UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: October 13, 2011

CBCA 2386

MOSHE SAFDIE AND ASSOCIATES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Laurence Schor and David A. Edelstein of Asmar, Schor & McKenna, PLLC, Washington, DC, counsel for Appellant.

James F. H. Scott, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **VERGILIO**, and **POLLACK**.

POLLACK, Board Judge.

This matter is before us on Moshe Safdie and Associates, Inc.'s (MSA's or appellant's) motion for summary relief regarding the General Services Administration's (GSA's) counterclaim. The appeals before us arise out of a contract between GSA and appellant for the design of a courthouse in Springfield, Massachusetts, under which appellant agreed to design a structure that could be constructed for $35 million. Appellant filed a claim and then an appeal seeking approximately $3,000,000, claiming that GSA made significant uncompensated changes to appellant's design efforts. That appeal was docketed as CBCA 1849. GSA, in the answer filed in that appeal, asserted that appellant owes it $5,275,880. GSA, thereafter, filed an affirmative claim against appellant for that same amount. That government claim was appealed by appellant and docketed as CBCA 2386.

The $5,275,880 claimed by GSA is identified in a March 3, 2011, letter from the contracting officer to appellant as the additional sums expended on account of MSA's failure to deliver contract-compliant bid documents on July 15, 2003 (the date required by the contract). GSA charges that appellant did not deliver contract-compliant documents until twenty months after the contract due date and, because of that lateness, GSA incurred escalated construction costs (reflected in the bids available for award) for which it is entitled to reimbursement. Alternatively, GSA asserts that if appellant is found to be due money, then GSA is entitled to set off these damages against such recovery.

Appellant charges in its motion that, as a matter of law, GSA cannot pursue the damages sought. It asserts that GSA is barred because GSA's claim "is based entirely on the fact that construction bids for the Courthouse, based on MSA's original design documents, exceeded $43.8 million." Appellant contends that GSA's sole remedy for a claim based on exceeding the design target is the redesign remedy set out in the Limitation of Funds (LOF) clause of the contract. Appellant states that where a contract provides a specific remedy for non-performance (such as the remedy in the LOF clause), then any common law damages (including consequential damages) arising out of those same actions cannot be pursued. Additionally, appellant makes a number of other arguments, among which are: (1) the claimed damages were unforeseen, (2) GSA excused the delivery of the allegedly late documents, (3) GSA has misapplied the funding clause, and (4) GSA failed to give appellant proper notice of an intended claim. We do not specifically address these latter items in this ruling, for they were not stated as the primary basis of the motion. Additionally, they are replete with mixed questions of fact and law, making them unsuitable for resolution by summary relief.

Background

GSA awarded a design contract to appellant in March 2000 in the amount of $2,322,800. The contract incorporated by reference the following clause dealing with limitations of funds, which is set out in pertinent part below.

> Design Within Funding Limitations (FAR 52.236-22) (APR 1984)
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> (a) The Contractor shall accomplish the design services required under this contract so as to permit the award of a contract under Federal Acquisition procedures for the construction of the facilities design at a price that does not exceed the estimated construction contract price as set forth in paragraph (c) of this clause. When bids or proposals for the construction contract are received that exceed the estimated price, the contractor shall perform such redesign services as are necessary to permit contract award within funding

> limitation. These additional services shall be performed at no increase in the price of this contract. However, the Contractor shall not be required to perform such additional services at no cost to the Government if the unfavorable bids or proposals are the result of conditions beyond its reasonable control.

Subparagraph (c) of the clause provided a space for insertion of the estimated construction contract price for the project. That space was not filled in. However, the contract contained another clause, part C, paragraph 6, titled "Project Construction Budget," that provided the estimated construction contract price to be $35 million. There is no dispute between the parties as to the inclusion in the contract of the initial target of $35 million.

The contract also provided directions as to the schedule to be followed. It called for final working documents to be submitted to GSA within seventy-six weeks of the start of the contract. The design contract was amended sixteen times between September 27, 2000, and December 16, 2008. Those amendments ultimately increased the price of the design contract to $3,382,707.37. During the design performance, GSA raised the construction cost limit (target) to $43.8 million.

Bids on the original design were received in August 2003 and significantly exceeded the initial LOF number. As a result, GSA directed appellant, pursuant to the LOF clause, to re-design and to meet an adjusted $43.8 million target. Appellant proceeded with that redesign, and in 2005 the redesigned building plans again went out for bids. Those bids exceeded the new LOF target. GSA at that point did not require a further redesign to achieve the target. Instead, in March 2005, GSA entered into a construction contract in the amount of $53,314,000.

In addition to the LOF clause and a clause dealing with time for performance, the contract also incorporated the Responsibility of Architect-Engineer Contractor (APR 1984) clause, which addresses claims against an architect for non-performance and has been interpreted in case law to hold architects to a professional negligence standard. *C.H. Guernsey & Co. v. United States*, 65 Fed. Cl. 582 (2005); *Swan Wooster Engineering*, AGBCA 83-104-1, 87-2 BCA ¶ 19,984.

It is appellant's contention that to the extent GSA is seeking damages based on the difference between the target construction price and the amount GSA had to pay for construction, GSA's remedy is limited to what is provided in the LOF clause. Appellant continues that the LOF clause applies whether the reason for the claimed overrun or price escalation was late completion or ineffective design. Appellant asserts that the fact that GSA characterizes this as a schedule breach and claims dollars based on escalation does not take

GSA's claim out of the ambit of the LOF clause. Accordingly to appellant, as a matter of law, where the contract specifies a specific remedy, such as the remedy set out in the LOF clause for dealing with bid price escalation, the Government is bound to that remedy and cannot substitute or add additional damages. Here, appellant points out that GSA directed it to redesign per the LOF clause and it did. It thus considers the government claim and set off to be double counting.

Discussion

The motion before us raises two primary legal matters for our consideration. First, does the case law mandate that where a contract provides for a specific performance remedy, that remedy is the sole and exclusive remedy which can be utilized by the Government, to the exclusion of consequential or other damages? Second, if the law does not mandate a legal bar to additional damages, does the LOF clause (by its terms) limit in this case the Government's remedy solely to performance of a redesign, and negate the Government's entitlement to consequential or actual damages arising out of the covered causes? In considering these issues, it is important to emphasize that the matters are before us on a motion for summary relief. For purposes of summary relief, we do not weigh evidence or judge credibility. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In resolving a dispute over the meaning of the terms, we must assess if the wording is subject to more than one reasonable interpretation and, if so, discern the intent of the parties at the time the contract was signed. *Stockton East Water District v. United States*, 583 F.3d 1344, 1362 (Fed. Cir. 2009); *KD1 Development, Inc. v. General Services Administration*, CBCA 2075, 11-1 BCA ¶ 34,744. In deciding whether to grant summary relief, all reasonable inferences are made in the non-moving party's favor, and if we find that a tribunal could conclude from the evidence that the non-moving party could prevail, then summary relief must be denied. *JAVIS Automation & Engineering, Inc. v. Department of Interior*, CBCA 938, 09-2 BCA ¶ 34,309.

Appellant cites *Johnson Controls World Services, Inc.*, ASBCA 46691, et al., 96-2 BCA ¶ 28,590, as authority for its contention that legal precedent requires us to conclude that where the Government provides for a specific remedy, that remedy is exclusive and bars substitute or additional damages arising out of the same causes. In *Johnson*, the Government sought to recover common law breach damages, in lieu of damages that had been quantified in clause E.7 of the parties' contract. The board ruled that the Government could not recover common law damages, concluding that clause E.7 covered the matter of damages and as such established the exclusive basis and amount for relief. The board said that the Government was seeking actual damages for an item for which the contract had designated and provided a specific price. The board further pointed out that it could not find "any other clause which provides a basis for the damage in question." The clause at issue in *Johnson*, read in pertinent part:

> (1) In the case of nonperformed work, the Government:
>
> > (a) Shall deduct from the Contract's [sic] invoice all amounts associated with such nonperformed work at the **prices set out** in the Schedule or provided by other provisions of this contract, unless the Contractor is permitted or required to perform pursuant to (b) below and satisfactorily completes the work.

Id. at 142,742 (emphasis added).

GSA characterizes clause E.7 in the *Johnson* contract as being in the nature of a liquidated damages clause, thereby establishing in that case a specific and set sum as the damages for non-performance. GSA acknowledges the well-established standard, as identified in *Johnson*, that where liquidated damages are provided, they provide an exclusive remedy. However, GSA then distinguishes *Johnson* from the situation in this case by noting that liquidated damages are not at issue in the courthouse contract. As GSA sees it, appellant is asking the Board to equate and substitute the specific performance of the redesign for liquidated damages, a position which GSA says has no basis. GSA cites *United States v. Paddock*, 178 F.2d 394, 396 (5th Cir. 1949), as authority for its contention that the fact that a contract contains a specific remedy clause does not negate the pursuit of additional, actual damages arising out of the same actions. In the cited case, the court had rejected the contractor's contention that a provision of the warranty clause created an exclusive remedy; the court did not read the clause to do so by express language or by necessary implication. The court noted that it is a generally recognized principle of law that remedies provided in a contract for breach of warranty are permissive only, and not exclusive, unless so provided in the contract either expressly or by necessary implication.

We have reviewed the respective positions of the parties and the cases relied upon by each. We find each case to be distinguishable from the instant situation. More important, however, we do not find as urged by appellant that there is any black letter bar to the Government pursuing both specific performance and actual or consequential damages. Rather, that determination is case specific and must turn on the clauses in issue and the surrounding circumstances. Accordingly, we do not find that the LOF clause in this case, per se, creates a bar to the pursuit of actual or consequential damages.

With that said, we turn to the second question, which is whether for purposes of summary relief, we find that the LOF clause in this contract prohibits GSA from pursuit of either consequential or actual damages arising out of missing the target price.

The LOF clause, while giving GSA the right to order appellant to undertake redesign, does not specifically use any wording as to delays, nor does it expressly provide that no actual or consequential damages may be allowed. While the clause might be read to establish an exclusive remedy by implication, we cannot make that determination without first assessing and addressing a number of points, which will require us to weigh factual issues as well as consider legal matters related to those factual contentions. Among those matters are the forseeability of the type of damages sought by GSA, the contemporaneous actions of the parties in interpreting the LOF clause prior to the dispute, the effect of the Responsibility of Architect clause, the application of contra proferentem to contract clauses, the intent of the parties, and possibly trade practices and custom. Given the factual and legal issues noted above, the question of the meaning of the LOF clause is not appropriate at this point for resolution on a summary relief basis. That said, the Government has identified nothing in the contract or case law that expressly obligates this contractor to fund those projected construction costs that exceed the target price. Factual and legal issues of breach, causation, and costs exist.

Decision

Accordingly, and for the reasons set out in this ruling, appellant's motion is **DENIED**.

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HOWARD A. POLLACK
Board Judge

We concur:

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JERI KAYLENE SOMERS
Board Judge

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JOSEPH A. VERGILIO
Board Judge