ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
ACEquip, Ltd.	)	ASBCA No. 53479
	)	
Under Contract No. F33600-99-C-0081	)	

APPEARANCES FOR THE APPELLANT: Stephen M. Ryan, Esq.
Holly A. Roth, Esq.
Manatt, Phelps & Phillips, LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
William M. Lackermann, Jr., Esq.
Senior Trial Attorney
MAJ Bradley C. Anderson, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE ROME
ON GOVERNMENT'S MOTION TO STRIKE

ACEquip, Ltd. has appealed under the Contract Disputes Act (CDA), 41 U.S.C. § 606, from the contracting officer's (CO) final decision terminating its contract for an air cargo handling system at Kadena Air Base, Okinawa, Japan, for cause and demanding repayment of milestone payments. The Government has moved to strike various paragraphs of the complaint, as set forth below.

I. MOTION TO STRIKE BASED UPON FED. R. EVID. 408

The Government has moved to strike paragraph 91 of the complaint, citing FED. R. EVID. 408, COMPROMISE AND OFFERS TO COMPROMISE. Paragraph 91 alleges that:

> As a result of Appellant's and Respondent's efforts to negotiate a settlement with respect to the Air Force's improper termination for cause, Appellant and Respondent jointly requested, and were granted, three separate extensions to the Rule 4 filing date.

Nothing in the bare allegation that appellant and the Government engaged in settlement efforts (already a matter of record when the complaint was filed) violates Rule 408. We deny the motion to strike with respect to paragraph 91.

II. MOTION TO STRIKE BASED UPON LACK OF JURISDICTION

The Government has moved to strike paragraphs 92, 125-145, and the last paragraph on page 30 of the complaint, on the ground that it has not asserted a claim for excess reprocurement costs or liquidated damages and that we lack jurisdiction to consider those matters. Paragraph 92 alleges that the Government has not attempted reprocurement and has failed to mitigate liquidated damages. The other paragraphs allege that the contract's liquidated damages clause is invalid because it improperly deviates from regulatory requirements for construction contracts; the Government waived the clause because it delayed contract performance; and the liquidated damages rate is an unenforceable penalty; they do not refer to excess reprocurement costs.

A. Facts for Purposes of Motion

Clause F-19 of appellant's contract incorporated by reference, modified and completed with monetary amounts, FAR 52.211-11 LIQUIDATED DAMAGES-SUPPLIES, SERVICES, OR RESEARCH AND DEVELOPMENT (APR 1984), such that the clause provided:

> (a) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, or any extension, the Contractor shall, in place of actual damages, pay to the Government as fixed, agreed, and liquidated damages, for each calendar day of delay in starting work on site (after site access) $285/DAY; for each calendar day past contract delivery $2160/DAY.
>
> (b) Alternatively, if delivery or performance is so delayed, the Government may terminate this contract in whole or in part under the Default-Fixed-Price Supply and Service clause in this contract and in that event, the Contractor shall be liable for fixed, agreed, and liquidated damages accruing until the time the Government may reasonably obtain delivery or performance of similar supplies or services. The liquidated damages shall be in addition to excess costs under the Termination clause.
>
> (c) The Contractor shall not be charged with liquidated damages when the delay in delivery or performance arises out of causes beyond the control and without the fault or negligence of the Contractor as defined in the Default-Fixed-Price Supply and Service clause in this contract.

(R4, tab 1 at 15)

The contract did not include the Default-Fixed-Price Supply and Service clause referenced in Clause F-19, but incorporated FAR 52.212-4 CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS (MAY 1997), which provided in part that disputes were to be resolved under the Disputes clause contained at FAR 52.233-1, and that*:*

> (m) *Termination for cause*. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(R4, tab 1 at 16)

On 4 October 2000, about three weeks prior to the contract's site access date, the CO wrote to appellant that "[i]n accordance with Clause F-19 of the contract, liquidated damages of $289.00 per day may be assessed for each day past the site access date that work hasn't begun" (R4, tab 61 at 1). On 29 November 2000, after the site access date had passed, the CO wrote: "We would like to remind you that liquidated damages of $285 per day for each calendar day of delay in starting work on site (after site access) continue to be assessed. The total now stands at $10,545 (23 Oct-29 Nov or 37 days)" (R4, tab 71 at 3). On 1 December 2000 the CO alerted appellant: "Please be advised that we intend to assess damages of $2,160.00 per day in accordance with Contract Clause F-19, Liquidated Damages, for each day past 25 Oct 01 that delivery is not made (365 days after the 23 Oct 00 site access is 25 Oct 01)" (R4, tab 74 at 2). On 1 February 2001, the CO notified appellant:

> Please be advised that liquidated damages of $285 per day continue to accrue for each day past the site access date of 23 Oct 00 which on-site work hasn't begun. . . . [W]e don't think it's probable that on-site work could start until at least mid-Jul 01. In that case, liquidated damages for late on-site start and late delivery would be approximately $75,525.00 (23 Oct 00-15 Jul 01=265 days x $285/day) and $572,400.00 (23 Oct 01-15 Jul 02=265 days x $2160/day) respectively.

(R4, tab 86 at 2)

By letter dated 7 February 2001 to the CO, appellant stated:

> [Y]our letter of 4 Oct 00 only indicated that liquidated damages "may" be assessed. No Notice was ever given that you were, in fact, assessing liquidated damages nor was any opportunity given to us to appeal such an action. You even suggested that a meeting be called to discuss issues outstanding. Our subsequent correspondence provided additional details to explain the delays encountered as mitigating factors. We respectfully suggest reconsideration of the assessment of liquidated damages and in the event of a negative determination we request an appeal.

(R4, tab 87 at 2)

In March 2001 the CO issued Cure and Show Cause Notices to appellant (R4, tabs 96, 104). In its 24 April 2001 response to the Show Cause Notice, appellant stated that "[w]e do not believe that the imposition of liquidated damages retroactively will facilitate a constructive resolution of the issues at hand" (R4, tab 110 at 3).

On 1 June 2001 the Termination Contracting Officer (TCO) issued a unilateral contract modification containing his "Notice of Termination for Cause, Final Decision of the Contracting Officer." In the opening paragraph, the TCO described the modification as "terminating said Contract for cause and demanding repayment of unliquidated milestone payments." (R4, tab 113 at 2) The TCO later listed the contract's Liquidated Damages clause among "relevant clauses" and mentioned, *inter alia*, that appellant had requested relief from liquidated damages (*id*. at 3 ¶ 6, at 4 ¶ 8). The TCO stated that "[T]o this date you have taken no action to begin work on site, although site access was granted as scheduled on 31 Oct 00. You have been notified that liquidated damages are being assessed-as you agreed in the contract-at $285/DAY" (*id*. at 5 ¶ 9). The TCO alleged performance deficiencies, then terminated appellant's contract for cause and demanded repayment of $794,592.20 in unliquidated milestone payments, giving the address where appellant was to send its check (*id*. at ¶¶ 9-10). He did not demand payment of any liquidated damages. The TCO concluded that:

> In the event of reprocurement of the items terminated hereby, you will be held liable for any excess costs incurred, including liquidated damages. In addition to charging excess costs, all rights and remedies provided by law or under the contract are reserved by the Government.

(*Id*. at 5 ¶ 11)

By letter to the TCO dated 5 July 2001, appellant disputed the termination and the demand for repayment of milestone payments but did not mention liquidated damages (R4, tab 120). On 18 July 2001 the TCO responded that he did not intend to reconsider his final decision (R4, tab 122). On 31 July 2001 appellant appealed to the Board. The notice of appeal did not mention liquidated damages. The record, to date, indicates that the Government has not offset or otherwise collected liquidated damages and that no reprocurement has occurred.

B. Discussion

The Government alleges that it has not asserted a claim for liquidated damages and that we do not have jurisdiction over the matter. Appellant responds that the TCO's final decision advised that liquidated damages were being assessed at the rate of $285 per day and that, in the event of reprocurement, appellant would be liable for excess costs, including liquidated damages. Appellant states that "[a]lthough Respondent has not asserted a monetary claim for liquidated damages," the amount of liquidated damages is readily determinable by simple arithmetic. (App. resp. to mot. to strike at 2) Appellant also alleges that we have jurisdiction because its complaint seeks the interpretation of contract terms.

The CDA requires that contractor claims be submitted to the CO for a decision and that Government claims against a contractor be the subject of a CO's decision. 41 U.S.C. § 605(a). The CDA does not define "claim," but the FAR Disputes clause incorporated into the contract defines it as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract." FAR 52.233-1(c) (DEC 1998).

As self-described, the TCO's final decision was one terminating the contract for cause and demanding repayment of milestone payments. Although the TCO mentioned that the Government was assessing liquidated damages, just as the CO had previously communicated to appellant, the TCO did not seek payment of liquidated damages. Thus, the TCO's final decision was not a Government claim for such damages within the meaning of the CDA. *Alonso & Carus Iron Works, Inc.*, ASBCA Nos. 37967, 38312, 90-2 BCA ¶ 22,642 at 113,572. *See also Keith Crawford & Associates*, ASBCA No. 46786, 95-2 BCA ¶ 27,855; *Spartan Building Corp*., ASBCA Nos. 43849, 44431, 94-1 BCA ¶ 26,336.

Appellant contends that its complaint seeks an interpretation of the contract's Liquidated Damages clause, rendering the issue properly before the Board. With respect to a contractor's claim, our CDA jurisdiction is based upon that claim, the CO's decision thereon (or deemed denial) and the contractor's appeal to the Board. Our jurisdiction cannot be enlarged by the prayers in a complaint concerning liquidated damages if they were not part of a contractor's claim to the CO. *Skip Kirchdorfer, Inc.*, ASBCA Nos. 40515 *et*

al., 93-3 BCA ¶ 25,899 at 128,834. Here we do not have an appeal from the denial of a contractor claim.

Accordingly, we grant the Government's motion to strike paragraphs 92, 125-145, and the last paragraph on page 30 of the complaint.

DECISION

We deny the Government's motion to strike paragraph 91 of the complaint and grant its motion to strike paragraphs 92, 125-145, and the last paragraph on page 30 of the complaint.

Dated: 10 September 2002

CHERYL SCOTT ROME
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

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. 53479, Appeal of ACEquip Ltd., rendered in conformance with the Board's Charter.

Dated:

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