Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

RESPONDENT'S MOTION TO FOR SUMMARY RELIEF GRANTED;
APPELLANT'S CROSS MOTION FOR SUMMARY RELIEF DENIED: July 11, 2001

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 pursuant to the Prompt Payment Act (PPA) 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. At the request of the Department of Labor (DOL), GSA withheld the funds from appellant's progress payments for supposed violations of the Davis-Bacon Act (DBA), 40 U.S.C. § 276a, the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. § 327, and the associated contractual labor standards provisions, by appellant and its electrical subcontractor, Laurelton Electric Corp. (Laurelton), in underpaying Laurelton's 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). The parties filed cross-motions for summary relief. We grant GSA's motion, deny appellant's motion, and deny the appeal. We conclude that for the reasons stated below,

appellant's claim for interest on the withheld funds is not redressable under the PPA or the contract's Interest on Overdue Payments clause.

Background

For purposes of the cross-motions for summary relief, the parties do not dispute the following facts.

On September 30, 1986, respondent awarded to appellant contract GS02P86CUC0096, to perform certain fire safety modifications at the United States Courthouse, Foley Square, New York. Appeal File, Exhibit 1; Respondent's Statement of Uncontested Facts ¶ 1.

The contract provided in pertinent part:

> 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 and 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 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, may, 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(¶ 6, 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 U.S. 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).[1]

> **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)).

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[1] The PPA provides that the Government shall pay an interest penalty when the Government fails to pay a concern for each complete delivered item of property or service by the required payment date. 31 U.S.C. § 3902(a). Generally, the payment date is thirty days after a proper invoice for the amount due is received by the agency. 31 U.S.C. § 3903(a)(1)(B).

Mr. Edward Liburd was a DOL investigator assigned to investigate the compliance by appellant and its subcontractors with the provisions of the DBA and the CWHSSA under the contract. Respondent's Cross-Motion for Summary Relief, Exhibit 4 (Declaration of Edward Liburd (Liburd Declaration) (Apr. 3, 2001) ¶ 3). Mr. Liburd investigated appellant's records regarding appellant's payments to its employees and amounts properly payable under the DBA and CWHSSA for the period October 1987 through June 1992. Liburd Declaration ¶ 4.

Mr. Liburd's investigation resulted in DOL's letter to GSA dated April 1, 1992. Liburd Declaration ¶ 4. In that letter, 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." Appeal File, 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, 1992, DOL told GSA that its estimate of DBA and CWHSSA violations had increased to $816,425.02. 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, 1992, 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 DBA back wages and $14,978.87 for CWHSSA back wages. Appeal File, Exhibit 71. DOL also noted that it had computed $9100 in CWHSSA liquidated damages under the contract, but it was not clear that DOL was requesting GSA to withhold that amount as well. By letter of February 25, 1994, 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.

Sometime before October 7, 1994, the GSA contract specialist, Ms. Patricia Traina, noticed that DOL had not reviewed the payroll records of appellant and appellant's electrical subcontractor, Laurelton, for the years 1993 and 1994. Respondent's Cross-Motion for Summary Relief, Exhibit 1(Declaration of Patricia Traina (Nov. 9, 2000) (Traina Declaration) ¶ 4). Ms. Traina telephoned Mr. Liburd and asked if DOL would be reviewing appellant's and Laurelton's payrolls for the pay period weeks ending March 30, 1993, through November 1, 1994, and November 25, 1992, through May 25, 1994, respectively, or whether GSA should review those payrolls as the contracting agency. Traina Declaration ¶ 5; Liburd Declaration ¶ 5. Ms. Traina informed Mr. Liburd that she had noticed apparent violations in appellant's and Laurelton's payrolls for those periods. Traina Declaration ¶ 5. Mr. Liburd requested that GSA review the payrolls for those periods and requested that Ms. Traina provide him with the results of GSA's investigation. Liburd Declaration ¶ 5. Mr. Liburd later sent Ms. Traina DOL wage transaction and computation sheets for use by GSA in its review of payroll records. Id.

Ms. Traina reviewed Laurelton's certified payrolls for the period of the week ending November 25, 1992, through May 25, 1994, and determined that Laurelton may have failed to pay its employees at the required wage rates and may also have misclassified the job status of certain employees. Traina Declaration ¶ 7. Because of the DOL's ongoing investigation and because the contract work was nearing completion, Ms. Traina determined that it would be necessary to withhold an additional $67,353.41 from appellant as the prime contractor in order to satisfy the liabilities of Laurelton for unpaid wages and to pay the affected employees of Laurelton. Id. ¶ 8; Appeal File, Exhibit 80.

Ms. Traina had originally intended to notify Mr. Liburd of the results of her review and to receive DOL direction as to further withholdings based on her review of Laurelton's payrolls. Traina Declaration ¶ 9. However, on October 11, 1994, appellant

submitted an invoice for $66,386.25. Id. ¶ 10. As Ms. Traina had determined the existence of potential liability of Laurelton for unpaid wages and because there was not sufficient time to receive direction from DOL before the deadline for paying the invoice, Ms. Traina decided to refuse payment of appellant's October 11 invoice. Id. ¶¶ 9, 10.

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. Appeal File, Exhibit 80. That same day, GSA refused to pay appellant's October 11, 1994, invoice for Laurelton's work until receipt of back wages had been certified. Id., Exhibit 81.

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. Appeal File, Exhibit 82. 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.

Also on October 18, Ms. Traina met with Mr. Liburd to discuss the initial results of her payroll review of Laurelton. Traina Declaration ¶ 11. Mr. Liburd stated that he was in full agreement with Ms. Traina's calculations and that DOL would prepare a letter requesting that GSA withhold that amount. Id.; Liburd Declaration ¶ 6.[2]

On November 17, 1994, Ms. Traina completed a second review of Laurelton's payrolls and determined that the amount of back wages due should be increased by $141.56 from $67,353.41 to $67,494.97. Traina Declaration ¶ 12. On November 17, GSA 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

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[2] Ms. Traina states that their meeting took place on October 18, 1994. Traina Declaration ¶ 11. Mr. Liburd states that their meeting took place on October 20. Liburd Declaration ¶ 6. The earlier date is supported by Ms. Traina's contemporaneous memorandum to the file, Respondent's Motion for Summary Relief, Exhibit 2, and we accept the earlier date as the correct one. The precise date is not material to the outcome in this matter.

$67,494.97 from the contract payment for back wages due to the employees of Laurelton. Appeal File, Exhibit 90; Liburd Declaration ¶ 6.

On February 3, 1995, GSA reported to DOL that it was withholding $832,233.37 for DBA 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 that department's review. Appeal File, Exhibit 93. GSA sent the letter to DOL, 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 appellant's 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.

In June 1995, Ms. Traina completed her review of appellant's payrolls for the pay periods week ending March 30, 1993 through November 1, 1994. Traina Declaration ¶ 15. Based on Ms. Traina's review, she determined that an additional $31,290.54 would be necessary to satisfy appellant's liabilities for unpaid wages and to pay the affected employees. Id. By letters of June 2 and June 16, GSA advised Mr. Liburd of the assessed back wages and the basis for GSA's calculations. Liburd Declaration ¶ 7; Id., Exhibits D, E. Eventually, GSA assessed appellant additional back wages of $31,290.54. Appeal File, Exhibit 98. GSA did not withhold that amount because, with the previous withholdings, the contract balance was $0. Id., Exhibit 141; Traina Declaration ¶ 18.

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 DOL's DBA wage determination for the contract. Appeal File, Exhibit 97. By letter of November 14, 1995, 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]." Id., Exhibit 101. GSA directed appellant to send all future correspondence on back wages to DOL.

Mr. Liburd, however, was under instructions from the United States Attorney's Office for the Southern District of New York to have no communication with appellant

due to a pending investigation by that office. Liburd Declaration ¶ 8. In November 1997 the United States Attorney's Office withdrew that instruction and Mr. Liburd met with appellant and its counsel on December 1. Id.

On December 8, 1997, appellant's counsel, on appellant's behalf, wrote the DOL and accepted a purported offer from DOL by which the $67,494.97 withholding for Laurelton was reduced to $14,070.66, and an alleged withholding of $31,290.54 for appellant was reduced to $1137.71. Appellant's counsel 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. Id. The contracting officer advised appellant that he would not release any monies without the written direction of DOL. Id.

In June 1998, after six months of exchanging information with appellant, Mr. Liburd determined that DOL's initial withholding should be modified based upon the additional information provided by appellant and Laurelton. Liburd Declaration ¶ 9. Mr. Liburd also found that the amounts withheld by GSA pursuant to its review of Laurelton payrolls should also be modified. Id. Mr. Liburd determined that the withholding of $67,494.97 against Laurelton should be reduced to $14,070.66 and that the GSA $31,290.54 assessment against appellant should be reduced to $1137.31. He determined that the amount which should be withheld for the investigation of appellant for violations covering the period October 1987 to June 1992 should be revised to $477,746.36. 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, the DOL, through its New York office, 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. Appeal File, Exhibit 125. DOL requested that the remainder of contract funds --$421,752.88-- be released to appellant. Id. However, later in November, DOL instructed GSA to disregard the November 10 letter and to await a letter from DOL's Philadelphia regional office, which was the proper office to authorize release of withheld funds. Traina Declaration ¶ 19.

Appellant submitted an invoice, dated November 13, for $421,752.88. Appeal File, 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 7, GSA received authorization from DOL's Philadelphia office to release the withheld funds. Traina Declaration ¶ 22. DOL also stated that it had computed CWHSSA liquidated damages to be $9100. Id.

On December 8, GSA advised appellant that GSA would assess $9100 in liquidated damages and release the remainder, $412,652.86. Appeal File, Exhibit 128.[3] 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. GSA's Public Buildings Service Automated Payment Section issued appellant a check for the released funds on December 31, 1998. Traina Declaration ¶ 25. Appellant received a check for the released funds on January 5, 1999. Id. ¶ 24.

By letter of December 31, 1998, appellant disputed the Government's assessment of CWHSSA liquidated damages. Appeal File, Exhibit 132. Appellant argued that it had paid all overtime hours to those employees who had actually worked overtime. Id. 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. Id. Appellant maintained that DOL based its initial determination on the false payroll data generated by the foreman. Id. On January 19, GSA 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." Appeal File, Exhibit 134. 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." Id. 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, and that the "$412,652.86 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

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[3] GSA calculated that the balance of contract funds was $421,752.8**6, not $421,752.88. Appeal File, Exhibit 128.**

further consideration until a certification was provided. 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 in accordance with the DBA and regulations 24 CFR 5.5(a)(2). 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 149. 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), Federal Acquisition Regulation 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.

Appellant states that as a result of the Government's withholdings, appellant was forced to borrow monies against its available credit lines and pay interest on the borrowing. Appellant's Cross-Motion for Summary Relief, Exhibit A (Affidavit of Morton Hirsch, Appellant's President (Hirsch Affidavit) (Mar. 20, 2001) ¶ 8). Appellant also maintains that DOL's withholding was based on its erroneous determination that workers should have been paid at a full laborer hourly rate of $21 instead of a mason laborer tender rate that was $4.50 per hour less. Id. ¶ 11. Appellant's president states that he believed that the "contracting officer was aware of this fact but did nothing about it." Id. According to appellant, the DOL assessment also included appellant's employees who never went to the site because they worked in appellant's pipe shop. Id. ¶ 12. Appellant maintains that the GSA contracting officer knew of these facts but "never informed the DOL that the DOL's calculations were too great because of the wage rate applied or the inclusion of the wrong people." Id.

Discussion

The parties cross-move for summary relief in this matter, and we conclude that this appeal is susceptible for resolution on the basis of the parties' cross-motions. Summary relief is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Granco Industries, Inc. v. General Services Administration, GSBCA 14902, 99-2 BCA ¶ 30, 568; Twigg Corp. v. General Services Administration, GSBCA 14387, 98-2 BCA ¶ 29,803. The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue. Vivid Technologies, Inc. v. American Science & Engineering, Inc., 200 F.3d 795, 806 (Fed. Cir. 1999); Executive Construction, Inc. v. General Services Administration, GSBCA 15225, 00-2 BCA ¶ 30,977. The established facts, as well as any inferences of fact drawn from such facts, must be viewed in a light most favorable to the opposing party. Barmag Barmer Maschinenfrabrik AG v. Murata Machinery, Ltd., 731 F.2d 831, 835-36 (Fed. Cir. 1984). Although the parties come to different conclusions as to whether the contracting officer acted independently from the DOL in the Laurelton withholding and in a supplemental wage assessment against appellant, they agree on the underlying facts concerning the assessments. We consider resolution of this appeal on cross-motions for summary relief to be appropriate.

In its cross-motion for summary relief, appellant argues that DOL's and GSA's withholdings were "unnecessary and unreasonable given the information provided by [appellant] to GSA and DOL during contract performance." Appellant's Cross-Motion for Summary Relief at 3. Appellant argues that, when it learned that the Government was going to withhold funds on the project, appellant:

> **immediately provided GSA with wage and withholding information and documentation and continued to do so throughout the course of GSA's and DOL's investigations. Even with this information and documentation, which clearly showed that GSA was retaining an amount far in excess than what was reasonably necessary to protect workers on the project, GSA failed to release any portion of the retained funds for years thereafter and [appellant] is entitled to interest thereon.**

Appellant's Motion for Summary Relief at 3. In short, appellant seeks interest on payments that appellant maintains were unreasonably withheld.

Interest cannot be recovered in a suit against the Government in the absence of an explicit provision by contract or statute or express consent by Congress. Library of Congress v. Shaw, 478 U.S. 310, 317 (1986); Gevyn Construction Corp. v. United States, 827 F.2d 752, 754 (Fed. Cir. 1987); Cedar Chemical Corp. v. United States, 18 Cl. Ct. 25, 32 (1989).

Here, appellant relies on the PPA and the Interest on Overdue Payments clause at General Services Acquisition Regulation (GSAR) 552.232-71 as the basis for recovering interest on payments allegedly unreasonably withheld.[4] The PPA does waive the Government's immunity for interest on overdue payments, 31 U.S.C. § 3902(a), but also provides that:

> **this chapter does not require an interest penalty on a payment that is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract.**

31 U.S.C. § 3907(c). Under the Interest on Overdue Payments clause, the Government is liable for interest penalties only on the amount of payment which is "past due." GSAR 552.232-71 (APR 1984), (Appeal File, Exhibit 1 at 70 (¶ 83(c)).

Thus, payments disputed as to amount or as to compliance with the contract are not covered by the PPA. Gutz v. United States, 45 Fed. Cl. 291, 298 (1999); L & A Jackson Enterprises v. United States, 38 Fed. Cl. 22, 44-45 (1997) aff'd., Jackson v. United States, 135 F.3d 776 (Fed. Cir. 1998) (Table); Cargo Carriers Inc. v. United States, 34 Fed. Cl. 634, 645 (1995), aff'd., 135 F.3d 775 (Fed. Cir. 1998) (Table). In the context of a labor standards violation, a payment is in dispute until the Government (1) determines that a portion of withheld funds is necessary to remedy the violation and (2) transfers funds to the General Accounting Office for payment of underpaid workers. Only after those things are accomplished does the remaining portion of the withheld funds become available for payment to appellant and does the PPA thirty-day time period start to run. Jawitz, ASBCA 33160, 87-3 BCA ¶ 20,011, at 101,332.[5]

Here, respondent, as a result of a non-frivolous DOL investigation, disputed appellant's compliance with the contract's labor standards provisions, and commencing

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[4] In its claim, appellant also relies on FAR clause 52.232-17, INTEREST (APR 1984), as a basis for recovery. That clause provides for the payment of interest by contractors on amounts that "become payable" by contractors **to the Government. Appellant has not demonstrated how this clause entitles appellant to an interest payment from the Government.**

[5] However, the Government's merely alleging the existence of a dispute, or raising a frivolous dispute, is insufficient to deny a contractor its right to interest for late payments under the PPA. **Sterling Millwrights, Inc. v. United States, 26 Cl. Ct. 49, 90 n. 15 (1992). In this case the payment dispute was not frivolous or a mere allegation.**

in April 1992, withheld funds from progress payments as requested by DOL to ensure that apparent monetary violations were remedied. In January 1993, to allow timely completion of contract work, GSA paid appellant fifty percent of the progress payments appellant had invoiced. It was not until December 7, 1998, that DOL, having determined the scope and extent of the labor standards violation, authorized the GSA contracting officer to release withheld funds. We cannot conclude that the withheld funds were payable or "due" under the PPA or the contract's Interest clause until DOL authorized GSA to release funds on December 7.

There is another reason why appellant is not entitled to payment under the Interest on Overdue Payments Clause. That clause provides that "[t]he contractor shall not be entitled to interest penalties on progress payments . . . on amounts withheld temporarily in accordance with the contract (e.g. retainage). " Interest on Overdue Payments (APR 1984) at ¶ 83(c)). Here the Government temporarily withheld those funds necessary to correct what it saw as monetary violations of the DBA and the contract's labor standards provisions.

Appellant argues that the amounts withheld, and later released, did not come under the exception of paragraph (c) of the clause for "amounts withheld temporarily in accordance with the contract." Appellant's Cross-Motion for Summary Relief at 16. Appellant maintains that the Government's lengthy withholding was not temporary. Appellant's Cross-Motion for Summary Relief at 17-18. The word "temporary" means "lasting for a time only; existing or continuing for a limited time." Webster's Third New International Dictionary at 2353 (1986). The phrase "amounts withheld temporarily" imposes no time limit on the Government's right to withhold funds when it discerns a labor standards violation. Further, we lack jurisdiction to review the reasonableness of the substance of DOL's determinations, and the length of time it took DOL to both complete its investigation and to authorize GSA to release the balance of the contract funds. In this regard, we refer the parties and the general reader to our discussion in our decision denying respondent's motion to dismiss. Active Fire Sprinkler Corp. v. General Services Administration, GSBCA 15318, 00-2 BCA ¶ 31,124, at 153,753 (citing Burnside-Ott Aviation Training Center Inc. v. United States, 985 F.2d 1574, 1583 (Fed. Cir. 1993)).

Appellant maintains, nonetheless, that this case is similar to Columbia Engineering Corp., IBCA 2351, et al., 88-2 BCA ¶ 20,595. In Columbia, the board concluded that a contracting officer's voluntary withholding of an "unreasonable" amount of funds was redressable under the PPA and the implementing contract clause. Id. at 104,091. The board also held that if DOL had requested the withholding, the board "might deplore the occurrence but it would decline to assert jurisdiction over the case because . . . only DOL now has the authority to resolve the dispute." Id. at 104,090. This case is distinguishable from Columbia. The undisputed facts and record do not demonstrate that at any time the contracting officer acted unilaterally or unreasonably. Nothing in the record demonstrates that the assessments or withholdings were unreasonable, particularly given DOL's investigation, which found substantial labor standards violations and a DOL request in April 1992 that "all remaining funds be withheld from contract payments due to the contractor." Although the Government

eventually released $412,652.86, it withheld $492,954.34 for payment of the workers and $9100 in CWHSSA liquidated damages.

Appellant argues that at the very least, we may consider the contracting officer's alleged voluntary assessment and withholdings related to Laurelton Electric and the assessment and withholding of $31,290.54 in June 1995. Appellant ignores the context of the contracting officer's actions, i.e. the DOL-initiated investigation and DOL's request that all remaining funds due the contractor be withheld. The contracting officer's assessments and withholdings were in furtherance of a DOL-initiated investigation and every action by the contracting officer was either approved in advance or ratified by DOL. Parenthetically, the $31,290.54 that the contracting officer assessed in June 1995 was not withheld because no remaining funds remained in the contract balance.

Decision

Respondent's MOTION FOR SUMMARY RELIEF is **GRANTED.** Appellant's **CROSS-MOTION FOR SUMMARY RELIEF** is **DENIED**. The appeal is **DENIED**.

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ANTHONY S. BORWICK
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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MARTHA H. DeGRAFF
Board Judge