



Comptroller General
of the United States
Washington, D.C. 20548

Perruso
144871

Decision

Matter of: Panama Canal Commission--Remission of
Liquidated Damages

File: B-242980

Date: September 20, 1991

DIGEST

Liquidated damages attributable to costs that were not foreseeable consequences of performance delay are remitted.

DECISION

The Acting Administrator of the Panama Canal Commission has requested that this Office remit part of the liquidated damages assessed against Constructores Electromecanicos, S.A., under Commission contract No. CC-2-566. This matter is before us under 41 U.S.C. § 256a (1988), which authorizes the Comptroller General, upon the recommendation of the head of any federal agency, to remit the whole or any part of liquidated damages assessed for delay as in his discretion may be just and equitable.

The contract provides for the installation of a fire-protection system at the Miraflores Locks at the Panama Canal. A liquidated damages clause provided for damages to be assessed at a rate of \$3,400 per day if the work was not completed by June 19, 1990. We understand that the contract still has not been completed, and that damages at the rate of \$3,400 per day currently are being assessed.

The Commission believes that the daily rate of liquidated damages should have been only \$650. That is the amount needed to cover the Construction Division's costs of providing on-site inspection (\$250) as well as the cost of Marine Bureau personnel to coordinate the installation (\$400). The remainder, consisting of relay operation costs and the costs of a craneboat and a cargo barge, should not have been included in the damage estimate, contends the Commission, because these costs were not foreseeable consequences of a performance delay. Under Federal Acquisition Regulation section 12.202(b), liquidated damages fixed without any reference to probable actual damages may be held to be a penalty, and therefore unenforceable. The Commission attributes the inclusion of these additional costs in the liquidated damages rate to an error in judgment by one of its estimators.

According to the contracting officer, relay operations are put into effect when there is a need to transit more ships than usual through the locks. Relay operations increase the frequency with which locomotives travel back and forth along the tracks. Because the work under contract is located away from the locomotive track, however, and in no way impacts on shipping, the Commission considers it unreasonable to expect that a delay in contractor performance could affect relay operations.

With respect to the craneboat, the contract provides that the Commission will furnish, free of charge, floating crane services for the installation and removal of the contractor's cranes. The Commission points out that late performance will not result in additional costs for the craneboat because only four trips during the life of the contract will be required to install and remove the cranes, regardless of how long it takes to complete the work. Similarly, the Commission says that the number of barge trips needed for transporting material and equipment is not dependent on when the contract is completed.

As the Commission has asserted, the liquidated damages provision in the contract appears to have included costs that were not foreseeable consequences of a performance delay. We therefore conclude that remission of these costs is equitable and appropriate. Consequently, we remit any liquidated damages assessed in excess of \$650 per day from June 19, 1990, to the date of this decision.



Acting Comptroller General
of the United States