UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART AS TO ENTITLEMENT: January 23, 2009

CBCA 1306

DELTA AIR LINES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

David W. Burgett and Edward C. Eich of Hogan & Hartson LLP, Washington, DC, counsel for Appellant.

Aaron Pound, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GILMORE**, and **STEEL**.

DANIELS, Board Judge.

Delta Air Lines, Inc. (Delta) claims interest under the Prompt Payment Act, 31 U.S.C. §§ 3901-3907 (2006), and the Contract Disputes Act, 41 U.S.C. §§ 610-613, on money paid by the General Services Administration (GSA) in 2007 for government travel and transportation. The amount of the claim, as of January 31, 2008, was $898,310.81. We grant the appeal in part as to entitlement. Because the parties have not yet addressed the amount Delta is to be paid, we must defer consideration of that matter.

Background

The facts relevant to this case have been presented by the parties in the form of a joint stipulation. The following summary of those facts is taken from the stipulation.

GSA annually solicits, from airlines seeking to provide transportation services to the Government, bids for the provision of transportation between specified cities. It then awards "city pair" contracts to airlines for services during specified federal fiscal years. The agency awarded to Delta city pair contracts for various federal fiscal years. This appeal involves interest on the invoices for travel under government travel requests (GTRs) issued to Delta under its 2005, 2006, and 2007 city pair contracts.

In March 2004, the Government Accountability Office issued a report which concluded that the Department of Defense (DoD) had paid several airlines for passenger tickets that were not used in 2001 and 2002. GSA subsequently demanded that Delta refund alleged overpayments Delta had received; if the airline did not comply, GSA said, the Government would deduct the amounts in question from payments due for government employee travel tickets purchased later by GTRs. (When a GTR is used for travel, the Government does not make payment for tickets until after travel has occurred.) Delta entered into discussions with GSA and researched tickets that DoD reported as not having been used.

On September 14, 2005, Delta petitioned for Chapter 11 bankruptcy protection. Delta continued to provide transportation for government employees and cargo while it was in bankruptcy.

Shortly after the filing of the bankruptcy petition, GSA began collecting and withholding funds for payment for transportation which occurred after that filing (also called "post-petition transportation"). An auditor contracted by GSA had approved payment of these funds, and no agency had disputed the validity of the invoices. GSA took the position, however, that it was entitled to recoup payments for unused tickets purchased in 2001 and 2002 from amounts owed to Delta for post-petition transportation which had been provided pursuant to GTRs.

On February 7, 2006, Delta requested a declaratory judgment by the United States Bankruptcy Court for the Southern District of New York precluding GSA from withholding payment for transportation ordered after Delta had filed for bankruptcy. On November 3, 2006, the court held that because Delta was operating in bankruptcy, GSA had no authority to set off payment for this transportation as a means of collecting amounts which were owed prior to the filing of the petition. *In re Delta Air Lines*, 359 B.R. 454 (Bankr. S.D.N.Y. 2006).

The Government appealed the decision on December 5, 2006. The appeal was dismissed by stipulation of the parties on July 27, 2007. At that time, the bankruptcy court's ruling as to the illegality of withholding payment became final.

GSA paid Delta the bulk of the principal amount owed under the invoices on March 7, 2007. It paid Delta the remainder of that amount on August 28, 2007. Neither of these payments included interest.

On January 31, 2008, Delta filed a certified claim with a GSA contracting officer for the total amount of unpaid statutory interest to that date. On May 8, 2008, the contracting officer denied the claim.

Discussion

Prompt Payment Act interest

In 1982, Congress, determined to "provide incentives for the Federal Government to pay its bills on time," H.R. Rep. No. 97-461, at 1, *as reprinted in* 1982 U.S.C.C.A.N. 111, enacted the Prompt Payment Act (PPA), Pub. L. No. 97-177, 96 Stat. 85 (1982). In its present form, the PPA contains the following basic scheme for achieving that objective: 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." That date 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 involved. 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 (CDA), or one year passes from the required payment date. *Id.* §§ 3902(a), (b), 3907(b).

The PPA contains an exception to the requirement for payment of interest on invoices not paid by the required payment date. Interest is not mandated "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).

The parties disagree as to whether this exception applied to GSA's withholding of payments on Delta's invoices under the carrier's 2005, 2006, and 2007 city pair contracts. GSA believes that it was justified in not paying interest while its withholding of payments on those invoices was in dispute in bankruptcy court. The agency maintains that if it owes

any interest to Delta, the interest should run only for the time between the date on which the Government's appeal of the bankruptcy court decision was dismissed (July 27, 2007) and the date on which payment on the invoices was made (August 28, 2007). Delta contends that the PPA precludes the running of interest not when payment is related to any sort of dispute, but rather, when there is a dispute related to payment under or compliance with the contract in question. Delta reads the exception in light of a statement in the House of Representatives committee report on the 1988 amendments to the Act: "The act's protections apply only when there is no *dispute relating to a contractor's performance in accordance with the terms and conditions of the contract*." H.R. Rep. No. 100-784, at 11, *as reprinted in* 1988 U.S.C.C.A.N. 3036, 3039 (emphasis added).

We agree with Delta. The evident meaning of the statute's exception, particularly in light of the legislative history, is that PPA interest fails to run on payment for contracted-for property or services only when an agency disputes that the contractor performed the work for which it has invoiced or the invoice is otherwise defective. These are the sole situations in which the contractor's invoice may not be considered "proper" and thus fail to trigger the requirement for prompt payment. The Government has never disputed that Delta provided the services for which it invoiced, and it has not contended that any of Delta's invoices was defective. Consequently, on each of the invoices in question, PPA interest began to run thirty days after the invoice was received by the Government, and it ran until payment was made, the CDA claim was filed, or one year passed after that required payment date, whichever came first.

This result is consistent with the one reached in the only decision cited by either party which bears on our situation, *In re Frontier Airlines, Inc.*, 146 B.R. 574 (D. Colo. 1992). In that case, the district court affirmed the bankruptcy court's holding that the Government owed to an airline operating in bankruptcy interest on amounts which had been improperly set off against amounts owed to the airline. GSA considers *Frontier Airlines* inapposite because there, the airline sought interest as part of a bankruptcy proceeding, whereas here, it seeks interest in a CDA proceeding. We agree with Delta that the identity of the proceeding makes no difference. Frontier sought and Delta seeks interest under the PPA, which runs as a matter of law if certain conditions are present. Those conditions were present in both instances, so the interest should run here as it did there.

Unlike GSA, we do not find this result inequitable. The agency withheld from Delta for a period of years money which it acknowledged was owed to the airline, but which it believed should be set off against money which the airline owed to the Government. The bankruptcy court held that the set-off was improper; the Government had thus improperly withheld money which was rightfully Delta's. The Government had the use of Delta's money for a period of years, and compensating Delta for that use, by awarding it interest, is

appropriate. Had the Government prevailed in the bankruptcy proceeding, interest might have run against Delta on the amount it owed to the Government, and if the calculations for both principal and interest amounts were identical, the Government would not have owed Delta any net interest. But the Government did not prevail, so interest ran only on the amount it improperly withheld.

Contract Disputes Act interest

The CDA provides that "[i]nterest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title [41, United States Code] from the contractor until payment thereof." 41 U.S.C. § 611. Because we have found that amounts are due Delta, consequent to its claim for PPA interest, the airline is clearly entitled to interest under the CDA from the date on which the GSA contracting officer received the airline's January 31, 2008, certified claim until the date of payment. Delta maintains that it is additionally entitled to interest under the CDA from the date on which PPA interest ceased to run until the date on which the contracting officer received the certified claim.

This portion of Delta's argument is inconsistent with the requirements of the CDA, as understood by the Court of Appeals for the Federal Circuit. The provision of the CDA relating to interest references receipt of a claim by a contracting officer. It is consonant with the fundamental provision of the Act which states, "All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). The Court of Appeals has explained, "Under the CDA, a final decision by the contracting officer on a claim . . . is a 'jurisdictional prerequisite' to further legal action thereon." *Sharman Co. v. United States*, 2 F.3d 1564, 1569 (Fed. Cir. 1993) (cited approvingly in *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc)). It is true, as Delta notes, that the Court has held that there is "no requirement in the [CDA] that a 'claim' must be submitted in any particular form or use any particular wording." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). Immediately following that sentence, however, the Court continued, "All that is required is that the contractor submit in writing *to the contracting officer* a clear and unequivocal statement *that gives the contracting officer* adequate notice of the basis and amount of the claim." *Id.* (emphasis added).

Until Delta submitted its certified claim on January 31, 2008, the airline had neither submitted a claim to a contracting officer nor received a decision from such an official. It may be true, as Delta argues, that in the context of its disputes with the Government as to rights and obligations as affected by the airline's bankruptcy petition, Delta made GSA as well as Department of Justice attorneys cognizant of its demands for interest. But even if

these discussions might possibly be construed to have made those demands into "claims," as that term is used in the CDA, it certainly does not evince any submission to a contracting officer. As the Court has held in other circumstances, contracting officers are "a limited class of government employees" with specialized authority, and that authority cannot be implicitly conveyed to or assumed by others. *See Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339, 1341, 1344 (Fed. Cir. 2007); *City of El Centro v. United States*, 922 F.2d 816, 820-21 (Fed. Cir. 1990).[1] We consequently conclude that Delta is not entitled to CDA interest, on amounts improperly withheld, for any period of time prior to the contracting officer's receipt of the January 31, 2008, claim.

Decision

We consequently **GRANT** the appeal **IN PART AS TO ENTITLEMENT**. Delta is entitled to be paid interest as calculated under the Prompt Payment Act on each invoice in question from the thirty-first day after that invoice was received until the first of the following events occurred: payment was made, Delta's January 31, 2008, claim for interest was filed under the Contract Disputes Act, or one year passed from the date on which interest began to run. Delta is also entitled to be paid interest as calculated under the Contract Disputes Act from the date on which the contracting officer received Delta's January 31, 2008, claim until the date of payment. Delta is not entitled to be paid any additional Contract Disputes Act interest.

The Board urges the parties to attempt to apply the holdings of this decision to the calculations of the amount due Delta under its claim. The parties shall file with the Board, within thirty days of the date of the decision, a report on the status of their efforts.

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STEPHEN M. DANIELS
Board Judge

[1] We recognize that the district court in *Frontier Airlines*, 146 B.R. at 579, came to a contrary conclusion. We respectfully believe that the court's ruling was wrong in this regard.

We concur:

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BERYL S. GILMORE
Board Judge

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CANDIDA S. STEEL
Board Judge