

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Industrias Educatec, S.A. ) ASBCA No. 51924  
 )  
Under Contract No. DAHC92-95-D-0038 )

APPEARANCE FOR THE APPELLANT: Mr. Javier Garcia Vallejo  
President

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA  
Chief Trial Attorney  
LTC Richard B. O'Keefe, Jr., JA  
Trial Attorney  
Clea Efthimidias, Esq.  
Trial Attorney  
U.S. Army Garrison - Panama

OPINION BY ADMINISTRATIVE JUDGE JAMES  
PURSUANT TO BOARD RULE 11

This appeal arises from the contracting officer's 29 September 1998 final decision which found merit in appellant's 26 June 1998 claim for \$41,759 under Delivery Order No. 3 under the captioned contract, assessed \$8,740.60 in liquidated damages for alleged delays in performing 157 delivery orders issued under the captioned contract, and determined that appellant was entitled to recover the net claim amount after deduction of such liquidated damages. Appellant timely appealed to this Board from that final decision in December 1998. The parties elected a decision on the record pursuant to Board Rule 11. Respondent filed a brief on 17 May 1999. Despite the Board's numerous written and telephonic requests to appellant, appellant chose to submit no brief. Only entitlement is to be decided.

FINDINGS OF FACT

1. On 28 September 1995 the U. S. Army Garrison, Panama, awarded contract No. DAHC92-95-D-0038 (contract 38) to Industrias Educatec, S.A. (IESA) for security work at U.S. military installations in Panama during a base year and two option years (R4, tab 1).

2. Contract 38's § F.6, entitled "DO [DELIVERY ORDER] TIME OF PERFORMANCE," provided:

Upon receipt of [DO], the Government will allow seven (7) calendar days to coordinate and execute a joint inspection, with DEH, establish the starting date(s), coordinate with the user, prepare and submit the Contract Progress Schedule and prepare the site of work on each [DO].

The total performance time in calendar days for completing the work for each [DO] from the date of receipt by the Contractor will be calculated as follows:

(1) Divide the value of the Delivery Order by \$5,000.00 and multiply by 1.4 to convert to calendar days, then round off the results to the next largest whole number of days, then add seven (7) calendar days allowed for joint inspection and scheduling . . . .

(2) Contractor shall commence work on each [DO] within seven (7) calendar days from the date of [DO] issue and shall be completed within the total performance time.

Exception to the above calculation will be established, as required, by the Government for scheduling specific [DOs] where the time of performance will be extended, for the convenience of and at no additional cost to the Government.

(R4, tab 1 at F-3)

3. Contract 38's § F.4, entitled "52.212-5 LIQUIDATED DAMAGES-CONSTRUCTION (APR 1984)-ALTERNATE I (APR 1984)," provided in pertinent part:

(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 \$65.00 FOR EACH DELIVERY ORDER OF \$25,000.00 OR LESS AND \$80.00 FOR EACH DELIVERY ORDER THAT EXCEEDS \$25,000.00 AS IDENTIFIED BY CLIN OR SUB-CLINS for delay of each separate part or stage of the work. [Capitalization in original]

(R4, tab 1 at F-1) FAR 52.212-5 in effect in September 1995 provided:

*Alternate I (APR 1984).* If different completion dates are specified in the contract for separate parts or stages of the work, revise paragraph (a) of the clause to state the amount of liquidated damages for delay of each separate part or stage of the work.

Contract 38's § F.4, ¶ (a), set forth above, omitted the phrase "for each day of delay" prescribed for the standard FAR clause in 48 C.F.R. § 52.212-5.

4. Contract 38 was a requirements contract providing for placement of delivery orders (DO) by the Government to the contractor; was awarded on Standard Form 1442, prescribed for construction, alteration or repair contracts by FAR 53.236-1(e); and incorporated by reference standard construction contract clauses, including FAR 52.235-5, 52.232-27, 52.236-2, -3, -5, -6, -7, -8, -9, -10, -11, -12, -13, -14, -21, 52.243-4, 52.246-21, 52.248-3 and 52.249-10, as well as 52.212-12 "Suspension of Work (APR 1984)," and 52.249-2 "Termination for the Convenience of the Government (Fixed-Price) (APR 1984) – Alternate I (APR 1984)" (R4, tab 1 at 2, B-10 to B-27, F-1, I-2, I-4, I-2 to I-9).

5. DOs were issued to IESA using DD Form 1155. There were 203 DOs issued under contract 38. Each DO was given to IESA by placing it in IESA's box located at the Directorate of Contracting (DOC), Corozal, Panama, or by handing it to IESA's project manager when he would come to the DOC. All DOs were given to IESA within one day of their issuance. On the DD Form 1155, the date of DO issuance was to be indicated in Box 3, the date on which delivery of the DO work was due was to be indicated in Box 10, and the date of inspection, receipt, or acceptance was to be indicated in Box 26. (R4, tabs 2, 16 at ¶¶ 1, 5, 6, tab 17)

6. On 30 September 1995 respondent issued DO 3 under contract 38 to replace miscellaneous items, including locks, at Gorgas Army Community Hospital in the amount of \$89,999.00. Box 10 of the DD Form 1155 contained no delivery date. (R4, tab 2)

7. On 6 May 1997 IESA ordered eight items, comprising 643 units, of lock hardware from Best International, Inc., California, for \$36,860.00. Those items were delivered to Panamanian customs authorities on 5 July 1997, as reflected on Customs Declaration No. 59635, dated 8 July 1997, citing the \$36,860.00 lot of hardware, plus \$291.40 for freight and \$368.60 for insurance, totaling \$37,520.00 (R4, tab 5).

8. According to the contracting officer (CO), the work under DO 3 was issued incrementally in task orders. Task orders 1-10 were issued on 8 May 1996, and work was completed on 19 May 1997, with many deficiencies and problems. Task orders 11-30

were issued on 4 April 1997 with completion scheduled by 30 June 1997. Such date was not met, because the hardware for the work did not arrive in Panama until late June and its exoneration papers were not presented to the CO until 8 July 1997. The CO decided to “cancel the remainder of the work.” (R4, tab 13)

9. IESA’s 27 August 1997 letter to the CO stated that the CO’s 30 June 1997 assessment of liquidated damages for DOs 46, 49 and 53 was excessive by \$1,494.50, because under contract 38, liquidated damages of \$65 were to be assessed for each DO, not for each day of delay per DO (R4, tab 6). The CO’s 30 June 1997 assessment was \$1,689.50 ( $\$1,494.50 + \$65 \times 3$ ).

10. IESA’s separate 27 August 1997 letter to respondent with respect to work on Gorgas Army Community Hospital, the subject of DO No. 3, requested payment of:

labor, materials, shipping and handling charges, storage charges, overhead and anticipated profits for the work related to subjectelivery [sic] order which our company has not been allowed to complete due to delay and for the convenience of the Government.

IESA identified “ $\$36,860.00 + 660.00$ ” (= \$ 37,520.00) for material purchased to satisfy DO No. 3. IESA did not identify any additional amounts for labor, shipping and handling charges, storage charges, overhead and anticipated profits. IESA stated that the CO had not notified it in writing to cease performance of DO No. 3, and cited a constructive suspension or a settlement under the convenience termination clause as the basis for the \$37,520 payment. (R4, tab 7)

11. From the time of ISEA’s 27 August 1997 letter to April 1998, the parties corresponded regarding IESA’s request for payment and the CO’s intent to assess liquidated damages under contract 38. The CO requested IESA to furnish proof that any of the DOs for which liquidated damages were proposed to be assessed were actually performed on time. (R4, tabs 7-10) No such proof appears in the record of this appeal (R4, tab 16 at ¶ 9).

12. The Government contract negotiator’s undated “PreNegotiation [sic] Objective Memorandum” regarding DO No. 3 under contract 38, stated that in addition to IESA’s \$37,520.00 cost for materials, IESA also requested, on an undisclosed date, “G&A” at 6%, or \$2,363.00 and “Profit” at 5%, or \$1,876.00, for a total amount of \$41,759.00 ( $\$37,520 + \$2,363 + \$1,876$ ) (R4, tab 10).

13. IESA’s 26 June 1998 letter to the CO regarding DO No. 3 under contract 38 presented its “formal claim for payment under our letter dated 24 September 1997 in the

sum certain amount of \$41,759.00” (R4, tab 11). IESA’s 24 September 1997 letter is not in the record.

14. The CO’s 29 September 1998 final decision regarding DO No. 3 under contract 38: (a) found “partial merit” in appellant’s 26 June 1998 claim for \$41,759, (b) assessed \$10,235 in liquidated damages for delays in performing 157 delivery orders issued under the captioned contract, as itemized in “Attachment 1” to the final decision, and credited \$1,494.40 in previously assessed liquidated damages, yielding a net assessment of \$8,740.60 (\$10,235 - \$1,494.40) of additional liquidated damages, (c) determined that, after deduction of additional liquidated damages, appellant was entitled to recover \$33,018.40 (\$41,759 - \$8,740.60), and (d) advised IESA that it could invoice for the \$33,018.40 as soon as respondent received the lock inventory (R4, tabs 12-13).

15. On 29 September 1998 the parties executed bilateral contract Modification No. 304 to contract 38 “to make payment on the final settlement and contracting officer’s decision dated 29 Sep 98.” That modification, which included no contractor release, provided that IESA was to be paid \$41,759.00 for materials and related costs, and \$8,740.60 was to be deducted therefrom for liquidated damages. (R4, tab 14)

16. On 15 December 1998 IESA timely appealed to the ASBCA the CO’s 29 September 1998 final decision “with regards to our liquidated damages withheld on the above mentioned contract.” IESA’s 15 December 1998 appeal notice also stated:

[IESA] will present formal claim against the US Army for improper contracting actions that have been taken in the administration of this contract, which has [sic] had a significant cost impact on my company, in the sum certain amount of \$22,500.00 plus interest for late payments to be calculated at the Department of Treasury rates set for the period identified in this claim. Educatec further claims relief from the government for improper termination of the work related to Gorgas Army Community Hospital and will request accounting, legal, clerical, termination costs and severance payments to employees and other reasonable and necessary costs associated with the preparation of the termination settlement. Furthermore, Educatec will present to the government costs associated with storage, transportation and other costs incurred, reasonably necessary for the preservation, protection, and disposition of the termination inventory.

(R4, tab 15) The Board docketed the appeal as ASBCA No. 51924.

17. IESA's Complaint in ASBCA No. 51924 commenced with the foregoing allegations in its notice of appeal regarding improper contract administration and termination costs. IESA further alleged that "many (over 80%)" of the DOs listed in the CO's final decision were performed within one or two days after they were begun; that IESA, not the parties jointly, was to establish the DO starting dates; that no liquidated damages were assessable against "task orders" issued under "bulk" DOs; that IESA was excusably delayed in performing some DOs; that IESA "substantially" performed some DOs timely; that the CO failed to comply with FAR Subpart 32.6 procedures for collection and deferment of debts; and that IESA was entitled to recover the sums of \$8,740.60 and \$1,689.50 assessed for liquidated damages, plus \$12,071.00 in termination costs. IESA did not identify any DOs by number which were the subject of the allegations in its complaint.

18. Respondent's answer in ASBCA No. 51924 stated that appellant's complaint for the first time asserted a claim for damages suffered as a result of the CO's alleged failure to timely terminate DO No. 3, which appeal element would be the subject of a separate motion to dismiss for lack of jurisdiction. On 26 March 1999 respondent filed such separate motion to dismiss for lack of jurisdiction.

19. Modification No. 000305 to contract 38, issued unilaterally by the CO on 18 March 1999, corrected the \$1,494.50 error in assessing liquidated damages for DOs 46, 49 and 53 which IESA had pointed out on 27 August 1997 (finding 9), deleted DO No. 1 from the list of 157 late DOs for which additional liquidated damages were assessed, and acknowledged that respondent owed IESA \$260.10 under contract 38, which IESA was entitled to invoice (R4, tab 16 at 7-8).

20. Respondent's contract specialist for contract 38, Catherine Scribner, declared on 8 April 1999:

IESA, in its ASBCA appeal [*i.e.*, its Complaint], has requested payment of \$12,071.00 for costs it alleges resulted from Government delay in terminating Delivery Order No. 0003 under the Contract. No claim for this amount or for any damages of this type has yet been submitted to the Contracting Officer for a decision.

(R4, tab 16 at ¶ 11)

21. The Board has verified the DO start and completion dates set forth in Rule 4, tab 17, for the 157 DOs listed in "Attachment 1" to the CO's final decision (R4, tab 12).

DOs 31, 32, 78, 87, 94 and 120 and several others contain delivery dates (in Block 10 of the DD Form 1155) which extended the date derivable by the § F.6 formula. We find that the date on which IESA completed those DOs listed in “Attachment 1” was later than the due date established by the DOs, except for the following 10 DOs, none of which exceeded \$25,000:

<u>PO No.</u>	<u>Due Date</u>	<u>Date Completed</u>
1	9-29-96	No proof
26	4-17-96	No proof
31	8-30-96	8-22-96
32	8-30-96	8-27-96
77	8-30-96	No proof
78	9-30-96	9-11-96
87	9-30-96	9-18-96
94	9-30-96	9-6-96
120	9-30-96	9-9-96
152	8-10-97	No proof

We further find that: (a) when the foregoing 10 DOs are eliminated, the remaining 147 DOs included Nos. 68 and 89, which exceeded \$25,000 and for which liquidated damages of \$80 were assessable, and 145 DOs which did not exceed \$25,000 and for which liquidated damages of \$65 were assessable; and (b) liquidated damages amounting to \$9,585.00 ( 2 X \$80 + 145 X \$65) were validly assessed.

## DECISION

### I.

Respondent moved to dismiss that portion of this appeal alleged in IESA’s notice of appeal regarding costs arising from the termination of DO No. 3, on the ground that they arise from claim allegations which were not submitted to, or decided by, the contracting officer, and, hence the Board lacks jurisdiction to entertain such portion. IESA filed no response to the Government motion.

IESA’s 26 June 1998 claim for \$41,759.00 (finding 13) was derived from IESA’s May 1997 order for lock hardware, totaling \$37,520.00 (findings 7, 10), plus \$4,239 for G&A and profit that IESA requested at an undisclosed later date, for a total of \$41,759.00 (finding 12). IESA’s 26 June 1998 claim did not include any amount for “improper contracting actions” in the alleged “sum certain amount of \$22,500.00” or for “improper termination” alleged in IESA’s 15 December 1998 notice of appeal (finding 16) and realleged in IESA’s complaint (finding 17). The CO’s 29 September 1998 final decision

addressed IESA's 26 June 1998 claim for \$41,759, and respondent's assessment of \$8,740.60 in additional liquidated damages (finding 14).

IESA's improper contracting actions and improper termination claim or claims were not submitted to the CO for decision prior to the CO's 29 September 1998 final decision. Under the Contract Disputes Act of 1978, 41 U.S.C. § 605(a), (b), a final decision by a CO on a "claim" (or a deemed denial) is a prerequisite for Board jurisdiction. *See Sharman Co. v. United States*, 2 F.3d 1564, 1568-69 (Fed. Cir. 1993). We grant respondent's motion to dismiss the portion of appellant's appeal which alleges such improper contracting actions and improper termination.

## II.

Respondent has the initial burden of proving that liquidated damages were due and owing. Once respondent establishes that appellant failed to meet the DO delivery dates, and the period of time for which it assessed liquidated damages was correct, then appellant has the burden to show why the failure to complete the DO timely was excusable. *See Skip Kirchdorfer, Inc.*, ASBCA Nos. 40515 and 43619, 00-1 BCA ¶30,622 at 151,170. Respondent has proven that \$9,585.00 in liquidated damages were validly assessed due to IESA's delinquent performance of 147 DOs (finding 21). Respondent does not argue that it was entitled to assess liquidated damages on a daily basis.

IESA submitted no evidence and no legal brief in this appeal. Nonetheless, IESA expressed its position in its complaint. IESA alleged that "many (over 80%)" of the DOs listed in the CO's final decision were performed within one or two days after they were begun. IESA offered no proof to substantiate that allegation. IESA further contends that IESA, not the parties jointly, was to establish the DO starting dates. This contention is untenable, because it conflicts with the unambiguous initial paragraph in § F.6. IESA argues that no liquidated damages were assessable against "task orders" issued under "bulk" DOs. This argument is academic, because no liquidated damages were so assessed. IESA asserts that it was excusably delayed in performing some DOs, and "substantially" performed some DOs timely, but did not identify any such DOs by number (finding 17), or submit any substantiating proof.

IESA argues that in assessing the liquidated damages, the CO failed to comply with the procedures prescribed in FAR §§ 32.606 and 32.610 for collection and deferment of debts. These FAR provisions did not invalidate the CO's assessment in this case because the CO had on hand IESA's valid claim for payment of \$41,759, and was required to make a "routine setoff" of liquidated damages in place of the demand prescribed in FAR 32.610, *see* FAR 32.611; *Dan F. Harrison Const., Inc.*, ASBCA No. 42546, 94-3 BCA ¶ 27,050 at 134,800, *mot. recon. den.*, 95-1 BCA ¶ 27,598.

We hold that IESA did not show why the failure to complete the 147 DOs timely was excusable. We sustain the appeal with respect to the ten DOs that IESA performed timely (see finding 21). We deny the balance of the appeal. We remand the appeal to the parties for resolution of quantum in accordance with this opinion.

Dated: 20 March 2000

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DAVID W. JAMES,, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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EUNICE W. THOMAS  
Administrative Judge  
Acting 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. 51924, Appeal of Industrias Educatec, S.A., rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals