5, 2011.

Another CAV report was issued on or about October 14, 2011, regarding UPE’s performance under the schedule contract. In that report, the GSA IOA noted “[a]ll 67 invoices . . . [that have] been issued to Ft. Irwin in the date range of October 12, 2010[,] through December 31, 2010[,] for a total of 613,387 gallons @ \$1.44/gallon The approved GSA price was . . . \$1.32/gallon.”

A total of four task orders were issued by Ft. Irwin that are pertinent to this appeal. In addition to task order 1 noted above, task order W9124B-12-F-001 (task order 2) for FY 2012 was issued on September 30, 2011; task order W9124B-13-F-0001 (task order 3) for FY 2013 was issued on October 17, 2012; and task order W9124B-14-F-0001 (task order 4) for FY 2014 was issued March 10, 2014.

On or about December 30, 2015, the GSA IOA issued an “end of term” contractor assessment report reviewing all activities under the MAS contract between September 2002 and September 2017. The report noted that UPE did not comply with schedule contract pricing requirements in its invoices for task order 4. The GSA IOA wrote, “[t]he contractor overcharged Fort Irwin on contract number W9124B-14-F-0001 [task order 4]. The contractor charged Fort Irwin \$1.38 per gallon of propane; however, the contractors’ GSA approved price is only 0.912 per gallon. The total overcharge for contract W9124B-14-F-0001 [task order 4] is \$165,785.69.”

GSA issued a demand letter to UPE on March 2, 2016, seeking payment of \$165,785.69, based on its finding that UPE overcharged Ft. Irwin on task order 4 as set forth in the report of December 30, 2015. When UPE refuted the overcharge claim on March 25,

³ A GSA ACO was named as a “pertinent contact” on the report, but it is not clear whether a copy of the report was provided to the ACO.

2016, the ACO rescinded the demand letter on April 19, 2016, and informed UPE of GSA's intention to investigate the matter further.

During that investigation, GSA's Office of Inspector General (OIG) reviewed available documentation related to the Ft. Irwin orders, including task orders 1 through 4. The OIG issued an audit report on September 19, 2016, which, in pertinent part, concluded that under task order 1, UPE had sold 2,325,247 gallons of propane at \$1.44 per gallon when the schedule contract price was \$1.32 per gallon. Based on these findings, GSA calculated that UPE's overbillings totaled \$279,029.64 for task order 1. Similar findings and calculations were made for task orders 2 through 4.

On June 13, 2017, a GSA ACO issued a final decision adopting the findings and calculations of the OIG audit report and demanding a total of \$3,321,946 in overpayments made to UPE on the four task orders. The final decision demanded \$279,029.64 for overpayments made in FY 2011, \$1,466,735.40 for overpayments made in FY 2012, \$717,913.29 for overpayments made in FY 2013, and \$858,268.29 for overpayments made in FY 2014.

On September 11, 2017, UPE filed a timely notice of appeal with the Board, where the matter was docketed as CBCA 5846. UPE now moves for summary relief, asserting that the portion of GSA's claim relating to task order 1 and FY 2011 overpayments is barred by the CDA's six-year statute of limitations, 41 U.S.C. § 7103(a)(4)(A).

Discussion

All the task orders, including task order 1, were issued under the MAS contract. Pursuant to the terms of the contract UPE had agreed to fulfill task order 1 for propane gas at a cost of \$1.32 per gallon.⁴

UPE argues GSA's claim related to task order 1 is untimely because the Government was notified that UPE's pricing may not be compliant in the May 2010 CAV report, yet it continued to allow UPE to fill subsequent orders. Alternatively, UPE argues that accrual of any claim related to task order 1 began on the date that UPE submitted its first invoice to the Government, October 18, 2010, or January 5, 2011, when Ft. Irwin began paying the invoices. Because GSA did not assert its claim against UPE until June 13, 2017, several months after the CDA's statute of limitations had run, UPE asserts GSA's claim for

⁴ Notwithstanding the terms of the MAS contract setting the unit price of gas at \$1.32 per gallon, Ft. Irwin's task order 1 noted that Ft. Irwin would order up to 2,600,000 gallons of gas at a unit price of \$1.44 per gallon for a total amount of \$3,744,000.

overpayments predating June 13, 2011, is untimely and partial summary relief should be granted.

GSA refutes UPE's arguments, asserting that the May 2010 CAV report had no bearing on subsequent purchases against the schedule contract and could not have predicted deficiencies arising under future orders. With respect to the invoices UPE submitted for task order 1, GSA also asserts those invoices were submitted to and paid by the Defense Finance and Accounting Service (DFAS), not GSA's finance office. As such, GSA alleges that it first became aware of the overcharges under task order 1 on or about October 14, 2011, with the issuance of the October 2011 CAV report, and its claim regarding task order 1 is therefore timely under the CDA's six-year statute of limitations.

Summary relief is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial burden of informing the tribunal of the basis for its motion and identifying those portions of the pleadings, depositions, and affidavits, admissions, and answers to interrogatories, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Only disputes over facts that might affect the outcome of the case under governing law will properly preclude the entry of summary relief. *Anderson*, 477 U.S. at 248. The party moving for summary relief bears the burden of demonstrating that there is no genuine dispute as to any material fact, and all justifiable inferences must be made in favor of the non-moving party. *Celotex*, 477 U.S. at 322-23. In considering summary relief, the tribunal will not make credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249.

The CDA requires that "each claim by a contracting officer against the Federal Government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A); see 48 CFR 33.206(a) (2004) (implementing CDA limitations period). A party's failure to submit a claim within six years of accrual is an affirmative defense to the claim. *ThinkGlobal Inc. v. Department of Commerce*, CBCA 4410, 16-1 BCA ¶ 36,489, at 177,793; *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789. UPE pled the statute of limitations as a defense to part of GSA's claim. UPE bears the burden of proving that GSA's claim for reimbursement under task order 1 is untimely. See *Shell Oil Co. v. United States*, 751 F.3d 1282, 1297 (Fed. Cir. 2014); *Brunswick Bank & Trust Co. v. United States*, 707 F.2d 1355, 1360 (Fed. Cir. 1983) (party raising an affirmative defense normally bears the burden of proof).

The Court of Appeals for the Federal Circuit recently addressed claim accrual in *Kellogg Brown & Root Services, Inc. v. Murphy*, 823 F.3d 622, 626 (Fed. Cir. 2016), where

it looked to FAR 33.201, Definitions, which provides that a claim first accrues on “the date when all events, that fix the alleged liability on either the Government or contractor and permit assertion of the claim, were known or should have been known.” The Court also looked to FAR 2.101, which provides that a claim for the payment of money does not accrue until the amount of the claim, “a sum certain” is known or should have been known. *Id.* Claim accrual is notice dependent: “once a party is on notice that it has a potential claim the limitations period begins to run.” *Cardinal Maintenance Service, Inc.* ASBCA 56885, 11-1 BCA ¶ 36,616, at 170,610 (2010). Notice need not wait until contract completion as long as some injury has occurred. *DTS Aviation Services, Inc.*, ASBCA 56352, 09-2 BCA ¶ 34,288, at 169,379 (“[T]he FAR definition states that for liability to fix for purposes of claim accrual, only ‘some’ but not necessarily ‘all’ of the injury must be shown.”); *see also Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539, at 178,009 (“A claim must accrue, and the statute of limitations starts to run, as soon as a contractor *can* assert a claim, even if it has not yet incurred all possible costs resulting from the change or breach.”).

The central issues in this motion are when the Government’s claim for damages accrued, and whether the Government submitted claims within six years after the accrual of the claims. As the date of claim accrual, appellant proffers the CAV report of May 18, 2010, or alternately, January 5, 2011, when the Government began paying UPE’s invoices. GSA asserts the claim did not accrue until the issuance of the second CAV report on October 14, 2011. As the Government’s final decision was issued on June 13, 2017, appellant’s proposed dates for claim accrual would time-bar some of the Government’s claims that accrued prior to June 13, 2011.

None of the referenced CAV reports are pivotal in deciding when these claims accrued. The MAS contract terms themselves and the overpayment of each invoice establishes claim accrual because it was at that time that the work was “performed, billed and paid,” and the Government knew or should have know of its overpayment claim. *Cf.*, *Fluor Corp.*, ASBCA 57852, 14-1 BCA ¶ 35,472, at 173,929 (2013).

We conclude the claims in issue began to accrue on January 5, 2011, when the Government overpaid the first task order 1 invoice submitted for payment under the MAS contract. At that point in time, the terms of the MAS contract clearly put both Ft. Irwin and GSA on notice that UPE was overbilling the Government and all events that fixed the alleged liability, specifically, in this case, overpayments in a “sum certain,” were known or should have been known. Government claims continued accruing each time Ft. Irwin overpaid a task order 1 invoice under the MAS contract, because every time a payment was made on an invoice, the Government knew or should have known of the overpayment and the “sum certain” it was overpaying.

We are not persuaded by GSA's argument that it first became aware that UPE had overcharged with the issuance of the October 2011 CAV report. A simple reading of the MAS contract should have put both GSA and Ft. Irwin on notice of the overpayments that were occurring on this MAS contract.

GSA's argument that the invoices were submitted and paid by DFAS, as opposed to GSA's finance office, is also unavailing. Although Ft. Irwin ordered, received, and paid for the propane gas orders, GSA was responsible for issuing, administering, and monitoring the MAS contract. As the schedule contract administrator, GSA had a duty to maintain communication with UPE, Ft. Irwin, and DFAS regarding contract performance, invoicing, and payments. While DFAS paid the invoices, GSA was obligated to monitor those payments in its role as the administrator of the FSS program. Had GSA been properly monitoring the MAS contract, it would have realized that there were problems with overbillings as they occurred. As of the dates that Ft. Irwin actually paid invoices containing overcharges, the Government had the ability to calculate the costs that were being incurred as a result of the overbilling.

The Government's claims for overpayments made on task order 1 started to accrue on January 5, 2011, and continued accruing thereafter as each invoice was overpaid. On each date an overpayment was made the Government knew or should have known of the overpayment had it simply read the MAS contract. As the final decision was issued on June 13, 2017, any claims for overpayments predating June 13, 2011, are time-barred.

Decision

For the foregoing reasons, appellant's motion for partial summary relief for overpayments is **GRANTED**. Any recovery that predates June 13, 2011, is precluded by the CDA's six-year statute of limitations, 41 U.S.C. § 7103(a)(4)(A).

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

We concur:

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge