This material reprinted from Government Contract Costs, Pricing & Accounting Report appears here with the permission of the publisher, Thomson/West. Further use without the permission of West is prohibited. For more information or to subscribe, call 1.800.344.5009.

GOVERNMENT CONTRACT
COSTS, PRICING & ACCOUNTING REPORT®

THOMSON
WEST

Volume 1, Issue 3 November 2006

FEATURE ARTICLE

¶ 21

Recovery Of Interest Against The Government

By Karen L. Manos

The American Bar Association Section of Public Contract Law on June 30 submitted recommendations to the Section 1423 panel—the Acquisition Advisory Panel established by §1423 of the Services Acquisition Reform Act of 2003—to revise the rules for recovery of interest by Government contractors. The section made three recommendations: (1) extend the interest provision of the Contract Disputes Act (CDA) to all Government contracts, (2) amend the CDA to allow stand alone or "interest only" type claims and (3) increase the CDA interest rate to more equitably compensate contractors and reflect the significant disparity between Government and private-sector financing costs.[1] According to the section, these recommendations are necessary to resolve existing "inconsistencies" and "fundamental inequities" with respect to the Government's payment of interest in connection with Government contract claims and disputes. The section noted that "[w]hile the government has rights to recover interest against virtually any debtor, there are various kinds of government contracts where the contractor has no interest recovery rights."[2] The section also observed that although the CDA allows interest, recent cases, including in particular the Federal Circuit's decision in *England v. Contel Advanced Systems, Inc.*, "have held that current law denies recovery to contractors for damages for incurred interest when represented as interest on a 'stand alone' or interest only basis."[3]

This article examines the what and why of these "inconsistencies" and "fundamental inequities." It discusses the rules for recovery of interest against the Government, and analyzes recent cases to determine whether they can be reconciled with these rules. It concludes that the "no interest" rule is the unifying theme behind the "inconsistencies" and "fundamental inequalities" noted by the section.

Sovereign Immunity and the 'No Interest' Rule

The doctrine of sovereign immunity is relatively straightforward, and, at first blush, does not appear to have anything to do with the payment of interest. Sovereign immunity is the Government's immunity from being sued without its consent.[4] The Government's consent to be sued is jurisdictional; absent such consent, no court or agency board of contract appeals has jurisdiction to hear the case.[5] Statutes waiving sovereign immunity are strictly construed in favor of the Government,[6] and, to be effective, a waiver must be "unequivocally expressed."[7] In waiving sovereign immunity, the Government can place limits and conditions on its consent to be sued.[8] For example, the Federal Tort Claims Act (FTCA) waives the Government's sovereign immunity for tort claims based on personal injury or property damage caused by the negligent acts or omissions of Government employees acting within the scope of their employment under circumstances where a private person would be liable in accordance with the law of the place where the act or omission occurred.[9] At the same time, the FTCA limits the Government's liability for

 © 2006 ❖ Thomson/West

such claims, stating that the U.S. "shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, *but shall not be liable for interest prior to judgment or for punitive damages*."[10]

The "no interest" rule is a corollary to the doctrine of sovereign immunity. It presumes that the Government's consent to be sued does not include consent to prejudgment interest in the absence of a separate, express waiver to the award of interest. As the Supreme Court explained in *Library of Congress v. Shaw*:

> In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award. This requirement of a separate waiver reflects the historical view that interest is an element of damages separate from damages on the substantive claim.[11]

The Court in *Shaw* explained that, because interest was presumed to be beyond the contemplation of the parties (as a result of the centuries-old religious proscriptions against charging interest), common law courts in England generally did not allow interest as damages absent an express agreement by the parties. The same "agreement-basis" rule was adopted by early American courts, but gradually faded away in suits between private parties.[12] Nevertheless, the courts have continued to apply the agreement requirement in suits against the U.S. as a corollary to the basic rule of sovereign immunity. The Court's opinion explains:

> The agreement requirement assumed special force when applied to claims for interest against the United States. As sovereign, the United States, in the absence of its consent, is immune from suit. This basic rule of sovereign immunity, in conjunction with the requirement of an agreement to pay interest, gave rise to the rule that interest cannot be recovered unless the award of interest was affirmatively and separately contemplated by Congress.[13]

In establishing the Court of Claims, Congress retained the agreement-basis rule for prejudgment interest. An 1863 amendment to the statute that created the court states that "no interest shall be allowed on any claim up to the time of the rendition of the judgment by said court of claims, unless upon a contract expressly stipulating for the payment of interest."[14] The current version of this statute is now codified at 28 USCA § 2516, which provides in pertinent part: "Interest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof."[15]

Interestingly, the Supreme Court has held that the "no interest" rule does not apply to Fifth Amendment "takings" cases, which the COFC hears under its Tucker Act jurisdiction. The Tucker Act waives the Government's sovereign immunity for non-tort monetary claims that are founded upon the Constitution, a federal statute, or an express or implied contract with the U.S.[16] In takings cases, the Supreme Court has consistently held that the Fifth Amendment's guarantee of "just compensation" entitles the property owner to interest from the date of the taking until the date of payment.[17]

By its terms, § 2516 applies only to COFC judgments, but the Supreme Court has "repeatedly made clear that the Act merely codifies the traditional legal rule regarding the immunity of the United States from interest."[18] Therefore, the Supreme Court stated, "[i]n cases not in the Court of Claims, this Court has reaffirmed the notion: 'Apart from constitutional requirements, in the absence of specific provision by contract or statute, or express consent ... by Congress,' interest does not run on a claim against the United States.' "[19]

Alan Washburn has argued persuasively that courts treating the "no interest" rule as a matter of sovereign immunity have mistakenly conflated the terms "traditional immunity" and "sovereign" into "sovereign immunity."[20] However, in *Shaw*, the six member majority and the three dissenting justices agreed that the "no interest" rule is, at least, a corollary to the general sovereign immunity doctrine. The dissenting justices stated:

> The so-called "no-interest rule" is, as the Court suggests, one of considerable antiquity. It is a corollary of the ancient principle that the sovereign is immune from suit and from liability for damages in the absence of an ex-

 © 2006 ❖ Thomson/West

> press waiver of immunity. And, as a corollary of the general sovereign immunity doctrine, the no-interest rule logically should be governed by the same canons of construction we employ to interpret waivers of sovereign immunity for suits for damages.[21]

The dissenting justices parted company with the majority in concluding that "Congress, in stating [in Title VII of the Civil Rights Act] that the Federal Government is liable for attorney's fees to the same extent as other losing parties, waived sovereign immunity for both fees and prejudgment interest thereon."[22]

When it applies, the "no interest" rule is defined broadly. As the Supreme Court observed in *Shaw*, "the force of the no-interest rule cannot be avoided by devising a new name for an old institution: '[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.' "[23]

Interest on a Claim v. a Substantive Claim for Interest

Although the "no interest" rule is broadly defined, it applies only to interest *on a claim*, and not to substantive claims for interest. Indeed, the theoretical basis for the "no interest" rule is that there is a difference between interest and the substantive claim—and, more particularly, that interest is an element of damages separate from damages on the substantive claim. In many circumstances, it is easy to distinguish interest from the substantive claim. For example, if the Government directs a change that increases the cost of performance by $10 million, the substantive claim is the $10 million change order, and interest is the time value of money from the date the increased costs were incurred until the claim is paid. Similarly, if the Government delays making payment on a contract, the delayed payment is the substantive claim, and interest is the time value of money resulting from the delayed payment.

In other circumstances, it is more difficult to distinguish between interest and the substantive claim. For example, what if a Government agency lacked sufficient funding to buy something, and sought instead to have a contractor acquire the item and license or lease it to the agency on an annual basis? A contractor in that circumstance likely would use private financing, and the Government's payments would include the contractor's financing costs. The financing itself is of value to the Government—and the Government is willing to pay extra for the contractor to provide private financing—because that is what allows the Government to avoid the funding constraints inherent in fixed period appropriations. When the Government directs a change in that circumstance, the contractor's increased costs will often be nothing more than increased financing costs. Accordingly, the substantive claim would be the additional financing costs the contractor must pay as a result of the change, while the interest on the claim is the time value of money from the date the contractor incurs the additional financing costs until the claim is paid. The distinction between interest on a claim and a substantive claim for interest in that circumstance is somewhat analogous to the distinction the Supreme Court has drawn between Tucker Act claims for "money damages" and Administrative Procedure Act actions for specific relief in which money is "the very thing" to which a party is entitled.[24]

Interest on Delayed Payment

Interest on delayed payments is precisely the type of interest covered by the "no interest" rule.[25] The Prompt Payment Act (PPA) expressly waives the Government's immunity to an award of interest. The PPA requires that agencies failing to pay for delivered goods and services by the required payment date must automatically pay interest penalties.[26] However, PPA interest penalties do not apply (1) when payment is delayed because of a dispute between the agency and the contractor over the amount of payment or other issues concerning compliance with the terms of the contract, (2) for contract financing payments, (3) when amounts are withheld temporarily according to the contract, (4) when an electronic funds transfer is not timely credited to the contractor's account because of a failure of the Federal Reserve or the contractor's bank, or (5) when the interest penalty is less than

© 2006 ❖ Thomson/West

one dollar.[27] In addition, PPA interest ceases to accrue after one year.[28]

The exception for payments in dispute can significantly undercut the value of the PPA remedy. In *Active Fire Sprinkler Corp. v. General Services Administration*, the General Services Board of Contract Appeals held that a contractor was not entitled to PPA interest on contract payments withheld during a six-year Department of Labor investigation of alleged violations of the Davis-Bacon Act and Contract Work Hours and Safety Standards Act.[29] Reasoning that "payments disputed as to amount or as to compliance with the contract are not covered by the PPA," the board held that:

> 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 withheld funds become available for payment to appellant and does the PPA thirty-day time period start to run.[30]

Interest on Borrowed Money

In the absence of an express waiver, the "no interest" rule bars recovery of interest on money a contractor is forced to borrow as a result of a Government-directed change or breach of contract. *J.D. Hedin Construction Co., Inc. v. U.S.* arose out of a claim for breach of contract resulting from the Government's improper termination of the contractor's right to proceed.[31] The contractor took out a loan to pay the surety's costs of completing the contract and claimed interest on the loan as part of its damages. Although the Court of Claims found that the termination was improper and the contractor was entitled to recover the excess completion costs, the court held that the contractor could not recover interest on the bank loan. Regarding the contractor's claim for interest, the court stated:

> This claim is not allowable as a matter of law. Interest paid on bank loans made because of financial stringency resulting from a breach by the Government of a contract between it and the borrower is not recoverable as an item of damages. It is … well established that interest on borrowed money is not recoverable in suits against the Government unless it is called for in the contract itself or in the governing statute. Neither of these conditions is found here. The statutory prohibition against the allowance of interest cannot be circumvented by casting the claim in the form of an item of damage for breach of contract.[32]

In contrast to sovereign immunity, which can be waived only by statute, the "no interest" rule can be waived by contract. The Changes clause waives the "no interest" rule by providing for an equitable adjustment for any increased costs that result from a Government-directed change.[33] In *Bell v. U.S.*, the Court of Claims held that allowing interest as a cost under an equitable adjustment was not in conflict with 28 USCA § 2516(a) because "the statute and its policy apply to demands in 'breach' claims against the United States where the plaintiff seeks compensation for delay in payment;" whereas, the plaintiff's demand in that case was "not based upon 'breach' but upon a change compensable under the 'Changes' article which entitles the contractor to reimbursement for the resulting 'increase … in the cost of performance of this contract.' "[34]

Somewhat illogically, in analyzing interest as an element of an equitable adjustment, the cases applying *Bell* distinguish between equity capital and borrowed funds, denying claims for imputed interest on equity capital and allowing claims for interest paid on borrowed funds. In two 1977 cases, the Court of Claims expressly declined to follow a line of Armed Services Board of Contract Appeals cases holding that an equitable adjustment for Government-directed changes may properly include imputed interest on equity capital used to finance the changed work.[35] In those cases, the court held that there are only two circumstances in which a contractor can recover interest as part of an equitable adjustment: (1) when the contractor takes out a specific loan to finance the changed work, and (2) when the contractor can prove a specific necessity to increase its general business borrowings as a result of the changed work.

The Court of Claims applied this rule in *Dravo Corp. v. U.S.* to deny the contractor's claim for

 © 2006 ❖ Thomson/West

interest on equity capital.[36] The contractor's claim in *Dravo* arose out of various Government-directed changes and suspensions of work that took an inordinately long time to resolve. The contractor submitted a claim for interest on the added costs and expenses, measured from the time the changes were directed and work was suspended until the date of the contract modifications recognizing the contractor's right to payment. The contractor computed its claim using the average rate of corporate borrowing during the relevant period. Citing the 1977 decisions, the Court of Claims held that "it is clear that this court still holds to the view that direct tracing to a specific loan or necessity for increased borrowing is still required to be proven in order for a contractor to recover for interest costs under an equitable adjustment theory."[37]

The Federal Circuit reaffirmed this rule in *Wickham Contracting Co., Inc. v. Fischer*.[38] The parties in *Wickham* agreed that, as a result of Government-imposed delays, work under the contract was not completed until 969 days after the contract date. The contractor claimed that it was forced to counter the severe cash flow problems resulting from this lengthy delay by using its equity and borrowings to subsidize the contract work. The Federal Circuit held that the contractor was not legally entitled to receive interest for its equity capital and had not met its burden of establishing that the borrowed funds were actually used on the contract work.[39]

Although interest on borrowings generally is recoverable as part of an equitable adjustment, it is *not* recoverable if the Federal Acquisition Regulation cost principles apply. Interest on borrowings has been unallowable for as long as there have been cost principles.[40] DOD's previous policy of reimbursing interest as an element of an equitable adjustment changed in 1970 with the promulgation of Defense Procurement Circular 79. DPC 79 added the following Pricing of Adjustments clause to the Armed Services Procurement Regulation: "When costs are a factor in any determination of a contract price adjustment pursuant to the 'Changes' clause or any other provision of this contract, such costs shall be in accordance with Section XV of the Armed Services Procurement Regulation as in effect on the date of this contract."[41] The clause is now found at Defense Federal Acquisition Regulation Supplement 252.243-7001 and named Pricing of Contract Modifications. There is no comparable clause in the FAR, but the FAR supplements for both GSA and the Department of Health and Human Services include a pricing of adjustments clause.[42] These clauses effectively carve out an exception to the Changes clause waiver of the "no interest" rule.

When the cost principles apply to the computation of an equitable adjustment, interest on borrowings is expressly disallowed by FAR 31.205-20. Notably, FAR 31.205-20 applies only to interest on borrowings and other financial costs related to raising capital. The Federal Circuit has rejected attempts to read the cost principle more broadly than its plain language allows. For example, in *Lockheed Corp. v. Widnall*, the Federal Circuit reversed an ASBCA holding that the interest associated with an unintended state tax deficiency was unallowable.[43] The tax deficiency resulted from an IRS audit that disallowed several deductions, thereby increasing Lockheed's taxable income. The ASBCA concluded that the interest on the back taxes was unallowable, and the Federal Circuit reversed, holding that the cost principle "by its plain language, does not make all interest payments unallowable; rather, it provides that interest paid to raise capital is unallowable."[44] Because there was no evidence that Lockheed intended to borrow money from the State of California by underpaying its taxes, the Federal Circuit held that the interest on the back taxes could not be considered "interest on borrowings" within the meaning of the cost principle. Consistently, in *Ingalls Shipbuilding, Inc. v. Dalton*, the Federal Circuit rejected the Navy's argument that the additional compensation payments Ingalls was required to make because it failed to timely pay claims of employees with noise-induced hearing loss were unallowable interest payments.[45] Just as in *Lockheed*, the Federal Circuit reasoned that the payments were not covered by the cost principle because they were not related to the borrowing of money to raise capital.

On the other hand, when the cost at issue is interest on borrowings, it will be unallowable, however represented. The contractor in *Environmental Tectonics Corp.* claimed that the Government

© 2006 ❖ Thomson/West

interfered with the contractor's relationship with its surety, which caused a decline in the contractor's bonding capacity and required the contractor to pay on a cash on delivery basis and put up additional collateral to secure bonds on other work.[46] The contractor claimed as damages the opportunity cost of money on the C.O.D. purchases and funds expended for additional collaterization of bonds. The ASBCA granted the Government's motion for partial summary judgment on that aspect of the contractor's claim, holding that:

> The damages for opportunity cost of money are, indeed, unrecoverable as a matter of law. This item seeks recovery of interest, albeit interest income lost rather than income expense incurred. FAR 31.205-20, made applicable by the "Pricing of Adjustments (APR 1984)" clause of the contract provides that "[i]nterest on borrowings (*however represented*)" (emphasis added) shall be unallowable. We view the highlighted phrase as encompassing not only interest on actual borrowings but also the economic equivalent thereof where a contractor foregoes interest income by making expenditures from its own capital.[47]

Consequently, cases involving contracts that include a pricing of adjustments clause or pricing of contract modifications clause consistently have disallowed the cost of interest on changed work.[48]

Reconciling *Contel Advanced Systems*

The dispute in *England v. Contel Advanced Systems, Inc.* arose out of a lease-to-ownership plan (LTOP) contract for the design, installation and maintenance of a telecommunications system. The contractor claimed and the ASBCA found that the Navy breached its implied obligation of good faith and fair dealing by failing to timely adjust the LTOP price. As a result, the contractor was required to maintain a higher loan balance than was actually required, resulting in higher financing costs. In sustaining the contractor's appeal for the excess financing costs, the ASBCA reasoned that the Pricing of Adjustments clause applies only to claims under the Changes or other remedy-granting clause, and not to a breach of contract claim.[49] The board acknowledged the general applicability of the "no interest" rule, but found the requisite waiver based on the fact that "payment of interest was an integral part of the parties' contract and it would be disingenuous to suggest otherwise." The board noted, for example, that the monthly payments "included a component for interest." Accordingly, the board held that the contractor was entitled to recover the increased financing costs resulting from the Navy's breach.

The Federal Circuit in a split decision reversed, holding that "[t]he no-interest rule bars the award of interest damages on a claim against the United States."[50] Citing *Library of Congress v. Shaw*, the Federal Circuit reasoned that "[t]he no-interest rule is an aspect of the basic rule of sovereign immunity" and "has been held not only to bar the recovery of interest on substantive claims against the government, but also interest costs incurred on money borrowed as a result of the government's breach or delay of payment."[51] The court disagreed with the board's finding of an express waiver and held that the contractor's claim was barred by the "no interest" rule.[52] Circuit Judge Newman dissented, reasoning that "[t]hese damages are not interest on a claim against the government, whereby interest on a monetary obligation of the government is not available unless authorized by statute or agreed by contract. The damages here at issue are the direct cost to the contractor of the government's breach of contract."[53] Thus, while the panel majority found the contractor's claim did not consent expressly to the award of interest and thereby waived the "no interest" rule, Judge Newman found that the "no interest" rule was not even applicable because the contractor was making a substantive claim for interest. As discussed above, it can be difficult to distinguish between interest on a claim and a substantive claim for interest. While one might disagree with the Federal Circuit's characterization of the contractor's claim in *Contel*, the case itself is entirely consistent with the traditional application of the "no interest" rule, assuming it applies.

CDA Interest

Much like the PPA and Changes clause, the CDA waives the "no interest" rule by expressly providing for the award of interest. Section 611 provides:

© 2006 ❖ Thomson/West

> Interest 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 from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.[54]

Section 611 is unusual for a prejudgment interest statute in that it does not rely on costs incurred. For example, when the contractor in *Servidone Constr. Corp. v. U.S.* submitted its certified claim, it had not yet incurred all of the costs that the COFC later found the contractor entitled to recover.[55] The COFC awarded interest on the claimed costs beginning on the date the claim was submitted to the CO. The Federal Circuit affirmed, holding that the language of § 611 "sets a red letter date for interest on all amounts found due by a court without regard to when the contractor incurred the costs."[56] Reviewing the legislative history of the CDA, the Federal Circuit found that Congress intentionally chose to set a red-letter date for interest, and rejected an alternative proposal under which interest would have run from the time the claim accrued or the additional costs were incurred, whichever was later.[57]

Consistently, in *Caldera v. J.S. Alberici Constr. Co.*, the contractor filed a differing site conditions claim before all of the claimed costs were incurred.[58] The board awarded interest from the date the claim was filed, rather than from the date the costs were incurred. The Federal Circuit affirmed, once again stating that "section 611 'sets a single, red-letter date for the interest on all amounts found due by a court without regard to when the contractor incurred the costs.' "[59] Thus, contrary to the erroneous implication in FAR 33.208(a),[60] a contractor is entitled to interest on both prospective and incurred costs, provided the costs are ultimately "found due" the contractor. As the Federal Circuit stated in *Alberici*, "If the statute wrongly requires the United States to pay interest on a contractor's prospective costs, Congress may correct it."[61]

Nothing in the CDA precludes a contractor from submitting a claim for costs it expects to incur. To the contrary, the agency boards of contract appeals consistently have held that because a contractor need not actually have incurred or ascertained the costs before submitting a CDA claim, the claim may include good faith estimates.[62] Furthermore, although CDA claims must demand payment of a "sum certain," the amount of the claim may later be changed, even while the appeal is pending.[63] For example, in *Tecom, Inc. v. U.S.*, the Federal Circuit held that "a monetary claim properly considered by the contracting officer … need not be certified or recertified if that very same claim (but in an increased amount reasonably based on further information) comes before a board of contract appeals or a court."[64]

Two recent Federal Circuit decisions make clear that, while the CDA allows interest on costs claimed before they are incurred, the contractor must, at some point, incur the costs. The dispute in *Raytheon Co. v. White* arose out of the contractor's claim for a defective technical data package under a contract that had been terminated for convenience.[65] The claim included costs that would have been incurred but for the termination in an effort to establish the total contract price for the purpose of applying the Termination for Convenience clause. Consequently, the claim included costs that not only had not been incurred, but never would be incurred because the contract was terminated. Raytheon argued unsuccessfully that interest should be allowed on these prospective, never-to-be-incurred costs pursuant to the holdings in *Alberici* and *Servidone*. The Federal Circuit reaffirmed the holdings in those cases and agreed with Raytheon that "interest may not be denied merely because costs later found due had not been incurred at the time the claim was filed."[66] However, the court stated, "We have never held that section 611 permits interest to accrue on costs that, because of the termination of the contract, were never actually incurred by the contractor."[67] The court went on to observe that:

> The distinction is important because, as the government notes, the Board has not yet established an amount "found due" and did not limit its analysis of Raytheon's claim to costs actually incurred before the termination. The Board's decision was instead focused on

> determining the correct theoretical "estimate to complete" cost. Raytheon will not be paid that amount; instead, the number will help establish how much money, if any, is due to Raytheon pursuant to the contract's termination for convenience clause.[68]

The Federal Circuit's recent decision in *Richlin Security Service Co. v. Chertoff*,[69] is a good example of the old adage, "bad facts make bad law." The dispute in *Richlin* arose out of two guard service contracts that mistakenly classified the level of the guards performing the contract, and led the Department of Labor to determine that the employees were entitled to back wages under the Service Contract Act. In an earlier proceeding, Richlin argued successfully that because of its financial condition, it should not have to pay its employees the back wages before receiving funds from the Government. At the same time, the Government was concerned that if it gave Richlin the money, the employees might never receive their back wages. Accordingly, the Government paid the money to Richlin's attorney in escrow, to be paid directly to the employees. Richlin later submitted a claim for CDA interest on the amount of the back wages. Citing *Raytheon*, the Department of Transportation Board of Contract Appeals denied Richlin's appeal, concluding that "there is nothing upon which interest could accrue" because the board's award was not an amount " 'found due' appellant upon which interest could have accrued."[70] Rather, the board concluded, "[T]he funds upon which appellant seeks to collect interest were 'found due' appellant's former employees and the Federal and state taxing authorities."[71] The Federal Circuit agreed with the board's analysis, reasoning that:

> If Richlin had advanced those amounts to the employees and the tax authorities pursuant to the contract, Richlin might have been entitled to interest. But that is not what occurred. Richlin did not advance a penny of its own money, and indeed claimed that it lacked the resources to make such advances. Rather, the government paid the amounts awarded into an escrow account, and those funds were used to pay the employees and the tax authorities.[72]

The court concluded by stating: "The award of back wages did not compensate Richlin for any past, present or future out-of-pocket expense .... Richlin acted merely as a conduit, and serving as a conduit did not entitle Richlin to receive interest."[73]

The court's "conduit" language goes well beyond the holding and rationale of *Raytheon*, and could lead to mischief. For example, a prime contractor arguably acts as a mere "conduit" in sponsoring a subcontractor's claim. Yet, there should be no question that a contractor sponsoring a subcontractor's claim is entitled to CDA interest on any amounts found due the contractor, even if the contractor will pay over those amounts to the subcontractor immediately upon payment by the Government.

Interest in Non-CDA Cases

Section 2516 and the "no interest" rule explain why prejudgment interest is routinely denied in cases involving Government contracts that are not subject to the CDA, such as implied-in-fact contracts, Government sales contracts, contracts involving the purchase of real property, and cooperative research and development agreements. These types of cases fall within the Court of Federal Claims' Tucker Act jurisdiction, but are not covered by the CDA. The CDA applies only to claims arising under or relating to a "procurement contract," that is, an express or implied contract entered into by an executive agency for the procurement of goods or services (including construction) or the disposal of real property.[74] For example, in *The Sweetwater, A Wilderness Lodge LLC v. U.S.*, the COFC held that a term special use permit issued for the plaintiff's operation of lodge and cabin facilities in the Shoshone National Forest was not subject to the CDA because, although the permit was executed in order for The Sweetwater to provide recreation activity to the public on federal lands, the procurement was not for the direct benefit or use of the Government.[75] Accordingly, although the court held that The Sweetwater was entitled to an equitable adjustment under the termination clause of its term special use permit, the court held that it was not entitled to CDA interest. To recover prejudgment interest in a non-CDA case, the contractor must find a statute or contract provision expressly consenting to an award of such interest.

To subscribe, call 1.800.344.5009
© 2006 ❖ Thomson/West

The "no interest" rule can be harsh, as the COFC recognized in *Robert Suess v. U.S.*, one of the *Winstar* line of cases. The court stated:

> The court understands, of course, that the award of approximately $35 million for the value of a franchise seized 12 years ago provides Franklin with far less in economic terms than it is owed. While the court is limited by the prohibition on pre-judgment interest in this case, the court believes that the award is grossly inadequate in view of the damages actually suffered by Franklin. This, of course, is a recurring problem in the *Winstar*-related cases, because the parties who are harmed, even when able to prove damages in these difficult and novel cases, will not be made fully whole.[76]

While the Public Contract Law Section has suggested resolving this "fundamental inequity" by applying the CDA to non-CDA cases, a more direct approach may simply be to amend § 2516 or legislatively repeal the "no interest" rule.

Conclusion

In summary, the "no interest" rule is the common thread underlying the fundamental inequities noted by the Section. While the rules may, and frequently do, lead to inequitable results, there *are* rules and, for the most part, the recent cases are consistent with those rules.

❖ Endnotes

1 See Letter from Robert L. Schaefer, Chair, ABA Section of Public Contract Law to Laura Auletta, Executive Director 1423 Panel, with attached "Section of Public Contract Law, American Bar Association, Comments on Interest for Consideration of the Section 1423 Panel, the Acquisition Advisory Panel" ("Section Comments") (June 30, 2006).

2 Section Comments at 1.

3 Id. at 3-4 (citing *England v. Contel Advanced Systems, Inc.*, 384 F.3d 1372, 1382-83 (Fed. Cir. 2004)).

4 See, e.g., *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); *U.S. v. Thompson*, 98 U.S. 486, 489 (1878) ("The United States possesses other attributes of sovereignty resting also upon the basis of universal consent and recognition. They cannot be sued without their consent.")

5 See, e.g., *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.") (citations omitted); *U.S. v. Clarke*, 33 U.S. 436 (1834) ("As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it.").

6 See *Sherwood*, 312 U.S. at 590.

7 *Lane v. Peña*, 518 U.S. 187, 192 (1996).

8 *Schillinger v. U.S.*, 155 U.S. 163, 166 (1894) ("The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination."); accord *U.S. v. Nordic Village Inc.*, 503 U.S. 30, 34 (1992).

9 Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 812, codified at 28 USCA §§ 1346(b), 2671–2680.

10 Id. § 2674 (emphasis added).

11 *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986).

12 Id. at 316.

13 Id.; see also Richard L. Hanson and Mark G. Jackson, "Interest In and On Claims," 06-4 Briefing Papers (surveying cases establishing and applying the no-interest rule over the past 200 years).

14 Act of March 3, 1963, 12 Stat. 766.

15 28 USCA § 2516(a).

16 Act of March 3, 1887, 24 Stat. 505, codified at 28 USCA §§ 1346(a)(2), 1491(a)(1).

17 *U.S. v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947) (citing *Seaboard Air Line Ry. Co. v. U.S.*, 261 U.S. 299, 306 (1923); *Brooks-Scanlon Corp. v. U.S.*, 265 U.S. 106, 123 (1924); and *Phelps v. U.S.*, 274 U.S. 341, 344 (1927)).

18 *Shaw*, 478 U.S. at 317.

19 Id. (citations omitted).

20 See generally Alan V. Washburn, *The Federal Government's "Immunity" to Liability for Interest*, 19 N&CR ¶ 20.

21 *Library of Congress*, 478 U.S. at 323 (Brennan, J., dissenting).

22 Id. at 327.

23 Id. at 321 (quoting *U.S. v. Mescalero Apache Tribe*, 518 F.2d 1309, 1322 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976)).

24 *Bowen v. Massachusetts*, 487 U.S. 879, 894-95 (1988) ("Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specific remedy.'") (citation omitted). Dissenting Justice Scalia, joined by the Chief Justice and Justice Kennedy, noted how unworkable the Court's definition would be to apply in practice:

> If the jurisdictional division established by Congress is not to be reduced to an absurdity, the line between damages and specific relief must surely be drawn on the basis of the substance of the claim, and not its mere form. It does not take much lawyerly inventiveness to convert a claim for payment of a past due sum (damages) into a prayer for an injunction against refusing to pay the sum, or for a declaration that the sum must be paid, or for an order reversing the agency's decision not to pay.

487 U.S. at 915-16 (Scalia, J., dissenting).

25 See, e.g., *U.S. ex rel Angarica de la Rua v. Bayard*, 127 U.S. 251, 260 (1888) (plaintiff not entitled to interest on payment withheld by Secretary of State because "[i]t has been established as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by congress on special application").

26 31 USCA §§ 3901–3907.

27 5 CFR § 1315.10(c).

28 5 CFR § 1315.10(a)(3), (5).

29 *Active Fire Sprinkler Corp. v. General Servs. Admin.*, 01-2 BCA ¶ 31,521 at 155,618-19, 43 GC ¶ 309.

30 Id. at 155,619 (citations omitted). The court noted, however, that "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." Id. at 155,620 n.5 (citing *Sterling Millwrights, Inc. v. U.S.*, 26 Cl. Ct. 49, 90 n.15 (1992)).

31 *J.D. Hedin Constr. Co., Inc. v. U.S.*, 456 F.2d 1315 (Ct. Cl 1972).

32 Id. at 1330 (internal quotation marks, citations and footnote omitted).

33 See, e.g., FAR 52.243-1(b) ("If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.")

34 *Bell v. U.S.*, 404 F.2d 975, 984 (Ct. Cl. 1968).

35 *See Framlau Corp. v. U.S.*, 568 F.2d 687, 693-95 (Ct. Cl. 1977); *Singer Co., Librascope Div. v. U.S.*, 568 F.2d 695, 718-19 (Ct. Cl. 1977).

36 *Dravo Corp. v. U.S.*, 594 F.2d 842 (Ct. Cl. 1979).

37 594 F.2d at 847.

38 *Wickham Contr. Co. v. Fischer*, 12 F.3d 1574 (Fed. Cir. 1994).

39 12 F.3d at 1582 ("Although interest on equity capital is not recoverable, a contractor may recover interest actually paid on funds borrowed because of the government's delay in payments and used on the delayed contract.")

40 See generally Karen L. Manos, Government Contract Costs & Pricing, 1 GC-Costs 17:A.

41 ASPR 7-103.26, Pricing of Adjustments (1970 JUL).

42 See 48 CFR §§ 352.270-4, 552.243-70.

43 *Lockheed Corp. v. Widnall*, 113 F.3d 1225 (Fed. Cir. 1997), *rev'g* ASBCA No. 36910, 94-3 BCA ¶ 27,101.

44 113 F.3d at 1227.

45 *Ingalls Shipbuilding, Inc. v. Dalton*, 119 F.3d 972, 978-79 (Fed. Cir. 1997).

46 *Environmental Tectonics Corp.*, ASBCA No. 42540, 92-2 BCA ¶ 24,902 at 124,187.

47 Id., 124,188 (emphasis board's).

48 *See Servidone Constr. Corp. v. U.S.*, 931 F.2d 860, 863 (Fed. Cir. 1991) (affirming Claims Court's denial of contractor's claim to interest on sums borrowed to cover excess costs); *Superstaff, Inc.*, ASBCA Nos. 48062 et al., 97-1 BCA ¶ 28,845 at 143,887 (holding that DFARS Pricing of Contract Modifications clause precludes recovery of interest even though contract did not otherwise incorporate the FAR cost principles); *Tomahawk Constr. Co.*, ASBCA No. 45071, 94-1 BCA ¶ 26,312 at 130,871 (denying contractor's claim for interest paid on borrowed funds associated with performance of the changed work); *J.W. Bateson Co., Inc.*, ASBCA No. 22337, 78-2 BCA ¶ 13,523 at 66,269 (holding that "the payment of interest is unallowable as a cost in the pricing of adjustments"). But see *Automation Fabricators & Eng'g Co.*, PSBCA No. 2701, 90-3 BCA ¶ 22,943 at 115,165 (holding that the Pricing of Adjustments clause in the Postal Contracting Manual, which provides that the cost principles "shall serve as a guide in negotiation of such contract price adjustment," did not preclude the payment of interest on changed work).

49 *Contel Advanced Sys., Inc.*, ASBCA Nos. 50648 et al., 03-2 BCA ¶ 32,277.

50 *England v. Contel Advanced Sys., Inc.*, 384 F.3d 1372, 1378 (Fed. Cir. 2004).

51 384 F.3d at 1379 (additional citations omitted).

52 384 F.3d at 1380.

53 384 F.3d at 1382 (Newman, J., dissenting) (citations omitted).

54 41 USCA § 611.

55 *Servidone Constr. Corp. v. U.S.*, 931 F.2d 860, 862 (Fed. Cir. 1991).

56 Id. (citing *Fidelity Constr. Co. v. U.S.*, 700 F.2d 1379, 1385 (Fed. Cir.), cert. denied, 464 U.S. 826 (1983)).

57 Id. (citing S. Rep. No. 95-1118, 95th Cong., 2d Sess. 32, reprinted in 1978 U.S. Code Cong. & Admin. News 5235, 5266).

58 *Caldera v. Alberici Constr. Co., Inc.*, 153 F.3d 1381, 1382-83 (Fed. Cir. 1998).

59 153 F.3d at 1383 (Fed. Cir. 1998) (quoting *Servidone Constr. Corp. v. U.S.*, 931 F.2d 860, 862 (Fed. Cir. 1991)).

60 FAR 33.208(a) provides that:

The Government shall pay interest on a contractor's claim on the amount found due and unpaid from the date that—

(1) The contracting officer receives the claim (certified if required by 33.207(a)); or

(2) Payment otherwise would be due, if that date is later, until the date of payment.

61 153 F.3d at 1383.

62 See, e.g., *J.S. Alberici Constr. Co., Inc.*, ENG BCA No. 6179, 97-1 BCA ¶ 28,639 at 143,005-008, aff'd, 153 F.3d 1381 (Fed. Cir. 1998); see also *GE Capital Info. Tech. Solutions-Federal Sys. v. General Svcs. Admin.*, GSBCA No. 15467, 01-2 BCA ¶ 31,445 at 155,306 ("Although the amount claimed is admittedly an estimate based on extrapolation, the Government has stated a claim for a sum certain."); *Manhattan Construction Co.*, ASBCA No. 52432, 00-2 BCA ¶ 31,091 at 153,521 ("It is well settled that inclusion of an estimate does not disqualify a claim for jurisdictional purposes provided a sum certain for the entire amount of the claim is stated.")

63 *J.S. Alberici Constr. Co., Inc.*, ENG BCA No. 6179, 97-1 BCA ¶ 28,639 at 143,008 ("Contractors routinely change amounts claimed, even after an appeal has been made as relevant information is obtained. A 'sum certain' need not remain fixed throughout the claims process, so long as the information provided to the Government is accurate to the extent possible, and provides adequate notice of a monetary claim against the Government to permit adjudication.") (citing *Tecom, Inc. v. U.S.*, 732 F.2d 935, 937 (Fed. Cir. 1984), and *Contract Cleaning Maintenance v. U.S.*, 811 F.2d 586, 592 (Fed. Cir. 1987)), aff'd, 153 F.3d 1381 (Fed. Cir. 1998)

64 *Tecom, Inc. v. U.S.*, 732 F.2d 935, 938 (Fed. Cir. 1984).

65 *Raytheon Co. v. White*, 305 F.3d 1354 (Fed. Cir. 2002).

66 305 F.3d at 1365.

67 Id.

68 Id.

69 *Richlin Sec. Serv. Co. v. Chertoff*, 437 F.3d 1296 (Fed. Cir. 2006), cert. denied, 2006 WL 2055603 (U.S.), 75 U.S.L.W. 3036 (Oct. 2, 2006).

70 *Richlin*, DOTCAB No. 3034, 04-2 BCA ¶ 32,670.

71 Id.

72 *Richlin Sec. Service Co. v. Chertoff*, 437 F.3d 1296, 1301 (Fed. Cir. 2006).

73 437 F.3d at 1302.

74 41 USCA § 602(a).

75 *The Sweetwater, A Wilderness Lodge LLC v. U.S.*, 72 Fed. Cl. 208 (2006).

76 *Robert Suess v. U.S.*, 52 Fed. Cl. 221, 232 (2002).

THOMSON WEST™

 © 2006 ❖ Thomson/West