GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

PERDOMO AND ASSOCIATES, INC.	)	
	)	CAB No. D-0799
Under Contract Nos. 0007-AA-04-0-5-CC,	)	
0040-AA-04-0-5-CC, 0041-AA-04-0-5-CC	)	

For the Appellant: Darrell Thomas, Esquire. For the Government: Michael L. Alston, Assistant Corporation Counsel.

Opinion by Administrative Judge Jonathan Zischkau, with Administrative Judges Zoe Bush and Terry Hart Lee concurring.[1/]

OPINION

By this appeal, the contractor, Perdomo and Associates, Inc. ("Perdomo"), seeks to overturn a decision by the District of Columbia's Director of the Department of Administrative Services which denied Perdomo's claim to recover liquidated damages and costs of punchlist completion assessed against it. We sustain Perdomo's appeal for the most part, holding that: (1) the District's assessment of liquidated damages was improper, and (2) the District failed to support its withholding of completion costs for punchlist items with the exception that the District is entitled to a credit for one portion of uncompleted contract work.

FINDINGS OF FACT

I. General Background

1. On January 4, 1985, the District of Columbia awarded Perdomo three contracts for the replacement of fuel oil burners at 19 of the District's public schools: Contract Numbers 0007-AA-0-5-CC (6 schools), 0040-AA-04-0-5-CC (7 schools), and 0041-AA-04-0-5-CC (6 schools). (Appeal File ("AF") 2a-2c).[2/] Under these fixed-price contracts totaling $782,000.00, Perdomo

[1/]Administrative Judge Benjamin Terner, who conducted the hearing of this appeal, has retired.

[2/]The District compiled a separate appeal file for each contract (0007: Exhibits 1a through 3nn; 0040 and 0041: Exhibits 1a through 3mm). Perdomo supplemented the appeal file with Exhibits 4 through 28 covering all three contracts. The documents constituting Exhibits 3a through 3mm of the 0040 and 0041 appeal files are nearly identical. The 0007 appeal file has substantially the same contents, except that it includes an additional document (3j) not found in 0040 and 0041, with the result that Exhibits 3k through 3nn of the 0007 appeal file correspond to Exhibits 3j

(continued...)

was required to replace the existing fuel oil burners at the school buildings with new combination gas/oil burners. (AF 2a, § 15.15).

2. The technical specifications in the contracts contained general technical requirements applicable to all 19 schools (AF 2a, §§ 15.15.1 - 15.15.9), and specific requirements related to each individual school (AF 2a, §§ 15.15.10 - 15.15.16).

3. Perdomo received notice to proceed from the District on May 15, 1985, and the contracts provided that Perdomo was to complete the work on each of the contracts within 90 days, *i.e.*, on or before August 13, 1985. (AF 2a, § 1.4.D). The project schedule for the contract work was approved by the contracting officer on May 17, 1985. (District Ex. 1;[3/] Tr. 289-90).

4. The parties agree that Perdomo substantially completed performance under the contracts on November 12, 1985 (AF 1a, 3z; Tr. 285, 511), about 3 months after the contract completion deadline. Perdomo worked on punchlist items from December 1985 until April 2, 1986, when the contracting officer barred Perdomo from returning to the school job sites. The District initially assessed against Perdomo 92 days of liquidated damages for each contract. Later, the contracting officer reduced the assessment of liquidated damages against Perdomo to 30 days of delay and granted Perdomo a time extension of 62 days. The contracting officer also deducted $24,832.99 from Perdomo's contract prices for costs the District claimed it had incurred in completing punchlist items.

II. Contract Performance Delays

Perdomo contends that it is not responsible for the delays in contract completion. It states that the District delayed contract completion by: (1) failing to facilitate Perdomo's disposal of old fuel oil from tanks located at the schools; (2) increasing the scope of Perdomo's disposal effort when the District mistakenly added to the school tanks an additional 120,000 gallons of the wrong fuel oil; and (3) failing to have the Washington Gas Company timely (i) supply to Perdomo data concerning the location of new gas meters, and (ii) install the gas meters at the schools.

The District asserts that Perdomo is responsible for 30 days of delay for the following reasons: (1) the work sites were consistently undermanned and progress was slow; (2) even though there was some delay in the removal of the old fuel oil, Perdomo could have substantially completed performance by firing the new burners on the old oil in lieu of the new oil; and (3)

(...continued)
through 3mm of the 0040 and 0041 appeal files. In accordance with the citation procedure adopted during the hearing, references in this opinion will be according to the numbering scheme used in the 0040 and 0041 appeal files.

[3/] During the hearing, the District had five exhibits (District Exs. 1-5) admitted into the record and Perdomo had three exhibits (Appellant Exs. 1-3) admitted.

even though there was some delay by Washington Gas in specifying the final location of some of the gas meters, that did not hold up Perdomo because Perdomo was not ready in any event to complete installation and fire the burners.

The Fuel Oil Delays

5. The specifications required that the new burners be capable of burning various grades of fuel oil (Nos. 2 through 6) as well as natural gas. (AF 2a, § 15.15.4.A(15)). The District intended to use natural gas as the primary fuel source for the school heating, but it intended to use No. 2 oil as the secondary source. (Tr. 533). With regard to fuel oil burning, the specifications required that the burners be adjusted to burn No. 2 fuel oil (AF 2a, § 15.15.4.A(15)), and the District wanted the burners to be fired on No. 2 oil (Tr. 233-34). Although the schools generally had No. 6 fuel oil in their tanks (Tr. 30), there was a District mandate to replace the burners, switching from burning No. 6 oil to No. 2 oil. (Tr. 530).[4/]

6. The technical provisions generally required Perdomo to remove all existing fuel oil from the underground fuel oil storage tanks located at the schools and dispose of it at another District facility as identified by the contracting officer. (AF 2a, § 15.15.10.G; Tr. 530-31). After removal of the No. 6 oil, Perdomo was required by the specifications to remove sludge and thoroughly clean existing fuel oil tanks, and to thoroughly flush out all fuel oil lines. (AF 2a, § 15.15.10.G; Tr. 530-31). Removing the No. 6 oil and cleaning the tanks were critical path activities. (Tr. 529-30). After these activities were completed, the District was responsible for having No. 2 fuel oil supplied for the clean oil tanks at each school. (AF 15.15.6.E; Tr. 30, 530-31).

7. The contract specifications, as well as the testimonial evidence adduced at the hearing, show that it was the intention of the parties that a new burner would be fired on No. 2 fuel oil, and that firing would commence only after the No. 6 oil had been removed, the tank and fuel lines had been cleaned, and No. 2 oil had been placed in the tank. (AF 2a, §§ 15.15.6, 15.15.10; Tr. 30, 233-34, 340-41, 344, 530-31, 627-28).

8. A burner adjusted to burn No. 2 oil could not burn No. 6 oil without damaging the burner. (Tr. 628). The District never directed Perdomo to adjust the new burners to burn No. 6 oil nor did the District direct Perdomo to fire any of the burners on No. 6 oil. *(Id.)*.

9. The District was unable to timely identify a District disposal facility for the No. 6 fuel oil. In a letter of July 3, 1985, Perdomo notified the District that the District's failure to provide the necessary information for removing the approximate 100,000 gallons of existing fuel oil was a critical problem and might preclude Perdomo from completing its work on time. (AF

[4/]No. 2 fuel oil burns more cleanly than No. 6 oil, and, therefore, No. 2 was preferred for environmental reasons. (Tr. 510.)

3b). By letters of July 15, 1985 (one for each contract), Perdomo advised the District that despite its best efforts, it had been unable to obtain instructions from the District on where to transfer the No. 6 oil currently in the oil tanks, which was holding up cleaning of the tanks and firing of the burners. (AF 10-12). In a response dated August 9, 1985 (AF 3i) -- *i.e.,* 4 days before the contracts were originally scheduled to be completed -- the District told Perdomo:

> [O]n July 9, 1985 and July 15, 1985, we requested D.C. Public Schools' authority to render their assistance and inform our office where the fuel oil #6 is to be delivered to. We are in contact on a daily basis with . . . [D.C. Public Schools] and require [its] cooperation. You will be promptly informed as soon as we obtain the required information.

In a September 24, 1985 letter, Perdomo again informed the District of the significant delays it was encountering due to the District's failure to identify sites for the transfer of the No. 6 fuel oil. (AF 3j). In a series of charts furnished to the District, Perdomo summarized the dates that the District identified a transfer facility for the No. 6 fuel oil: August 4, 1985 (1 school), September 13 (3 schools), September 18 (1 school), September 24 (1 school), October 8 (4 schools), October 15 (2 schools), and October 22 (7 schools). (AF 15a-15c). Thus, for 18 of the 19 schools, the District failed to provide timely information until well after the date the contract work was to be completed.

10. The District constructively changed the amount of work needed to transfer the existing oil from the tanks at the schools to the storage facility. At the start of the work, the schools had a total of approximately 100,000 gallons of No. 6 oil. (AF 3b; Tr. 79-80, 96-98). Due to a mistake by the District, an additional amount -- approximately 120,000 gallons -- of No. 6 oil was added to the tanks at some of the schools after Perdomo commenced work but before the existing oil had been removed and the tanks cleaned. (AF 3j, 3p; Tr. 22-23, 79-80, 96-98). The intent was that the District would purchase No. 2 oil and have this oil placed into the schools' tanks after the tanks had the existing No. 6 oil removed and after Perdomo had cleaned the tanks. Unfortunately, the District filled tanks at some of the schools with new No. 6 (rather than No. 2) oil before Perdomo had removed the existing No. 6 oil and cleaned the tanks. This meant that Perdomo had to remove at least twice the amount of oil as originally planned, with resulting impacts on Perdomo's schedule and cost. (Tr. 98-99).[5/]

11. The record discloses that the effort in transferring the existing oil to a storage facility was made more time-consuming due to District misdirections, the District's late direction that Perdomo use a private entity rather than a District facility, and additional inefficiencies arising because other contractors during the same time period were using the same facility for oil disposal. (Tr. 40-41; AF 3j).

[5/] Apparently, Perdomo did not file any claims for equitable adjustment under these contracts. (Tr. 99-100.)

12. The significant delays in the removal of the existing No. 6 oil made the removal step a constraining activity that impacted other crucial activities. (Tr. 40). The District's failure to timely identify a storage facility delayed: Perdomo's draining and cleaning of the oil tanks at the schools; the District's furnishing of No. 2 oil to the schools' oil tanks; and Perdomo's firing of the new oil burners. (Tr. 30, 534-35; AF 3b, 10-12).

13. The record discloses that the District was still completing deliveries of No. 2 oil even as late as January 1986. For one school, oil was not delivered during Perdomo's performance period apparently because of a perforated oil tank. (AF 21a-21c, 15a-15c). These delays in delivery further delayed the firing of those schools' burners. (AF 3w, 3dd, 3kk).

14. We find that Perdomo's performance and contract completion were delayed, at least through November 12, 1985, by the District's (1) untimely notification of a suitable location for transfer of the existing No. 6 fuel oil, (2) mistake in filling school tanks with more No. 6 fuel oil, and (3) late delivery of No. 2 fuel oil. We also find that these causes for delay were beyond Perdomo's control and without its fault.

The Gas Meter Delays

15. The new combination gas/oil burners were to be capable of burning natural gas supplied by Washington Gas Company. (AF 2a, § 15.15.4.A.(15)). Washington Gas was responsible for installing gas meters at school sites which were connected to Washington Gas' main gas supply lines. (Tr. 443-44). For schools that required installation of new gas meters or relocation of existing meters, the meters were to be placed on concrete pads which were to be constructed by Perdomo. Before Perdomo could construct a pad, it needed to have information from Washington Gas concerning the intended location of the gas meters. (Tr. 444, 523-24; AF 3b). After gas meters were installed, Perdomo was responsible for installing gas piping to connect the new burners to the gas meters. (Tr. 143, 322-23, 450-51). Perdomo could not fire the burners on natural gas until these preliminary tasks were completed. (Tr. 50, 523-25; District Ex. 1).

16. Perdomo was required under the contract provisions to coordinate with Washington Gas. (AF 3h). The District, however, was responsible for any delays in Washington Gas' performance not attributable to a failure by Perdomo to properly coordinate with Washington Gas.

17. The approved project schedule (District Ex. 1) makes clear that Perdomo's performance was dependent on timely completion of tasks by Washington Gas. Under the schedule activity labeled "Gas Piping Installed", a note states: "Will be completed by 8-4-85, but, actual schedule is dependent on Wash. Gas relocation of the meter." Under the "Gas Meter Installed" activity, a note states: "Actual schedule dependent on Washington Gas Company."

18. Perdomo notified the District by letters of July 3 and July 15, 1985, that it had only recently received information from Washington Gas on meter locations for just less than half of

the 19 schools, had received no information for the remaining schools, and that this problem would delay completion of the contracts. (AF 3b, 10-12). Some of the meter locations initially provided by Washington Gas had to be changed later. (AF 3j). Some existing meters, initially thought by Washington Gas to be adequate for the new burners, had to be replaced because the meters could not support the burners. (Tr. 302-04; AF 3kk). The District's July 17 and August 9, 1985 replies to Perdomo merely noted that it was Perdomo's "responsibility to do all coordination with the Washington Gas Company" (AF 3e) and that the District on June 6, August 7, and August 9, had requested Washington Gas "to proceed with the required gas installation modifications." (AF 3i).

19. The record shows that Perdomo regularly contacted Washington Gas, using appropriate means, in an effort to obtain expeditiously all necessary information on meter locations. Perdomo also fulfilled its coordination responsibilities by timely notifying the District on the status of the effort and the delays that were being encountered. (AF 3b, 3d, 3j). Accordingly, we find that Perdomo fulfilled its obligation of coordinating with Washington Gas.

20. The record reveals that the providing of meter location information and the installing of meters were not being completed by Washington Gas in a timeframe that would have allowed Perdomo to complete work by either the initial completion date (August 13, 1985) or the substantial completion date (November 12, 1985). For many schools, these activities were not completed until October 1985 through January 1986. (AF 15a-15c, 21, 21a-21c; Tr. 43-44, 46, 48, 51, 67-68). The delays in these activities delayed completion of the gas-related activities. (District Ex. 1; AF 21).

21. Washington Gas informed Perdomo that the delays in specifying gas meter locations resulted from the District's failure to give prompt notification of the work requirements, heavy workload on Washington Gas in supporting not only Perdomo's burner installation projects but also other contractors' burner installation projects, and other factors beyond Perdomo's control. (Tr. 242-43; AF 3p, 3kk).

22. We find that Perdomo's performance and contract completion were delayed, at least through November 12, 1985, by untimely (1) notification of gas meter locations, and (2) gas meter installation, and that these causes for delay were beyond Perdomo's control and without its fault. (Tr. 241-44; AF 3dd, 3kk).

Manpower

23. While there is correspondence from the District citing Perdomo for lack of sufficient manpower (AF 3a, 3g, 3l), Perdomo contemporaneously responded to the District's complaints (AF 3b, 3h), and, we believe, reasonably justified its manpower levels, especially considering the disruptions to work flow caused by the fuel oil delays and gas meter location/installation delays. There was no evidence offered by the District showing how particular manpower commitments by Perdomo delayed the critical path to completion of the contract work.

The District also failed to show that Perdomo committed insufficient manpower to the work. That Perdomo did not have workers at a particular school site on a day a District inspector visited that site does not demonstrate lack of manpower. First, all of Perdomo's workforce did not have to be deployed at a school site everyday. (Tr. 395). Second, no District witness was able to testify as to how many of Perdomo's workers were at all sites on any given day. (Tr. 520).

III. The Liquidated Damages Assessment

24. By letter dated January 30, 1986 (AF 3z), the District notified Perdomo that the District was assessing liquidated damages at the contract rate of $500.00 per day, for 92 days[6/] of delay beyond the scheduled completion date, for each of the three contracts, for a total of $138,000.00. Perdomo submitted correspondence explaining that the delays were beyond its control, and requested that the monies being withheld from progress payments be paid. (AF 3p, 3dd, 3kk).

25. In a final decision dated September 4, 1986 (AF 1a), the contracting officer granted Perdomo a time extension of 62 calendar days for delays "beyond the control and without the fault" of Perdomo, and assessed liquidated damages for the remaining 30 days[7/] of delay, which, at the rate of $500.00 per day, totaled $15,000.00 for each contract, and $45,000.00 for the three contracts.

26. The record does not disclose any reasoned support for either the 30-day delay charged against Perdomo or the 62-day time extension granted to Perdomo. At the hearing, the District was unable to explain its methodology for calculating Perdomo's responsibility for any portion of the 30 days of claimed delay (Tr. 253-59, 543), and the record is devoid of any documentation specifying how the District made its delay determination (Tr. 257-58). An official from the Department of Public Work's Facility Operations Maintenance Administration, testifying that he believed Perdomo should have been charged liquidated damages for the full 92 days of delay, explained the basis for the 62-day time extension this way: "Arbitrarily, we took 62 calendar days off. I made the recommendation to the Contracting Officer. That's it." (Tr. 543).

IV. Completion of Punchlist Items

Perdomo challenges the District's withholding of $24,832.99 for the costs the District claims it incurred in completing punchlist items after April 2, 1986, the date the District effectively barred Perdomo from completing performance on the contracts. The District states this amount constitutes the District's actual costs in correcting deficiencies in Perdomo's work on

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[6/] Although the parties have assumed the correctness of the 92-day figure, our calculations indicate that the delay amounts to 91, not 92, days. For purposes of our decision, the difference is immaterial.

[7/] Based on our observation in note 6 *supra*, and the District's grant of a 62-day time extension, Perdomo should have been charged for 29, not 30, days of liquidated damages according to the District's rationale.

the contracts.

27. By cover letter of December 6, 1985, the District furnished Perdomo a multi-page package of forms entitled "Construction Deficiencies" covering the work at the 19 schools. (AF 3m).[8/] The cover letter directed Perdomo to correct the listed deficiencies within 15 days and warned that failure to "comply and complete the work within the said time frame will cause the District to terminate your right to further proceed with the work. In such event, the work will be prosecuted by others and all cost incurred will be deducted from your contract price." (*Id.*). The punchlist pages in Appeal File 3m are in a matrix format, each row identifying separate punchlist items, and the columns identifying completion status at various inspection dates. The punchlist in Appeal File 3m contains annotations recording completion status for the period December 1985 through February 1986.

28. On January 9, 1986, District and Perdomo representatives met to discuss the punchlist items. Perdomo reported that all punchlist items had been completed except: (1) installation of a heat exchanger at Thomas School; (2) painting of gas frame connections; and (3) fire up on gas at three schools. Items (1) and (3) required some action by the District prior to completion. The results of the meeting were memorialized in a Perdomo letter of the same date. (AF 3s). The record indicates that corrective work needed prior to firing the gas burners at the three schools was caused by a conflict between the District's specifications and District code requirements. (AF 3t).

29. In a letter of January 17, 1986 (AF 3w), Perdomo reported on the status and resolution of 5 outstanding items from the punchlist for two schools. In a January 30, 1986 letter (AF 3y), the District advised Perdomo that it had not obtained inspection and tagging of gas piping from the District's Department of Consumer and Regulatory Affairs, as noted on the December 1985 punchlist, for 11 of the 19 schools. The District renewed its complaint by letter of February 20, 1986. (AF 3cc).

30. By letter of March 26, 1986 (AF 3ee), the District enclosed a second punchlist for work under the three contracts; however, the appeal file exhibit does not contain the punchlist enclosures. The letter advises Perdomo that it has five working days to correct all cited deficiencies or face termination, have the incomplete work finished by others, and have the costs of completion charged against Perdomo.

31. Perdomo responded to the March 26 punchlist by letter of April 2, 1986. (AF 3gg). In its letter, Perdomo states that 42 of the 66 deficiencies were newly cited by the District, and that "all noted deficiencies have been corrected as reflected on the attached check list." The appeal file exhibit, however, does not contain the referenced check list. The letter also identifies four categories of deficiencies, two of which Perdomo argues are not deficiencies because they

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[8/] Exhibit 3m in each contract's appeal file contains punchlists for the schools covered by that contract.

are not required by the contracts, and, for the other two, Perdomo assures prompt completion once it receives shipment of needed materials.

32. By letter also dated April 2, 1986 (AF 3ff), the District's contracting officer informed Perdomo that an inspection conducted that day by a member of the contracting officer's staff "revealed that you have failed to comply with our directive and the deficiencies remain incomplete." Stating that the District had granted Perdomo ample time to complete the work, the contracting officer advised Perdomo that the District would have the balance of the deficiencies done by others and would deduct the costs from Perdomo's contracts. In the letter, the contracting officer effectively barred Perdomo from returning to the school sites to complete any remaining punchlist items. The District did not, however, terminate Perdomo's contracts. (Tr. 577-78).

33. The District claims that during the period May 9, 1986 through July 11, 1986, its personnel completed punchlist items left unfinished by Perdomo. (District Ex. 3).

V. Assessment of Completion Costs

34. In his final decisions of September 4, 1986, the contracting officer deducted a total of $24,832.99 from the contracts to cover the costs of completing punchlist items. (AF 1a).

35. By letter of December 12, 1986 (AF 28), Perdomo requested a breakdown of the work and costs which the District claimed to have incurred. Nowhere in the appeal files is there documentation itemizing the District's completion costs.

36. At the hearing, the District introduced Exhibits 3 and 5 in support of its claim for completion costs.

37. District Exhibit 3 records all punchlist items identified during District inspections conducted March 17-20, 1986, asserted by the District to be outstanding (Tr. 584-85), with the exception of pages 2 and 3 of Exhibit 3, which we conclude are not properly part of the punchlist. It is the last comprehensive punchlist for the contracts that is found in the record and it supersedes the annotated December 1985 punchlist.

38. For the vast majority of items listed in Exhibit 3, the District has failed to establish that these items were valid punchlist items, *i.e.,* the items were deficiencies as measured against the contract specifications and the items were not previously completed by Perdomo. For example, Exhibit 3 lists numerous items as "deficient" that were noted as being previously completed by Perdomo on the annotated December 1985 punchlist. While the District suggests that the Exhibit 3 punchlist items had been outstanding for many months (Tr. 555, 587-88), a comparison of Exhibit 3 and the annotated December 1985 punchlist reveals that many of the Exhibit 3 punchlist items were identified as punchlist items for the first time in late March 1986.

39. District Exhibit 5, untitled and undated, was introduced by the District to support its assessment of completion costs. Pages 1 through 4 of Exhibit 5 are in matrix format, containing six columns, the first identifying the name of a school, and the other five providing the following categories of information associated with the school listed in the first column: "Description of Work", "Date Work Performed", "Cost", "Man Hours/Rate", and "Materials Used."

40. The "Description of Work" column purports to identify by school the specific punchlist items completed by District personnel. In reality, the vast majority of work descriptions in Exhibit 5 bear little or no resemblance to the punchlist descriptions found in Exhibit 3. Like Exhibit 3, most of the Exhibit 5 work descriptions do not describe valid punchlist items. Punchlist items improperly claimed by the District include items previously noted as completed by the District, items that never appeared on the punchlists (*i.e.,* AF 3m, District Ex. 3), and items not contractually required.

41. The entry for every school under the "Date Work Performed" column reads "5/9/86-7/11/86." The "Man Hours" column contains a labor hour total by school. Nowhere in the exhibit are labor hours broken out by punchlist item. Thus, the "Man Hours" totals, which aggregate labor claimed for all items -- whether valid or not -- improperly include hours that cannot be charged to Perdomo. Total manhours claimed by the District for all schools exceeds 1000 hours, and the District applied a uniform hourly rate of $19.20 for the alleged corrective work.

42. The cost totals found in the "Cost" column represent the sum of labor and material costs by school. These costs totals, of course, aggregate completion cost for both valid and invalid punchlist items.

43. Page 5 of Exhibit 5, which purports to summarize pages 1 through 4 of the exhibit, contains labor totals and cost totals significantly different from the figures shown on pages 1 through 4. The District was unable to explain these discrepancies.

44. Neither Exhibit 5 nor any other document in the record contains an itemization of labor and material costs by punchlist item. No District witness was able to testify to actual costs by individual punchlist item. (Tr. 596-598). For the few punchlist items not completed by Perdomo that can be traced from Exhibit 5 to Exhibit 3, there is no evidence in the record to support a contract price adjustment, with one exception.

45. For Thomas Elementary School, the record shows that Perdomo had not installed a new steam to hot water heat exchanger (which had been delivered to the site). (Tr. 595, 599). Perdomo's own correspondence provides sufficient evidence that the cost to install the heat exchanger was $735.20. (AF 3n).

VI. Administrative Review

46. Perdomo appealed the contracting officer's decisions of September 4, 1986 to the Director of the Department of Administrative Services ("DAS"), and DAS denied the appeal in a decision dated December 1, 1987.[9/]

47. Perdomo filed a notice of appeal from the DAS decision and its complaint with the Board on December 21, 1987, and March 1, 1989, respectively. The District filed its answer on October 22, 1990, and a hearing on the merits was conducted October 27-29, 1992.

DISCUSSION

The Board has *de novo* jurisdiction over this dispute pursuant to section 903 of the D.C. Procurement Practices Act of 1985 ("PPA"), D.C. Code § 1-1189.3 (1992).

I. Liquidated Damages

Perdomo claims that the District erred in assessing $45,000 in liquidated damages because (1) the District was responsible for all 92 days that contract completion was delayed, including the 30 days charged against Perdomo, and (2) as a matter of law, the District may not recover liquidated damages because it has admitted that it was responsible for at least some of the delay period. The District claims that it properly assessed 30 days of delay against Perdomo.

The party assessing liquidated damages, here the District, bears the burden of proving that liquidated damages are due and owing. This involves showing that the contract performance requirements were not substantially completed by the contract completion date, and that the period for which the assessment was made was proper. *See, e.g., Sauter Construction Co.*, ASBCA No. 27050, 84-2 BCA ¶17,288 at 86,081; *Central Ohio Building Co.*, PSBCA No. 2742, 92-1 BCA ¶ 24,399 at 121,824; *Wickham Contracting Co.*, IBCA No. 1301-8-79, 86-2 BCA ¶ 18,887 at 95,284. Where the party assessing liquidated damages for contract delay has contributed to that delay, it may not recover liquidated damages, *United States v. United Engineering & Contracting Co.*, 234 U.S. 236, 242 (1914), unless there is, in the proof, a clear apportionment of the delay attributable to each party. *William F. Klingensmith, Inc. v. United States*, 731 F.2d 805, 809 (Fed. Cir. 1984); *Blinderman Construction Co.*, 695 F.2d 552, 559 (Fed. Cir. 1982); *Fortec Constructors v. United States*, 8 Cl.Ct. 490, 508 (1985); *Titan Pacific Construction Corp.*, ASBCA No. 24148, 87-1 BCA ¶19,626 at 99,353; *Callison Construction Co.*, AGBCA No. 88-309-1, 92-3 BCA ¶25,071 at 124,952.

[9/]There is no evidence in the record indicating when Perdomo filed its appeal with DAS, and our record does not contain copies of Perdomo's DAS appeal submission and DAS's decision. As discussed later in our opinion, this will affect computation of interest pursuant to D.C. Code § 1-1188.6 (1992).

The contractor may defend against an assessment of liquidated damages by showing that it should not be held responsible for some or all of the delay period on the ground that the delay resulted from causes beyond its control and without its fault or negligence. *Elias Pamfilis Painting Co.*, ASBCA No. 30839, 87-3 BCA ¶20,189 at 102,179; *Mit-Con, Inc.*, ASBCA No. 42884, 92-1 BCA ¶24,634 at 122,924. Thus, Perdomo bears the burden of proving the defense of excusable delay.

Applying these principles to the facts, we conclude that the District's assessment of liquidated damages cannot stand. Not only did the District contribute to the delay that was charged against Perdomo, which in itself would preclude charging of liquidated damages, we have found that the District was responsible for the entire period of delay on account of the problems relating to the transfer of the existing fuel oil and the locating and installing of gas meters. (F.F. 14, 22, 23). There is *no* evidence -- let alone clear evidence -- for the District's determination that Perdomo was responsible for 30 of the 92 days that contract completion was delayed, and the record certainly suggests that the determination of 30 days delay for the liquidated damages assessment was arbitrary. (F.F. 26).

The District's proof that Perdomo was responsible for delay based on lack of manpower came up well short of the mark. After a careful review of the record, we have been unable to find specific evidence showing that Perdomo had manpower shortages or that particular commitments of manpower delayed project completion. We did not find persuasive the few District documents which generally complained that Perdomo did not have any personnel at a particular school site on a selected day. No District witness was able to testify as to the total size of Perdomo's workforce working at the various school sites at any given time. (F.F. 23).

The District's attempts to minimize the significance of the fuel oil and gas meter problems are also unpersuasive. The District, not Perdomo, was responsible for the significant delays associated with the removal of the No. 6 fuel oil, the cleaning of the fuel tanks, and the refueling of the tanks with No. 2 oil. Contrary to the District's after-the-fact position that Perdomo could have fired the burners on the existing No. 6 oil, the contract language shows -- consistent with the parties' intent -- that Perdomo was to fire the burners on No. 2 oil, not No. 6 oil. (F.F. 7). The District cites no authority for placing the burden on Perdomo to ignore the contract requirements and accept the risks for firing the new burners on the wrong fuel. If the contracting officer wanted Perdomo to fire the burners on No. 6 oil, he could have done so through a directed change. As for the gas meter issue, the evidence shows that the delays Perdomo encountered in receiving meter location information and in obtaining meter installation had a direct impact on Perdomo's ability to fire the gas burners. (F.F. 20).

Based on this same evidence, it is clear that Perdomo satisfied its burden of showing that the causes for delay were beyond its control and without its fault. (F.F. 14, 22).

For the reasons discussed above, we conclude that the District's assessment of liquidated damages was improper.

VII. Costs to Complete Punchlist Items

Perdomo claims that it should recover the full amount withheld by the District as costs to complete punchlist items. Perdomo asserts: (1) the District has assessed completion costs for work previously completed by Perdomo or beyond the contract requirements, (2) the District failed to give Perdomo a reasonable opportunity to correct some newly-cited punchlist items, and (3) the District's actual costs to complete are grossly inflated. The District responds that: (1) it charged Perdomo for the actual costs incurred by District employees to correct work deficiencies, (2) the District's costs are reasonable, and (3) Perdomo had months to correct the deficiencies but failed to do so.

The Government bears the burden of proving its entitlement to, and the amount of, any credit, setoff, or contract price reduction for completion of contract work or correction of defective work. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 769 (Fed. Cir. 1987); *Hart's Food Service, Inc.*, ASBCA No. 30756, 89-2 BCA ¶ 21,789 at 109,643; *Beach Building Corp.*, ASBCA No. 33051, 88-1 BCA ¶ 20,508 at 103,678.

After a careful review of the record, we conclude that there is insufficient evidence to support the District's assessment of completion costs. First, the District failed to itemize costs. District Exhibit 5, the only evidence of District costs in the entire record, merely presents aggregate completion cost totals for each school. (F.F. 41, 44). Because we have found that most of the punchlist or corrective work items described for each school in Exhibit 5 cannot properly be charged to Perdomo,[10/] there is no way to identify the costs for items which the District might have validly charged to Perdomo. Where the evidence does not allow the Board to distinguish between properly claimed costs for corrective work and improperly claimed costs, no price reduction or credit will be made. *Hart's Food Service, Inc.*, 89-2 BCA at 109,643.

Even if the District had substantiated the value of contract price reductions for open punchlist items, there remains another impediment to the District's recovering completion costs. The government may not recover completion costs where it has not provided the contractor a reasonable opportunity to cure the work deficiencies. *See, e.g.*, *Richardson Construction, Inc.*, GSBCA No. 11161, 93-1 BCA ¶ 25,239 at 125,710. Here, the District has charged completion costs for punchlist items, the vast majority of which were first identified by the District during the March 1986 inspections, less than two weeks before the District barred Perdomo from returning to the school sites. The District cover letter transmitting the punchlist, which recorded the results of the March 1986 inspections, advised Perdomo that it had five days to complete the punchlist or face termination. In the circumstances, the five-day cure period was not a reasonable period of time. This finding is supported by the fact that the District logged in excess of 1000

[10/] For example, we previously found that Exhibit 5 attempted to charge Perdomo for punchlist items that had been previously completed, did not appear on the punchlists, or were not contractually required. See F.F. 40.

hours during a period of over two months to complete what it claims was Perdomo's deficient work.

The one exception to our conclusion that the District is not entitled to costs for open punchlist items concerns the task of installing the heat exchanger at Thomas Elementary School. This item had been identified in the original December 1985 punchlist and again in the March 1986 punchlist. Contrary to Perdomo's assertion that the District, in its March 26, 1986 letter, "directed" Perdomo not to install the heat exchanger, that letter merely exempted this installation work from the 5-day deadline and directed Perdomo to install the unit "at the earliest time possible." Because the District effectively barred Perdomo from doing any further work after April 2, 1986, we do not believe the District is entitled to assess its completion costs for this item. However, because the record in this one instance provides Perdomo's own estimate to complete the installation, we conclude that the District is entitled to a contract price reduction (for the 0040 contract) in the amount of $735.20 (F.F. 45) for work Perdomo never performed.

VIII. Interest

Perdomo claims it is entitled to 4 percent interest, pursuant to section 806 of the PPA, D.C. Code § 1-1188.6,[11/] on the amounts improperly withheld by the District, commencing on December 16, 1986, the date Perdomo says it filed its claim with DAS. We have reviewed the record and have been unable to find any evidence as to when Perdomo filed its claim with DAS.[12/] Accordingly, interest will run from December 1, 1987, the date that DAS issued its decision denying Perdomo's claim.

CONCLUSION

For the foregoing reasons, we sustain Perdomo's appeal, reversing the District's assessment of liquidated damages and completion costs, with the exception that the District is entitled to a price reduction in the amount of $735.20 for the 0040 contract. Accordingly, the District shall pay Perdomo $69,097.79, with interest at 4 percent from December 1, 1987.

DATE: September 17, 1993

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Administrative Judge

[11/] D.C. § 1-1188.6 provides:

> Interest on amounts found due to a contractor on claims shall be payable at a rate set in [D.C. Code] § 28-3302(b) applicable to judgments against the District government from the date the Director receives the claim until payment of the claim.

[12/] *See* note 9 *supra*.

CONCUR:

/s/ Zoe Bush
ZOE BUSH
Chief Administrative Judge

/s/ Terry Hart Lee
TERRY HART LEE
Administrative Judge