

## ASBCA Discusses Prompt Payment Act

Written by Administrator  
Monday, 19 July 2010 00:00

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We have [noted before](#) that the DOD has attempted to wiggle out of complying with the requirements of the Prompt Payment Act (Public Law 97-177, or PPA) when involved in military contingency operations. In August 2009, DOD issued a “class deviation” to evade requirements of FAR 32.9 with respect to such operations. [On July 13, 2010](#), DFARS 232.908 was revised and a related contract clause was implemented (252.232-7011 “Payments in Support of Emergencies and Contingency Operations”) to permanently exempt such operations from the requirements of the Prompt Payment Act.

These actions concerned us. As we said in our previous article on the topic—

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The purpose of the Act, and its implementing regulations in the FAR, was to protect contractors from a government bureaucracy that was notoriously slow to pay, and from the cash flow hardships caused by such slow payments. These contractors, who generally must follow all direction given to them by authorized government representatives, and who generally must continue to perform their government contracts regardless of any losses they may be incurring, had little if any recourse available to them for such contract breaches, short of litigation. But under the Prompt Payment Act, contractors could typically expect to receive payment for properly prepared invoices within 30 days (often sooner), or else receive an additional interest payment automatically--i.e., without making another request.

But this article isn't really about the DOD evading its statutory obligations to pay its contractors timely. It's more about a [recent decision](#) by the Armed Services Board of Contract Appeals (ASBCA), who were asked to decide a contractor's claim for interest due pursuant to the requirements of the Act. Before the Court was a request for [summary judgment](#), with the Government moving for a dismissal – i.e., the Government asserted that it was entitled to a decision without a trial because it was clearly going to prevail as a matter of law. Judge Peacock wasn't so sure.

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Calvary Security Group (CSG) supplied equipment and supplies to the Iraqi police forces under an ID/IQ contract, originally with the Coalition Provisional Authority (CPA). The contract provided that—

Inspection and acceptance was to be ‘conducted by DCMA QAR’ at a third Baghdad warehouse and ... ‘Invoices are submitted to the contracting officer, end user for approval certification and submission to the USACE Finance Center [in Tennessee] in conjunction with the receiving report (DD250).’

CSG submitted a certified claim to the contracting officer in the amount of \$196,640 alleging that the government owed it PPA interest penalty for late payments for deliveries made under the contract. CSG was asking only for the interest that was payable ‘automatically’ under the regulatory provisions implementing the PPA (which were recited at length by the Judge in the decision).

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The Government contended that “payments were timely issued within 30 days of actual acceptance of the supplies” and, therefore, CSG was not entitled to any interest under the PPA. The Government asserted that the contract required inspection by the DCMA QAR and that Government acceptance took place only upon the QAR’s execution of the Form DD250. According to the government, the 30 day PPA payment period did not commence until the date of the QAR’s completion of the form for each of the deliveries in dispute. The government asserted that payments generally were made within 30 days of the actual acceptance/signature dates indicated in the DD250 forms and, therefore, the payments were not subject to PPA interest.

Judge Peacock, writing for the Court, disagreed with the Government’s position, stating—

OMB regulations establish as a general rule that PPA interest penalty begins to accrue 30 days following the later of the date of actual receipt of the invoice if annotated or seven days after delivery of the supplies ordered, or the invoice date if not annotated, absent circumstances and exceptions not germane to disposition of the present motion. The actual acceptance date is relevant to the extent that it occurs prior to the end of the “constructive acceptance” period of seven days for this contract. ... The government’s interpretation of the Prompt

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Payment clause ignores ¶ (a)(5)(i) of that clause which states that 'acceptance is deemed to occur constructively on the 7<sup>th</sup> day (unless otherwise stated in this contract) after the Contractor delivers the supplies....' Although FAR 32.908(c)(1) and FAR 32.904(b)(4) authorize extension of the seven day 'constructive acceptance' period if justified, no such modification of the date was specified here or permitted for this ... contract. The 'constructive acceptance' provision in the clause is reiterated in FAR 32.904. See

*also*

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FARS 232.905(1). Of course, the government is entitled to take reasonable and appropriate actions to ensure conformance of the delivered supplies with contractual requirements. However, inspection delays extending beyond the prescribed seven days do not postpone accrual of interest penalty where there are no disagreements regarding quantity, quality or contractor compliance with contractual requirements.

The Government's motion for summary judgment was denied.

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We think this case is illustrative of some of the mechanics of the Prompt Payment Act. In our experience, contractors are often reluctant to assert their right to interest on late payments. This case shows that contractors may have a good chance of prevailing in litigation when they assert their rights under the Act.