ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Sundt Construction, Inc. | ) | ASBCA No. 57358 |
| | ) | |
| Under Contract No. F41622-02-D-0001 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE GRANT
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this appeal, the government has moved for summary judgment, asserting that its assessment of liquidated damages against Sundt Construction, Inc. (Sundt) is proper under the terms of the task order. Sundt has cross-moved for summary judgment, and also opposes the government's motion. Both parties have responded to each other's initial motions. We have jurisdiction under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 7101-7109. For the reasons stated below, we find the government's approach to the assessment of liquidated damages to be authorized under the task order, and grant the government's motion. Sundt's cross-motion is denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. The government awarded a task order (TO) TG21 under Air Force Contract No. F41622-02-D-0001 in the amount of $18,435,341 to Sundt on 9 March 2004 (R4, tab 22, sub-tab TO TG21). The task order was issued against an underlying Basic Contract for design and construction services for military family housing at various locations (R4, tab 22). Line item 0004 ("L/I 0004") of TG21 required the demolition of certain military housing units and the construction of new housing units on Andrews Air Force Base, MD (R4, tab 22, sub-tab TO TG21; govt. mot., Undisputed Findings of Fact (UFF) ¶ 1).[1] As

[1] Sundt does not dispute UFF ¶¶ 1-2 and 14-16 (app. mot. at 26-28).

ultimately revised, housing demolition was required on three streets, Columbus Circle, Vandenberg Drive, and Youngstown Street, and 30 new housing units were required to be built, 18 on Columbus Circle and 12 on Vandenberg Drive (R4, tab 13 at 2). One of these units, on Vandenberg Drive, was for General Officer housing (R4, tab 13 at 2, tab 22, sub-tab 13 at 2, attach. 5 at 4).

2. The task order contained the FAR 52.211-10, COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984) clause. The clause stated that the contractor "shall...complete the entire work ready for use not later than 27 MARO [months after receipt of order]." (R4, tab 22, sub-tab TO TG21 at 5 of 8). The task order also established a schedule date in Section F, "SUPPLIES/SCHEDULE DATA," also "27 MARO" (R4, tab 22, sub-tab TO TG21 at 3).

3. The task order also contained the FAR 52.211-12, LIQUIDATED DAMAGES – CONSTRUCTION (SEP 2000) clause. Section (a) of this clause stated that:

> (a) If the contractor fails to complete the work within the time specified in the TO for construction services issued hereunder, the contractor shall pay liquidated damages to the Government in the amount of $380.00 for the first day of delay and each successive day of delay until the work is completed or accepted.
>
> Additionally, $42.00 per individual housing unit per day will be added to the liquidated damages amount for EACH housing unit that is delayed. (For example: If one (1) housing unit was delayed for 10 days, $420.00 {$42.00*10} would be deducted from the contractor plus the amounts referenced in (a) above. If two (2) housing units were delayed for 10 days, $840.00 {$42.00*10days*2 housing units} would be deducted from the contractor plus the amounts referenced in (a) above.)

(R4, tab 22, sub-tab TO TG21 at 5 of 8) (Emphasis in original)

4. The original date for completion of the task order was 8 June 2006. Bilateral Modification No. 01 (Mod 1) dated 2 August 2004 specified this date as both the "CCD" (contract completion date) and "DELIVERIES OR PERFORMANCE" date in Section F (R4, tab 22, sub-tab 1 at 1, block 14, at 2, ¶ 3 and at 3). This original completion date was extended by various modifications for various reasons (R4, tab 22, sub-tabs 3, 5, 11, 12, 13, 17, 18, 20). Modification No. 21 (Mod 21), signed 15 November 2006, ultimately revised Section F and established the "Delivery Schedule Date" as 28 February 2007 (R4, tab 22, sub-tab 21 at 3).

5. Sundt did not complete any of the housing units required by the task order as of 28 February 2007 (UFF ¶ 14).

6. On 27 February 2007, the government wrote to Sundt, responding to an earlier request by Sundt for a schedule adjustment and contract completion date extension for TG21. The government letter stated that there was "no valid basis for extending the performance period" and that "the subject Task Order TG21 completion date of 28 February 2007 remains unaltered." The letter also advised that Sundt would be allowed to continue performance on TG21 "beyond the present completion date of 28 February 2007 and that liquidated damages will be assessed against Sundt after that date." The letter stated that the "Government neither condones delinquent performance beyond 28 February 2007 nor waives any contractual rights...as a result of delinquent performance." The letter concluded by notifying Sundt that the government would be assessing liquidated damages after 28 February 2007 in accordance with the liquidated damages clause. (R4, tab 21)

7. Sundt completed the housing units on various dates between 4 April 2007 and 10 August 2007, with the exception of one, General Officers' Quarters Building 01 (GOQ-01) (UFF ¶ 16). This unit was the subject of a number of government design changes during the spring of 2007, including upgrades to the kitchen and master bath. On 28 August 2007, Sundt wrote to the government asking for payment for increased costs on that unit, and as well for another General Officers' Quarters unit (GOQ-00) under a different task order (TO TG24), not the subject of this appeal. Sundt also asked for "a time extension...on the two GOQ's [sic]." (R4, tab 20 at 2)

8. Sundt completed work on GOQ-01 on 14 September 2007 (UFF ¶ 16). Teleconference negotiations were conducted between the parties on 19 September 2007 to address compensation (money and time) for the GOQ-01 design changes. Sundt documented these negotiations in an email dated 20 September 2007, stating in part that "[i]t was agreed that the Period of Performance for TG21 would be extended to 14 Sep[tember] 2007 to coincide with the date of final Government acceptance of this unit." (R4, tab 19, ¶ 4)

9. On 26 September 2007, the government sent a proposed modification (Mod 17) to Sundt concerning the other task order, TG24, providing an extension for GOQ-00 only, restating existing performance dates for all other units, and including standard release language (app. mot., Callihan decl., attach. 6 at S000115, -119). Sundt emailed the government on 27 September 2007 proposing to add the phrase "specifically for these GOQ upgrades only" to the end of the release. Specifically Sundt stated that:

> We understand your reasons for the current wording however we believe it confuses the specific scope of the mod between

> the GOQ upgrades and establishing the final period of performance for each unit. As we discussed yesterday Sundt wants to ensure this mod cannot be interpreted as a general waiver or release from further discussion of the JNCO unit period of performance.

(R4, tab 18) The government accepted this proposed revision (R4, tab 17; Callihan decl., attach. 12 at S000141).

10. Mod 26 for TG21 was being processed at the same time as Mod 17 for TG24, and also addressed period of performance dates and included release language. Mod 26 restated that the delivery schedule date of 28 February 2007 agreed to in Mod 21 remained unchanged for all other units, but extended the period of performance for GOQ-01 to 14 September 2007. Specifically, it stated that "[t]he Period of Performance is changed from 28 Feb 2007 to 14 Sep 2007 for Vandenberg GOQ Bldg 1 ONLY. The balance of L/I 0004 is unchanged as as [sic] 28 Feb 2007 and is restated below for clarification." Mod 26 then listed the other 29 units, each with the 28 February 2007 date. (R4, tab 22, sub-tab 26 at 2, 4) The release language was the same as Sundt had proposed for Mod 17, except for specifying GOQ-01 instead of GOQ-00. In full, the release reads:

> This supplemental agreement constitutes a full and equitable adjustment and the contractor releases the Government from any and all liability under the contract for further equitable adjustments arising out of or in connection with the changes to this modification specifically for the GOQ 01 upgrades only.

(R4, tab 22, sub-tab 26 at 2, ¶ 3). Mod 26 also specified that "ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED" (*id.* at 5). Mod 26 was signed on 27 September 2007 by both parties, Ms. Dorothy Callihan, Project Manager for Sundt, and Ms. Sharon Money, contracting officer (CO) for the government (R4, tab 22, sub-tab 26).

11. Several months later, on 7 December 2007, Mr. Dave Allan, Senior Project Manager of Sundt, contacted the government, asking for, among other things, "correction of [MOD] 26." Mr. Allan stated that language in Mod 26 about the period of performance was "invalid and violates the contract and applicable regulations because it limits the proposed time extension to GOQ Building 1 only." Mr Allan stated that TG21 did not set forth more than one completion date, and there were no specific completion dates for individual buildings or units. Thus Mr. Allan stated that "the time extension applies to the overall TG21 completion date without limitation." (R4, tab 15)

12. On 9 January 2008, the government emailed Sundt with the government's calculations of liquidated damages for TG21 (other than for GOQ-01) based on the required completion date of 28 February 2007 and actual acceptance dates for the units and the site (R4, tab 13). Sundt responded on 17 January 2008 "disagree[ing] with the Government's position on the issue of LDs" (R4, tab 11).

13. After further communications between the parties, the government notified Sundt on 15 February 2008 that liquidated damages would be assessed in the amount of $194,462 based on Sundt's failure "to meet the established task order completion date of 28 Feb 2007" (R4, tab 8). The liquidated damages were computed based on $380 for each day of delay overall, plus $42 per day per individual housing unit. The unit delays covered the 18 housing units on Columbus Circle, completed at various times from 4 April 2007 to 16 May 2007, and 11 units on Vandenberg Drive, all completed on 10 August 2007. These unit delays were calculated from 28 February 2007 to each individual unit completion date, for a total unit delay assessment of $114,282. The overall site delay was calculated from 28 February 2007 to 27 September 2007, the date of the acceptance of the Youngstown Street demolition site (211 days), for a total site delay assessment of $80,180. (Callihan decl., attach. 15 at 4)

14. On 4 February 2010, two years later, the government formally assessed liquidated damages against Sundt, and also revised the initial calculations in two ways. First, the government unilaterally extended the completion date for all units from 28 February 2007 to 14 March 2007 to adjust for 10 days (14 calendar days) of government delay, due to crawl space engineering design changes and base access delays. The government also used the date of 10 August 2007 instead of 27 September 2007 as the cutoff date for assessing site-level liquidated damages. The government determined that 10 August 2007 was a constructive beneficial occupancy date for the Youngstown Street demolition area, the same date as the date the last housing unit was accepted, and thus formed the end-date for calculating site-level liquidated damages. (R4, tab 4 at 6-7) As a result, Mod 29 imposed $97,230 in damages for the unit-based delays (14 March 2007 to each individual unit completion date), and $56,620 for the site delay (14 March 2007 to 10 August 2007, 149 days), totaling $153,850 (R4, tab 22, sub-tab 29 at 3). No liquidated damages were assessed against Sundt for anything (unit or site) after 10 August 2007 (*id.*).

15. Sundt submitted a certified claim to the CO on 25 March 2010, requesting an equitable price adjustment of $153,850 as a result of the government's allegedly wrongful assessment of liquidated damages (R4, tab 3). Sundt stated that the government improperly interpreted the TG21 completion dates, leading to an improper assessment of liquidated damages. Specifically, Sundt argued that Mod 26, by extending the performance for GOQ-01 to 14 September 2007, extended the completion dates for all the task order work, including all the other units as well. Sundt stated the task order only specified one completion date, and that Sundt did not agree to allow the government to

"sever the assessability of liquidated damages." (R4, tab 3 at 8) Sundt did not assert that the government was at fault for Sundt's performance delays on the non-GOQ-01 units, or request an equitable adjustment other than the price adjustment to relieve Sundt from the assessment of liquidated damages.

16. The CO denied Sundt's claim on 31 August 2010, stating that Mod 26 extended the schedule date only for GOQ-01, and kept the original schedule date of 28 February 2007 (as later revised to 14 March 2007) for the other listed units. Because Sundt did not complete the other units on time, the CO determined that liquidated damages could properly be assessed against Sundt for that late performance, notwithstanding the separate completion date for GOQ-01. (R4, tab 1) After receipt of the CO's final decision, Sundt appealed to this Board.

17. As part of its cross-motion for summary judgment and opposition to the government's motion, Sundt provided two declarations: one by Project Manager Dorothy Callihan who signed Mod 26 on behalf of Sundt, and one by Senior Project Manager David Allan. Ms. Callihan asserts that, during negotiations in September 2007, she informed Ms. Money that Sundt's position was that Sundt reserved the right to claim that there was only one completion date for the entire TG21 work, and that the parties agreed that the matter would remain open until the government could fully investigate the issue. (Callihan decl. ¶¶ 26, 28, 29, 35 and *passim*). Mr. Allan asserts that during negotiations he advised the government of Sundt's position that the period of performance for the entire task order would be extended to 14 September 2007 and that the government did not respond or indicate disagreement. (Allan decl. ¶¶ 15, 18).

## DECISION

The government moved for summary judgment on the grounds that Mod 26 extended the schedule date only for GOQ-01, and kept the original schedule date of 28 February 2007 for the other listed units. Because Sundt did not complete the other units by 28 February 2007, the government argues it could properly assess liquidated damages against Sundt for that late performance, notwithstanding the separate completion date for GOQ-01. Sundt cross-moved for summary judgment, arguing that the task order did not allow for assessing liquidated damages based on separate completion dates, and that the government was responsible for the period of delay through 14 September 2007 due to its design changes for GOQ-01. Since all work was complete by 14 September 2007, Sundt argues that any assessment of liquidated damages is improper.

Summary judgment may be granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Here, the parties disagree about the conclusions to be drawn from the facts and how the task order

as modified should be interpreted, but the facts themselves are not in dispute. Thus, since the matter concerns contract interpretation, summary judgment is appropriate. *ECI Construction, Inc.*, ASBCA No. 54344, 05-1 BCA ¶ 32,857 at 162,807 (disagreement about the interpretation of the contract schedule is a legal issue appropriate for resolution by summary judgment).

Following the established approach to contract interpretation, we start by examining the plain language of the task order, reading its terms together to give reasonable meaning to all the parts. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (appropriate contract interpretation considers the plain language of the contract, and interprets the contract terms "to effectuate its spirit and purpose," giving reasonable meaning to all its parts). Specifically, we review the language of task order TG21 as modified to determine the task order completion date (or dates) and whether the government could properly assess liquidated damages in the manner it did.

To start with, the task order completion date was 28 February 2007 for all units except GOQ-01 and that unit's completion date was 14 September 2007. The original task order completion date of 27 MARO (8 June 2006) was extended up to 28 February 2007 by Mod 21. No further change was made until Mod 26, which retained the "Delivery Schedule" date of 28 February 2007 for all units except GOQ-01, and carved out that specific unit with a separate "Period of Performance" date of 14 September 2007 due to government design changes. Sundt has argued that the terms "delivery schedule" dates and "period of performance" dates are not the same as "completion" dates, but we disagree. These terms have been used interchangeably in various documents, for example, in the initial task order, in Mod 1, and in Mod 26. Within each document, one date is used despite different labels attached to it. We do not find these terms to have different meanings for purposes of the issues in this case, and conclude that Mod 26 clearly and unambiguously established two completion dates, which both parties agreed to: 28 February 2007 for all the work except GOQ-01, and 14 September 2007 for GOQ-01.

Sundt asserts that the FAR 52.211-10, COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984) clause prohibits establishing a separate completion date for one unit, because it refers to completion of "the entire work" by one date, 27 MARO. However, in our view, the reference to completion of the "entire" work is simply a reasonable designation of the project end point at time of award; the term does not preclude the parties from later agreeing to a separate completion date for one unit delayed by government design changes. The date itself serves as an initial baseline date that can be (and was) extended. The 27 MARO clause date is repeated in the initial schedule at Section F, showing that both the clause and the schedule are linked. It was entirely appropriate for the government to make changes to this baseline date via the schedule, whether extending one overall completion date, or adding a later date for a delayed unit. We see no conflict between the 27 MARO date in the clause and the later

schedule dates, including those in Mod 26, and we do not find that the government is required to update the clause every time the schedule date changes. Both the clause and the schedule are read together.

Regardless of the fact that Mod 26 broke out the GOQ-01 unit for a separate completion date, the FAR 52.211-12, LIQUIDATED DAMAGES – CONSTRUCTION (SEP 2000) clause could properly be applied against the rest of the task order work that was late. The liquidated damages clause is triggered when the contractor "fails to complete the work within the time specified in the TO [task order]," which we interpret to mean the task order *as modified.* Nothing in Mod 26 changed the terms or the application of the liquidated damages clause; indeed, Mod 26 states that "all other terms and conditions remain unchanged." Under the clause, failing to complete work within the time specified for that work leads to a potential assessment of liquidated damages. The liquidated damages clause itself points to unit severability, in specifying damages per unit and per site, with separate per-unit delay calculations. Further, Sundt has not identified any critical path issues or construction practicalities that would inextricably link the GOQ-01 work with the other individual housing units; indeed, the design changes applied only to the General Officers' Quarters unit. We concluded above that the completion date for all units except GOQ-01 was 28 February 2007; once that date was missed, liquidated damages could be assessed on that late work.

Sundt argues that Mod 26 did not mention liquidated damages, and that although Sundt signed the modification with separate completion dates, it did not agree that liquidated damages could be assessed against the earlier date. However, we do not find this to be a reasonable interpretation of the modification. Sundt agreed to completion dates that it had already missed, in a task order with a liquidated damages clause. Sundt also knew earlier that the government was not condoning delinquent performance or waiving the right to assess liquidated damages, and nothing in the modification suggests any change in the government's position. Furthermore, we cannot reasonably read the "site date" portion of the liquidated damages clause as exonerating a contractor from late performance simply because the parties have agreed to a performance extension on one separate unit due to excusable delay. Thus, we find that the terms of Mod 26, read together with the task order, allowed the government to assess liquidated damages in the manner it did.

We find distinguishable the cases cited by Sundt, *Jacqueline Howell, Ltd.,* ASBCA No. 27026, 82-2 BCA ¶ 16,086, and *J. G. Watts Construction Co.,* ASBCA Nos. 9462, 9463, 1963 BCA ¶ 3889. In *Howell*, there was no liquidated damages clause in the initial contract at all. Rather, the government added it unilaterally, also unilaterally imposing a specific dollar rate. The Board found that the contractor had not agreed to the liquidated damages dollar rate and that the government could not unilaterally impose one. Here, in contrast, the task order contained a liquidated damages clause from the start, and also contained specific liquidated damages rates. Unlike *Howell*, the issue here is not

whether the parties agreed to liquidated damages or to a specific rate (they did), but how to interpret what in fact they already agreed to.

We find *Watts* distinguishable as well. In *Watts,* the contract had a single date for assessing liquidated damages, and a modification giving additional time to complete "the revised work" was interpreted by the Board as extending the completion date for *all the work as revised*, not just the *revised part of the work* as the government argued. But here, in contrast to *Watts,* Mod 26 specifically reiterated that the existing date for all other units remained unchanged, and only established a different date for one separate unit. The specificity of Mod 26 stands in marked contrast to that in the *Watts* case where there was no clear statement about when the allegedly "non-revised" work was due. Further, the Board in *Watts* did not conclude that the parties *could* not agree to revised dates; rather it found that there was inadequate evidence to conclude that they *did.* Thus the Board determined the completion date from the "terms of the formal instrument itself," not by "doubtful inference" from what the appellant had said earlier. *Id.* at 19,311. We do the same here.

The absence in the task order of FAR 52.211-13, TIME EXTENSIONS (SEP 2000) clause does not alter our conclusion that the parties could bilaterally agree to separate completion dates, triggering liquidated damages for whatever date was missed. Prescription language in FAR 11.503(b) and (c) states that the time extensions clause should be used when the contract specifies more than one completion date for separate parts of the work; the clause itself addresses if and how a change to one part might (or might not) affect the critical path of the entire project. In this case, one completion date was maintained throughout performance except for the government-caused delay extension allowed for GOQ-01 in Mod 26. The parties were free to agree to extend performance for one unit for excusable delay without having to have a separate time extensions clause in the task order.

Sundt argues that although it agreed to the 28 February 2007 completion date in Mod 26, the limited release language shows that Sundt was not releasing the government from "liability" for anything unrelated to GOQ-01. We partially agree, in that if the government had been at fault ("liable") for the delays related to the other units, Sundt's release would not have barred Sundt from holding the government accountable, *i.e.,* claiming a schedule adjustment and relief from liquidated damages. Indeed, if the government had not later adjusted the 28 February 2007 completion date to 14 March 2007 because of government changes in crawl space design and base access delays, Sundt could have contested the liquidated damages assessment for those reasons. However, we do not read the release language as enabling Sundt to later challenge the underlying completion dates themselves, which it agreed to, in the absence of government delays. Our reading in this regard gives meaning to both the release language and the unchanged completion dates for all the other units, rather than having to set aside or explain away either one or the other. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435

(Fed. Cir. 1996) (court must interpret the contract in a manner that gives meaning to all its provisions and makes sense).

Sundt has presented extrinsic evidence, by way of emails, memoranda, and declarations, to show that it did not intend to concede liquidated damages by signing Mod 26. However, extrinsic evidence can only be considered if a document is ambiguous—*i.e.*, subject to two reasonable interpretations. *McAbee*, 97 F.3d at 1434-35 (if the terms of a contract, read as a whole, are not subject to more than one reasonable interpretation, the contract is not ambiguous and extrinsic evidence cannot be considered to interpret its terms). As noted above, we found that Mod 26 unambiguously established two completion dates and that liquidated damages could be assessed regardless. Sundt's interpretation that there was (or should have been) only one date, and that liquidated damages therefore could not be assessed against the earlier date, is not reasonable based on the language of the task order as modified as a whole. Consequently, we cannot consider extrinsic evidence concerning whether Sundt's intent differed from the unambiguous words of Mod 26. *ITT Avionics Division*, ASBCA No. 50403 *et al.*, 03-2 BCA ¶ 32,378, at 160,215 (extrinsic evidence may not be used to vary the terms of an unambiguous contract, even if there is some evidence "at odds with the clear language of the contract").

We have considered Sundt's other arguments and find them to be without merit.

CONCLUSION

For the reasons set forth above, the government's motion for summary judgment is granted and Sundt's cross-motion for summary judgment is denied. The appeal is denied.

Dated: 24 May 2011

Elizabeth M. Grant

ELIZABETH M. GRANT
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. 57358, Appeal of Sundt Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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