

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Pete Vicari General Contractor, Inc.) ASBCA No. 54982
)
Under Contract No. N62467-96-C-0969)

APPEARANCE FOR THE APPELLANT: Stephen J. Caire, Esq.
Metairie, LA

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
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Command
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Washington, DC

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON PARTIAL MOTION FOR SUMMARY JUDGMENT

Pete Vicari General Contractor, Inc. (Vicari) appeals the deemed denial of its claim for alleged wrongful government actions in the solicitation, award and performance of a construction contract. One of the claim items (Count II of the complaint) seeks release of liquidated delay damages withheld by the government for late completion of Phase B. Vicari moves for summary judgment on that count. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. The contract was awarded to Vicari on 21 May 1998 for construction of two new buildings and renovation of an existing building at a naval air station. The contract amount was \$6,011,823. The contract specifications at Section 01110 stated that the work was to be performed in three successive phases as follows:

PHASE	DESCRIPTION	SCHEDULED START DAY	COMPLETION DAY
A	Cleaning [sic], Grubbing and Surcharge Site	0	210

PHASE	DESCRIPTION	SCHEDULED START DAY	COMPLETION DAY
B	New BCE ^[1] Building Storage Building	211	575
C	Building 149 Renovation	596	866

(R4 tab 1 at 24, 162)²

2. Paragraph 1.3 of contract document 00720 specified the total time for completion of the work in relevant part as follows:

The Contractor shall be required to:

....

(c) Complete the entire work ready for use not later than 881 [days] after notice to proceed.

TIME FOR COMPLETION: The work shall be completed within 866 calendar days and shall be performed as specified in Section 01010 [sic] of the project specification. For purposes of computing the contract completion date 15 calendar days will be added to the completion time to allow for mailing of the contract award and the submission and approval of required bonds. The contract completion date will therefore be 881 calendar days from the date of contract award.

(R4, tab 1 at 95)

3. Paragraph 1.4 of contract document 00720 was the FAR 52.211-12 LIQUIDATED DAMAGES – CONSTRUCTION (APR 1984) – ALTERNATE I (APR 1984) clause. That clause specified liquidated damages for delay in completion of the work in relevant part as follows:

(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

¹ Base Civil Engineering

² By letter dated 16 November 2005, the government designated the Rule 4 file in ASBCA Nos. 53943 and 54419 as the Rule 4 file for this appeal, subject to further supplement. Unless otherwise noted all R4 references are to that Rule 4 file.

damages, the amounts as listed below for each calendar day of delay. If more than one phase of the work is in arrears at the same time, damages may be assessed concurrently.

PHASE A	\$ 200.00
PHASE B	\$2,113.00
PHASE C	\$ 352.00

(R4, tab 1 at 95)

4. The daily rates in the liquidated damages clause were determined by the government in accordance with Table 1, "General Construction Projects," section 12.202 of the Naval Facilities Engineering Command (NAVFAC) P-68 manual. Table 1 specified a daily rate of \$200 for estimated "project cost" between \$100,000 and \$500,000 plus an additional \$50 for each \$100,000 in excess of \$500,000. The government had estimated project costs of \$255,915 for Phase A, \$4,327,340.82 for Phase B and \$803,839.56 for Phase C. Vicari does not allege, nor does the record otherwise indicate, that it protested the specified liquidated delay damages rates as unreasonable when it bid the contract. (Gov't opp'n, ex. 8 at 1-2, 6-8)

5. Page 2A of the award document specified the dates for the start and completion of the three phases of the work as follows:

PHASE	COMMENCEMENT DATE	COMPLETION DATE
A	05 JUNE 98	02 JAN 1999
B	03 JAN 99	02 JAN 2000
C	22 JAN 2000	19 OCT 2000

(R4, tab 1 at 25)

6. Notice to proceed with Phase A was given on 5 June 1998. The Phase A contract completion date was extended by contract modification to 13 January 1999 (R4, tab 2 at 4). Phase A was completed on 16 March 1999, 62 days late (gov't opp'n, ex. 14 at 1). Notice to proceed with Phase B was given on 16 March 1999 (R4, tab 2 at 11). The Phase B contract completion date was extended by contract modification to 18 June 2000 (R4, tab 2 at 89). Phase B was completed on 21 July 2000, 33 days late (gov't opp'n, ex. 15 at 1, 2).

7. Notice to proceed with Phase C was given effective 11 August 2000. The Phase C contract completion date was extended by contract modifications including

P00008 and P00014 to 8 May 2001. (R4, tab 2 at 36). Phase C was completed on 28 March 2001, 0 days late (compl. & answer ¶¶ 29). The contract modifications extending the start dates of Phases B and C expressly stated that the extensions did not waive the government's right to assess liquidated damages for the delay in completion of the immediately preceding phase (R4, tab 2 at 10, 36).

8. On or about 29 October 2001, the government paid Vicari the balance due on the contract price less \$12,400 for 62 days delay in completion of Phase A, \$67,616 for 32 days delay in completion of Phase B and an unexplained withholding of \$426 (gov't opp'n, ex. 16 at 26). On 10 August 2004, Vicari submitted a claim to the contracting officer demanding, among other things, "a complete recovery of liquidated damages charged to Vicari for Phase B in the amount of \$69,729" (gov't supp. R4, tab 1 at 6).³ On 3 January 2005, the Board directed the contracting officer to issue a final decision on the claim (ASBCA No. 54781-909). No decision was issued. On 8 April 2005, Vicari submitted this appeal from a deemed denial.

DECISION

Vicari moves for summary judgment on that part of its claim (Count II of the complaint) demanding release of the liquidated damages withheld for late completion of Phase B. Vicari argues that (i) liquidated damages can be assessed only for the overall delay in contract completion;⁴ (ii) the overall delay in contract completion was only 34 days;⁵ and (iii) since the government was withholding liquidated damages for 62 days late completion of Phase A, it had exceeded the total days for which damages were due (app. mot. at 2-4).

We do not agree. Section 01110 of the contract specifications stated that the work was to be performed in three successive phases and specified the days duration of each phase. *See* finding 1. The 881-day time for completion of the "entire work" specified at paragraph 1.3 of Contract Document 00720 was stated to be the 866 days specified in specification section 01110 for the three phases of the work plus 15 days for mailing of

³ The claim assumes withholding for 33 days delay.

⁴ Vicari states: "The contract specifies only one completion date, specifically fixing the 'TIME FOR COMPLETION' in one sentence, which is a simple sentence: 'The contract completion date will therefore be 881 calendar days from the date of contract award'" (app. mot. at 2).

⁵ Vicari measures the delay in overall contract completion from the 22 February 2001 Phase C completion date specified in Modification P00008 to the 28 March 2001 actual completion date for the Phase C work (app. mot. at 4). This computation does not take into account Modification No. P00014 which extended the Phase C and total contract completion date to 8 May 2001 (R4, tab 2 at 36).

the contract and submission and approval of the required bonds. *See* finding 2. The liquidated damages clause of the contract specified different rates for each phase and not a single rate for the entire contract. *See* finding 3. Considering the express provisions of the contract and the government's reservation of its rights in extending the contract phase completion dates (*see* finding 7), we find no merit in Vicari's contention that liquidated damages applied only to late completion of the entire contract and that no liquidated damages are due for the late completion of Phase B.

Vicari also argues that the liquidated delay damages daily rate of \$2,113 for Phase B was not a reasonable estimate of the damage that might have resulted from any delay in completing that phase. Vicari contends that a day of delay in completion of Phase B would cause no greater delay in completion of the new buildings than a day of delay in completion of Phase A, for which the liquidated delay damages daily rate was only \$200. *See* finding 3. This may be true, but we cannot tell on the record before us on the motion whether the Phase A rate was unreasonably low or the Phase B rate was unreasonably high.

The liquidated damages daily rates were determined by the government in accordance with the P-68 manual. *See* finding 4. Rates so determined are presumed reasonable. *Atlantic Maintenance Co.*, ASBCA No. 40454, 96-2 BCA ¶ 28,323 at 141,416. Moreover, even if the presumption of reasonableness is rebutted by the tenfold disparity in the Phase A and Phase B rates, the burden of proof of the unreasonableness of the Phase B rate remains with Vicari as the party claiming that rate to be unenforceable. Fed. R. Evid. 301; *DJ Manufacturing Corp. v. United States*, 86 F.3d 1130, 1134-35 (Fed. Cir. 1996). Vicari has offered no evidence that it was the Phase B rate that was an unreasonable estimate of the damages that might be suffered by the government as a result of delayed completion of the buildings.

The motion is denied.

Dated: 21 November 2005

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER

EUNICE W. THOMAS

Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

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. 54982, Appeal of Pete Vicari General Contractor, Inc., rendered in conformance with the Board's Charter.

Dated:

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