Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

Contract Dispute of	)	
	)	Docket No. 08-TSA-040
Siemens Government Services, Inc	)	
	)	
Pursuant to Solicitation HSTS04-05-DEP156	)	

DECISION DENYING MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On January 22, 2009, Siemens Government Services, Inc. ("SGS") filed the instant Contract Dispute ("Dispute") with the Federal Aviation Administration ("FAA") Office of Dispute Resolution for Acquisition ("ODRA"). The Dispute pertains to Contract Number HSTS04-05-C-DEP156, which was awarded to SGS by the Transportation Security Administration ("TSA") on February 28, 2005 ("Contract"). The Contract requires SGS to perform both preventive and corrective maintenance on TSA-owned security equipment ("Equipment") deployed at airports throughout the United States and its territories. In the Dispute, SGS is seeking to recover $7,640,103.85, including interest plus $405,348.16, excluding interest (collectively referred to herein as "Disputed Amount"), that SGS alleges it is entitled to under the Contract. *Dispute* at 2, 3. For its part, TSA does not deny that the Disputed Amount was withheld, but contends that it was justified in doing so under the terms of the Contract. *Agency Response* ("*AR*") at 1-8.

The Dispute currently is before the ODRA on SGS's motion for summary judgment, or in the alternative, for partial summary judgment ("Motion"). The Motion asserts that the Contract's plain language establishes it, as a matter of law, as a firm fixed price contract, and not a unit price contract. *Motion* at 1. Consequently, according to SGS, it is entitled

to summary judgment on the entire Disputed Amount, inasmuch as the sole justification for the TSA's withholding rests on its allegedly incorrect interpretation that the Contract is unit price in nature. *Id.* at 4, 7. SGS further asserts that TSA's interpretation of the Contract constitutes a unilateral reformation of the Contract from a firm fixed price type to a unit price type. *Id.* at 9. To bolster its argument, SGS states that through the first three and one half years of performance, the Contract was treated as a firm fixed price contract. *Id.* For its part, the TSA asserts that SGS erroneously invoiced and was paid for Equipment that was not "deployed and utilized" pursuant to the Contract's Statement of Work and that the Disputed Amount was properly withheld from other payments made to SGS under the Contract. *TSA Response and Opposition to SGS Motion* ("*TSA Response*") at 8 quoting *Declaration of Contracting Officer William Melanson* ("*Melanson Declaration*") at ¶ 11-12.

Alternatively, SGS seeks partial summary judgment on a portion of the Disputed Amount on timeliness grounds. *Motion* at 13-14. SGS asserts that: (1) an August 15, 2008 Letter ("August 15 Letter") to SGS from the Contracting Officer ("CO"), which first asserts the Government's right to withhold the Disputed Amount, constitutes a Government claim; (2) pursuant to Disputes Clause 3.9.1.1 of the Contract, TSA was required to file a claim with the ODRA within two years of the accrual of the contract claim; and (3) the portions of the alleged claim accruing more than two years prior to the date of the August 15 Letter are not timely before the ODRA. *Id.* Stated another way, under the SGS theory, TSA is time barred from withholding funds related to acts that occurred from the inception of the Contract on February 28, 2005 through August 15, 2006. *Dispute* at 6.

After considering the Motion, as well as the parties' submissions and the record developed to date, the ODRA has concluded that: (1) the nature of the Contract as fixed price or unit price involves a mixed question of fact and law and that there are material facts in dispute related to the interpretation of the Contract that preclude summary judgment at this stage in the proceedings; and (2) the TSA's action in withholding payments and reducing invoice amounts constituted an exercise of the Government's common law right to recoupment and setoff. As such, the action is not time barred by the

ODRA's Procedural Rules governing the filing of contract disputes. The ODRA therefore denies SGS's Motion for summary judgment and partial summary judgment.

II. FACTUAL BACKGROUND

Under the Contract at issue, SGS is required to perform preventive and corrective maintenance on different types of Equipment. *Id.* at 23. The Contract Statement of Work ("SOW") provides:

> 1.0 SCOPE
>
> This Statement of Work (SOW) defines the requirements for the establishment, implementation, and maintenance of an Integrated Logistics Support (ILS) program to sustain the Security Equipment (SE) deployed and utilized by TSA. This does not include Government-certified Explosives Detection Systems (EDS). The SE covered in this SOW is deployed at Category X through IV airports and other Government-designated facilities throughout the United States and its territories. This SOW includes provisions for program management, quality assurance, configuration management, equipment maintenance, training, call center, and integrated information technology support.

Id. at 23-24; Attachment 3; Contract Section C, 1.0, Scope of Work at B00029. SGS's maintenance responsibilities are described as follows:

> The equipment to be maintained under this Contract is currently divided into four major technologies – Enhanced Metal Detectors (EMD), Explosive Trace Detection (ETD) machines, supplemental X-Rays (XRAY), and Threat Image Projection (TIP)-ready X-rays (TRX) . . . . The Contracting Officer will modify the contract to include provisions for new equipment and future technologies as they are procured and deployed. The Contractor shall establish and maintain the necessary agreements with current and future OEMs to properly maintain all fielded equipment.

Id. at 24-25; Attachment 3; Contract Section C, 4.1. Maintenance at B00044. The SOW goes on to provide:

> The Contractor shall perform monthly, quarterly, and yearly preventative maintenance on both in-and out-of-warranty SE and corrective maintenance, along with logistics activities, for equipment that has exited warranty to maintain the RMA of fielded SE at the levels required by this Contract. Corrective maintenance for SE that is under warranty will be provided by the OEMs per separate Contracts with the Government. Contractor field service technicians (FSTs) may supplement the OEM repair capability at no cost to the government during the warranty period through outside arrangements with the OEMs. The Contractor shall coordinate all maintenance scheduling with local TSA staff and OEMs as appropriate. The Contractor shall notify the TSA where the OEM-provided schedule for preventative maintenance will not support corrective maintenance requirements.

Id. Due to the demands on TSA's airport security obligations, TSA directed SGS to constantly move some of the Equipment throughout the United States and its territories. *Id*. at 26. TSA accomplished this through the issuance of Move Add Change Modifications ("MAC Mods") to the Contract. *Id.*

Soon after the commencement of contract performance, TSA directed SGS to establish and maintain a warehouse, the Transportation Logistics Center ("TLC"), for use in the movement of large volumes of the Equipment to airports and regions. *Id.* at 25-26. The TLC also is used as a storage facility for the Equipment no longer deployed, such as Thermo Detection EGIS II Explosive Trace Detectors, which the program office pulled out of service, as they were ineffective and costly to maintain. *Melanson Declaration* at ¶ 7. SGS invoiced for the stored Equipment in question, but the CO believed that the invoicing was not in accordance with the Contract, and withheld $760,000 from the August 2007 invoice because the units had not been maintained. *Id.* Other non-fielded Equipment included the Sabre 4000 unit, which had been invoiced beginning in January, 2008, even though it had also not been maintained. *Id.* at ¶ 14.

In the August 15 Letter, the CO informed SGS that TSA would begin withholding payment from SGS's August and September, 2007 invoices and all invoices subsequent to the August 15th Letter for alleged overpayments made to SGS for Equipment on which

no maintenance had been performed.[1] *Dispute* at 1-2. In that regard, the August 15 Letter states:

> [The] Contract . . . is a firm fixed unit priced contract to maintain the Security Equipment (SE) listed in Section B of the contract in accordance with the ILS Statement of Work (SOW). As stated in the SOW Paragraph 1.0 Scope, the SE to be maintained is deployed and utilized by TSA at Category X through IV airports throughout the United States and its territories. The Section B firm fixed priced contract amount is based upon a fixed unit price based on the number of deployed non-EDS security equipment as defined in the SOW. To assist in determining what SE is deployed and utilized by TSA, SGS has established and maintains a Security Equipment Database . . . that includes the entire inventory of fielded equipment. . . .
>
> Security Equipment stored in the Transportation Logistics Center (TLC) is not to be and is not being maintained. SGS has stated in meetings . . . that it understands that it does not get paid for maintaining equipment located at the TLC. Utilizing the data provided . . ., TSA has determined that *SGS has in fact invoiced and been paid for SE located in the TLC* and for which no maintenance has been performed.

Dispute, Attachment 1, Letter of August 15, 2008 (emphasis added). TSA withheld $8,631,547 related to alleged overpayments made during the base year and the first two option years of the Contract. *Id.* at 3. The CO also requested that SGS prepare an estimate for amounts allegedly overpaid in Option Year 3, and directed SGS to adjust its Option Year 4 invoices to reflect reductions for the Equipment in question.[2] *Id.* A conforming unilateral contract modification, Modification No. P00578, was appended to the letter and made effective as of that date. *Melanson Declaration* at ¶ 17. In a Letter of September 30, 2008, Brian Simon, the Senior Director of Contracts for SGS advised TSA:

> . . . that SGS takes exception to this unilateral change, including and especially the language of Paragraph 4 of the subject modification . . .
>
> Pursuant to the Changes Clause, SGS will perform according to the directed Change. However, SGS hereby reserves all rights and remedies

[1] SGS does not dispute that no maintenance was performed on the Equipment in question.

[2] SGS, at the time of filing, had not prepared the estimate, but SGS had revised the invoices for option year 4 and, at the time of filing, submitted the first three invoices.

> under the Contract and at law in connection with this Change, and in connection with the matters addressed in TSA letter TSA25-04-00488, dated August 15, 2008 as it relates to contract interpretation and related issues.

Melanson Declaration at ¶ 18 quoting SGS Letter of September 30, 2008, *AR* at B00231. Subsequently, SGS filed the instant Dispute with the ODRA.

III. DISCUSSION

A. The Contract Interpretation Issue

The ODRA's Procedural Regulations at 14 C.F.R. § 17.29 provide for summary judgment in contract disputes.[3] The ODRA has held that summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Contract Dispute of Huntleigh USA Corporation*, 06-ODRA-008 and 025 (Decision Denying Cross Motions for Summary Judgment, dated March 30, 2009) quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The Procedural Regulations require that, "prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the ODRA shall afford all parties against whom the dismissal or summary decision is to be entered, the opportunity to respond to the proposed dismissal or summary decision." 14 CFR § 17.29(e). Moreover, at the ODRA, as elsewhere, there is a strong preference for deciding cases on the merits rather than by dispositive motion. *Protest of Water & Energy Systems Technology Inc.*, 06-ODRA-00373.

A party moving for summary judgment bears the burden of establishing that there are no issues of material fact, and that the movant is entitled to judgment as a matter of law.

[3] Summary decisions before the ODRA are governed by 14 C.F.R. § 17.29 rather than the Federal Rules of Civil Procedure. The ODRA may consider the Federal Rules of Civil Procedure and related decisions as persuasive authority and useful guidance.

Contract Dispute of Astornet Technologies, Inc., 08-ODRA-00466 (Decision on Summary Judgment dated July 10, 2009). In reviewing a motion for summary judgment, the ODRA assumes the non-moving party's supported allegations are true for purposes of the motion, views the facts in a light most favorable to the non-movant, and draws any factual inferences in favor of the non-movant. 14 CFR § 17.29(b); *Protest of Northrop Grumman Corporation,* 00-ODRA-00159 (Decision on Motion to Dismiss dated August 17, 2000).

It is well established that "pure contract interpretation is a question of law which may be resolved by summary judgment." *Crown Laundry and Dry Cleaners, Inc. v. United States,* 29 Fed.Cl. 506, 515 (1993). However, "the question of interpretation of language, the conduct, and the intent of the parties, *i.e.*, the question of what is the meaning that should be given by a court to the words of a contract, may sometimes involve questions of material fact and not present a pure question of law." *Id.* Moreover, summary judgment is inappropriate when extrinsic evidence is needed to interpret ambiguities in a contract. *Beta Systems, Inc. v. United States,* 838 F.2d 1179, 1183 (Fed. Cir. 1988) (vacating a grant of summary judgment on an issue of contract interpretation when the parties needed to produce extrinsic evidence and that evidence needed to be weighed by the trier of fact to resolve a contract ambiguity); *Burchick Construction Co.*, 83 Fed.Cl. 12, 20 (denying cross-motions for summary judgment that involved ambiguous contractual provisions because the evidence presented was insufficient to determine the parties' intentions and resolve ambiguities).

SGS did not submit affidavits, excerpts from depositions, or any other materials in support of its motion. SGS instead asserts that "[a]t no point did TSA supplement the Dispute File." *Motion* at 3; and that:

> TSA has placed no material fact in dispute, either through its March 26, 2009 submission of the Agency Record, or in its March 30, 2009 Response to SGS's Contract Dispute. Nor did it do so in its July 14, 2009 Response to SGS's discovery requests, which essentially refused to answer SGS's requests regarding TSA's positions on the facts as SGS alleged in its Contract Dispute document.

Id. at 1-2.

SGS correctly states that "[o]ne of the most fundamental principles of contract interpretation provides that where the terms of a contract are unambiguous and clearly stated, a judicial or other body attempting to interpret the contract must give effect to the terms precisely as they are written." *Id.* at 8.

SGS points out that:

> Until the time this dispute arose, near the end of the second option year of the Contract – in other words, for the first two and one half years of Contract performance, the parties consistently administered the Contract as a firm fixed price Contract. SGS consistently invoiced TSA on a monthly basis, or, during certain portions of the Contract, twice per month, by taking the total annual firm fixed Contract price for the security equipment maintenance and dividing the price by 12 (for monthly invoicing) or 24 (for invoicing twice per month). From Contract commencement in early 2005 through August 2007, TSA consistently paid SGS on this basis, without ever suggesting that such invoicing was inappropriate or inconsistent with the Contract.

Motion at 6. SGS also points to bilateral contract modifications designed "to reflect annual adjustments to the firm fixed contract price to reflect annual 'true-ups' conducted to reflect the changes in quantity and type of security equipment that remain or was placed into service since the beginning of the prior contract year." *Id.* Additionally, SGS points out that "TSA never even suggested that the Contract was a fixed *unit* price Contract until April 9, 2008, well *over three* years after the contract was entered." *Id.* at 7 (emphasis in original).

While maintaining that the Contract is not ambiguous, SGS argues alternatively that to the extent that there is ambiguity it must be construed against the drafter in this case. *Id.* at 11, 12. SGS asserts:

> TSA drafted the Contract's *firm fixed price* language. TSA inserted the standard TSA firm fixed price clauses. Thus, to the extent there is any

> ambiguity whatsoever in the Contract as awarded, such ambiguity must be construed against TSA.

Id. (emphasis in original).

In its Response to the Motion, TSA asserts that SGS has not met its burden for summary judgment. TSA also correctly states that "[t]he burden of the nonmoving party is not a heavy one, the nonmoving party simply is required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." *Response* at 5 citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). TSA's Response relies on the Melanson Declaration to demonstrate there is a material dispute as to the interpretation of the Contract. *Response* at 8. The Melanson Declaration consists principally of a recounting of meetings held between TSA and SGS in 2008 concerning the interpretation of the Contract. The allegations in the Declaration refer to representations allegedly made by Brian Simon, who is identified as the Head of Contracts for SGS.

The Melanson Declaration alleges that Mr. Simon admitted that "SGS agrees with TSA that this contract is Fixed Price Unit Contract not a Firm Fixed Price Contract." *Melanson Declaration* at ¶ 13 citing and quoting Meeting Notes (June 9, 2008), *AR*, Tab 4 at 0216 (emphasis removed). Mr. Simon is alleged also to have stated that "SGS will agree to a repayment of not deployed units from May of 2007 (Option year 2) through the end of the contract." *Id.* (emphasis removed). Finally, according to Mr. Melanson, Mr. Simon, at a meeting held on June 13, 2008, indicated that "SGS now agrees to a repayment of not deployed units from May of 2007 (Option year2) through the end of the contract." *Id.* at ¶ 16 citing and quoting Meeting Notes (June 13, 2008), AR, Tab 4 at 0214.

SGS moves for summary judgment on the basis that the parties entered into a firm fixed price contract in which the price paid was not dependent on the number of units of Equipment serviced by SGS. *Motion* at 5. However, as SGS itself points out, "unit pricing did *not* consistently appear in the Contract." *Id.* at 7 (emphasis in original). Moreover, the record demonstrates ambiguities in the Contract that raise questions of

material fact. For example, Section B, the Contract Line Items (CLIN), shows the "Supplies or Services," Quantity to be serviced, the "Unit Price," and the "Price Total." *AR*, Tab 2; Contract Section B, at 00027-00038. In following standard rules of contract interpretation, the ODRA first looks to the plain meaning of the text and is loathe to read otherwise unambiguous, express language out of a contract. *Protest of Team Clean*, 09-ODRA-00499. In that regard, SGS asserts:

> The Contract included unit prices and quantities for the different types of security equipment that was to be maintained, but quantities were not stated to be "estimated" quantities. Contract Dispute, 29-30. The quantities were fixed unless and until TSA changed the quantities in subsequent Contract Modifications, a most fundamental fact the TSA completely ignores in its arguments. Thus, while the Contract contained unit prices and *fixed* quantities for the security equipment to be obtained, those unit prices and *fixed* quantities for the security equipment to be obtained, those unit prices and quantities were simply components of the firm fixed CLIN prices for maintenance of the security equipment, and of the overall firm fixed Contract price. While the parties negotiated unit prices for purposes of establishing the firm fixed pricing in the Contract, the unit prices had no significance for purposes of invoicing and payments under the Contract.

Motion at 5 (emphasis in original). SGS elaborates that "the unit prices were simply one component of the firm fixed Contract pricing. . . . [T]he *quantities* were also *fixed*." *Id.* at 7 (emphasis in original). In the ODRA's view, SGS's position underscores the need for extrinsic evidence to determine the intent of the parties.

In addition, the Melanson Declaration demonstrates ambiguities raised by the parties in the interpretation of the Contract during performance. The Melanson Declaration discusses two such meetings held at the time the instant controversy arose. He states:

> On May 29, 2008 a meeting was held between TSA and SGS to discuss "Deployed Units vs. Units not Deployed in the Warehouse." Specific attention was paid to the Thermo EGIS units. I noted that Jennifer Vance, the COTR at the time "had noticed that the EGIS machines were no longer deployed and that the government was pay[ing] for maintenance on these units (even though they had been removed from all airports and were in the warehouse)[.]" *I further noted that "Section 1.0 of the SOW states that*

> *SGS is to 'sustain security equipment deployed and utilized'" I asked why the Government was still being invoiced for these units inasmuch as they were neither fielded nor deployed.* I reminded the SGS participants that "[i]n minute meeting notes from 25 May 2007 a statement is contained in those minutes that Wayne Weatherly states that '*Siemens Government Services does not charge TSA for units not deployed*'."

Melanson Declaration at ¶ 11 citing and quoting Meeting Notes: (May 29, 2008), *AR* Tab 4 at 0219 (emphasis added). At the same meeting, SGS countered that it was understood that:

> The terms *"deployed" or "fielded" are not defined terms in the contract.*
>
> We do not agree that the Government is entitled to repayment of funds for past option years – the discussion about the issue with the units and adjusting quantities was discussed in the past but nothing was done to change it.
>
> The Government could have terminated the portion of the contract for the Thermo units but the Government did not. The Thermo units were an anomaly-this is not the same situation as with the other units under contract.

Id. at ¶ 12 citing and quoting Meeting Notes: (May 29, 2008), *AR*, Tab 4 at 0220 (emphasis added). Subsequently, in a June 9, 2008 meeting, SGS is alleged to have agreed with TSA's interpretation of the Contract as a fixed price unit contract, and raised ambiguities in the Contract related to when the inventory counts would be recalculated and when and if the inventory would be recalculated. *Id.* at ¶ 13. The alleged exchanges during these meetings illustrate the Contract's lack of clarity regarding the parties' obligations with respect to Equipment taken out of service.

As noted above, during the period of performance of the Contract, TSA paid invoices from SGS in a manner consistent with SGS's interpretation that the Contract was not dependant on the number of units serviced or maintained. Only later did TSA take action to recoup portions of those payments. However, as noted above, TSA has alleged in the Melanson Declaration that representatives of SGS in meetings held with TSA regarding this issue agreed with the TSA interpretation of the Contract as a unit price contract.

For purposes of summary judgment, the ODRA is required to accept TSA's supported allegations regarding statements allegedly made by SGS as true for purposes of the Motion. Thus, the ODRA finds that the ambiguity in the Contract language, coupled with the course of conduct of the parties during contract performance, raises issues of material fact. SGS has not met its burden of demonstrating that there are no issues of material fact in dispute, and that it is entitled to judgment as a matter of law. *Appeal of Walashek Industrial & Marine, Inc.*, ASBCA No. 52166 (2000) (Summary judgment is inappropriate where material facts exist regarding how contract provisions were interpreted during the course of performance.); *Appeals of Cosmodyne, Inc.*, ASBCA No. 39741 (1992) (Summary judgment denied where course of performance under the contract might have established a contemporaneous interpretation of the pricing terms.). The Motion for Summary Judgment therefore must be denied.

B. The Timeliness Issue

In the alternative to its contract interpretation argument, SGS asserts that TSA's withholding of monies from invoices for its alleged overpayments to SGS constitutes a Government claim. *Motion* at 13-14. According to SGS, TSA was required to file its own contract dispute with the ODRA, and, therefore, all sums arising from the disputed contract language that accrued prior to the date of the August 15 Letter are untimely. *Id.* TSA in its Response asserts that the August 15 Letter does not constitute a claim by the Government. *Response* at 2. TSA asserts:

> The August 15 withholding directive did not constitute a government claim. The well-developed Contract Disputes Act jurisprudence on the subject makes clear that a withholding by the government does not constitute a government claim. The same holds true for a true setoff.

Id. at 2.

It is well established that the Government has a common law right to setoff contract debts

to the United States against contract payments otherwise due to the debtor. *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947) ("The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'"). The government retains its setoff right unless there is an explicit statutory or contractual bar to its exercise. *Id.*; *see also Marre v. United States*, 117 F.3d 297, 302 (5th Cir. 1997). The ODRA previously has recognized the Government's common law contractual rights under the AMS. *See Contract Dispute of Technical Innovative Concepts*, 08-ODRA-470. Additionally, the AMS characterizes "[o]verpayments related to errors in . . . billing" as contract debt to the government. *AMS Procurement Guidance T3.3.1.a(4) - Contract Funding, Financing & Payment (Revision 7, July 2009).* Moreover, SGS itself characterizes the August 15 Letter as a setoff by TSA. *Dispute* at 103, n. 43.

Similarly, the government's right of recoupment of incorrectly made payments on a single contract is well recognized. *System Fuels, Inc. v. United States*, 73 Fed.Cl. 206, 216 n.8 (2006) ("Recoupment . . . arise[s] out of the same transaction that engenders a plaintiff's claim."). The courts, boards and commentators have used the terms "setoff," "recoupment," and "withholding" interchangeably. *See* J. Cibinic & R. Nash, *Administration of Government Contracts* (4th Ed.) at 1166; *Compare Appeal of Kearfott Guidance & Navigation Corp.*, ASBCA No. 49263 (1999) *with In re URS Consultants, Inc.*, IBCA 4285-2000 (2002). Regardless of which term is used, however, it is clear that the government's right to set off or recoup improperly paid amounts is well recognized. *See, e.g., Appeal of Consolidated Airborne Systems, Inc.*, ASBCA No. 20273 (1978). The act of recouping allegedly wrongfully made payments, during the course of contract performance, is a routine contract administration function that does not require the filing of a contract dispute with the ODRA by the contracting officer.

Under the ODRA Procedural Regulations, a Dispute constitutes "a claim for the payment of money in a sum certain" as well as a request for "the . . . interpretation of contract terms." 14 CFR § 17.3(g). While the ODRA may dismiss a contract dispute for lack of timeliness under 14 CFR § 17.25(e), a setoff or recoupment action of the Agency, under

the circumstances here, is not subject to the time limitation applicable to the filing of a contract dispute. Once the Agency has exercised its common law right to setoff or recoupment, as the TSA has done here, it is incumbent upon the contractor to challenge, as SGS has in this case, whether the setoff was justified. In the instant case, the Contracting Officer discovered alleged overpayments made to SGS for equipment that was not being maintained. The Contracting Officer, in the August 15 Letter, informed SGS that TSA would recoup the amounts from current and future invoices. SGS then timely filed the instant Dispute with the ODRA challenging the Agency's action. There is no legal basis for finding that TSA's recoupment of any portion of the Disputed Amount was untimely.

IV. CONCLUSION

For the reasons stated above, SGS's Motion is denied. The ODRA will convene a conference with the parties in order to establish a schedule for the completion of the adjudication. The ODRA encourages the parties to renew their efforts under 14 C.F.R. § 17.33(a) (ODRA's alternative dispute resolution process) to attempt to reach a resolution of this matter.[4]

-*S*-
Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution
For Acquisition
January 13, 2010

[4] This is an interlocutory decision. It will become final and appealable once incorporated into a final agency decision and order at the conclusion of this case.