DOCUMENT RESUME

02664 - [A1652653]

[Request for Equitable Remission of Liquidated Damages]. B-187820. June 7, 1977. 4 pp.

Decision re: Construction Electric Co.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).
Organization Concerned: Department of the Air Force.
Authority: 10 U.S.C. 2312. A.S.P.R. 1-310(c). A.S.P.R. 7-602.5. Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387 (1944). Southwest Engineering Co. v. United States, 341 F.2d 998 (1965).

Equitable remission of liquidated damages assessed under Air Force contract was requested. Company's request for remission of liquidated damages was denied, despite the Air Force's recommendation favoring partial remission, because CEC's actions were not consistent with timely completion and the record fails to show that the Government acted so as to render timely performance difficult or impossible. (Author/QM)

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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-187820 DATE: June 7, 1977

MATTER OF: Construction Electric Company

DIGEST:

> Contractor's request for equitable remission of liquidated damages is denied, notwithstanding agency recommendation favoring partial remission, where contractor's actions were not consistent with timely completion and record fails to show that Government acted so as to render timely performance difficult or impossible.

This is a request for equitable remission of liquidated damages assessed under contract No. F04700-75-C-0236, involving the installation of an electric motor generator.

The contract was awarded to Construction Electric Company (CEC) on April 18, 1975 and provided for completion of work within 120 calendar days of receipt of a notice to proceed, that is, by September 11, 1975. Work was completed April 5, 1976. The contract provided for the assessment of liquidated damages of $45 for each day of delay amounting, in the instant case, to $9,270, or approximately 29 percent of the total contract price.

CEC filed a request for remission of all liquidated damages contending that CEC did everything possible to perform within the performance period but that its efforts were frustrated by the limited number of suppliers and the Government's failure to approve CEC's alternative proposal in a timely manner. CEC also contends that the Government did not take reasonable action to mitigate damages, Armed Services Procurement Regulation (ASPR) § 1-310(c) (1976 ed.), when CEC offered a temporary substitute unit for the promised performance. Finally, CEC contends that the Government was not damaged to the extent of the liquidated damages assessed.

We requested a report and recommendation from the Secretary of the Air Force in accordance with our statutory authority under 10 U.S.C. § 2312 to remit, upon the agency head's recommendation, that portion of the liquidated damages for which remission would be just and equitable. The Acting Assistant Secretary of the Air Force (Installations & Logistics) recommended remission of liquidated damages of $3,629.86, amounting to the difference between the Government's estimate of the actual costs due to delay ($5,640.14) and the assessed liquidated damages ($9,270.00).

At the outset, we note that the amount of assessed damages is not unconscionably high when viewed in light of the estimated actual damages. Furthermore, the fact that the Government was not damaged to the extent of the assessed liquidated damages does not render the assessed damages inequitable where, as in this case, the Government's preaward evaluation of the probable damages adequately supported the rate of assessment. It is well-settled that an otherwise valid agreement for liquidated damages is not rendered invalid because the amount so assessed exceeds the amount of the actual damages, if any, sustained. Southwest Engineering Co. v. United States, 341 F.2d 998 (8th Cir. 1965), cert. denied, 382 U.S. 819 (1965).

In its request for remission, the contractor states:

> "We did everything within our power to insure that the motor generator set would be manufactured and installed within the original contract completion date."

However, the contractor also states:

> "After Construction Electric was advised that it was the low bidder, but before the contract was actually awarded, we contacted Graybar Electric Company to determine whether the contract completion date could be, in fact, met. We were informed that Teledyne-Inett, and Introll

> were the only manufacturers in the United States capable of making the particular unit required by the Air Force. We were further advised that there was a significant lead time as to the preparation of shop drawings and ultimate manufacture of the generator." (Emphasis added)

It does not appear that the contractor based its promise of timely performance upon adequate bid preparation efforts or that the firm made any effort to identify or overcome foreseeable impediments to timely performance prior to bid submission.

Although, in general, a request for equitable relief should be accompanied by clean hands as to the matter under consideration, Précision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806 (1945), that doctrine does not represent a rigid formula to be applied to the exclusion of all countervailing equitable considerations. Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387 (1944). Consequently, examination of the Government's conduct may be appropriate even though CEC should have ascertained prior to bidding that timely performance was unlikely. In the instant case, however, neither the Government nor the contractor has produced evidence of equitable considerations sufficient to relieve the contractor from any part of its responsibility for late performance.

The contractor contends that Government delays in approving an alternative proposal were a cause of delay here. The Government agrees, but the contracting officer's statement indicates that these delays were caused by the contractor's failure to support its proposal with adequate technical information. The record indicates that approval was granted on July 24, 1975, shortly after the contractor submitted drawings and specifications on an "In-Trol #5-3366 verticle M-G set" on July 22. The contractor also contends that the Government could have mitigated liquidated damages, as required by ASPR § 1-301(c), by accepting a temporary substitute for the promised performance. Here, too, the contracting officer's statement indicates that CEC failed to furnish sufficient technical data to support acceptance of the profferred substitute.

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The Air Force has informally suggested that the Government's failure to terminate for default after denying the contractor's request for an extension, may have unnecessarily compounded the contractor's liability. However, a termination for default does not end the Government's right to assess liquidated damages. The termination for default clause of ASPR § 7-602.5 provides in part:

> "(b) If fixed and agreed liquidated damages are provided in the contract and if the Government so terminates the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work."

Thus, a termination for default would not have mitigated liquidated damages unless the Government would have been able to obtain substantially expedited performance by another contractor. The Government was under no obligation to grant an extension and there is no evidence from which to conclude that, following the Government's denial of the requested extension, less costly or more timely means of satisfying the Government's needs existed. Consequently, on this record, it is purely conjectural whether the Government had opportunities to mitigate damages and the request for equitable remission of liquidated damages is denied.

R.F. Keller

Deputy Comptroller General
of the United States