The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: City of Aberdeen

File: B-226231

Date: October 23, 1987

DIGEST

Army Corps of Engineers (Corps) erroneously overbilled City of Aberdeen for 1983 annual payment under water storage contract. When error was discovered, Corps credited overpayment to 1985 charges. Aberdeen's claim for interest on the overpayment may not be allowed in view of long-established prohibition on recovery of interest from United States except where expressly authorized in relevant statute or contract.

DECISION

A disbursing officer at the Portland District, Corps of Engineers (Corps), Department of the Army, has requested our decision on a claim by the City of Aberdeen, Washington, in the amount of $113,835, representing interest on an overpayment by the city to the Corps under a contract. As explained below, the claim cannot be allowed since the payment of interest in the circumstances presented is authorized neither by statute nor by the relevant contract.

BACKGROUND

In 1967, the City of Aberdeen entered into a contract (Contract No. DACW67-68-C-0024) with the United States acting through the Corps of Engineers, for storage of the city's municipal and industrial water supply in the Wynoochie Dam and Reservoir, a federal flood control project. The contract requires the city to make annual payments to the government over a 50-year period for a stated percentage of the government's project construction costs. In addition, the city is required to make annual payments for operation and maintenance costs of the Wynoochie Project.

Over the years, the Corps' Seattle District has billed the city for its annual payment. In 1983, the Seattle District erroneously calculated the operation and maintenance payment, and overbilled the city in the amount of $422,043,

which the city paid. When the mistake was discovered in April 1985, the Seattle District advised the city that it would not refund the overpayment but would credit it against the city's payment for 1985. The Seattle District also advised that it would pay compound interest on the overpayment. The $113,835 figure was derived by applying the interest rates applicable under the Contract Disputes Act of 1978 to the overpayment from the date of the city's payment through the end of 1985.

When the matter reached the Corps' Portland District for payment (apparently in the form of further credits against future payments by the city), the Portland disbursing officer declined, on the grounds that the proposed payment constituted a "prohibited interest payment" and thus could not be paid "due to the absence of any contract provision or statute which specifically authorized such a payment." In view of the disagreement between the Portland and Seattle Districts, the disbursing officer requested this decision, forwarded to us through the Office of the Comptroller of the Army. The disbursing officer is correct.

DISCUSSION

The starting point is the long-established rule that, except for certain eminent domain takings under the Fifth Amendment of the Constitution, interest is not recoverable against the United States unless it has been expressly authorized by statute or contract. The Supreme Court has recognized and applied the so-called "no-interest rule" in numerous cases. E.g., United States v. N.Y. Rayon Importing Co., 329 U.S. 654 (1947); United States v. Thayer-West Point Hotel Co., 329 U.S. 585 (1947). It is undisputed that there is no provision in Contract No. DACW67-68-C-0024 that authorizes the payment of interest on the return of overpayments by the city. Also, as discussed further below, there is no statute authorizing the payment of interest in this case.

The Seattle District has suggested two possible grounds for allowance of the proposed payment, neither of which is sufficient.

1. Interest By Any Other Name

According to the record, the money the city used to make the overpayment was drawn from interest-bearing accounts. Thus, the city lost interest income on these funds. It is suggested that the city's claim can be viewed not so much as a claim for interest but as a claim for "damages" for the government's breach of contract in submitting an inaccurate billing.

In rejecting an argument that the no-interest rule does not bar the award of compensation for delay, the Supreme Court recently said that "the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution." Library of Congress v. Shaw, ___U.S.___, 106 S.Ct. 2957, 2965 (1986). The Shaw Court cited with approval the case of United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975), in which the Court of Claims stated:

> "[The] no-interest rule applies to any incremental damages sought to be assessed against the United States, whether it be designated interest, as such, or is designated by some other terminology which has the same effect . . . .[Emphasis in original.]
>
> "[T]he character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it." 518 F.2d at 1321, 1322.

See also United States ex rel. Angarica v. Bayard, 127 U.S. 251, 259-60 (1888); Ramsey v. United States, 101 F. Supp. 353, 356 (Ct. Cl. 1951), cert. denied, 343 U.S. 977 (1952); Moran Brothers Co. v. United States, 61 Ct. Cl. 73, 106 (1925).

It is clear that the city's claim in this case is a claim for interest. The city has designated it as such. It represents the time value of money, in this case the amount of interest income the city could have earned but for the overpayment. And the amount proposed for payment is calculated by applying an interest rate to a principal amount over a period of time. Therefore, the no-interest rule applies.

2. Interest for Delay in Payment of Settlement

The Seattle District further suggests that interest may be authorized at least from the discovery of the error in April 1985, citing two board of contract appeals decisions allowing interest for delay in payment of a negotiated settlement. Dawson Construction Co., Inc., GSBCA No. 5777, 80-2 BCA para. 14,817 (1980); Elkhorn Construction Co., VABCA Nos. 1493 et al., 84-2 BCA para. 17,435 (1984).

While the cited decisions did award interest for delay in payment of a settlement agreement, the boards in those cases were applying a specific statutory interest provision,

section 12 of the Contract Disputes Act of 1978, 41 U.S.C. § 611. The Contract Disputes Act applies with respect to a contract under which the government is procuring goods or services. 41 U.S.C. § 602(a). It does not apply when the government is providing services. Rider v. United States, 7 Cl. Ct. 770 (1985). Thus, the interest provision of the Contract Disputes Act, and the case law applying it, are not relevant to the city's claim in this case.

Also, as the disbursing officer has noted, the Prompt Payment Act, 31 U.S.C. §§ 3901-3906, does not apply. First, the contract in this case predates the October 1, 1982 effective date of the Prompt Payment Act (Pub. L. No. 97-177, § 7(a), 96 Stat. 88). Second, as with the Contract Disputes Act, the Prompt Payment Act applies only to the acquisition of "property or service from a business concern" (31 U.S.C. § 3902(a)). We are aware of no other statute authorizing the payment of interest under the circumstances presented.

In view of the foregoing, since there is no authority for the payment of interest in this case either in the relevant contract or in any statute, the city's claim may not be paid.

for Milton J. Socolar
Comptroller General
of the United States