UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 1, 2009

CBCA 1009

NORTHERN MANAGEMENT SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

John Deshon, President of Northern Management Services, Inc., Sandpoint, ID, appearing for Appellant.

Dawn M. Dickman, Office of the General Counsel, Department of Agriculture, Juneau, AK, counsel for Respondent.

DRUMMOND, Board Judge.

Through this appeal, Northern Management Services, Inc. (NMS) challenges a Department of Agriculture, Forest Service (FS) contracting officer's decision which assessed $9750 in liquidated damages, and pending submission of a release of claims by NMS, withheld a contract balance of $1976.26.[1] NMS maintains that the project was substantially

[1] NMS has elected to have its claim decided under the Board's small claim procedures. Under such procedures, a decision is rendered by a single judge, is not appealable, and may not be cited as precedent. Board Rule 52 (42 CFR 6101.52 (2008)). The parties elected to submit their positions on the record.

complete earlier than the date on which the Government approved it as complete and that the imposition of liquidated damages was inappropriate.

For the reasons discussed below, we deny this appeal.[2]

Background

On September 21, 2006, the FS awarded to NMS contract AG-0116-C-06-0086 (the contract). Appeal File, Exhibit 2 at 2. The contract, in the amount of $533,093.74, required NMS to replace the lighting and lighting control systems for the exhibits and theater at the Ketchikan, Alaska, Southeast Alaska Discovery Center (SEADC). *Id.*, Exhibits 2, 4. As awarded, all contract work was to be completed by April 1, 2007. *Id.*, Exhibit 2 at 5.

The contract described the SEADC as a visitor center operated by the FS. Appeal File, Exhibit 2 at 11. The contract further described the SEADC as including exhibit areas, a theater, and offices for several FS employees. *Id.* The contract stated that the SEADC hosted over "139,000 visitors in 2005." *Id.* at 44. The FS considers the SEADC important to the mission of the FS as the SEADC "provides many visitors to Southeast Alaska with their initial contact with the Forest Service in Alaska." *Id.*, Exhibit 46.

The contract included a "Selection Criteria Summary," which warned the successful bidder that important award factors were: preset programming from the light control station, and from a personal computer, which was to be LAN (local area network) capable; and easy-to-use preset programming software. Appeal File, Exhibit 2 at 58. As awarded, the contract contemplated fully operational lighting controls that would give the FS the capability and flexibility to program lighting presets as needed. *Id.* at 46, 54. The contract stated that "the new lighting system shall provide at a minimum equivalent lighting quality and flexibility in preset programming as the existing exhibit lighting." *Id.* at 46.

The contract singled out for special attention the programming requirements for the new lighting controls for the theater and exhibits. Appeal File, Exhibit 2 at 54. Specification 01010, entitled "New Lighting Controls for Theater and Exhibits," states in section III.A.6:

> [t]he Preset Programming Software for a PC connected to the lighting control system <u>shall be provided</u> by the Contractor

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[2] The record consists of the pleadings; Appeal File, Exhibits 1 - 46; Supplemental Appeal File, Exhibits 1 - 8; Appellant's Brief; Respondent's Brief; and Appellant's Opposition to Respondent's Brief.

> loaded on a laptop computer ready to go. Contractor shall provide the laptop computer with modem, operating system, standard software package, and manufacturer's warranty. Contractor shall be required to set up the laptop, connected to a phone line provided by the government . . . . The laptop will not be connected to the LAN.

Id. at 54. Section III.A.8 of that same specification states: "Lighting control programming shall be user friendly, requiring minimal steps." *Id.* Section III.A.10 states: "All programming shall be finished and functioning prior to close out of the project." *Id*. Section III.A.13 states: "The system shall have the capability to program lighting presets from each light control station in its respective exhibit area." *Id*. at 55. Section III.A.14 states: "The system shall include protection at each light control station to prevent accidental programming." *Id*.

During contract performance, NMS and its subcontractors, particularly Pacific Lighting, experienced problems completing scheduled tasks and ordering material in a timely manner. *Id*., Exhibits 12, 14, 17. In February 2007, the contracting officer (CO) expressed his concern that timely completion of the project might be in jeopardy. *Id.* Exhibit 26. The CO noted that "the lighting control installation was to begin in the theater on February 2 and in the exhibits on March 5; however, manufacturing of the controls has not yet begun." *Id*. Delays involving the manufacturing and installation of lighting controls for the theater and exhibit areas continued. On March 30, 2007, Mr. Dane Ash for NMS wrote to the CO requesting an extension of the contract completion date to April 26, citing, *inter alia*, as reasons for the request: "1. A21 Panel Missing one Module - Rejected by QC (Quality Control) at the manufacturer and being rebuilt . . . . " and "2. A21 Key Pad interface problems . . . [manufacturer to present programming solution or submit replacement model] . . . ," and "3. C21 Panel to Laptop interface problems . . . ." *Id*., Exhibit 32. These three problems related to the lighting controls for the theater and exhibit areas.

The extension of the contract completion date proposed by NMS was the subject of negotiations between the parties and resulted in the execution of modification 0003 by the CO and NMS. Modification 0003 extended the contract completion date to April 27, 2007, and added a Liquidated Damages clause to the contract. Appeal File, Exhibit 33. The SEADC was scheduled to reopen on or about May 1, 2007, and the CO was concerned that further delays beyond the proposed revised completion date would adversely impact the scheduled reopening of the SEADC. The CO considered the daily cost to rent another facility if the work was not completed by April 27, 2007. *Id*., Exhibit 46 at 2. He also anticipated the adverse impact and disruption to the FS if it could not use the lighting controls as intended. *Id.* Originally, the CO calculated liquidated damages at $1000 per day,

but the parties agreed to $750 per day. *Id*.; Affidavit of John Deshon (Feb. 11, 2008) ¶ 9. The Liquidated Damages clause states in relevant part: "If the Contractor fails to complete the work within the time specified in the contract, the Contractor shall pay liquidated damages to the Government in the amount of $750 for each calendar day of delay until the work is completed or accepted." Appeal File, Exhibit 33. The modification contained no reservations or exceptions.

By e-mail message dated April 26, 2007, the FS advised NMS that the system's mobile unit and lighting recall buttons still were not functioning as required by the terms of the contract. Appeal File, Exhibit 40. Specifically, the FS stated:

> Once communication is established with the system, the laptop will not manipulate the presets in any way.
>
> Communication is only established after a preset station is physically manipulated.
>
> The laptop does not reflect current channel settings nor can channels be manipulated with the visual sliders even after communication is established.

Id.

On June 26, 2007, NMS submitted to the FS copies of manuals and the as-built drawings required by the contract. Appeal File, Exhibit 41. NMS also submitted a final invoice for payment by the FS. *Id*.

By e-mail message dated August 14, 2007, the CO wrote to NMS requesting that it sign and return the release that was attached. The CO stated that the "outstanding contract amount was $11,726.26 minus the liquidated damages (13 days at 750/day = $9,750)." Appeal File, Exhibit 42. NMS responded by expressing its disagreement with the assessment of liquidated damages. NMS maintained that the contract work was completed within the contract period. *Id*. NMS regarded the programming problems to be minor and not warranting the assessment of liquidated damages. *Id*.

On August 20, 2007, the CO wrote to NMS stating that the work was not complete until May 10, 2007, when a technician for the manufacturer of the lighting controls, Strand Lighting, corrected the problems with the laptop control which prevented the system from functioning as required by "Sections III.A.6 and III.A.13." Appeal File, Exhibit 43. The CO stated that "because the laptop was the mechanism meeting Section III.A.13, the lack of

functionality prevented users from any use of the system beyond preset recall from the floor control stations." *Id*.

On September 11, 2007, NMS responded to the CO's letter of August 20, 2007. Appeal File, Exhibit 44. NMS's letter enclosed an unsigned letter from a sales manager for Strand Lighting dated September 6, 2007, which stated the "C21/A21 dimming system . . . was complete and fully operational prior to April 26, 2007. Further, all architectural control devices were programmed to specified presets." The Strand Lighting letter also characterized the two programming problems that existed on May 10, 2007, as being minor. *Id*. The record contains no persuasive evidence to corroborate the statements in September 6, 2007 letter as being true.

On November 7, 2007, the CO issued a final decision. Appeal File, Exhibit 46. In that decision, the CO rejected the claim by NMS for final contract payment, stating that: "it is my decision to collect thirteen days of liquidated damages at $750.00 per day for a total of $9,750.00." *Id*. The CO stated further that "I am awaiting your release, and upon its receipt, the Forest Service will process a payment of $1,976.26, which is the final invoice price less the liquidated damages . . . ." *Id*.

Among other things, the CO stated the contract was not complete on April 27, 2007, because:

> . . . the system did not function as it was designed. Specifically, there were problems with the A21 and C21 dimmer racks. The A21 problem prevented turning off the theater control board without losing the preset lighting levels, and the C21 problem prevented functional interface with the lighting controls using the laptop computer. While these problems did not delay the reopening of the Discovery Center, they go beyond the definition of minor punch list items and they caused unnecessary confusion and work-arounds for the Discovery Center staff.

Appeal File, Exhibit 46.

After filing an appeal, NMS submitted an affidavit of John Deshon, the president of NMS. In that affidavit, Mr. Deshon declares that during a conversation with the CO on October 24, 2007, the CO said NMS had to pay some amount in liquidated damages to "absorb some punishment." Deshon Affidavit ¶ 19. The FS has denied that the CO made the alleged statement. Respondent's Brief at 15. The record contains no evidence to corroborate Mr. Deshon's assertion concerning the alleged improper statement by the CO.

Discussion

NMS's objection to FS's imposition of liquidated damages may be summarized as follows: (1) The liquidated damages constitute a penalty, and (2) the work was substantially complete by the contract completion date. We do not find either of these arguments meritorious.

NMS argues that the assessment of liquidated damages was punitive because the FS has not shown it suffered actual damages. The burden of proving a liquidated damages clause to be unenforceable rests with the party challenging the provision. *DJ Manufacturing Corp. v. United States*, 86 F.3d 1130, 1134 (Fed. Cir. 1996). Whether or not the FS suffered actual damages is immaterial. Such provisions will be enforced where they "are fair and reasonable attempts to fix just compensation for anticipated loss . . . . 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." *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947).

The record reflects that the visitor center was scheduled to reopen to the public on May 1, 2007. The parties recognized the critical need for timely completion of the contract work, and they anticipated the cost and inconvenience the Government would suffer if the lighting controls could not be used as intended. The liquidated damages of $750 per day constituted a reasonable projection of the potential damage to the FS if NMS failed to timely correct the problems with the lighting controls, and NMS agreed to the terms. Under these circumstances, the negotiated amount for liquidated damages is to be enforced as any other provision of the contract. *Hughes Bros., Inc. v. United States*, 133 Ct. Cl. 108 (1955). NMS has offered no evidence to overcome the presumption that the liquidated damages in this contract are reasonable. *Wise v. United States*, 249 U.S. 361, 365-66 (1919). Reasonable liquidated damages provisions "are not to be regarded as penalties." *Rex Trailer Co. v. United States*, 350 U.S. 148, 151 (1956).

NMS also argues liquidated damages were punitively applied by the FS. It contends that the CO assessed the liquidated damages because NMS "had to absorb some punishment for the delays." We understand NMS to contend that the statement attributed to Mr. Patton is proof that the liquidated damages were improperly motivated and should be set aside as punitive; however, NMS stops short of asserting that the FS's assessment should be vitiated by bad faith. In the absence of evidence to the contrary, we find that NMS had not shown that the FS assessed the liquidated damages to punish NMS, nor has it shown that the FS was motivated by improper purpose.

We find that NMS's allegation of an improper statement by the CO, without more, is insufficient to meet the evidentiary standard of proving bad faith on the part of the Government by "clear and convincing evidence," a more onerous burden than that of a preponderance of the evidence. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002).

Finally, NMS contends that the work was substantially complete on April 27, 2007, and therefore, it is not subject to liquidated damages. Complaint ¶ 8. NMS contends that the two programming issues that existed after April 27, 2007, were minor and had no impact on the use of the SEADC.

The FS contends that NMS's performance under the contract was not substantially compete until the two programming problems were corrected on May 10, 2007. The FS maintains that the two programming issues were significant and prevented the system from functioning as intended. The FS maintains that it is clear from both the contract and the parties' conduct during the course of the performance that both the FS and NMS intended and expected to have the lighting system give the FS the capability and flexibility to program lighting presets as needed.

The FS asserts that the first problem with the system involved the programming console for the theater lighting control system. The FS maintains that the lighting control system located in the theater included a wall-mounted control unit and a mobile control unit that could be plugged into the computer in the wall-mounted control unit. Respondent's Brief at 6. The FS further asserts that when working properly, the mobile unit is connected to the wall-mounted unit to program the desired lighting settings, and then can be disconnected while the programmed presets are retained in the memory of the wall-mounted unit. *Id*. NMS has not disputed the FS's assertions concerning the configuration and functionality of the lighting controls in the theater and exhibit areas.

The FS argues that until NMS fixed the problem on May 10, 2007, all programmed lighting levels that should have been retained in the wall-mounted control system were lost if the mobile programming console was turned off or disconnected from the wall-mounted unit. The FS states that when this happened, the lights would turn on to their maximum setting, thus interfering with the programming capability and the use of the room as a theater. Respondent's Brief at 6. NMS counters by asserting that this was not a significant problem since "there was no reason for the DMX cable to ever be disconnected from the control system." Appellant's Brief at 3. However, this does not explain how the system was to be used as intended, since the mobile programming console was intended to be disconnected when not being used for programming.

The FS maintains that the second problem concerned lighting recall buttons. The FS asserts that the lighting control system in the exhibit areas consisted of a preset group of lighting buttons that were programmed by a lighting specialist and blank recall buttons that could be programmed by FS staff as needed for special lighting situations. Respondent's Brief at 7. NMS has not disputed the FS's assertions concerning the configuration and functionality of the lighting recall buttons in the exhibit areas.

The FS states that until the problem was fixed, FS staff was unable to program any of these recall buttons. Respondent's Brief at 7. NMS contends that there was no reason for FS staff to change preset functions. Appellant's Brief at 3. We find NMS's assertion to be directly contrary to the plain language of the contract that the "[n]ew lighting system shall provide at a minimum equivalent lighting quality and flexibility in preset programming as the existing lighting system."

Liquidated damages are improperly assessed after the date of substantial completion of contract work. Substantial completion of work on a contract occurs when a high percentage of work is complete and the project is available for its intended use. *AMEC Construction Management, Inc. v. General Services Administration*, GSBCA 16233, 06-2 BCA ¶ 33,410, at 165,653; *Program and Construction Management Group, Inc. v. General Services Administration*, GSBCA 14757, et al., 00-1 BCA ¶ 30,641, at 151,317. Government occupancy of a building is not conclusive proof of substantial completion. *Haas & Haynie Corp.*, GSBCA 5530, et al., 84-2 BCA ¶ 17,446, at 86,896.

In the instant case, we know from reading the contract that programming the lighting system and presets was considered to be an important part of the work performed by NMS. The mandatory specifications set forth the performance requirements and the requirement that all programming "shall be user friendly, requiring minimum steps" and "finished and complete prior to close-out of the project." Until the systems were working properly, as intended by the contract, the work could not be considered substantially complete. NMS has not suggested that the systems were fully operational earlier than May 10, 2007. We consequently cannot fault the FS's determination that substantial completion was achieved on that day.

We find the inability to turn off the theater control board without losing the preset lighting levels, and the inability to interface with the lighting controls using the laptop computer precluded the FS's primary mode of operation as intended by the contract. We further find, based upon a review of the record, that the system could not be used as intended by the contract until May 10, 2007. In this case, preset programing from the light control station, and from a personal computer and LAN, and the ability to readily lock and unlock programing at the light control station were important award factors. The CO's computation

of liquidated damages was reasonable and consistent with the contract provisions. NMS has offered no persuasive evidence which demonstrates that the system was substantially completed by an earlier date. *Southwest Marine, Inc.*, DOT BCA 1577A, 95-1 BCA ¶ 27,519.

Decision

We uphold the contracting officer's decision. This appeal is **DENIED**. NMS is entitled to the contract balance of $1976.26, pending its submission of a release of claims.

JEROME M. DRUMMOND
Board Judge