ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Weis Builders, Inc.	)	ASBCA No. 56306
	)	
Under Contract No. DACA45-03-D-0006	)	

APPEARANCE FOR THE APPELLANT: Leonard L. Burridge, Esq.
General Counsel

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Thomas J. Tracy, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, Omaha

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND
GOVERNMENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

This appeal arises from the government's assessment of $1,294,765 in liquidated damages in connection with a task order placed against an indefinite delivery, indefinite quantity contract for the construction of military housing. Weis Builders, Inc. (Weis or appellant) moves for partial summary judgment, alleging that there are no material facts in dispute and that the liquidated damages clause in the contract is unenforceable as a matter of law. The government opposes Weis' motion and cross-moves for summary judgment, alleging that there are no disputed issues of material fact and that it is entitled to $1,294,765 as a matter of law. Weis opposes the government's motion on the ground that counsel have agreed to reserve the issue of whether the liquidated damages clause in the contract was a penalty.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. On 2 January 2003, the Omaha District of the U.S. Army Corps of Engineers (government) awarded Contract No. DACA45-03-D-0006 (base contract) to Weis to Replace Family Housing at Minot Air Force Base (AFB), North Dakota (R4, tab 7). The base contract was an indefinite delivery, indefinite quantity, design/build contract. The government anticipated awarding approximately $350 million worth of construction projects under the base contract over a period of ten years using an overlapping, phased approach. Each task order was expected to be in the range of $35 to $45 million and to include no fewer than 150 units. (Mailander aff. ¶ 4)

2. The government awarded Weis Task Order No. 0001 in the amount of $38,545,526 concurrently with the base contract. Task Order No. 0001 included phases 8 and 9 and had a scheduled completion date of 14 November 2004. Task Order No. 0001 was completed 282 days late and Weis accrued 27,352 days of late turnover, resulting in potential liquidated damages of $1,634,120. Instead of enforcing the liquidated damages clause, the government accepted Weis' offer to construct an additional three-bedroom duplex in exchange for extending the contract completion date to 1 July 2005. The additional duplex cost Weis $358,597 to construct. Weis completed the additional duplex 53 days late and was assessed $186,800 in liquidated damages. (R4, tab 3 at 3) Details of Task Order No. 0002 are not in the record.

3. On 30 March 2004, the government awarded Weis Task Order No. 0003 in the amount of $38,575,000. Task Order No. 0003 included phase 10 and consisted of the demolition of existing units and the construction of 157 three- and four-bedroom units (R4, tabs 6 at 9, 8). The parties agreed upon a performance period of 540 days for Task Order No. 0003, establishing a contract completion date of 5 October 2005 (R4, tabs 6, 8; app. memo at 1). The contract completion date was later extended to 24 October 2005 (R4, tabs 14-19).

4. The base contract, Task Order No. 0001, and Task Order No. 0003 contained the identical liquidated damages clause. The clause provided, in part, as follows:

> (a) If the Contractor fails to complete the work within the time inserted on the PRICING SCHEDULE, the Contractor shall pay liquidated damages to the Government in the amount of $2400.00 for each calendar day of delay until the work is completed or accepted. In addition, $35.00 a day in liquidated damages will be assessed for each housing unit not turned over to the Government.

(R4, tab 3)

5. The government derived the $2,400 per day liquidated damages rate from the following formula:

DETERMINATION OF LIQUIDATED DAMAGES
FOR CONSTRUCTION CONTRACTS

* FORMULA A (1) FOR MILCON AND CONSTRUCTION GENERAL

LD = (5/7) ($32.38) (1.9) (5.60/3.54) (8) [divided by] .706 = $790 (X)

....

° WHEREIN

5/7	Conversion factor to convert from calendar days to work days.
$32.38	Average hourly special effective rate salary of field employees.
1.9	Number of man-hours expended in field offices for each hour on-site representation. Includes on-site representative, supervision, administrative support, and technical support at the area and resident level.
5.60/3.54	Ratio of S&A funding received for MILCON and Construction General Projects compared to S&I distributed to areas.
....	
8	Number of work hours in a normal day.
.706	Field labor cost as a percentage of total field costs expressed as a decimal.
X	Number of inspectors that are assigned.

(Mailander aff. ¶¶ 3, 4, attach. at 2)

6. The formula yielded a cost of $790 per day to maintain one inspector. The government rounded $790 up to $800. Since it expected that it would need 3 inspectors to man the job in the event of late completion, the government multiplied $800 by 3, resulting in a liquidated damages rate of $2,400 per day. (Mailander aff. ¶ 4)

7. The $35 per day per unit rate for delayed turnover was based on Minot AFB's costs from the previous year for using local hotels and motels to house military families until they could move into more permanent housing (Mailander aff. ¶ 7).

8. Weis did not complete the contract until 221 days after the extended contract completion date, resulting in an assessment of $530,400 (221 x $2,400), and it accrued 21,839 days of delayed turnover, resulting in an additional assessment of $764,365 (21,839 x $35), for a total liquidated damages assessment of $1,294,765 (R4, tab 3 at 2).

9. On 27 July 2007, Weis submitted a claim to the CO for the return of $1,294,765 in liquidated damages. In support of its claim, Weis alleged that the government's actual damages were probably substantially lower than the amount assessed, that the second part of the clause allowing the government to assess $35 per day

for delayed turnover was ambiguous, that the government's damages could have been calculated at the time of award, and that the government had impliedly admitted that the clause was a penalty by accepting an additional duplex in exchange for releasing the liquidated damages withheld in connection with Task Order No. 0001. (R4, tab 3)

10. The CO denied the claim on 30 October 1997 and Weis appealed the denial to this Board on 23 January 2008 (R4, tabs 1, 2). We docketed the appeal as ASBCA No. 56306 on 25 January 2008.

11. On 31 October 2008, Weis moved for partial summary judgment alleging that the liquidated damages clause should be set aside because the government's damages were neither uncertain in nature or amount nor unmeasurable. Weis also argued that the second sentence of the clause was latently ambiguous. Weis did not submit any affidavits or other evidence in support of its motion. On 8 September 2008, the government filed an opposition to Weis' motion and cross-moved for summary judgment on the grounds that there are no issues of material fact and that it is entitled to $1,294,765 in liquidated damages as a matter of law. The government submitted the affidavit of Mr. Mark Mailander, the Area Engineer for the Omaha District of the U.S. Corps of Engineers in support of its motion. Weis opposes the government's motion, asserting that the parties have agreed to reserve the issue of whether or not the clause is a penalty pending the outcome of this motion. Weis requests that it be allowed additional time to conduct discovery into the penalty issue. In particular, it asserts that it "needs to discover the answer to at least the following question: 'What amount of actual damages did the Corps incur when phases earlier than Phase 10 were delivered late?'" (Weis opp'n at 4)

DECISION

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc.*, 812 F.2d 1387, 1390-92 (Fed. Cir. 1987); *Lockheed Martin NES-Akron*, ASBCA No. 54193, 04-2 BCA ¶ 32,728 at 161,896. The fact that both parties have moved for summary judgment does not mean that we have to grant summary judgment as a matter of law for one side or the other. Summary judgment in favor of either party is not proper if disputes remain as to material facts. A material fact is one that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). We evaluate each party's motion on its own merits, taking care to draw all reasonable inferences against the party whose motion is under consideration. *Mingus*, 812 F.2d at 1390-91.

The standards for judging a liquidated damages provision are set forth in *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411-12 (1947):

> When they are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract, they are enforced [citations omitted]. They serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts [citations omitted]. And the fact that the damages suffered are shown to be less than the damages contracted for is not fatal. These provisions are to be judged as of the time of making the contract [citations omitted].

See United States v. Bethlehem Steel Co., 205 U.S. 105, 121 (1907) (liquidated damages clauses will be enforced as long as the "amount is not so extraordinarily disproportionate to the damage which might result...as to show that the parties must have intended a penalty, and could not have meant liquidated damages"); *Wise v. United States*, 249 U.S. 361, 365 (1919) (liquidated damages clauses will be enforced as long as the amount stipulated is not so extravagant, 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). As the party challenging the clause, Weis bears the "exacting" burden of proving unenforceability. *DJ Manufacturing Corp. v. United States*, 86 F.3d 1130, 1134 (Fed. Cir. 1996) (the burden is exacting "because when damages are uncertain or hard to measure, it naturally follows that it is difficult to conclude that a particular liquidated damages amount or rate is an unreasonable projection of what those damages might be").

Weis presents four arguments in support of its motion for partial summary judgment. First, Weis argues that the government's actual damages were not uncertain in nature and amount or unmeasurable at the time of contract award (Weis memo at 9). Second, Weis argues that the government has failed to demonstrate that, prior to bidding, it conducted an analysis to determine whether its delay damages would be computable and measurable (Weis opp'n at 2). Third, Weis argues that the second sentence of the liquidated damages clause was latently ambiguous. Fourth, Weis argues that the liquidated damages clause should not be enforced because the government had a formula that provided a precise method for measuring any actual damages it might incur (Weis opp'n at 2).

Drawing all inferences in favor of the government as nonmovant, we conclude that the damages the government would suffer in the event of late completion were neither certain nor measurable at contract award. While the government could have anticipated that it would incur additional administrative and engineering costs in the event of late completion, the precise amount and nature of those costs depended entirely upon Weis' performance of the contract. In this case, Weis completed the contract 221 days late. Common sense dictates that the government could not have anticipated this delay at the

outset of the contract. *See Priebe*, 332 U.S. at 411 (in many instances, damages caused by breach of a government contract are uncertain in nature or amount or are unmeasurable); *Young Associates, Inc. v. United States*, 471 F.2d 618, 621 (Ct. Cl. 1973) (the government's damages stemming from delayed receipt of the supplies or construction it ordered are normally hard to measure).

Contrary to Weis' second contention, the government was not required to prove as a condition precedent to upholding the clause that it conducted an analysis prior to bidding of whether its delay damages would be computable and measureable. We are not aware of any case law that imposes such a requirement on the government. Indeed, the case law indicates that the method used to arrive at the liquidated damages figure is not determinative. *E.g., DJ Manufacturin*g, 86 F.3d at 1137 (trial court correctly held it was unnecessary to inquire into how the liquidated damages figure was arrived at); *Young*, 471 F.2d at 622 (regardless of how the liquidated damages figure is arrived at, clause will be enforced if the amount is reasonable for the particular agreement at the time it was made).

Weis thirdly argues that the $35 per day per unit assessment for delayed turnover is latently ambiguous and should be construed against the government as the drafter. According to Weis, the sentence could be reasonably interpreted to mean that the assessment would only be triggered if all the units in phase 10 were not turned-over. Since Weis turned over all the units, it concludes that the last sentence was never triggered and that the government improperly assessed $764,365 pursuant to that sentence (21,839 days of delayed turnover x $35).

A contract is ambiguous only if it is susceptible to more than one reasonable interpretation. An ambiguity is patent if it is so glaring as to raise a duty to inquire. If the ambiguity is not patent, but latent, we construe it against the drafter under the rule of *contra proferentem*. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999). For the rule to apply, however, the nondrafting party must prove that it relied on its interpretation during bidding. *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1430 (Fed. Cir. 1990).

Applying those rules here, Weis has failed to prove that the second sentence of the liquidated damages clause was ambiguous. Assuming, for the sake of argument, that Weis' alleged interpretation is within the zone of reasonableness, it has not offered any evidence that it relied on that interpretation during bidding. Moreover, we are convinced that Weis was fully aware that the $35 per day per unit assessment would cease as soon as it turned over the last unit because that is how the sentence was interpreted during both Task Order Nos. 0001 and 0003. In any event, where a liquidated damages clause does not contain a time limit, the courts will imply a duty to act within a reasonable length of time. *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 414 (Ct. Cl. 1978). In this

case, the government discharged its duty to act within a reasonable period of time by ceasing the liquidated damages assessment for Task Order No. 0003 on the day Weis turned over the last unit to the government.

As its fourth argument, Weis urges us to find that the liquidated damages clause is not enforceable because the government had a formula that gave it "a precise method for measuring actual damages if they are incurred" (Weis opp'n at 2). According to Weis, upholding the liquidated damages clause in cases like this would allow the government to utilize a liquidated damages provision in virtually every contract (Weis opp'n at 2). The federal courts have already held that there is no requirement that liquidated damages clauses be tailor-made for each individual contract or that they be considered on a case-by-case basis. *DJ Manufacturing,* 86 F.3d at 1136-37 (and cases cited therein). Weis' argument is without merit.

The government cross-moves for summary judgment, alleging that there are no issues of material fact and that it is entitled to recover $1,294,765 in liquidated damages as a matter of law. Weis opposes the motion, asserting that the parties have agreed to reserve the issue of whether or not the clause is a penalty pending decision on Weis' motion for partial summary judgment. Whether or not the liquidated damages clause is a penalty is a disputed issue of material fact that prevents granting the government's motion for summary judgment.

CONCLUSION

Weis' motion for partial summary judgment is denied. The government's cross-motion for summary judgment is denied.

Dated: 17 February 2010

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER

I concur

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. 56306, Appeal of Weis Builders, Inc., rendered in conformance with the Board's Charter.

Dated:

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