



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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**THIS DECISION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER  
AND IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON  
JUNE 7, 2023**

MOTION FOR PARTIAL DISMISSAL DENIED: May 19, 2023

CBCA 7565, 7566, 7567

ACUITY ENGINEERING & TECHNICAL SERVICES, LLC  
fka MICHAEL BAKER GLOBAL SERVICES, LLC

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Kara L. Daniels and Sonia Tabriz of Arnold & Porter Kaye Scholer LLP,  
Washington, DC, counsel for Appellant.

Jeffrey A. Regner, Office of the Legal Adviser, Buildings and Acquisitions,  
Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **RUSSELL**, **GOODMAN**, and **KULLBERG**.

**GOODMAN**, Board Judge.

Appellant, Acuity Engineering & Technical Services, LLC fka Michael Baker Global Services, LLC, has filed these three appeals which have been consolidated for decision. Respondent, the Department of State (DOS or respondent), has filed a motion to dismiss count V of the consolidated complaint for failure to state a claim for which relief can be granted. We deny the motion.

Background

Count V of the consolidated complaint reads in its entirety:

Count V: Breach of Contract -  
Application of Unenforceable Liquidated Damages Rate

199. Acuity hereby incorporates the preceding paragraphs of this Complaint.

200. FAR 11.501 and applicable precedent require that the liquidated damages rate listed in the Contract be a “reasonable forecast of just compensation for the harm that is caused by late delivery or untimely performance” under the Contract and that the government evidence the reasonableness. *See George W. Marshall [and] Gordon L. Blackwell*, ENG BCA No. 6066, 00-1 BCA ¶ 30,730 (explaining that liquidated damages in construction contracts should reflect estimated daily costs of inspection, supervision, engineering and associated overhead expenses resulting from contractor-caused delay and therefore striking as an unenforceable penalty “an improper, erroneous rate that bore no relationship to the actual damages that the Government would suffer if the contract completion date was not met”).

201. FAR 11.501(a) makes clear that “[l]iquidated damages are not punitive” and may only be used to “compensate the Government for probable damages.” Furthermore, as set out in FAR 11.501(c): “The contracting officer must take all reasonable steps to mitigate liquidated damages.”

202. The liquidated damages assessed by DOS against Acuity do not approximate any damage suffered by DOS or bear any relationship to any alleged damages that DOS has suffered, and are furthermore disproportionate, unreasonable and excessive.

203. The liquidated damages are punitive.

204. DOS has taken no steps to mitigate liquidate [sic] damages. To the contrary, DOS caused critical path delays to the Project schedule and unreasonably refused to extend the substantial completion date to account for those and all other excusable delays entitling Acuity to a time extension.

205. Despite the tens of millions of dollars of increased performance costs and losses that Acuity incurred to overcome the design and other issues faced,

Acuity's commitment to DOS and the successful completion of the Project did not waiver.

206. Acuity substantially completed the Project in early May 2022, at significant financial cost to the Company.

207. To date, the financial burden of the flawed design as well as the numerous other government-caused impacts resulting in delay and lost productivity have been borne by Acuity alone.

208. In addition to an extension of substantial completion date and an increase in the price of the Contract, Acuity is entitled to recover \$3,198,312 in liquidated damages improperly assessed by DOS, plus applicable interest and any other relief the Board deems appropriate.

Appellant's Complaint at 37-38.

Respondent states in its motion to dismiss count V:

Acuity alleges that the contract liquidated damages rate is unenforceable because the rate is not comparable to the actual damages suffered by the Department. Acuity applies the wrong standard. Instead, the reasonableness of a liquidated damages rate is measured at the time of contract, not in retrospect. Acuity fails to allege any facts challenging the reasonableness of the contract liquidated damages rate under the correct forward-looking standard. Accordingly, Count V of the complaint should be dismissed for failure to state a claim upon which relief may be granted.

.....

Acuity fails to allege anywhere in its complaint that the liquidated damages rate was not a reasonable forecast of damages at the time of contracting. Instead, Acuity alleges only that the liquidated damages rate is not related to the damages that the Department suffered in retrospect. Complaint, [¶] 202.

... Even if this allegation were true, it would not be sufficient to establish that the liquidated damages amount was an unreasonable forecast at the time of contracting. The remainder of the allegations in count V of the complaint are either legal conclusions or allegations not relevant to the issue of enforceability.

Respondent's Motion to Dismiss at 1-2, 7.

### Discussion

A motion to dismiss for failure to state a claim will be granted only when the facts asserted by the appellant do not entitle it to a legal remedy. We must assume that all well-pled factual allegations plausible on their face are true and indulge in all reasonable inferences in favor of the non-movant. *Océ North America, Inc. v. Department of Health and Human Services*, CBCA 2115, 11-1 BCA ¶ 34,677, at 170,819. Dismissal for failure to state a claim should not be granted unless it appears beyond doubt that the appellant cannot prove any set of facts in support of its claim that would entitle it to relief. *GC Columbia, LLC v. General Services Administration*, CBCA 7374, 22-1 BCA ¶ 38,197, at 185,502 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and *Icenogle Construction Management, Inc.*, VABCA 7534, 06-2 BCA ¶ 33,325, at 165,271).

In response to respondent's motion, appellant asserts that it has pled sufficiently with regard to the unreasonableness of the liquidated damages assessed, which ultimately may be proved by facts found during discovery in which the parties have yet to engage. *See, e.g., George F. Marshall*, ENG BCA 6066, 00-1 BCA ¶ 30,730, at 151,825-26; *see also ALK Services, Inc. v. Department of Veterans Affairs*, CBCA 1789, 10-2 BCA ¶ 34,518, at 170,246 (allowing a non-moving party in a summary judgment proceeding to engage in discovery to establish support for its claim).

Respondent states in its motion to dismiss that "the remainder of the allegations [other than ¶ 202] in Count V of the complaint are either legal conclusions or allegations not relevant to the issue of enforceability." We do not read count V as narrowly as respondent, as it contains additional allegations that the liquidated damages are punitive and that respondent caused delays, failed to issue time extensions, and failed to mitigate damages. Indulging in every reasonable inference in favor of the appellant, as we must, we cannot say at this stage of the proceedings, before discovery has commenced, that appellant cannot prove any set of facts in support of its allegations in count V of the consolidated complaint that would entitle it to relief. *Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 08-1 BCA ¶ 33,770, at 167,161.

Decision

The motion to dismiss count V of the consolidated complaint for failure to state a claim for which relief can be granted is **DENIED**.

*Allan H. Goodman*

ALLAN H. GOODMAN

Board Judge

We concur:

*Beverly M. Russell*

BEVERLY M. RUSSELL

Board Judge

*H. Chuck Kullberg*

H. CHUCK KULLBERG

Board Judge