

## Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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DENIED IN PART; DISMISSED IN PART FOR  
LACK OF JURISDICTION: December 1, 2004

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GSBCA 16029

CONTRAIL AVIATION, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

John Disney, President of Contrail Aviation, Inc., Phoenix, MD, appearing for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **PARKER**, **NEILL**, and **GOODMAN**.

**GOODMAN**, Board Judge.

Appellant, Contrail Aviation, Inc. (Contrail or appellant), files this appeal from the General Services Administration's (GSA or respondent) assessment of liquidated damages arising from a default termination of a contract for sale of an aircraft. The parties have agreed to submit the appeal for decision on the written record pursuant to Board Rule 111 (48 CFR 6101.11 (2003)). We deny the appeal of the assessment of liquidated damages and dismiss for lack of jurisdiction appellant's request to be reinstated as a bidder on GSA contracts.

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### Findings of Fact

In October 2002 appellant submitted a bid in the amount of \$3,150,000 to purchase a Gulfstream airplane (the aircraft) from respondent and was awarded the contract of sale. Appeal File, Exhibit 5. Appellant's check for the bid deposit of \$100,000 was not honored by the bank for lack of funds, id., Exhibit 11. Appellant thereafter failed to pay the full purchase price and remove the aircraft within thirty days, id., Exhibit 15, as required by the

contract, id., Exhibit 2 at 4. The Default clause of the contract stated that under such circumstances the contracting officer may ask appellant to cure the default and if no cure is forthcoming, terminate the contract and assess liquidated damages in the amount of 20% of the purchase price. Id., Exhibit 2 at 1-2.

The respondent's contracting officer issued a final decision, citing the Default clause of the contract, terminating the contract for default and assessing liquidated damages in the amount of \$630,000. Appeal File, Exhibit 34. After terminating the contract for default, respondent did not award the contract of sale to the next highest bidder, whose bid was \$750,000 less than appellant's bid. Appellant's Proposed Finding of Fact ¶ 2. On December 18, 2002, Contrail filed this appeal with the Board contesting the default termination and seeking either delivery of the aircraft at the contract price or, in the alternative, the costs it incurred in attempting to purchase the aircraft.

In January 2003, the respondent offered the aircraft for sale again and sold it for \$3,150,001. Respondent contends that it incurred \$16,958.22 in administrative expenses - \$4210.38 for advertising and \$12,747.84 for contract support labor costs - that it would not have incurred had the first sale been completed. Declaration of Shirley R. Littlefield, (October 28, 2004).

Contrail subsequently amended its legal position in this appeal, representing to the Board that it would not contest the default termination of the contract but would continue to challenge the assessment of liquidated damages in the amount of \$630,000. Additionally, appellant requested that its ability to bid on GSA contracts be restored. Appellant's Proposed Findings of Fact at 2.

### Discussion

Contrail contends that even though it defaulted on a contract of sale for an aircraft, it is not liable for liquidated damages, as the respondent sold the aircraft three months later for one dollar more than the appellant's purchase price. In fact, Contrail contends that its actions enriched the Government, because it believes the Government would have sold the aircraft to the next highest bidder for \$750,001 less than the ultimate sale price, but for Contrail having submitted its bid.

GSA asserts that even though it sold the aircraft for more than the appellant's purchase price it is still entitled to liquidated damages in the amount of \$630,000, 20% of the appellant's purchase price, citing decisions in which this Board has upheld the validity of contract clauses containing language substantially similar to that in the Default clause in the instant contract. Alternatively, GSA asserts that if the Board were to find that the respondent was not entitled to liquidated damages, GSA would still be entitled to its actual damages.

We have upheld the validity of the terms of the Default clause, with its assessment of liquidated damages at 20% of the purchase price, numerous times in cases involving GSA auctions of automobiles, boats, or consumer goods when actual breach damages are uncertain or difficult to measure at the time of contracting and if the amount of liquidated damages bears a reasonable relationship to the Government's administrative costs of terminating a bidder for default and awarding the sale of the item, at a possible loss, to the next highest

bidder, if one is available. See, e.g., House of Denim, Ltd. v. Department of Homeland Security, GSBCA 16182-DHS, 04-1 BCA ¶ 32,477; Tim Antrim v. General Services Administration, GSBCA 15885, 02-2 BCA ¶ 32,041; Monique K. Nguyen--Auto Wholesaler, GSBCA 13516, 96-2 BCA ¶ 28,313; Harry W. Griffith v. General Services Administration, GSBCA 11571, 93-1 BCA ¶ 25,421 (1992).

It is the burden of the non-breaching party to prove that a liquidated damages clause is unenforceable. In order to meet this burden, the appellant must demonstrate that, at the time of contracting, the measure of actual damages was certain or capable of being measured with certainty or that the amount stipulated as liquidated damages was unreasonable. Appellant has made no attempt to meet this burden. The liquidated damages provision is therefore enforceable. DJ Manufacturing Corp. v. United States, 86 F.3d 1130 (Fed. Cir. 1996); House of Denim, Ltd.

The Government's resale of the aircraft for a price greater than the appellant's bid does not afford the appellant relief from liability for liquidated damages. Even if the non-breaching party's actual damages are less than the liquidated damages specified in the contract, the breaching party is still liable under an enforceable liquidated damages provision for the amount specified in the contract. Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947).

The appellant has requested that this Board restore its ability to bid on GSA contracts. While we are not aware of the circumstances that prompt this request, our jurisdiction does not encompass claims of debarments and suspensions. 41 U.S.C. §§ 605, 607 (2000); Hans Evers, M.D. v. Social Security Administration, GSBCA 16264-SSA, 04-1 BCA ¶ 32,347 (2003). We dismiss this request for lack of jurisdiction.

### Decision

The appeal from the assessment of liquidated damages is **DENIED**. The appellant's request for restoration of its ability to bid on GSA contracts is **DISMISSED FOR LACK OF JURISDICTION**.

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ALLAN H. GOODMAN  
Board Judge

We concur:

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ROBERT W. PARKER  
Board Judge

EDWIN B. NEILL  
Board Judge