WHERE FAR PART 31 COST PRINCIPLES SPECIFICALLY APPLY, INTEREST IS NOT ALLOWED ON A LOAN TAKEN BECAUSE OF GOVT DELAY OF PAYMENT

The U.S. Code provides that "interest on a claim against the United States shall be allowed in a judgment of the U.S. Court of Federal Claims only under a contract or Act of congress expressly providing for payment thereof." 28 U.S.C. § 2516(a). The FAR provides that "[i]nterest on borrowings (however representated), bond discounts [and] costs of financing and refinancing capital…are unallowable" costs. FAR 31.205-20. (These are known as the "no-interest rule"). The Defense FAR Supplement states, in its pricing of modifications cost that "[w]hen costs are a factor in any price adjustment under this contract, the contract cost principles and procedures in FAR part 31…apply." DFARS 252.243-7001.

Along comes Doyon Utilities, which was building landfill natural gas facilities in Alaska. However, because of the United States' delay in making payment, after the government modified its contract, Doyon was forced to obtain a loan to sustain its operations and the U.S. refused to reimburse Doyon for the interest it incurred ($178,000) on that loan. *Doyon Utilities, LLC v. United States,* No. 19-199C (Fed. Cl. April 20, 2020).

Doyon submitted a claim to the contracting officer based on three things: (1) under FAR 52.243-1, there was a change to the general scope of the contract that resulted in an increase in cost of performance to Doyon; (2) alternatively, under the changes clause in the contract, FAR 52.243-1, the government approval of a "pass-through" of the landfill natural gas facilities, was a change in the general scope of the contract; and (3) alternatively the contracting officer constructively changed the contract requirements.

The U.S. Government sought to dismiss the complaint arguing that Doyon failed to state a claim for which relief can be granted because interest on borrowings is an unallowable cost under the FAR and DFARs and that subject matter jurisdiction was lacking because Doyon's claim for interest was barred by sovereign immunity of the U.S. Government.

The court examined the history of the "no-interest" rule, and found that in early decisions, the courts ruled that interest paid to third parties to finance changed work was a proper component of equitable adjustments. See *Bell v. United States,* 404 F.2d 975 (Ct. Cl. 1968). In subsequent decisions, the courts granted interest where the contract included a "Changes" clause that waived the sovereign immunity of the U.S.

The question in this case was whether or not sovereign immunity had been waived by the changes clause in Doyon's contract. In examining the cases, the Board found that when a contract specifically bars recovery of the interest on borrowings, the waiver of sovereign immunity does not apply. Doyon's claim included the DFARS pricing of contract modifications clause, which states that "when costs are a factor in any price adjustment under this contract, the contract cost principles and procedures in FAR part 31…apply. The Board held that incorporation of that provision barring interest means that the changes clause does not apply and

sovereign immunity is not waived—hence, the Board held that the interest costs were unallowable, and sovereign immunity applied.

Takeaway: Be careful of seeking interest on borrowings resulting from added costs from government delays if your contract references or includes a "no interest allowable" clause or states the cost principles and procedures in FAR part 31 apply.

For other helpful suggestions on government contracting, visit:
Richard D. Lieberman's FAR Consulting & Training at https://www.richarddlieberman.com/, and
Mistakes in Government Contracting at https://richarddlieberman.wixsite.com/mistakes.