ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Valenzuela Engineering, Inc.	)	ASBCA Nos. 53608, 53936
	)	
Under Contract No. N62474-97-C-1600	)	

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OPINION BY ADMINISTRATIVE JUDGE DICUS

ASBCA No. 53608 is an appeal taken from a contracting officer's deemed denial of the claim of Valenzuela Engineering, Inc. (Valenzuela) for an equitable adjustment of $70,713.38 and a 52-day extension. ASBCA No. 53936 is an appeal taken from a contracting officer's decision demanding from Valenzuela liquidated damages of $184,800.00. The underlying contract is for weapons facility improvements, including construction of a Type "C" magazine, at the Naval Air Station, Lemoore, California (Lemoore). We are to decide entitlement including the number of days of government-responsible delay, if any. We deny the appeals.

FINDINGS OF FACT - GENERAL

1. Contract No. N62474-97-C-1600 between Valenzuela and the United States Navy was awarded on 22 October 1998 for a fixed-price of $7,242,000 (R4, tab 1 at 30). The contract called for a variety of construction and renovation work, including an earth-covered Type C concrete magazine (*id.*, § 01110 at 1, Modification No. A00001 at 2). The magazine required 3 doors with openings of 25 feet (R4, tab 3).

2. The contract included FAR 52.211-12, LIQUIDATED DAMAGES -- CONSTRUCTION (APR 1984) ($4200 per day); FAR 52.233-1, DISPUTES (OCT 1995) -- ALTERNATE I (DEC 1991); FAR 52.243-4, CHANGES (AUG 1987); and FAR 52.246-12, INSPECTION OF CONSTRUCTION (AUG 1996) (R4, tab 1, § 00710 at 16, § 00711 at 16, 35,

41). The rate for liquidated damages came from guidelines in the NAVFAC P-68 Contracting Manual (tr. 2/138-41).

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3. Specification section 01330, SUBMITTAL PROCEDURES, set forth procedures for submitting variations to the specifications and drawings. Paragraph 1.3.4 of that section mandated that variations from contract requirements be proposed in writing, and accompanied by documentation and an explanation of benefits to the government. Such variations would be considered if advantageous to the government. (R4, tab 1, § 01330 at 3)

4. Section 14636, paragraph 2.5, PATENTED TRACK, stated, in pertinent part, "Provide specially designed beam, i.e., patented track beam, constructed from welded steel components. Track sections shall not be spliced. Provide patented track fabricated by a manufacturer regularly engaged in the production of this type of beam." The term "patented track" is "[a] generic term referring to drive tractor and trolley track built in accordance with MMA MH27.1[1] utilizing a composite track section incorporating a proprietary bottom flange shape." (R4, tab 1, § 14636 at 2, 11) Patented track (hereinafter sometimes "rail") of 57 and 60 feet was required for the 25-foot door openings on the magazine (tr. 1/104). The rail is available in lengths up to 60 feet (tr. 1/54-55). Shipping is a concern for a 60-foot rail, but it is not an insurmountable problem (tr. 1/58).

5. The Navy has standard requirements for Type C magazines (tr. 2/203-04). The Department of Defense Explosives Safety Board (DDESB) oversees construction and maintenance of explosives facilities such as Type C magazines (tr. 2/205-06). The doors for the Type C magazine were to be suspended from the patented track. The doors were blast doors and an integral part of the overall safety design which is intended to contain the force of an explosion should a mishap occur. The drawings and specifications for the contract were thus submitted to the DDESB for approval. The drawings and specifications approved by DDESB did not show a splice of the patented track. (Tr. 2/207-08)

6. Valenzuela's subcontractor for the doors on the Type C magazine was Industrial Door Contractors, Inc. (IDC) (tr. 2/31). IDC is an experienced contractor that has done many blast door projects (tr. 1/69). IDC's contract with Valenzuela is not in the record. IDC submitted drawings for approval that did not show spliced rails (tr. 1/189-90). Nevertheless, in January 2000 IDC delivered six rails that required multiple sections for each door opening (amended complaint, ¶ 15; tr. 2/108-09). The

[1] A publication of the Monorail Manufacturers Association, titled "1981 Underhung Cranes and Monorail Systems" (R4, tab 1, § 14636 at 1).

Navy informed Valenzuela at the next weekly meeting that this was a problem because the contract called for a single-piece rail, not a spliced rail and that Valenzuela needed to take corrective action (tr. 2/109, 111-12). For some time thereafter at the weekly meetings Valenzuela was asked about what corrective actions were being taken. Valenzuela assured the Navy the matter would be corrected. (Tr. 2/112-13) Finally, Valenzuela superintendent Mark Paz wrote a 29 March 2000 letter to IDC on behalf of Valenzuela in which he stated "Per Specification section 14636-2.5, the track beam shall not be spliced. In order to submit a deviation [variation] to the government, design and calculations must be developed and stamped by a licensed Structural Engineer. Please submit this no later than March 31, 2000." (R4, tab 4) No variation request was ever submitted (tr. 2/115).

7. IDC had interpreted the specification as precluding a load-bearing splice but not an alignment splice (tr. 1/110-11). There is no evidence of trade practice or other corroboration, such as expert testimony, for IDC's interpretation. IDC had installed patented track for a Type C magazine using an alignment splice in performing a contract for the Navy on Guam and the Navy accepted it, although the record is silent on certification (tr. 1/69-70, 76). In this regard, the Navy had solicited a "design/build" contract with a specification received in March 1999 that permitted a spliced rail. The record does not establish whether a Type C magazine was being acquired or whether the design was certified by DDESB. (Ex. A-7 at 39, 41, 42, 51)

8. IDC sent a letter to Valenzuela on 4 April 2000 explaining that it was awaiting a response from the rail manufacturer on design and calculations for the spliced rail (R4, tab 5). On or about 13 April 2000 some calculations were provided. This prompted a 14 April 2000 letter from Valenzuela in which it asked for a clarification of the calculations and informed IDC that its best interests were served by submitting documentation justifying the splice. The letter also directed IDC to respond immediately as to its intentions and, in any event, to submit all pertinent information by 19 April 2000 or face the prospect of replacing the spliced rail. (R4, tab 7)

9. In a 3 May 2000 letter to IDC, Valenzuela again raised the variation for the splice, as well as other issues, and threatened cost consequences if work was not completed by 19 May 2000 (R4, tab 8). On 3 May 2000 IDC received a letter from Design Engineering Associates stating the Navy's concerns were "legitimate," but the splice "does not compromise either the functionality or structural adequacy of the design" (R4, tab 10). The letter was presented to the Navy at a 4 May 2000 meeting (tr. 1/93-95; ex. A-8).

10. IDC had, despite the communications from Valenzuela on 14 April and 3 May 2000 telling IDC that spliced track was unacceptable without government approval, installed the track at Lemoore with alignment splices no later than 3 May 2000 (R4, tabs 7, 8; tr. 1/181).

11. Rainer Winckelmann was the explosives safety officer at Lemoore (tr. 2/203). He was the "customer" for the project, which was undertaken to do away with existing safety waivers (tr. 2/204). He observed construction of the Type C magazine "almost daily" (tr. 2/204). He believed that any change to the specification would have to be submitted to the DDESB for approval (tr. 2/208). It had been made clear to him by the DDESB that no new construction would be given waivers (tr. 2/205-06). The record does not establish the cost of the magazine or any other basis for its value, certified or uncertified. Mr. Winckelmann was told by Gene Vickers, an official in the approval cycle with the Explosives Safety Inspection Team, that the magazine might not be certified if it was approved by the contracting officer with a splice (tr. 2/210). Mr. Winckelmann provided the specification to Mr. Vickers by email[2] and asked what finding his team would write if the splice was accepted. The following email from Mr. Vickers was received by Mr. Winckelmann on 1 June 2000:

> We would write this discrepancy up as a finding as any deviation from the siting and contract specifications would result in the magazine being classified as a non-standard magazine. If the magazine is classified as non-standard the amount of NEW stored within and its siting would be affected. To consider a waiver to avoid following specifications is out of the question.

(R4, tab 14) Accordingly, we find the magazine would not have been certified by DDESB with the spliced rail. Without certification, the magazine would not be usable for its intended purpose. (Tr. 2/211)

12. By letter dated 19 May 2000,Valenzuela was directed by the Navy to provide a plan of action by 6 June 2000 for correcting the spliced rails (R4, tab 12). On 31 May 2000, Valenzuela instructed IDC "to make the necessary corrections and ensure that the patented beam track complies with the contract requirements" (R4, tab 13). This was followed by a 2 June 2000 letter from Valenzuela to IDC specifically directing IDC to remove the spliced rails and replace them with rails that were not spliced (R4, tab 15). IDC set about to find unspliced rails and found some that had been purchased for use on a crane installation. IDC purchased the rails and had them transported to Lemoore by truck. (Tr. 1/74-75) The spliced rails were then removed and replaced with the unspliced rails, with the installation completed on or about 12 June 2000 (tr. 1/79-81, 135-36). It had taken about 2 days to locate seamless rails 60 feet in length, and the cost was about the same as the cost of the 6 shorter rails which needed to be spliced (tr. 1/131-32, 199-200).

[2] Mr. Vickers had previously reviewed the complete specification (tr. 2/212).

13. By letter of 5 September 2000 IDC filed a claim for additional compensation of $40,654.48 and a 31-day extension. The claim asserts that the costs and delay arose from the replacement of the spliced rails with seamless rails. (R4, tab 31) Valenzuela thereafter submitted a request for an equitable adjustment of $70,713.38 and 52 days (R4, tab 34) which was denied in a letter of 12 October 2000 (R4, tab 36). Valenzuela requested a contracting officer's decision by letter of 15 December 2000 (R4, tab 37). An appeal based on a deemed denial was filed on 12 March 2001. A contracting officer's decision denying the claim was issued on 1 August 2002 (R4, tab 45).

14. We have considered the testimony of Terry Allen, project architect (ex. A-1), Gary Vangsness, an engineer with a patented track supplier who described no experience or education regarding explosives containment (tr. 1/32-64), Hurley Campbell, IDC vice president who is not an engineer (tr. 1/66-208), and James Dillard, IDC president, who is not an engineer (tr. 1/208-33), as well as the letter from Design Engineering Associates (finding 9), regarding the functionality of the magazine with spliced rails. None of the witnesses was qualified as an expert in the design and construction of explosives containment. None was entitled to the presumed neutrality of an expert. Design Engineering Associates' letter was not subject to cross-examination, as its author did not testify, and considered the Navy's concerns "legitimate" (R4, tab 10). Mr. Allen, a civil engineer, was an employee of a design firm. His education does not present any particular specialization, and he described his responsibilities as "[e]verything involving engineering on any projects" (ex. A-1 at 5-9). He had worked on 20 magazine projects, and this contract was his only Type C experience (*id*. at 23, 26). This is the only magazine on which he has seen a spliced rail used (*id*. at 40). He had no contractual authority and his testimony was presented through a prehearing deposition. Read as a whole, his testimony was not conclusive on the adequacy of the spliced rails. He developed the design generally using standard specifications mandated by the Navy from the Navy-wide SPECSINTACT[3] system. He did not draft the "no splice" provision in section 14636. (Ex. A-1 at 18, 29, 38) He testified he could "hypothesize [that] explosive safety . . . would not be compromised by the splice" (ex. A-1 at 51). However, the basis of that hypothesis was not explained. He was equivocal as to whether he would have approved the spliced rail, about which he had "reservations" (*id*. at 43). When asked the question directly, he answered "possibly" (ex. A-1 at 76). Another question on whether he would have approved the splice, which he answered in the affirmative, was in the context of a splice welded at the factory (*id*. at 77). However, he also testified that he believed the "no splice" requirement should be maintained in the specification (*id*. at 69-70). He testified "if you don't splice the track, then you don't have to worry about alignment" (*id*. at 38). He also testified that during his only visit to the site he observed the door as having a "visible bump", "a noticeable movement in the door support" from a

[3] In examining Mr. Allen, appellant's counsel referred to SPECSINTACT as the "guide spec" (ex. A-1 at 30). We assume counsel's arguments on brief referring to the "guide specification" also refer to the SPECSINTACT specifications.

"fairly small" misalignment at the point of the splice (*id*. at 15-16). Further, an issue surfaced at the hearing regarding the adequacy of the support for the alignment splice. Specifically, the support beam for the alignment splice was bolted directly to the concrete with two bolts, not to imbedded support steel with four bolts as were other support beams (tr. 2/121-24, 195-96). This issue was not resolved and not presented to Mr. Allen. We are not persuaded that the spliced rail substantially complied with the contract requirements.

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15. Contract Modification No. A00011 bilaterally extended the contract completion date to 12 June 2000 (R4, tab 1, Modification No. A00011 at 3 of 3). The Navy took beneficial occupancy of the site on 26 July 2000 (tr. 2/92, 135-37). The Navy assessed Valenzuela liquidated damages of $184,800.00 for the alleged 44-day delay in a contracting officer's decision of 1 August 2002 (R4, tab 45).

16. The record does not contain a critical path method (CPM) schedule. The testimony from Mr. Valenzuela (tr. 2/5-70, 228) is not sufficiently specific to establish government fault for delay independent of testimony and evidence presented by other witnesses on the spliced rail issue.

17. The Navy presented unrebutted evidence of critical path delays unrelated to the spliced rail issue through Rodney Duich, Assistant Resident Engineer in Charge of Construction (tr. 2/103, 149-61). The testimony is corroborated in part by the daily reports (R4, vol. 4). As we deny ASBCA No. 53608 *infra,* and after weighing the testimony and daily reports as cited in findings 15-17, we find that Valenzuela has not carried its burden of proving that delays in beneficial occupancy were excusable.

DECISION

ASBCA No. 53608

Appellant raises various arguments on the interpretation of the specification, but IDC's interpretation must overcome the actual words of the specification, to wit, "[t]rack sections shall not be spliced" (finding 4). Appellant has not submitted expert testimony or evidence of trade practice to support the reasonableness of IDC's interpretation that the specifications permitted an alignment splice (finding 7). We interpret the plain language of the specification as precluding any splice of the patented track, and hold that appellant's interpretation (that patented track could be spliced in spite of the specification's language in paragraph 2.5 of section 14636) is unreasonable.

The specifications thus required installation of rail that was not spliced. Under the Inspection of Construction clause, the government bears the burden of proving that the

work it directed appellant to correct did not conform to the specifications. *Con-Seal, Inc.*, ASBCA No. 41762, 98-1 BCA ¶ 29,501 at 146,371. We have found that appellant installed spliced rail and that the only reasonable reading of the specification at issue is that the contract required seamless (unspliced) rail. We hold, therefore, that the Navy has proved that the work it ordered appellant to correct did not conform to the specifications.

We also hold there were no impediments to providing rails of the required length for which relief could be granted. Patented track in 60-foot lengths was available and IDC ultimately provided patented track 60 feet in length (findings 4, 12). Impossibility is therefore not a viable basis for recovery. The evidence establishes a minimal cost differential and 60-foot rails were found in 2 days (finding 12), so commercial impracticability has not been shown. Moreover, while longer sections are harder to transport, transportation problems are not insurmountable (finding 4). Indeed, IDC managed to transport 60-foot lengths for installation at Lemoore (finding 12). Appellant argues that the "Guide Specification" now allows for splices, but we conclude the record is incomplete on material points regarding the March 1999 revised specifications. The contract in question was a "design/build" contract so we cannot conclude, as appellant argues, that the "Guide Specification" (presumably a reference to SPECSINTACT) was amended. Further, this record does not disclose whether the contract was for construction of a Type C magazine and we are not told whether the magazine was certified by the DDESB. (Finding 7) Moreover, subsequent specification changes do not relieve a contractor of the obligation to comply with the specifications in its contract. Appellant also argues that it was allowed to splice a rail in a project on Guam (finding 7). The record does not disclose whether the magazine was certified thereafter (*id*.). We cannot conclude that the Guam project and the "design build" contract represent a sequence of events which would constitute a course of dealing. *Underground Construction Co. v. United States*, 16 Cl. Ct. 60, 67 (1988). We have not been shown, and are not aware of, case precedent that would somehow support recovery based on these events.

Appellant next argues that the Navy took no action until after the spliced rails were installed. We find this argument unsupported by the record. The Navy brought the matter to Valenzuela's attention in January soon after the nonconforming rails were delivered (finding 6).

Valenzuela also argues that economic waste resulted from the Navy's insistence on strict compliance with the prohibition against splicing in the specification. Economic waste does not *ipso facto* excuse non-performance. Rather, it serves to limit excessive damages for repair of non-conforming work. RESTATEMENT (SECOND) OF CONTRACTS, § 348 (1981). It is a factor in determining whether the government has the right to demand strict compliance with specifications. *H.L.C. & Associates Construction Co. v. United States*, 367 F.2d 586 (Ct. Cl. 1966). It is well-accepted that in the absence of economic waste the government generally has the right to enforce its contracts so as to get precisely what it ordered:

> We recognize that the government generally has the right to insist on performance in strict compliance with the contract specifications and may require a contractor to correct nonconforming work. *S.S. Silberblatt, Inc. v. United States,* 433 F.2d 1314, 1323, [(Ct. Cl.] (1970). However, there is ample authority for holding that the government should not be permitted to direct the replacement of work in situations where the cost of correction is economically wasteful and the work is otherwise adequate for its intended purpose. In such cases, the government is only entitled to a downward adjustment in the contract price. [Citations omitted.]

Granite Construction Co. v. United States, 962 F.2d 998, 1006-07 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1048 (1993). Read in context, and given the provisions of the Inspection of Construction clause, we do not consider the foregoing quote to mean that the government is literally precluded from ordering replacement if the cost is unreasonably high. Rather, we interpret this to mean that the government may be vulnerable to a claim for an equitable adjustment for the difference between the "downward adjustment" to which it would be entitled for loss of value and the cost of replacement if that cost is shown to be "clearly disproportionate." *Id.*

The doctrine of economic waste has evolved from *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 230 N.Y. 239 (1921) (Cardozo, J.). In that case, "[o]ne of the specifications for the plumbing work provide[d] that 'all wrought iron pipe must be well galvanized, lap welded pipe of the grade known as 'standard pipe' of Reading manufacture.'" *Id.* at 890, 240. Some of the pipe had not been made in Reading and the builder was ordered to replace the nonconforming pipe with Reading pipe. Replacement involved demolition at great expense. The builder left the work untouched and sought final payment. When it was not forthcoming, the builder sued. The trial court had rejected evidence that the nonconforming pipe was the same as Reading pipe although manufactured elsewhere. The intermediate appellate court reversed and ordered a new trial. An appeal was taken to the New York Court of Appeals, which affirmed the appellate court's decision and ordered "judgment absolute" in favor of the builder. *Id.* at 892, 245. In so holding, the court found the nonconformity to be unsubstantial and the owner entitled only to the difference in value, which the court considered "of trivial or inappreciable importance." *Id.* The owner was thus not entitled to the cost of reconstruction as the measure of damages. The court observed that the outcome would be different if the nonconformity "is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract. [Citation omitted.] There is no general license to install whatever, in the builder's judgment, may be regarded as 'just as good.'" *Id.* at 891, 243.

It is in this latter quotation that we believe resolution of the instant appeal lies. We are here asked to sanctify an unapproved substitution, which deviated from appellant's own submittal, in construction of a weapons magazine installed in spite of timely, specific and unambiguous government direction to follow the specification at issue. The specific component is a rail supporting a blast door. The blast door is an integral part of the overall safety design directed toward the containment of an explosion should a mishap occur (finding 5). This involves serious safety concerns. The evidence establishes that the DDESB has responsibility for designs and it had approved a design without a splice (finding 5). Indeed, IDC had submitted shop drawings that did not show a splice (finding 6) and it had been told months before the actual installation that the splice was unacceptable without an approved variance (findings 6, 10). No request for a variance was ever submitted (finding 6). It was the opinion of a government official charged with responsibility for explosives safety that it would be "out of the question" to permit a nonconformity (finding 11). Moreover, even the firm used by IDC to justify the splice considered the Navy's concerns legitimate (finding 9). IDC supported the splice with a support beam with a two-bolt connection directly to the concrete and not a four-bolt connection to imbedded steel as was the case for the other rail supports (finding 14). We think this is a situation described by Judge Cardozo as a contractor substituting a change which the contractor believes is "just as good." *Jacob & Youngs* at 891, 243. There is no "general license" to do so, and we conclude it should not be permitted here, where public safety is at issue. On this basis alone we hold that the doctrine of economic waste is inapplicable. Further, IDC, which had created the problem, did nothing to alleviate it, as it never filed for a variation as required by the contract (finding 6). Appellant's position here is far different from that of the builder in *Jacob & Youngs v. Kent.*

Moreover, as stated above, economic waste does not let Valenzuela and IDC off the hook for the non-conforming specification in any event. It merely affects damages by limiting the downward contract adjustment to which the government is entitled to an amount based on loss of value in the magazine which, in turn, may entitle appellant to an equitable adjustment for the difference between the loss of value and replacement cost where the latter is clearly disproportionate. It is incumbent on appellant, as the claimant, to show that it has suffered *some* damage in order for us to find government liability. *Cosmo Construction Co. v. United States*, 451 F.2d 602, 605 (Ct. Cl. 1971). As noted above, the change required the Navy to obtain DDESB's approval of the spliced rails if the magazine was to be certified. If the magazine design as modified by the spliced rails was not certified by the DDESB, or if the redesign was not submitted to DDESB and DDESB decertified the magazine at a subsequent inspection, the matter would have been sufficiently substantive to "frustrate the purpose of the contract," in the words of Judge Cardozo. Without DDESB approval, the magazine would have been unusable for its intended purpose (finding 11). The key to certification was in appellant's hands, as it could have removed this problem either by installing the rails as it was set forth in the specifications and in its own submittal, or by submitting a request for a variance. It did

neither. The evidence of record persuades us that the magazine would not have been certified with the spliced rail (finding 11). The record has not provided us with evidence on the value of the building. Similarly, IDC's subcontract is not in the record. (Findings 6, 11) Thus, we have no way of estimating what that loss of value would be.[4] Assuming, *arguendo*, the cost of replacement is equal to the amount of the claim (IDC seeks $40,654.48, to which Valenzuela has added $30,058.90 for a total claim of $70,713.38), we only have one side of the necessary equation. We have no way of ascertaining whether this amount is more than the loss of value would have been had the magazine been accepted with the spliced rail and either uncertified or decertified. We hold, therefore, that appellant has failed to establish "some damage" as required by *Cosmo Construction*, *supra*.

Further, it is incumbent upon Valenzuela and IDC to show that the magazine with spliced rails would have substantially complied with the contract requirements. *Granite Construction Co.*, *supra* at 1005. This showing has not been made (finding 14). The record is notably devoid of expert testimony to establish that the functionality of the magazine was not compromised. *Cf. Granite Construction Co.*, *supra*.[5] While expert testimony may not be a requirement for proving substantial compliance in other circumstances, it must be remembered that an explosives magazine is at issue. We are not prepared to find appellant's burden of showing substantial compliance here met without proof more compelling than that presented by appellant. Indeed, the only witness who was an engineer and had some credentials for explosives containment was Mr. Allen, and he was unwilling to testify without equivocation that the spliced rail was acceptable (finding 14). We think, absent persuasive expert testimony, the government should be allowed to demand strict compliance—indeed, to err on the side of caution in design and execution—for a structure which has as its purpose the containment of explosions. If we require less here, where catastrophic consequences are a possibility, we help to eviscerate the principle of strict compliance iterated by our appellate court. Accordingly, ASBCA No. 53608 is denied.

ASBCA No. 53936

The evidence establishes that the contract date for completion of performance was 12 June 2000, that the contract provided for liquidated damages of $4,200 per day, and that beneficial occupancy was taken on 26 July 2000, or 44 days after the contract completion date (finding 15). Valenzuela has presented no evidence that the daily rate is unreasonable, and as the rate for liquidated damages was from the NAVFAC manual it is

[4] The court in *Granite Construction* had a basis to make such an estimate notwithstanding the fact that damages *per se* was not before them. *Id*. at 1007-08.

[5] In that case, the court relied upon credible expert testimony that the non-conforming waterstops exceeded the project safety margin by 20 times while the remainder of the project had a safety margin of 2. *Granite Construction* at 1006.

prima facie reasonable. *Brooks Lumber Co.,* ASBCA No. 40743, 91-2 BCA ¶ 23,984. The Navy has met its burden of proof for assessing liquidated damages of $184,800 (44 days x $4,200). As we have denied ASBCA No. 53608, Valenzuela must establish an independent basis to establish that the delay was excusable. It has failed to meet its burden of proof (findings 16, 17). We deny ASBCA No. 53936.

SUMMARY

Both ASBCA No. 53608 and 53936 are denied.

Dated: 29 January 2004

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

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 Nos. 53608 and 53936, Appeals of Valenzuela Engineering, Inc., rendered in conformance with the Board's Charter.

Dated:

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