

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Amigo Building Corporation) ASBCA No. 54329
)
Under Contract No. DACA63-01-C-0012)

APPEARANCE FOR THE APPELLANT: Thomas P. LeBlanc, Esq.
Lundy & Davis, LLP
Lake Charles, LA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Lloyd R. Crosswhite, Esq.
Acting District Counsel
Dava-Kay Kaitala, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Fort Worth

OPINION BY ADMINISTRATIVE JUDGE PAGE

The contractor takes this appeal from a government claim for liquidated damages, in the amount of \$24,150, assessed for a 42-day delay in completing a construction contract. The parties elected to proceed under Board Rule 11 and have submitted documentary evidence and briefs for a decision without a hearing. For the reasons discussed below, the appeal is sustained in part and denied in part.

FINDINGS OF FACT

1. In September 2001, the government awarded Amigo Building Corporation (Amigo or contractor) a construction contract, DACA63-01-C-0012, in the amount of \$5,569,200 to renovate barrack building numbers 2273 and 2389 at Fort Polk, Louisiana (R4, tab 4).

2. The contract contained the standard FAR clauses for a fixed-price construction contract, including 52.233-1 DISPUTES (DEC 1998) (R4, tab 4 at 00700-61). Of particular importance to this appeal are the following clauses which we recite in pertinent part:

52.211-12 LIQUIDATED DAMAGES –CONSTRUCTION (SEPT 2000)

(a) If the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to the Government as liquidated damages, the sum of (See Section 01000) for each calendar day of delay until the work is completed or accepted.

....

52.246-12 INSPECTION OF CONSTRUCTION (AUG 1996)

....

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements. The Contractor shall maintain complete inspection records and make them available to the Government. All work shall be conducted under the general direction of the Contracting Officer and is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.

(c) Government inspections and tests are for the sole benefit of the Government and do not—

- (1) Relieve the Contractor of responsibility for providing adequate quality control measures;
- (2) Relieve the Contractor of responsibility for damage to or loss of the material before acceptance;
- (3) Constitute or imply acceptance; or
- (4) Affect the continuing rights of the Government after acceptance of the completed work under paragraph (i) of this section.

(d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the Contracting Officer's written authorization.

....

(h) If, before acceptance of the entire work, the Government decides to examine already completed work by removing it or tearing it out, the Contractor, on request, shall promptly furnish all necessary facilities, labor, and material. If the work is found to be defective or nonconforming in any material respect due to the fault of the Contractor or its subcontractors, the Contractor shall defray the expenses of the examination and of satisfactory reconstruction. However, if the work is found to meet contract requirements, the Contracting Officer shall make an equitable adjustment for the additional services involved in the examination and reconstruction, including, if completion of the work was thereby delayed, an extension of time.

(i) Unless otherwise specified in the contract, the Government shall accept, as promptly as practicable after completion and inspection, all work required by the contract or that portion of the work the Contracting Officer determines can be accepted separately. Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Government's rights under any warranty or guarantee.

(Id. at 00700-12, -73, -74)

3. In addition to the FAR clauses cited in the contract, the following additional contract provisions, § 01451, are also of significance:

3.8 COMPLETION INSPECTION

3.8.1 Punch-Out Inspection

Near the end of the work, or any increment of the work established by a time stated in the Special Contract Requirement Clause, "Commencement, Prosecution, and Completion of Work", or by the specifications, the CQC Manager shall conduct an inspection of the work. A punch list of items which do not conform to the approved drawings and specifications shall be prepared and included in the CQC documentation, as required by paragraph DOCUMENTATION [3.9]. The list of deficiencies shall

include the estimated date by which the deficiencies will be corrected. The CQC System Manager or staff shall make a second inspection to ascertain that all deficiencies have been corrected. Once this is accomplished, the Contractor shall notify the Government that the facility is ready for the Government Pre-Final inspection.

3.8.2 Pre-Final Inspection

The Government will perform the pre-final inspection to verify that the facility is complete and ready to be occupied. A Government Pre-Final Punch List may be developed as a result of this inspection. The Contractor's CQC System Manager shall ensure that all items on this list have been corrected before notifying the Government, so that a Final inspection with the customer can be scheduled. Any items noted on the Pre-Final inspection shall be corrected in a timely manner. These inspections and any deficiency corrections required by this paragraph shall be accomplished within the time slated for completion of the entire work or any particular increment of the work if the project is divided into increments by separate completion dates.

(R4, tab 7 at 8-9)

4. Contract § 01000 detailed the construction schedule as well as the amount of liquidated damages to be assessed per calendar day for failure to meet scheduled deadlines. According to the schedule, work was to begin on building 2273 “Within 10 calendar days after receipt of Notice to Proceed,” and be completed “250 Calendar days after notice to proceed,” with liquidated damages established at \$575 per calendar day. The agreed upon schedule provided a 30-day period between the contractor’s completion of building 2273 and possession of building 2389. Following possession of building 2389, the contract allotted the contractor an additional 200 calendar days for completion. The rate of liquidated damages for the second building was also set at \$575 per day. (R4, tab 6 at 01000-1) According to the project data form, the daily damages were calculated by dividing the government’s estimated cost of contract supervision and administration for each building by the number of days allotted for construction (ex. G-24, *see also* ex. G-25).

5. The government issued the notice to proceed on 15 October 2001, which the contractor acknowledged on 23 October 2001 (R4, tab 3).

6. By letter dated 20 November 2001, Amigo proposed “to complete this project ninety calendar days earlier than originally scheduled if both Buildings 2273 and 2389 are made available to us for construction purposes at the same time” (R4, tab 8). Appellant submitted this proposal after the government “advised that it was important that the project be completed in significantly less time than allowed under the Contract” (ex. A-11, ¶ 6).

7. The parties thereafter agreed (bilateral Modification No. P00001, issued on 2 January 2002) to Amigo’s possession of both buildings at the same time, with possession to begin “Within 10 calendar days after receipt of Notice to Proceed.” Building 2273’s completion date and liquidated damages rate remained the same. However, the completion date for building 2389 was amended to 390 calendar days after the notice to proceed. The original contract completion date was reduced by 90 calendar days. There was no change to the contract price. (R4, tab 10)

8. The work of coating the interior walls of the barracks with the appropriate acrylic wall finish (AWF) was subcontracted to Miller Plastering, Inc. (Miller) (ex. G-2). On 2 May 2002, the contractor’s Chief of Quality Control met with a government quality assurance representative. At that meeting, the contractor presented the government with a sample “panel” of the proposed AWF; the government reviewed the pattern and agreed to its use throughout the building. (Exs. A-1 at 2; A-2 at 78-82; A-13 at 334, 336) On 15 May 2002, Miller began coating the interior walls of building 2273 with the AWF (ex. A-1 at 10). The government first took note of the fact that the AWF application was less than acceptable on 3 June 2002 (ex. G-16 at report no. 223). The coating process continued until 6 June 2002, at which point government representatives and the contractor’s employees inspected the AWF in building 2273. The government demonstrated to the contractor that there were several areas where the “[AWF] finishes on some walls were unacceptable due to the fact that some tooled joints could be seen.” (Exs. A-1 at 12-16, 18-22; A-2 at 105-49; A-13 at 352-75; G-16 at report no. 226) Miller began repairing the AWF on 18 June 2002 and completed the repairs on 25 July 2002. A total of 48 days were spent repairing the walls (exs. A-1 at 34-60; A-2 at 177-261; G-16 at report nos. 238-50; G-17 at report nos. 251-75).

9. On 25 July 2002, the administrative contracting officer (ACO) sent appellant a letter confirming a conversation with appellant’s superintendent. The ACO said that he had discussed appellant’s progress with the superintendent because appellant was behind schedule. The ACO advised that liquidated damages may be assessed if building 2273 was not completed on time. (Ex. A-11, attach.)

10. Appellant has submitted the affidavit of Jaime Torres, appellant’s vice president, in which he states that after receiving the 25 July 2002 letter, he contacted Gary Westby, the government’s project engineer. Mr. Torres declares that, during that

conversation, “Mr. Westby stated that it was the [government’s] intention to assess liquidated damages in this case ‘to teach Nicky Priola a lesson.’” (*Id.* at ¶ 11) Mr. Priola is president of Priola Construction Corporation, appellant’s principal subcontractor on the job (ex. A-12, ¶¶ 2-3). The government has submitted the affidavit of Mr. Westby, in which he “vehemently” denies stating to Mr. Torres that “liquidated damages were to be assessed in order to ‘teach Mr. Priola a lesson.’” He acknowledges that the discussion with Mr. Torres became heated and that he “made an off-hand remark that perhaps the imposition of liquidated damages would teach Mr. Priola a lesson.” (Ex. G-21, ¶¶ 3-4) Mr. Westby had no supervisory responsibility with respect to the contracting officer or ACO, and had no discussions with any government employee who had any input into the decision to assess liquidated damages (*id.*, ¶¶ 2-3). Weighing the Torres and Westby affidavits, and the other evidence of record, we find that appellant has not proved that the government assessed liquidated damages to teach appellant’s subcontractor a lesson or for any other improper purpose.

11. The government inspector prepared quality assurance reports (QARs) documenting the contractor’s progress on almost a daily basis (*see, e.g.*, exs. G-16-19). According to those documents, Amigo or one of its subcontractors was “setting bathroom fixtures” as early as 3 July 2002 (ex. G-17 at 3 July 2002), and by 1 August 2002 the “HVAC mechanics continued installing grills in building 2273” and “[P]lumbers continued setting toilet fixtures in building 2273” (ex. G-15 at 1 August 2002).

12. Beginning 19 August 2002, the government’s QAR periodically mentions that for building 2273 the contractor was engaged in “general clean-up, repair of qc punch list.” The government directs our attention to the QAR for 19 August 2002 to show that Amigo was then installing fire alarm fixtures. (Gov’t br. at 6, ¶ 12 citing ex. G-15 at 19 August 2002) We find that the fire alarms, which are not later mentioned in the QARs or cited by the government as continuing work, were installed 19 August 2002; this is 11 days after the contract completion date of 8 August 2002 for building 2273. Amigo offered no proof that the government was responsible for this delay, which we attribute to the contractor.

13. Subsequent QARs indicate that additional work performed between 19 August and the pre-final inspection of 28 August 2002 included punch list items, cleanup, painting of service modules, setting fixtures, cabinet trim and hardware. (Ex. G-15 at 19-28 August 2002; ex. G-18 at 20 August – 22 September 2002)

14. On 28 August 2002, the government conducted a pre-final inspection of building 2273. The QAR for that date documented that walls were then being painted, door hardware installed, and bathroom fixtures set. (Ex. G-18 at 28 August 2002) Contract § 01451, ¶ 3.8.2 PRE-FINAL INSPECTION required the government to conduct that inspection and if there were deficiencies, prepare a Government Pre-Final Punch List

(finding 3). However, neither party provided a record citation to, nor does our examination of the record disclose, a government punch list documenting those items upon which the government bases its determination that building 2273 was not substantially complete as of that date.

15. Following the pre-final inspection, the QARs through 25 September 2002 show that the contractor continued in building 2273 with cleaning, punch list items, painting, and the installation of light fixtures and door hardware (exs. G-18-19, *passim*). In addition to these tasks, on 4 September 2002, the contractor performed the “pressure test crawl space piping” and flushing of water lines, and on 5-9 September 2002 set toilet partitions (ex. G-19 at 5-9 September 2002).

16. The work on building 2273 was accepted on 19 September 2002, 22 days after the pre-final inspection. With the exception of work subject to Modification No. P00007, which had a separate completion date of 31 October 2002, this acceptance took place 42 days after the completion date for that building. Building 2389 was accepted on 2 January 2003, which was within the allotted contract delivery date. (R4, tabs 2, 11-12)

17. Certain work remaining after the pre-final inspection became the subject of bilateral contract Modification No. P00007, executed on 26 September 2002. That change extended the contract completion date until 31 October 2002 for indicated work in building 2273 including “dayroom finishes,” specified work pertaining to ceilings and light fixtures in modules A and D, and the replacement of nine non-functional flush valves for designated water closets. (Ex. G-5)

18. After realizing that the government intended to assess liquidated damages for the late completion of building 2273, Amigo sought to have the liquated damages waived. Amigo based its request on the premise that the entire project was completed on time, that the government had suffered no damages as a result of the delay, that it had made a mistake in calculating the number of days it would be necessary to complete building 2273 while simultaneously working on building 2389, and that the entire project was completed in 90 days less than originally solicited by the government (R4, tab 13).

19. By letter dated 12 February 2003, the government responded stating that Amigo had presented no justification for a time extension; therefore, liquidated damages would be assessed (R4, tab 14).

20. By letter dated 21 February 2003, Amigo sought a contracting officer’s decision, reiterating its request to have the liquidated damages waived (R4, tab 15). Neither the contractor’s request for waiver of liquidated damages (R4, tab 13) nor its request for a final decision (R4, tab 15) asserted problems arising from the government’s inspection process or difficulties with the AWF.

21. On 18 June 2003, the contracting officer issued a final decision on Amigo's request. In that decision, the government denied the request and stated that the total amount of liquidated damages was \$24,150. The position taken by the contracting officer was:

(1) that Modification No. P00001 was negotiated and agreed to by both parties, and constituted full and fair compensation for the completion of the work; (2) that Building 2273 was completed 42 days late; and (3) that Amigo [had] not shown that there [was] cause for extending the completion date; and because granting a waiver of liquidated damages [was] beyond [his] power as the Contracting Officer

(R4, tab 2 at 5-6)

22. From the final decision, Amigo filed its timely appeal with this Board on 16 September 2003.

THE PARTIES' ARGUMENTS

Amigo advances several arguments in its claim for remission of liquidated damages assessed by the government in the amount of \$575 per day for 42 days, totaling \$24,150 (app. br. at 4-19). It challenges the assessment as punitive in both nature and application, alleging that the amount is excessive and that the government improperly was motivated in imposing the damages. The contractor also contends that the government inspector was remiss in not bringing to Amigo's early attention later-alleged deficiencies in application of wall finishes.

Appellant also asserts the damages were unwarranted from the standpoint of project completion, and criticizes the government for waiting "until essentially no work remained" before accepting building 2273. The contractor posits that by 8 August 2002, the date specified in the contract, but in no instance later than 19 August 2002, "the work on building 2273 had progressed to merely 'trimming out' certain areas, cleaning up, and remedying punch list items." (*Id.* at 13 citing ex. G-18) Other than these efforts, appellant contends that the only substantive effort identified by the government as precluding acceptance "was completion of the service areas of Modules A and D, which . . . was subject to a separate completion date" of 31 October 2002 pursuant to bilateral Modification No. P00007. Amigo argues that, with this later deadline, the government errs to the extent it premises liquidated damages upon work related to the barrack's dayrooms or replacement of plumbing fixtures. (*Id.* at 13)

The government disagrees, contending that the imposition of liquidated damages is appropriate because building 2273 was not complete by 8 August 2002 (gov't br. at 12-14). It denies that any of the work still to be completed after 19 August 2002 “was affected in any way by the issuance of Modification P0007 [sic]” (*id.* at 14). While it agrees that it is “well-settled that liquidated damages may not be predicated on punch-list work that does not affect the suitability of the facility for its intended use,” the government argues that it is also “equally well-settled that beneficial occupancy requires that the building be ready for its intended use” (gov't br. at 13).

DECISION

Assertions that the Liquidated Damages were Punitive

We consider first Amigo’s allegation that the assessment of liquidated damages was punitive in nature and against the policy and purpose of Federal contract law because the government has not shown it suffered any actual damages. By now, the law regarding the enforceability of liquidated damage provisions is firmly established. Although losses to be suffered due to late completion may be difficult to project, such provisions will be enforced where they “are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract They serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts.” *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947); *see also Perini Corp.*, ASBCA Nos. 51160, 51573, 04-1 BCA ¶ 32,530 at 160,898. A contractor faces an exacting burden in challenging a liquidated damages clause, *DJ Manufacturing Corp. v. United States*, 86 F.3d 1130, 1134 (Fed. Cir. 1996); *Gassman Corp.*, ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720 at 151,743. As stated in *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 414 (Ct. Cl. 1978):

In the final analysis, the contractor has the burden of showing that the contested liquidated damages bear no reasonable relation to the probable loss that the Government was likely to have suffered from a delay in performance.

The liquidated damages included in the contract were calculated based on the government’s supervision and administration costs for each day of construction, which, in accordance with prior holdings, we uphold as being a reasonable measure of the foreseeable damages the government sustained as a result of delayed contract completion. *See Perini Corp.*, 04-1 BCA at 160,898. Contrary to appellant’s arguments, the government does not have to show actual damages when the liquidated damages are based upon this reasonable determination. *See L&C Europa Contracting Co.*, ASBCA

No. 52848, 04-1 BCA ¶ 32,609 at 161,398. We hold that the liquidated damages in the instant contract were not punitive in nature.

The contractor also argues that the liquidated damages were punitively applied by the government. It contends that the government was “intent on assessing liquidated damages against Amigo” in order “to teach [Amigo’s subcontractor] a lesson” (app. br. at 14 quoting Mr. Torres’ affidavit) and that the government’s attitude toward its subcontractor was “inappropriate and [did] not justify assessing liquidated damages against Amigo” (*id.* at 15). We understand the contractor to contend that remarks attributed to a government employee (Mr. Westby) are proof that the liquidated damages improperly were motivated and should be set aside as punitive; however, Amigo stops short of asserting that the government’s assessment should be vitiated by bad faith. We have considered the Torres and Westby affidavits as well as other evidence in the record, and hold that Amigo has not proven that the government assessed liquidated damages to punish its subcontractor, nor has appellant shown the government was motivated by another improper purpose.

We find that Amigo’s allegations of improper acts, without more, are insufficient to meet the evidentiary standard of proving bad faith on the part of the government by “clear and convincing evidence,” a more onerous burden than that of preponderant evidence. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002); *see also Atherton Construction, Inc.*, ASBCA Nos. 44293 *et al.*, 02-2 BCA ¶ 31,918 at 157,713-14. We hold that the contractor has not shown that the government punitively applied the liquidated damages provision.

Allegations that the Government Inspector Failed Timely to Advise of Deficiencies

Amigo argues that the government delayed completion of the project by disallowing the AWF after its application was substantially complete, and if the AWF application was not in accordance with contract specifications, then the government was remiss for not rejecting the sample AWF application during earlier government inspections. We disagree.

Ultimately, it is the contractor’s responsibility to “ensure that the work performed under the contract conforms to contract requirements.” FAR 52.246-12(b), finding 2. Further, the fact that the government provided a quality assurance representative did not “[r]elieve the Contractor of responsibility for providing adequate quality control,” or “constitute or imply acceptance” of the AWF. FAR 52.246-12(c). As stated in contract provision FAR 52.246-12(c), government inspections are for the sole benefit of the government and do not relieve the contractor of its responsibility for complying with the contract. Amigo’s complaint that the government inspector’s silence regarding the unacceptable AWF while making daily visual inspections (app. br. at 5-6) is unavailing.

It is well established that the government's right to inspect work generally does not relieve a contractor of its obligation to perform, nor can the contractor properly rely on government inspection for the discovery and correction of any errors. *Granite Construction Co. v. United States*, 962 F.2d 998, 1003 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1048 (1993); *Kenneth Reed Construction Corp. v. United States*, 475 F.2d 583, 589-90 (Ct. Cl. 1973); *Taisei Rotec Corp.*, ASBCA No. 50669, 02-1 BCA ¶ 31,739 at 156,798-99.

The Government's Affirmative Claim for 42 Days of Liquidated Damages

We next consider whether the imposition of liquidated damages was warranted. The assessment of liquidated damages is an affirmative government claim for which the government bears the burden of proving by preponderant evidence that the contractor failed to meet the agreed-upon schedule. *C.H. Hyperbarics, Inc.*, ASBCA Nos. 49375 *et al.*, 04-1 BCA ¶ 32,568 at 161,152 citing *Idela Construction Co.*, ASBCA No. 45070, 01-2 BCA ¶ 31,437 at 155,257 and *Skip Kirchdorfer, Inc.*, ASBCA Nos. 40515, 43619, 00-1 BCA ¶ 30,622 at 151,170. Liquidated damages are not properly assessed on a construction contract after the date the project is substantially completed. *Seaboard Surety Co.*, ASBCA No. 43281, 93-1 BCA ¶ 25,510 at 127,045. Whether the contract has achieved that state is a factual determination made by the Board after considering evidence indicating both the quantity of work remaining to be done as well as the extent to which the project was capable of serving adequately its intended purpose. *See Lindwall Construction Co.*, ASBCA No. 23148, 79-1 BCA ¶ 13,822 at 67,795.

The government does not provide the contemporaneous list of deficiencies requiring correction that it was to have prepared in accordance with contract § 01451, ¶ 3.8.2 PRE-FINAL INSPECTION. In an apparent effort to reconstruct its bases for refusing earlier to accept building 2273, the government cites QARs recording work performed by Amigo after 18 August 2002. It summarizes the tasks as: (1) setting toilet fixtures; (2) installing fire alarm fixtures; (3) installing HVAC grills; (4) taping and floating sheetrock; (5) hanging electrical fixtures; (6) testing electrical fixtures; (7) performing an 8-hour pressure test of hot and cold water lines for leaks in a crawl space; (8) insulating pipes in a crawl space; and (9) setting bathroom partitions. (Gov't br. at 12) The government then concludes that rejection was appropriate because "Without toilets, bathroom partitions, tested water lines, a completed HVAC system, and electrical fixtures, the building was not habitable" (*id.*).

We address first the government's assertion that Amigo's failure to complete the fire alarm system prior to 19 August 2002 was sufficient to support the assessment of liquidated damages prior to that date. The record shows that the contractor worked upon the fire alarm until that date (finding 10), and Amigo does not deny this late final installation of the fire alarms. In its brief, while urging the Board to accept 8 August

2002 as the date of contract completion for building 2273, it notes in the same sentence (without specifically mentioning the fire alarm installation) that “in no instance later than August 19, 2002, the work on building 2273 had progressed to merely “trimming out” certain areas, cleaning up, and remedying punch list items” (app. br. at 13).

We find the barrack was not inhabitable prior to installation of a functional fire alarm system, which is an essential safety feature of a building to be occupied by soldiers. Prior to that time, building 2273 could not adequately serve its intended purpose. *Lindwall, supra*, 79-1 BCA at 67,795. *See Fortec Construction*, ASBCA Nos. 25847 *et al.*, 85-2 BCA ¶ 17,972 at 90,130 (flight simulator training facility not ready for beneficial occupancy where fire alarm system was inoperable); *Saturn Construction Co.*, ASBCA No. 22653, 82-1 BCA ¶ 15,704 at 77,690 (imposition of liquidated damages justified and substantial completion delayed until sprinkler was complete in mess hall). The government has justifiably imposed upon Amigo 11 days of liquidated damages at \$575 per day for a total of \$6325 between the 8 August 2002 contract completion date for building 2273 and the 19 August 2002 installation of the fire alarm system.

Otherwise, the description of work provided by the QARs supports Amigo’s assertion that after 19 August 2002, it was performing punch-list items and cleanup in building 2273, or other work consistent with that described by Modification No. P00007 and subject to the later completion date of 31 October 2002. (*See* exs. G-5, G-18 (19-28 August 2002) and G-19 (29 August- 22 September 2002)) Although the government takes exception to the contractor’s characterization of the work (gov’t br. at 13-14), it provides no rebuttal other than vague general denials, and furnishes no explanation of how the work differed from that subject to the modification. The government failed to produce a contemporaneous assessment of deficiencies justifying rejection of the barrack on 19 August 2002. It cited no evidence to aid in determining whether these were punch list items that do not support the imposition of liquidated damages or whether these were deficiencies of such moment as to rightly forestall beneficial occupancy of building 2273. We find the government has failed to meet its burden of persuasion and has not justified the assessment of liquidated damages for work remaining between 19 August and 19 September 2002.

CONCLUSION

The Board has considered all the other arguments advanced by the parties. Finding these to be without merit, no extended discussion is necessary. This appeal is sustained in part and denied in part. We find that the government was justified in withholding liquidated damages until 19 August 2002 due to the absence of a working fire alarm in building 2273. At the contractually-established rate of \$575, this 11-day

assessment totals \$6,325. The government failed to meet its burden of proof with respect to the remaining liquidated damages, and the contractor is entitled to the remission of \$17,825 (\$24,150 less \$6,325 = \$17,825).

Dated: 17 August 2005

REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54329, Appeal of Amigo Building Corporation, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals