Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

RESPONDENT'S MOTION TO DISMISS DENIED: September 8, 2000

GSBCA 15318

ACTIVE FIRE SPRINKLER CORP.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Laurence Schor of McManus, Schor, Asmar & Darden, L.L.P., Washington, DC, counsel for Appellant.

Catherine Crow, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK, HYATT,** and **DeGRAFF.**

BORWICK, Board Judge.

Appellant, Active Fire Sprinkler Corp., seeks to recover interest on allegedly excessive funds withheld by the respondent, General Services Administration (GSA), in the course of administering the labor standards provisions of appellant's construction contract with GSA. The Government withheld the funds for supposed violations of the Davis-Bacon Act (DBA), 40 U.S.C. § 276a (1994) and Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. § 327, by appellant and its electrical subcontractor, Laurelton Electric Corp. (Laurelton), in underpaying its workers.

Appellant filed a certified claim for the interest with the contracting officer, who in a reply of March 30, 2000, maintained that he lacked authority to issue a contracting officer's decision under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. Appellant filed an appeal at this Board from the contracting officer's deemed denial of the claim. 41 U.S.C. § 605(c). GSA moves to dismiss the appeal arguing that under the contract's Disputes Concerning Labor Standards clause the parties agreed to exempt the dispute from the contract's dispute clause and the CDA and to resolve the dispute in accordance with procedures established by the Department of Labor (DOL). We deny respondent's motion. We conclude that although appellant's claim is undoubtedly related to administration of the

labor standards provisions of the contract, appellant seeks relief under standard contract clauses and has presented a CDA claim cognizable by the Board. DOL has stated that appellant's claim for interest can not be resolved under its authority or procedures.

Background

For the purposes of deciding this motion only, the following facts are not in dispute.

The contract provided:

> The Contracting Officer shall upon its own action or written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the Contractor or subcontractor under any such contract or any other Federal contract with the same Prime Contractor, or any other Federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same Prime Contractor, such sums as may be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for unpaid wages or liquidated damages as provided in the provisions set forth in paragraph (b) of this clause.

Appeal File, Exhibit 1 at 79 (¶ 2(c) GSAR 552.222-71 (Apr. 1984)). The contract also provided:

> The Contracting Officer shall upon his/her own action or written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the Contractor under this contract or any other Federal contract with the same Prime Contractor, or any other Federally-assisted contract subject to Davis-Bacon prevailing wage requirements which is held by the same Prime Contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the Contractor or any other subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper employed or working on the site of work . . . all or part of the wages required by the contract, the Contracting Officer, after written notice to the Contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

Appeal File, Exhibit 1 at 81(¶ 7 GSAR 552.222-75 WITHHOLDING (Apr. 1984)).

For disputes arising out of labor standards provisions, the contract stated:

> Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Parts 5, 6, and 7. Disputes within the meaning of this clause

> include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the Department of Labor, or the employees or their representatives.

Appeal File, Exhibit 1 at 81 (¶ 9 GSAR 552.222-78 DISPUTES CONCERNING LABOR STANDARDS (Apr. 1984)). The general Disputes clause of the contract provides that the contract is subject to the CDA. Id. at 74 (¶ 92(a) FAR 52.223-1--DISPUTES (APR 1984)(Alternate 1)).

> The contract incorporated an Interest clause which provided in pertinent part:
>
> Notwithstanding any other clause of this contract, all amounts 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. . . .

Appeal File, Exhibit 1 at 70 (¶ 84a FAR 52.232-17 INTEREST (APR 1984)). The contract also included a clause implementing the Prompt Payment Act (PPA), 31 U.S.C. § 1801:

> a. The Prompt Payment Act . . . is applicable to payments under this contract and requires the payment to contractors of interest on overdue payments and improperly taken discounts.
>
> . . . .
>
> c. The contractor shall not be entitled to interest penalties on progress payments . . . made for financing purposes before receipt of complete delivered items of property or service[s] or on amounts withheld temporarily in accordance with the contract (e.g. retainage). The Government shall be liable for interest penalties only on the amount of payment which is past due that represents payment for complete[ly] delivered items of property or service[s] which have been accepted by the Government.

Id., Exhibit 1 at 70 (¶ 83 GSAR 552.232-71--INTEREST ON OVERDUE PAYMENTS (APR 1984)).

On April 1, 1992, the Employment Standards Administration (ESA) of DOL advised GSA of its investigation of the contractor under the DBA and CWHSSA. DOL stated that its investigation disclosed "substantial monetary violations, resulting from failure to pay the required prevailing wage rates." Appeal File, Exhibit 54. DOL estimated that back wages due amounted to $800,000 and requested of GSA that "all remaining funds be withheld from contract payments due to the contractor." Id. DOL stated that "should [it] succeed in securing direct payment to the employees or should there be any change in the amount noted, we will advise you immediately." Id. On May 4, 1992, the GSA contracting officer advised appellant of the pending DOL investigation and the estimated amount of back wages due. GSA told appellant that "in view of the [DOL's] findings, and in accordance with the Davis [-]Bacon Act and regulations [at] 29 CFR 5.5(a)(2), this office has been directed to withhold all remaining funds under the referenced contract. Consequently, progress payments will not

be issued until we are notified by [DOL] that all monetary violations have been corrected." Id., Exhibit 57.

On August 5, 1992, DOL advised GSA that it estimated that back wages would not exceed $805,000 and that any funds being withheld at DOL's request in excess of $805,000 could be released to the contractor. Appeal File, Exhibit 60. On October 27, 1992, GSA explained to DOL that GSA's practice was not to issue progress payments for work performed until the amount specified for withholding was satisfied. GSA also advised that $805,000 was the obligated balance of contract funds. GSA opined that since appellant was aware of the contract withholding, appellant had performed little progress on the job. GSA maintained that its inability to issue progress payments to the contractor had become detrimental to completion of the contract, and requested that DOL keep GSA advised of the progress of its investigation. Id., Exhibit 62.

On October 29, DOL told GSA that its estimate of Davis-Bacon and CWHSSA violations had increased to $816,245.02. Appeal File, Exhibit 63. Sometime before December 31, appellant wrote respondent and proposed a progress payment schedule to cure the alleged labor violations. Id., Exhibit 66. On December 31, appellant warned respondent that it would be unable to continue work on the contract unless the Government and appellant came to an agreement on such payments by January 15, 1993. Id. On January 25, 1993, GSA advised appellant that GSA and DOL had agreed to withhold fifty percent on each progress payment until such time as the labor violations, now estimated at $825,035.02, were satisfied. Id., Exhibit 67.

By letter dated September 20, 1993, GSA advised DOL that as of August 19, GSA had withheld $486,688.63, which was applied to the assessed labor violations, and that as each future invoice was processed, fifty percent of the progress payment would be withheld for DOL until such time as the total amount due was satisfied. Appeal File, Exhibit 68. On December 21, 1993, GSA reported to DOL that it had withheld $804,314, that the current balance due DOL was $20,720.12, and that based on the withholding from the next progress payment, the total amount assessed for labor violations--now $825,035.02--would be satisfied. Id., Exhibit 70.

On January 24, 1994, DOL told GSA that "further investigation has revealed additional back wages due." DOL requested that GSA withhold $832,233.37 for Davis-Bacon back wages and $14,978.87 for CWHSSA back wages. Appeal File, Exhibit 70. DOL also noted that it had computed $9,100 in CWHSSA liquidated damages under the contract; but it was not clear that DOL was requesting GSA withhold that amount as well. By letter of February 25, appellant's counsel complained to DOL that appellant did not acquiesce in the withholding of contract funds by GSA "at the direction of DOL." Id., Exhibit 72. That day, GSA advised DOL and appellant that it would continue withholding fifty percent of the progress payments until the full amount of $847,212.24 was satisfied. Id., Exhibits 73, 74.

GSA reviewed Laurelton's certified payrolls for the period of the week ending November 25, 1992 through May 25, 1994. GSA determined that Laurelton had substantially underpaid--by $67,353.41–wages for ten journeymen electricians, as established by the contract's wage decision. Appeal File, Exhibit 80. In its letter of October 12, 1994, GSA

advised Laurelton of the underpayment and of missing payroll records for parts of December 1992, March 1993, and April 1994. GSA requested Laurelton to redo each payroll from the week ending November 25, 1992, making all necessary salary adjustments, plus certification from each of the ten employees that he or she had received back wages. Id. That same day, GSA refused to pay appellant's invoice 15894 for Laurelton's work until receipt of back wages had been certified. Id., Exhibit 82. On October 18, 1994, appellant disputed GSA's withholding because GSA had not credited towards the employees' wages those fringe benefit payments Laurelton had made to the International Brotherhood of Electrical Workers Union (IBEW) on behalf of the employees. Appellant maintained that it was entitled to interest under the Prompt Payment Act for every dollar which GSA had improperly withheld from the date of submission of the invoice until payment is received. Appellant stated that this letter was its "notice of claim." Id. In response, by letter of November 1, GSA explained that Laurelton had failed to supply sufficient information in its payroll record concerning the type and amount of fringe benefits paid on behalf the employees to the IBEW. Id., Exhibit 83.

GSA recalculated Laurelton's alleged wage underpayment to be $67,494.97, and on November 17, informed Laurelton and appellant of the recalculation. Appeal File, Exhibits 84, 85. On December 8, 1994, GSA advised DOL of Laurelton's alleged underpayment of wages and the action GSA had taken to secure Laurelton's payment of those wages. Id., Exhibit 88. On January 17, 1995, DOL advised GSA that it had undertaken its own investigation of the alleged wage underpayment and requested withholding of $67,494.97 from the contract payment. Id., Exhibit 90.

On February 3, 1995, GSA reported to DOL that it was withholding $832,233.37 for Davis-Bacon back wages, $14,978.87 for CWHSSA back wages, $67,494.97 for Laurelton's back wages, and $5505.03 for appellant's missing payrolls, for a total of $920,212.24. Appeal File, Exhibit 91. On February 10, GSA notified appellant of DOL's request regarding Laurelton's back wages, and told appellant that it would continue to withhold $914,707.21 in assessed back wages "until [GSA was] notified by the DOL that all monetary violations have been corrected." Id., Exhibit 92.

By letter of March 21, 1995, appellant's counsel advised GSA that he considered information sent earlier to be adequate verification of Laurelton's payment of fringe benefits to the IBEW on behalf of the ten employees. Appellant's counsel advised that he could submit additional information if requested, and asked that GSA send his letter to DOL for their review. Appeal File, Exhibit 93. GSA did so, but maintained that the information earlier received was unacceptable. Id., Exhibit 94.

As of late March 1995, DOL's assessment of back wages did not include payrolls for the years 1993 and 1994. Appeal File, Exhibit 96. On March 29, 1995, GSA notified appellant that GSA was examining appellant's payrolls for those years and would tell appellant of the total assessment of back wages due upon the completion of the examination. Id. Eventually, GSA assessed appellant additional back wages of $31,290.54. Id., Exhibit 98. GSA maintains that it did not withhold that amount because, with the previous withholdings, the contract balance was $0. Id., Exhibit 141.

Appellant's counsel submitted an affidavit from appellant's employees explaining that, with fringe benefits counted as part of the wages paid, the hourly total paid to each employee exceeded the minimum requirements of the DOL's Davis-Bacon wage determination for the contract. Appeal File, Exhibit 97. By letter of November 14, GSA forwarded this explanation to DOL for its review, and, by letter of the same date advised appellant that "the assessment of both Active's payrolls and Laurelton['s] payrolls is now entirely with [DOL] as part of [its] ongoing investigation under the Davis-Bacon Act and [CWHSSA]." GSA directed appellant to send all future correspondence on back wages to DOL. Id., Exhibit 101.

On December 8, 1997, appellant's counsel, on appellant's behalf, wrote DOL and accepted a purported offer from DOL by which the $67,494.97 withholding was reduced to $14,070.66 and a withholding of $31,290.54 for appellant was reduced to $1137.71. Appellant stated that the $98,785.51 was withheld by GSA "on its own initiative." Appeal File, Exhibit 113. Appellant's counsel, in effect, asked DOL to advise GSA to reduce the withholding by $83,577.74 in accordance with the agreement. Id. On December 18, the GSA contracting officer, having reviewed appellant's letter, stated that the statement that the funds were withheld at GSA's initiative was not accurate. The contracting officer advised appellant that it would not release any monies without the written direction of DOL. Id.

On August 12, 1998, appellant's counsel advised GSA that appellant and DOL had reached a "complete financial settlement" concerning the amounts that should be paid to appellant's and Laurelton's workers, and that DOL would soon be issuing a notice to GSA to release contract funds. Appeal File, Exhibit 122. Appellant expressed the hope that "GSA will act expeditiously to release all funds." Id. On November 10, DOL requested that the sum of $492,954.34 be transferred to the General Accounting Office for payment of the back wages due appellant's workers. DOL requested that the remainder of contract funds--$421,752.88-- be released to appellant. Id., Exhibit 125. Appellant submitted an invoice, dated November 13, for $421,752.88. Id., Exhibit 126. GSA acknowledged receipt of the invoice, but told appellant that it was reviewing DOL's calculations of $9100 in CWHSSA liquidated damages. DOL had advised GSA that the assessment of the liquidated damages was at GSA's discretion. Id. On December 8, GSA advised appellant that GSA would assess $9100 in liquidated damages and release the remainder, $412,652.86. Id., Exhibit 128.[1] On December 28, GSA advised DOL that it would release the $412,652.86 to appellant, and would withhold $9100 as liquidated damages for CWHSSA violations. Id., Exhibit 131. According to GSA, the $412,652.86 was released "effective December 15, 1998, and received by appellant on January 4, 1999." Id., Exhibit 154.

By letter of December 31, 1998, appellant disputed the Government's assessment of CWHSSA liquidated damages. Appellant argued that it had paid all overtime hours to those employees who had actually worked overtime. Appellant explained that the excessive number of overtime hours on the payroll schedules was due to a foreman who had telephoned false overtime hours to the payroll clerk, obtained payments for the false hours, and pocketed the payments. Appellant maintained that DOL based its initial determination on the false payroll data generated by the foreman. Appeal File, Exhibit 132. On January 19, GSA

[1] GSA calculated that the balance of contract funds was $421,752.86, not $421,752.88. Appeal File, Exhibit 128.

advised appellant that it had consulted with DOL, which assured GSA that the assessment of liquidated damages was based on actual overtime hours worked. Id., Exhibit 133.

On January 26, 1999, appellant filed a "revised claim for interest on wrongfully withheld funds." The claim was not certified. Appellant recited the course of the labor investigation and stated that "in addition to receiving the amount of withheld funds, now established to have been withheld wrongfully, [appellant] should receive interest, which accrued on the amount wrongfully withheld. [Appellant] requests payment of $116,704.53 of interest based upon the Contract, the PPA and the CDA." Appeal File, Exhibit 134. Appellant alleged that "the GSA and DOL" began to withhold funds for alleged DBA and CWHSSA violations, that DOL ultimately determined that appellant was liable for back wages, that the "$412,642.86 now due [appellant] represents wrongfully withheld funds in excess of the back wages owed." Id.

The contracting officer replied to appellant's letter, denying that GSA had initiated a labor investigation; the contracting officer stated that DOL had initiated the investigation and that GSA had withheld funds under the direction of DOL. Appeal File, Exhibit 135. The contracting officer denied GSA's responsibility for interest payments, but did not style the reply a contracting officer's decision. Id. By letter of March 22, 1999, appellant requested a "final decision" of the contracting officer, and made further arguments why the labor withholdings were incorrect. Id., Exhibit 136. Appellant disputed that DOL had initiated all of the withholdings. Appellant maintained that the alleged over-withholding was primarily due to DOL's use of a general laborer rate instead of a mason tender laborer rate, that DOL failed to take into account the fact that appellant's own forces performed a large amount of plastering and painting, and that DOL had erroneously included in the withholding appellant's shop personnel who should not have been included. Id.. On April 8, the contracting officer told appellant that because its claim was not certified he would give the claim no further consideration until it was. Id., Exhibit 137. Appellant argued that because the initial claim for interest was below $50,000, no certification was necessary, but forwarded the certification anyway. Id., Exhibit 138.

The contracting officer forwarded the claim to DOL by letter of May 14, 1999, and:

> request[ed] your interpretation of the 29 CFR in regard to jurisdiction over the review of claims submitted by a contractor for interest on funds withheld at the request of the DOL during an investigation of labor violations under the Davis-Bacon and Related Acts and the Contract Work Hours and Safety Standards Act. Please advise this office as to whether or not the contractor is entitled to interest on funds withheld in excess of the settlement amount negotiated by the DOL, and whether the contracting agency or the [DOL] has jurisdiction over the review and settlement of such claims.

Appeal File, Exhibit 139. On June 2, DOL responded:

> It is our opinion that [appellant's] claim for interest is not within the jurisdiction of the [DOL's] regulations. . . . 29 CFR Part 5.5(a)(9) provides that disputes arising out of the labor standards provisions of the contract are to be resolved in accordance with Regulations 29 CFR Parts 5, 7, and 9 rather

> than the general disputes clause of the contract. The disputes regarding the labor standards provisions of this contract (i.e. proper classification of workers, hours worked on the contract and wages paid, etc.) have already been fully resolved between the [DOL], [Appellant], and Laurelton. Further, there are no provisions in the Davis Bacon Act or its regulations regarding the payment of interest on funds withheld for potential labor standards violations.

Id., Exhibit 144. On July 29, GSA advised appellant that it would require additional time to complete its evaluation of appellant's claim and anticipated rendering a final decision by October 7. Id., Exhibit 146.

On September 17, GSA wrote DOL arguing that the claim fell within the jurisdiction of DOL and was not within the authority of GSA, as the withholdings were at the direction of DOL. Appeal File, Exhibit 148. On October 1, GSA advised appellant that it would need until December 3, 1999 to evaluate appellant's claim. Id., Exhibit 150. On October 26, GSA again told DOL that it thought GSA had no jurisdiction over the claim. Id., Exhibit 152. On December 3, GSA told appellant it would need until January 31, 2000, to render a final decision, Id., and on January 31, told appellant it would need until March 30, 2000 to render the decision. Id., Exhibit 153.

On March 30, 2000, the contracting officer responded to appellant's certified claim and, citing 41 U.S.C. § 605(a), FAR 33.210(a), and the contract's Disputes Concerning Labor Standards clause, told appellant that he lacked authority to issue a contracting officer's decision under the CDA. Id., Exhibit 154.

Discussion

Respondent argues in its motion to dismiss that, under the contract, the "DOL is specifically authorized to resolve claims arising out of the labor standards provision of the contract." Respondent's Motion to Dismiss at 6. Respondent argues that appellant's claim "is for CDA and PPA interest on funds withheld by respondent pursuant to directives from DOL during DOL's investigation of appellant for violations of the DBA and CWHSSA. However, the basis for its claim is not governed by the CDA." Respondent's Motion to Dismiss at 8. Appellant argues that its appeal "is unrelated to DOL's determination of the existence of underlying labor violations and [appellant's] settlement with DOL is not at issue. The settlement quantified the amount [appellant] paid and recovered from GSA. This appeal concerns the Disputes and other prime contract clauses and whether they impose an obligation on GSA to pay interest on funds wrongfully withheld for labor violations." Appellant's Opposition at 6. Appellant identifies FAR clause 52.232-17 INTEREST (APR 1984), GSAR clause 552.232-71--INTEREST ON OVERDUE PAYMENTS (APR 1984), and the CDA clause as contract clauses entitling it to relief under the contract. Id. at 12.[2]

[2] FAR clause 52.232-17 INTEREST (APR 1984) provides for the payment of interest by contractors on amounts that "become payable" by contractors to the Government. Appellant will have to demonstrate how this clause entitles it to an interest payment from the Government.

The Court in Emerald Maintenance v. United States, 925 F.2d 1425 (Fed. Cir. 1991), considered the interplay among the CDA, the Disputes Concerning Labor Standards provisions of the contract, and the DOL procedures for resolving disputes set forth in 29 CFR Parts 5, 6 and 7. That case involved a contractor who had paid his employees as laborers when, under the contract's wage determination, the contractor was required to pay the employees at the higher wage rate for roofers. The contracting officer had withheld monies from the contractor to pay workers the proper rate, and the contractor sued for the monies withheld. Emerald Maintenance, 925 F.2d at 1427. The contract contained a Labor Standards provision, which stated that disputes arising out of labor standards provisions were not governed by the General Disputes clause of the contract, but by procedures of the DOL set forth in 29 CFR Parts 5, 6 and 7. The board below had dismissed the contractor's claims of breach and inadequate specifications, which the board found amounted to an attack on the wage determination prepared by DOL, and thus within the exclusive jurisdiction of DOL. The Court affirmed, holding that no matter how the contractor styled its dispute, the dispute related to wage rates. Thus, the dispute "arose out of" the contract's labor standards provisions; the parties had agreed in the contract that such disputes would not be governed by the Disputes clause, or by the CDA, and the matter was thus not subject the board's jurisdiction. Emerald Maintenance, 925 F.2d at 1429.

Later, the Court considered a case in which during the course of the contract DOL had issued a revised wage determination increasing the contractor's labor costs. The contractor, after an unsuccessful challenge of the wage determination before DOL, paid the increased labor costs. After denial of the claim by the contracting officer, the contractor sued in the United States Claims Court (Claims Court) for price adjustment under the Price Adjustment and Changes clauses of the contract. Burnside-Ott Aviation Training Center Inc. v. United States, 985 F.2d 1574, 1576 (Fed. Cir. 1993). Relying on Emerald Maintenance, the Claims Court dismissed those counts. The Court of Appeals reversed, holding that the contractor was not challenging DOL's ruling--indeed it had already mounted an unsuccessful challenge at DOL--but was merely "request[ing] the Claims Court to determine the effect that DOL's classification had on its contract rights." Id. at 1580. The Court held that the Claims Court retained jurisdiction where the dispute centers on the parties' mutual contract rights, even though matters reserved to and decided exclusively by DOL are part of the factual predicate. Id. In this instance, the allegedly excessive withholding by GSA at DOL's request forms only a part of the factual predicate of the claim. Appellant also claims interest on allegedly excessive withholding from October 12, 1994, through January 17, 1995, by the GSA contracting officer for Laurelton's underpayment of its workers.

This matter is unlike Emerald Maintenance. This claim does not, in effect, challenge the wage determination itself, which is a matter arising out of the labor standards provision of the contracts. Instead, appellant claims it is entitled by virtue of the contract's interest clauses to interest on funds temporarily withheld by the respondent's contracting officer at the direction of DOL and eventually released. Indeed, in this case, when GSA referred appellant's claim for interest to DOL, DOL stated that the interest claim was not within DOL's regulations or procedures. DOL's position in this matter is consistent with decisions of DOL's Wage Appeals Board (WAB), which has concluded that DOL could not order a Government agency not a party to its proceedings to pay interest on withheld funds. Donahue Favret Contractors, Inc., 92-13, 1992-1995 Wage & Hour Case. (CCH) ¶ 32,264 (Apr. 30, 1993). The WAB has stated that "with respect to the issue of interest on moneys

withheld and then returned to petitioner, the Board is not aware of any authority, either by statute, regulation or case law, which grants the Secretary of Labor the right to award interest. . . ." Mast Construction, WAB 84-22 1986 WL 193102 (Mar. 14, 1986).

Consequently, appellant's claim for interest on the withheld funds does not arise out of the Disputes Concerning Labor Standards clause of the contract; its claim is not exempt from the general disputes clause of the contract and, by extension, from the CDA. Cf. MMC Construction, Inc., ASBCA 50863, et al., 99-1 BCA ¶ 30,322 (claim for interest due to alleged excessive withholding by agency contracting officer cognizable under CDA.); see also Shook v. United States, 26 Cl. Ct. 1477, 1489 (1992) (although DOL responsible for general enforcement of labor standards, contracting officer's act of withholding money is appealable under CDA.).

The cases relied upon by respondent are not to the contrary. In Ball, Ball & Brosamer, Inc., IBCA 3542-95, et. al., 98-1 BCA ¶ 29,637, the board dismissed the appeal for interest on withheld funds because the contractor had filed its appeal from the contracting officer's decision too late to meet the CDA's ninety-day filing requirement, and dismissed the appeal for PPA interest because appellant never submitted a claim to the contracting officer for PPA interest. McGreary Company, ASBCA 41998, 91-3 BCA ¶ 24,117, also relied upon by respondent, stands for the unremarkable proposition that a jurisdictional prerequisite to the board's CDA jurisdiction over an appeal for PPA interest is a claim for PPA interest submitted to the contracting officer. In this matter, appellant submitted a claim for both interest on withheld funds and for PPA interest to the contracting officer.

Our denial of respondent's motion to dismiss, however, does not render the Disputes Concerning Labor Standards clause irrelevant to the future conduct of these proceedings. In Burnside-Ott, 985 F.2d at 1583, the Court held that the remanded counts "do not require the Claims Court to revisit actions by DOL, but instead require the Claims Court to determine the contractual consequences of the DOL's determinations." Similarly, and more recently, the Court observed that when dealing with claims related to labor disputes, a board of contract appeals is "not to itself determine a labor provisions dispute or to review the Labor Department's ruling on that issue." Herman B. Taylor Construction Co. v. Barram, 203 F.3d 808, 811 (Fed. Cir. 2000).

As of now, the only discernible theory for appellant's recovery is an entitlement to interest under the contract's PPA clause. Appellant must demonstrate that the payments made by GSA after DOL authorized release of withheld funds were "overdue" or "past due" within the meaning of the PPA clause so as to entitle appellant to interest. Based on the authorities discussed above, we will not review DOL's withholding requests to GSA for alleged wrongful or erroneous action.

Decision

Respondent's **MOTION TO DISMISS** is **DENIED**. Within ten calendar days from the date of this decision, respondent will file its answer. The Board will schedule further proceedings after respondent submits its answer.

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ANTHONY S. BORWICK
Board Judge

We concur:

_____
CATHERINE B. HYATT
Board Judge

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MARTHA H. DeGRAFF
Board Judge