ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
William F. Klingensmith, Inc.	)	ASBCA No. 52028
	)	
Under Contract No. 263-93-C-0434	)	

APPEARANCES FOR THE APPELLANT: Branko Stupar, Esq.
David S. Healy, Esq.
Faulkner, Shands & Stupar
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Jeffrey Robbins, Esq.
Jonathan A. Baker, Esq.
Trial Attorneys
Department of Health and Human Services
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE REED
ON APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The appeal is from a Government claim for liquidated damages (LDs). *William F. Klingensmith, Inc.*, ASBCA No. 52028, 01-2 BCA ¶ 31,589 at 156,095. Prior to that earlier decision in this appeal, appellant (WFK or contractor) sought "partial summary judgment on the issue of [LDs]" (appellant's motion for partial summary judgment (app. mot.) at 1). The motion was accompanied by the sworn declaration of the contractor's vice president (VP) entitled "Statements of Material Facts for Which There Can Be No Genuine Dispute" (VP affidavit). Following our previous decision, WFK submitted "Appellant's Supplement to Motion for Partial Summary Judgment" (app. mot. suppl.). Attached was a document entitled "Government Admissions of Fact" comprised of purported extracts of (1) the contractor's amended complaint and the Government's answer to the amended complaint (C&A) and (2) the contractor's requests for admission with the Government's responses.

The Government responded with its "Motion in Opposition to Appellant's Motion for Partial Summary Judgment" (Gov't resp.) with attached affidavit by a Government project officer (PO) and the Government's answers to WFK's requests for admission. The Government's response is not a cross-motion for summary judgment but generally posits that the matter is not susceptible of summary judgment and that the appeal should be resolved only after a hearing. The contractor submitted a reply to the Government's response (app. mot. reply).

The bases for the motion, as supplemented, are as follows:

1. delay by HHS, not contractor delay, caused late performance;

a. WFK experienced excusable and/or compensable delays for which the Government had not made compensation and during which delay periods the Government should not assess LDs (several general and specific delay assertions are combined by the Board under this category);

b. the Government "refused to acknowledge how the timing of later phases [of the work were] affected by justified delays in earlier phases [and thereby] denied [the contractor's] request to accelerate . . ." (app. mot. at 5);

c. the Government "waived the completion date" under the contract and thereby waived LDs when it failed to negotiate a new completion date after issuing a stop work order (SWO) (app. mot. suppl. at 10);

d. the Government breached its duty of good faith to the contractor by withholding LDs while refusing to negotiate alleged excusable and/or compensable delays;

e. a "cardinal change" resulted from a 169-day time extension allowed by the Government that "would require a contract renegotiation and [would] estop any assessment of [LDs]" (app. mot. suppl. at 11);

2. the LDs are an unenforceable penalty;

a. the LDs are unenforceable, in part, to the extent that the daily LDs rates were based on alternative space rental costs that were never actually incurred because the contract specified that the Government would occupy the site during the entire construction period;

b. the Government deleted the requirement for a critical path method type schedule (CPM) which "eliminated any logical and practical method for determining any completion dates and thereby waived any claim to [LDs]" (app. mot. at 4);

c. the LDs were a penalty in that daily LDs rates were based, in part, on costs for a Government contract for "contract managers," which contract was not extended to correspond with the extended performance period of WFK's contract; therefore, "by not renewing or extending the 'contract managers' contract, [the Government] effectively mitigated its damages [but failed to pass the savings along to appellant] by reducing the amount or rate of [LDs] . . ." (*id.*) (this argument is conceded by WFK not to be ripe for

summary judgment (app. mot. suppl. at 6); therefore, it will not be addressed further in this decision);

d. the Government "had no reasonable expectation of suffering any damage by performance delay" when the Government "acknowledged and warned [appellant from the outset] that there would be delays in the project" (app. mot. suppl. at 4);

3. the Government added a "final phase," for which there exists no "contractual basis for assessing [LDs]" (app. mot. at 4); and

4. LDs were withheld after substantial completion (this argument is conceded by WFK not to be ripe for summary judgment (app. mot. reply at 3); therefore, it will not be addressed further in this decision).

STATEMENT OF FACTS PERTINENT TO THE MOTION

1. Contract No. 263-93-C-0434 (the contract) was awarded based on sealed bids on 20 September 1993 by the U.S. Department of Health and Human Services (HHS or the Government) to the contractor. The construction contract consisted of "phased modifications to National Institutes of Health [NIH] Building 14E and parts of NIH Building 14A . . . ." (R4, tabs 300/0001-02; 301, § 01010, ¶ 1.2A.)

2. The contract incorporated by reference the following pertinent standard provisions:

a. FAR 52.233-1 DISPUTES (DEC 1991);

b. FAR 52.236-15 SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984);

c. FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984) ALTERNATE I (APR 1984);

d. FAR 52.243-4 CHANGES (AUG 1987); and

e. FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984).

(R4, tab 300/0012, 47-49)

3. Concerning the timing of contract work, WFK was required to complete the entire work not later than 540 calendar days after notice to proceed. The work was divided into five phases (numbered I-V or 1-5 in various contract provisions) with each having a separate *per diem* LDs amount. A basic LDs rate was calculated on or about 3 May 1993 for use in each of the phases. Added at that time to the basic rate was a projected amount

for "rent" per day per square foot. The amount for rent was tailored to each work phase based on the portion of Building 14E that was expected to be unavailable to HHS during each phase of the work. No daily LDs amount is included in the contract for overall completion or for any time period or work activity not included within one of the five specified phases. (App. requests for admission and Gov't answers, ¶¶ 44; R4, tabs 300/0011, 123-24; 301, § 01010, ¶¶ 1.4A.-E.; PO affidavit, ¶ 7)

4. A "Major Milestone Schedule" chart in the contract specifications set out, among other time limits, the completion time for each of the five phases, based on number of days from notice to proceed (NTP). The milestones were specified to "be used as the basis for [LDs]." A completion time from NTP for each of phases 1-5 was set forth as follows, respectively: "end day" 113, 199, 285, 381, and 481. Following "complete phase 5," the major milestone chart set out five additional milestones and related activities that were to be accomplished after "end day" 481 from NTP with various completion times up to "end day" 540 from NTP, a period of 59 days. These included the following: test and balance all systems, "end day" 502; submit all required documents, "end day" 510; restoration of all tree, lawn, and landscape areas, "end day" 511; punch list, "end day" 518; and final turnover, "end day" 540. (R4, tab 301, § 01170, ¶¶ 1.11A., C. and major milestone schedule chart)

5. The specifications, in pertinent part, require that appellant "[t]est, adjust, and balance all systems after Phase 5" (R4, tab 301, § 05990, ¶ 1.2D.).

6. Appellant was obliged to "limit [its] on-site work to one phase at a time." The contract initially required submission by the contractor of a "bar graph" type schedule. WFK was also "required to develop a [CPM] to coordinate the phasing of the work while allowing for the continuous operation of NIH activities within [Buildings 14A and 14E]." As is typical with a CPM, the contractor was to use the schedule "in planning, coordinating and performing the work under this contract . . . ." Appellant's initial CPM was acceptable to HHS; however, according to the HHS PO, subsequent updates were either not timely submitted, were not current, or were in error by not accurately portraying criticality of activities. Therefore, by unilateral contract Modification No. 11 (Mod 11), the contracting officer (CO) deleted the CPM requirement. (Statement of Facts 2b.; R4, tabs 300/0032-33, 0109; 301, § 01010, ¶¶ 1.2A., 1.3B., § 01170, ¶ 1.1A.; PO affidavit, ¶ 5)

7. Interruption or interference by the contractor with HHS business in other building areas outside the contract work area was prohibited by the contract. To avoid interruption of or interference with Government activities in the building, the contractor was required to separate work areas from the remainder of the building with smoke-tight partitions or with temporary dust-proof enclosures and partitions in certain instances (such enclosures were always required to separate sterile or germ-free areas of the building from the contractor's work area; the building serves, among other uses, as a laboratory and animal holding space). In addition, WFK was also under certain restrictions regarding use of

building elevators, toilets, storage areas, corridors, stairwells, driveways, and entrances. (R4, tabs 300/0033-35; 301, § 01010, ¶¶ 1.2A., 1.7B.3.; PO affidavit, ¶¶ 1-2, 7)

8. Concerning use by HHS of the buildings during the work, the contract provided as follows in the specifications, in pertinent part:

> 1.7 WORK RESTRICTIONS DUE TO GOVERNMENT OPERATIONS
>
> A. Scheduled Operations:
>
> 1. Full Government Occupancy: The Government will occupy the site and existing building during the entire construction period. Cooperate with the government during construction operations to minimize conflicts and facilitate government usage. Perform the work so as not to interfere with the government's operations[;] delays may be incurred. . . .
>
> 2. Some areas within the limits of the contract shall be occupied during performance of the work under this contract. . . .

(R4, tab 301, § 01010-5)

9. HHS planned to occupy parts of Building 14E, but not all of the building space, during various phases of performance of the contract. In a few limited instances, HHS and contractor personnel worked side-by-side in the same rooms and spaces. HHS occupants of Building 14E expanded or extended their rental of leased space to accommodate the unavailability of certain space in that building. (C&A, ¶¶ 4-5; PO affidavit, ¶ 7)

10. In his affidavit, appellant's VP contends that various causes added work to the contract. In some instances, HHS modified the contract to allow time extensions, among other relief. Time extensions allowed by HHS to date amount to 198 days. Two of the modifications to the contract which allowed time extensions were bilateral and refer to the Changes provision of the contract for authority. In bilateral Mod 4, the parties agreed to a 169-day time extension for phase 1, but reserved "the exact costs associated with this time extension" for later negotiation. (The CO final decision (COFD) provides that 113 days were added to phase 1; neither party has shown how the discrepancy between 113 days and 169 days is resolved, if it is, in the present record.) In bilateral Mod 13, the parties settled, among other things, time (four days) and money for "Change 38," a part of "PDL 32a." The modification does not recite the phase of the work affected by Change 38 and/or PDL 32a. Unilateral Mods 10 and 11 allow time extensions related to PDLs 12 and 26, respectively, but do not specify the phase(s) of work affected by those PDLs. (Statement of Facts 2a., d.;

R4, tab 300/0076-120; AR4, tabs A-1, -2; ASR4, tab 1; VP affidavit, ¶¶ 6, 10, 16, 19, 22, 25-26, 30, 33, 36-39, 50, 53, 56, 59, 62, 65, 68, 71, 74)

11. In his affidavit, the HHS PO contends that contract work was delayed by a lack of coordination on appellant's part. Further, the PO asserts that WFK exhibited poor workmanship in installing ceilings, installed defective equipment, used unapproved materials, and was obliged to perform remedial work to reinstall a steam pipe and equipment and pipe supports. (PO affidavit, ¶ 11) The affected phases of work are not specified.

12. HHS requested about 69 changes during the life of the job. HHS contends that it attempted to negotiate bilateral agreements and allowed extra payment and time extensions when justified. (R4, tab 300/0076-120; PO affidavit, ¶ 12)

13. In a letter dated 20 November 1995, the CO noted that HHS had not received from WFK "the required composite coordination drawings for Phase III [which were] to be submitted and approved per your contract prior to beginning any work on Phase III. Not withstanding [sic] . . . subcontractors have been observed performing new work in the Phase III area. . . . Any work which has begun without the approval of the [PO] must be suspended immediately . . . ." The parties met on 21 November 1995, resulting in rescission of the CO's 20 November 1995 directive by a letter dated 21 November 1995. (R4, tabs 300/2029, 2035)

14. The HHS PO implies that, for phase 3, appellant was required to submit coordination drawings but had not done so. The PO further implies that WFK had not obtained permission to go forward with phase 3 work by accepting the risk of going forward without approval. Therefore, the PO asserts that the CO, in her letter dated 20 November 1995, was enforcing the relevant specification provision by directing that appellant "not proceed in a manner which is contrary to contract requirements." Those requirements, found in the specifications at § 01205, ¶ 1.3B., according to the PO's interpretation, require that the contractor accept the risk of going forward without prior approval. The PO states that acceptance of that risk by WFK on or about 21 November 1995, allowed rescission of the CO's letter. (R4, tab 301; PO affidavit, ¶ 9)

15. The relevant contract specification provides:

> SECTION 01205 - PROCEDURES AND CONTROLS
>
> PART 1 - GENERAL
>
> . . . .
>
> 1.3 COORDINATION AND MEETING

. . . .

B. Coordination Drawings: Refer to FAR 52.236-21 . . . for general requirements.

. . . .

2. Sleeves and Inserts: Before any sleeves and inserts are set or any mechanical or electrical equipment of foundations [sic] or other work is installed, the Contractor shall prepare and submit for approval by the [PO] composite coordination drawings . . . .

3. Any work installed prior to approval of coordination drawings shall be at the Contractor's risk. . . .

(Statement of Facts 2c.; R4, tab 301)

16. In a COFD dated 10 November 1998, the Government set forth its claims for LDs in the total amount of $917,822. For each of phases 1-5, a number of days and the inclusive dates for which LDs are assessed is listed in the COFD. In addition, an LDs amount was assessed for a so-called "Final Phase." The final phase LDs *per diem* amount imposed by the Government is the same as that specified in the contract for phase 5. The COFD provides that phase 5 was completed no later than 11 July 1997. The final phase allegedly commenced on that date "with a performance period of 59 days," the same time duration as from day 481 to day 540 after NTP. Final phase LDs were assessed by the CO for 42 days during 9 September-20 October 1997, a total of $63,378. WFK appealed to the Board from the COFD by former counsel's letter dated 8 February 1999. The Government avers "that the 'final phase' is actually part of Phase Five and so extends after the July 11 date." Government counsel contends that "[t]he logic behind this is clear. At the end of the project there were some final items of work such as balancing which had to be done for the building as a whole (i.e. for all five phases) before the project could be considered substantially complete. However, the [G]overnment also acknowledges that the drawing demonstrating this (R4, [t]ab 303/ A1.0) is not totally consistent with the Major Milestone Schedule cited by [a]ppellant." (Statement of Facts 4; AR4, tabs A-1, -2; ASR4, tab 1; Board Correspondence File; C&A, ¶¶ 37; Gov't resp. at 6) Neither party has yet indicated the specific delayed activities within each phase, the cause of any such delay, which of the delayed activities was critical to completion of a phase, or whether any concurrent delay occurred during any such delays. The Government has pointed to no evidence in the present record that shows completion of phase 5 after 11 July 1997.

17. Contract drawing "A 1.0" indicates the phasing plan for Building 14E (Building 14A abuts Building 14E). The Building 14E plan drawing indicates segregated portions of the building labeled for work during phases 1-5 or combinations of phases. The words "Final Phase" do not appear. The drawing does not show the roof of Building 14E, where the new air handling units AHU-1 and AHU-2 are to be located. "Phasing Notes" which do not mention a "Final Phase" are also included on the drawing, as follows, in relevant part:

> General:
>
> . . . .
>
> Testing and Balancing of Supply Air, Exhaust Air . . . Systems shall occur at the end of each phase to establish proper air flows for rooms E 109 A, E 111 A, E 111 B, E 113 B, E 115 A, and E 118 A [all those room numbers are indicated on the drawing within Building 14E].
>
> . . . .
>
> Phase 5:
>
> . . . .
>
> . . . Complete testing of AHU-1 and AHU-2 and place in operation . . . .
>
> Perform complete testing and balancing of Building 14E.

(R4, tab 303/A 1.0, A 2.3 ("Building 14E - Roof Plan"))

DECISION

Summary Judgment

A party may obtain summary judgment if no material facts are genuinely disputed and that party is entitled to judgment as a matter of law. To determine whether a material fact is disputed, we construe all reasonable inferences in favor of the nonmoving party. In examining the record in response to a motion for summary judgment, we neither weigh evidence to determine the truth of a matter nor resolve factual differences in deciding whether a material fact dispute genuinely exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49, 255 (1986); *Geisler v. United States*, 232 F.3d 864, 869 (Fed. Cir. 2000); *Jay v. Secretary of DHHS*, 998 F.2d 979, 982 (Fed. Cir. 1993); *Caddell Constr. Co.*, ASBCA No. 53144, 02-1 BCA ¶ 31,850 at 157,403.

WFK's remaining assertions in its motion fall into three categories as listed above in outline form in our prefatory remarks: (1) delay by HHS, not contractor delay, was the cause of late performance, (2) the LDs are an unenforceable penalty, and (3) LDs were withheld during a so-called "final phase" during which no contractual basis exists for the assessment of LDs. Some of appellant's assertions present affirmative defenses for which WFK has the burden of coming forward with or pointing to competent and credible evidence for support of each element of its defenses or to show an absence of evidence supporting the nonmovant's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *DJ Mfg. Corp. v. United States*, 86 F.3d 1130, 1135 (Fed. Cir. 1996); *Idela Constr. Co.*, ASBCA No. 45070, 01-2 BCA ¶ 31,437 at 155,257; *Elam Woods Constr. Co.*, ASBCA No. 52448, 01-1 BCA ¶ 31,305 at 154,545, *aff'd on recon.*, 02-1 BCA ¶ 31,658.

The claim underlying the appeal is a Government claim for LDs for which the Government has the ultimate burden of proof. To the extent that the period of time for which LDs was withheld is an issue, including proof of delays for which the contractor is alone responsible and the date on which each phase of the project was substantially complete, the Government must prove the correctness of the assessment. *United States v. United Eng'g & Contracting Co.*, 234 U.S. 236, 242 (1914); *Idela Constr.*, 01-2 BCA at *id.*; *KEMRON Envtl. Servs. Corp.*, ASBCA No. 51536, 00-1 BCA ¶ 30,664 at 151,399.

HHS, as the nonmoving party under the motion and the party with the ultimate burden of proof for the claim of LDs, must counter any showing by appellant with evidence sufficient to demonstrate a material fact genuinely disputed or that the contractor is not entitled to judgment as a matter of law. Conclusory statements or arguments will not suffice to raise a genuine factual dispute. The nonmovant's evidence must be adequate for a reasonable fact finder, drawing the requisite inferences and applying the preponderance of evidence standard, to decide the issue in favor of the nonmovant. Where the nonmoving party bears the ultimate burden of proof and the moving party demonstrates that a crucial aspect of the nonmovant's case is without evidentiary support, summary judgment may follow. *Celotex Corp.*, 477 U.S. at 322-25; *Anderson*, 477 U.S. at 248-49; *DK Mfg.*, 86 F.3d at *id.*; *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1541 (Fed. Cir. 1993); *Sweats Fashions v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987); *Caddell*, 02-1 BCA at *id.*; *Elam Woods*, 01-1 BCA at *id.*

Alleged Government Delay

a. Delay Assertions

A number of changes were requested by the Government, appellant asserts that various causes added work to the contract, and HHS claims that the contractor delayed itself. The parties disagree over the effect of those matters on the time for completion of the work in each phase of the contract. HHS allowed some time extensions in what it says

were bilateral modifications to the contract and other time extensions in unilateral modifications. We are not informed by the record at this point of all of the activities or phases of work that were delayed by these causes. Neither party has yet produced any delay analysis. (Statement of Facts 10-12, 16) Material facts are genuinely disputed and summary judgment is not appropriate.

b. Requests to Accelerate

The contractor contends that its requests to accelerate were denied by the Government, thus waiving any right to assess LDs. As we understand the contention, it is connected with or flowed from the alleged failure by HHS to negotiate and allow time extensions to which WFK is allegedly entitled. Appellant contends: "Numerous time extension requests remain pending and must be determined before any [LDs] may be considered." (App. mot at 2; app. mot. suppl. at 2) No legal authority is cited in support.

Further, appellant suggests that by not allowing time extensions, the Government "treated the five phases of the contract as five separate contracts, one to be completed before the next could begin. . . . [And] refused to acknowledge how the timing of later phases was affected by justified delays in earlier phases" (app. mot. at 4-5; app. mot. suppl. at 9). This argument seems to be tied to the contractor's asserted "discretion to proceed at its own risk before approval of drawings" with which HHS is said to have interfered by removing that discretion in PDL 25 (app. mot. suppl. at 10).

The contract provides that WFK was limited to working on one phase at a time, absent further agreement of the parties (Statement of Facts 6). We have nothing but assertions without proof concerning whether appellant needed permission or had discretion to proceed with work at its own risk. A more complete record will be necessary. At this point in the proceedings, we are not convinced that HHS was obliged to allow the contractor to work on more than one phase at a time even if it agreed to assume the risk of rejection and re-performance. Further, as concluded above, we are unable to determine with sufficient certainty the extent of delay to any activity or phase of the contract. Disputed facts related to the alleged delays must be resolved after a more complete development of the record. Summary judgment is not appropriate.

c. SWO

The contractor asserts that HHS "issued a five-day [SWO] effectively canceling all previously contemplated completion dates . . . ." Later in the motion, WFK argues that HHS "issued a [SWO] on November 25, 1995. This order was rescinded three days later on November 28, 1995. This [SWO] waived the completion date under the contract. Upon resumption of the work, a new completion date should have been negotiated but was not. By not issuing a new completion date, [HHS] waived any completion date and any [LDs]." In the supplement to the motion, appellant contends that the CO "issued a [SWO] on

November 20, 1995. [The contractor] received a rescission of this [SWO] on November 28, 1995." (App. mot. at 1, 5; app. mot. suppl. at 2, 10-11)

HHS contends that no SWO was issued. Rather, says HHS, the CO was merely enforcing the contract specifications by her actions on 20-21 November 1995. (Statement of Facts 13-14)

A more complete factual record will be necessary for the Board to determine the effect under the contract of the contractor's and the CO's actions during 20-28 November 1995. Among other things, it is not clear what actions the contractor or the CO took on or about 20-21 November 1995, to satisfy any requirement in the contract that appellant "take the risks associated with proceeding" with the work prior to approval of coordination drawings. (Statement of Facts 2a., d., 13-15; Gov't mot. at 7) Moreover, our examination of the exercise of the CO's discretion in these matters is a fact-driven determination that cannot yet be made. And, as stated above, even if a delay was experienced on certain activities, neither party has shown what effect that delay had on completion of a project phase, which party is responsible for the delay, or whether any other delay was concurrent.

To the extent that the contractor asserts a waiver by HHS of its right to assess LDs, WFK would be obliged to show an "intentional relinquishment or abandonment of a known right or privilege." *Alvarez & Assocs. Constr. Co.*, ASBCA No. 49341, 98-1 BCA ¶ 29,559 at 146,536 quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *See Hooe and Herbert v. United States*, 41 Ct. Cl. 378, 382-83 (1906) (motion to suppress depositions) where the court stated:

> Waiver is always a question of fact, determinable from all the facts and circumstances surrounding the transaction in hand. To estop the assertion of one's rights it must distinctly appear that the same were waived with full knowledge of what they were and with intent to waive the same. Mere silence does not constitute waiver except in that class of cases where the law will presume waiver from silence irrespective of the party's actual intent or knowledge. . . . [T]he burden of establishing waiver rests upon the party asserting the defense.

Other than its unsupported assertion, appellant points to no evidence that HHS abandoned its right to assess LDs by its actions on 20-21 November 1995. Rather, the record as a whole indicates that, at some point (to be shown on a more complete record), HHS raised the issue of LDs and has pursued that remedy to date.

Genuinely disputed material facts remain for resolution after a more complete record is established. It also is not clear that the contractor is entitled to judgment as a matter of law based on waiver. Summary judgment is inappropriate.

d. Breach of Duty to Negotiate Delay

The essence of WFK's argument is that the Government may not withhold LDs before all contractor time extension requests are resolved. No legal authority is cited.

Material facts related to the effect on work phases of time extensions already allowed and any additional time extensions due are genuinely disputed. We are not convinced that WFK is entitled to judgment as a matter of law concerning an asserted duty by HHS to resolve all requested time extensions before LDs properly may be assessed. Therefore, summary judgment is not appropriate.

e. Cardinal Change

WFK contends that the time extensions allowed by HHS constitute "a cardinal change in the Contract, which would require a contract renegotiation and estop any assessment of [LDs] under the original Contract" (app. mot. suppl. at 11). No legal authority is cited for support.

WFK's argument for cardinal change is undercut by two bilateral contract modifications in which the parties agreed to 173 of the 198 days allowed overall by HHS, including the 169-day delay characterized by appellant as a cardinal change. The signed modifications evidence a meeting of the minds within the bounds of the contract Changes provision. (Statement of Facts 10) By agreeing to these modifications, WFK agreed that the changes resulting in the time extensions were redressable under the contract, not materially different obligations from those bargained for in the contract.

The time extensions total about a 37% increase over the original performance period (Statement of Facts 3, 10). We cannot agree, on this limited record, that appellant is entitled to summary judgment on the facts or that the changes resulting in the aggregated time extensions allowed to date constitute cardinal changes as a matter of law.

Unenforceable Penalty

a. Space Rental Costs

Appellant challenges the LDs rate as an unenforceable penalty because it is based in part on rental costs that HHS allegedly never incurred. According to appellant, the contract specified that HHS would occupy the entire building while the project was being performed.

WFK refers to the specifications, § 01010, ¶ 1.7.A.1., to argue that HHS "cannot reasonably anticipate delay damages where [it] was to occupy the site and continue operations during the renovation and the contractor was required to work around [HHS's]

operation." The contractor interprets the cited contract provision to mean that the work "would be delayed." WFK further contends that HHS "would have beneficial occupancy of the building throughout the performance of the Contract." Therefore, according to the contractor, "it was improper for [HHS] to include in the Contract a provision for [LDs]. The [Government] cannot set up a contract requiring the contractor to work around the government's operations and at the same time anticipate, and profit by, any damages from delayed performance by the contractor." (Statement of Facts 8; app. mot. at 3; app. mot suppl. at 3-4)

WFK misconstrues the contract language at specification § 01010, ¶ 1.7.A.1. That provision states that "delays may be incurred," not that work "would be delayed," as appellant suggests in its motion. The specification language must be read and harmonized with other language in the contract. (Statement of Facts 2d.-e., 7-10) To the extent that delay of the contractor's work was experienced, ¶ 1.7.A.1. does not preclude an examination of the cause(s) of the delay and an allocation of responsibility for it under remedy-granting provisions of the contract.

Concerning LDs generally, the focus of an inquiry concerning the propriety of an LDs rate is at the time of contract award, not LDs assessment. HHS need not actually incur the rental costs as a condition precedent to recovery of LDs. *U.S. Floors, Inc.*, ASBCA No. 45915, 94-2 BCA ¶ 26,636 at 132,486.

The LDs rate was calculated prior to award, was included in the solicitation, and WFK agreed to the resulting contract terms (Statement of Facts 1, 3). The contractor claims that "[e]ven when viewed from the time the contract was formed, the [LDs] provided in the contract did not constitute a reasonable attempt by the NIH to forecast any actual delay damages" (app. mot. at 2). Appellant has thus far brought forth no credible evidence of impropriety in the LDs amount at the time of its calculation. Appellant's assertions are not evidence.

For its part, HHS has presented some evidence that rental costs were projected based on expected space needs that were to be met by rental of alternative space on account of the contract work (Statement of Facts 3, 9). WFK disputes that; however, in at least one instance, appellant asserts that the Government vacated certain space in anticipation of phase 4 of the project (app. requests for admission, ¶ 179).

Appellant misconstrues the contract as it relates to the potential for delay on account of occupancy of the buildings by HHS. Further, WFK has made no showing that the LDs rate is a penalty. Therefore, we are not convinced that appellant is entitled to summary judgment.

b. CPM Deletion

The contractor contends that deletion of the contractual requirement for a CPM made it "impossible to determine revised completion dates after the incorporation of numerous change orders and PDLs." According to WFK, by eliminating the requirement for submission by appellant of the CPM to HHS, the Government "waived any claim to [LDs]." (App. mot. at 2, 4; app. mot. suppl. at 2, 7) No legal authority is cited in support of the waiver claims.

The HHS PO came to have no confidence in WFK's CPM as a project management tool. Therefore, the parties genuinely dispute the ongoing utility of the CPM. Further, whether the CPM or some other form of schedule continued in use by the contractor is a factual issue that cannot be determined from this preliminary record (by deleting the CPM requirement, HHS did not preclude appellant from using whatever scheduling, time, and resource management technique it wished, whether a CPM, a bar chart, or some other methodology). (Statement of Facts 6) As we stated above, neither party has yet shown any delay analysis or related evidence that would tend to support the contractor's statements concerning the practicability of analyzing alleged performance delays.

Waiver of LDs also was discussed above. Facts related to the effect of the deletion of the CPM requirement from the contract are genuinely disputed. We are not convinced that appellant is entitled to judgment as a matter of law on the issue of waiver.

c. No Reasonable Expectation by Government of Suffering Delay Damages

WFK refers to FAR 11.501 in combination with specification § 01010, ¶ 1.7.A.1., to argue from a slightly different perspective that HHS "cannot reasonably anticipate delay damages where [it] was to occupy the site and continue operations during the renovation and the contractor was required to work around [HHS's] operation." (Statement of Facts 8; app. mot. at 3) We have already discussed above appellant's misconstruction of the contract provision.

FAR 11.501 addresses the policy behind LDs. It was promulgated after the contract was awarded. (Statement of Facts 1; FAC 97-19, 65 Fed. Reg. 46,052 (26 July 2000), effective 25 September 2000)

The comparable FAR provision at award was FAR 12.202, "Policy," which provided in pertinent part:

> (a) [LDs] clauses should be used only when both (1) the time of delivery or performance is such an important factor in the award of the contract that the Government may reasonably expect to suffer damage if the delivery or performance is delinquent, and (2) the extent or amount of such damage would be difficult or impossible to ascertain or prove. . . .

> (b) The rate of [LDs] used must be reasonable and considered on a case-by-case basis since [LDs] fixed without any reference to probable actual damages may be held to be a penalty, and therefore unenforceable. . . .

To prevail, appellant must show that "'the contested [LDs] bear no reasonable relation to the probable loss that [HHS] was likely to have suffered from a delay in performance.' . . . a [LDs] clause will not be set aside unless the contractor presents credible evidence that the rate was disproportionately high to the reasonably anticipated damages." *U.S. Floors, Inc.*, *id*. quoting *Jennie-O Foods, Inc. v. United States*, 217 Ct. Cl. 314, 338, 580 F.2d 400, 414 (1978).

> When damages are uncertain or difficult to measure, a [LDs] clause will be enforced as long as 'the amount stipulated for is not so extravagent, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression.' . . .
>
> [The burden of challenging a LDs provision] is an exacting one, because when damages are uncertain or hard to measure, it naturally follows that it is difficult to conclude that a particular [LDs] amount or rate is an unreasonable projection of what those damages might be. . . .

DJ Mfg., 86 F.3d at 1133-34 (and cases cited), quoting *Wise v. United States*, 249 U.S. 361, 365 (1919). For the reasons discussed above under space rental costs, we are not convinced that WFK is entitled to judgment as a matter of law concerning the propriety of the LDs rates. Therefore, summary judgment is not appropriate.

Final Phase LDs

WFK asserts that HHS may not properly assess LDs for a "final phase" following phase 5 of the contract because the contract provides for no LDs after completion of phase 5 and no LDs for overall contract completion. HHS admits that "it was not appropriate to assess [LDs] for a 'final phase'" but argues that LDs for "some final items of work such as balancing which had to be done for the building as a whole (i.e. for all five phases) before the project could be considered substantially complete" were properly assessed as a part of phase 5. The Government also contends in its answer that the final phase is more correctly part of Phase 5. (Statement of Facts 3, 16; Gov't resp. at 6)

Each of five phases, together covering much but not all of the work under the contract, has a rate for LDs for failure timely to finish that phase only. The contract does not include LDs for contract completion as a whole or for any final phase. The Government has pointed to no contract provision that specifies a final phase. That term appears to have been used for the first time in the COFD. It is clear that the COFD attempts to incorporate into phase 5 the 59-day period of the overall performance period that follows after the conclusion of phase 5. The Government has pointed to no evidence that shows phase 5 work underway after 11 July 1997. (Statement of Facts 3-4, 16-17)

The Government asserts that logic would require some overall balancing work of building systems to reach a state of substantial completion for the project as a whole. Government counsel points to evidentiary support in contract drawing "A 1.0." That drawing does not indicate a final phase, although it shows phases 1-5. Counsel generally seems to find an ambiguity between the drawing and the major milestone chart, but failed to specify the particular provisions that are, according to the Government, "not totally consistent."

We surmise that counsel refers to the final note among the phasing notes on the drawing, requiring "testing and balancing of Building 14E," presumably referring to work on the air handling units as a part of phase 5 work to be completed by end day 481. Counsel's reference to the major milestone schedule apparently relates to work to be performed after phase 5, testing, adjusting, and balancing all systems throughout the project area of Buildings 14A and 14E to be completed by end day 502. (Statement of Facts 4-5, 16-17)

There is no conflict between the phasing notes and the major milestone chart provisions of the contract. LDs may be assessed under phase 5 for work specified under that phase only, including "complete testing and balancing of Building 14E." LDs may not be assessed for a so-called final phase, including testing, adjusting, and balancing all project systems and other work indicated to be performed after end day 481.

The facts concerning whether LDs may be assessed for a so-called final phase, as such, are not disputed as there is no provision in the contract for a final phase. Therefore, LDs may not be assessed for a separate final phase. It is clear that some work is specified by the contract to occur after the completion of phase 5. Activities specifically called out in the contract to be performed after completion of phase 5 cannot, alone, be the subject of LDs. (Statement of Facts 3-5)

The Government contention that certain work must be accomplished for the project as a whole to be considered substantially complete has no bearing on assessment of LDs during phases 1-5. Logic notwithstanding, if the Government thought that LDs were important for overall substantial completion, it would or should have specified such in the contract. It did not. LDs may not be assessed for any activity not within one of the phases for which LDs were specified in the contract, even if non-completion of those activities

leaves the project less than substantially complete. Each LDs assessment for each separate phase, as defined by the contract, stands or falls on its own. *U.S. Floors*, 94-2 BCA at 132,487.

Appellant is entitled to summary judgment on the issue of whether LDs may be withheld for a 59-day so-called "Final Phase" after substantial completion of phase 5 of the contract work. The Government must return to appellant the amount withheld on that basis.

SUMMARY

The contract provides neither for a final phase nor for any LDs associated with any work outside of phases 1-5. Therefore, LDs may not be assessed for any activity not within one of the five phases for which LDs were specified, even if non-completion of those activities left the overall project less than substantially complete. Summary judgment is granted and the appeal is sustained to that extent. The sum of $63,378 must be returned to appellant.

In all other respects, the motion for partial summary judgment is denied.

Dated: 15 November 2002

STEVEN L. REED
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continue)

I concur

I concur

MARK N. STEMPLER
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. 52028, Appeal of William F. Klingensmith, Inc., rendered in conformance with the Board's Charter.

Dated:

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