ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
CI^2, Inc.	)	ASBCA No. 59948
	)	
Under Contract No. DABN01-03-C-0007	)	

APPEARANCE FOR THE APPELLANT: H.J.A. Alexander, Esq.
Alexander Law Firm, P.C.
Atlanta, GA

APPEARANCE FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
Kyle E. Chadwick, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN

This appeal is the quantum proceeding related to the Board's entitlement decisions under ASBCA Nos. 56257 and 56337. Based upon appellant's Statement of Costs/Damages (SOCD), appellant seeks roughly $1.5 million as damages, inclusive of interest under ASBCA No. 56257, and roughly $2.6 million of damages, inclusive of interest under ASBCA No. 56337. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.

Under ASBCA No. 56257, the Board held that the government breached this contract to the extent it failed to assign the mandated quantities of registrars and temporary registrars in the base year of the contract based upon Modification No. P00002, and to the extent it failed to assign the mandated quantity of temporary registrars in the option year of the contract based upon Modification No. P00003. Under ASBCA No. 56337, the Board held that the government breached the contract by its failure to award to appellant the first Award Term. *CI^2, Inc.*, ASBCA Nos. 56257, 56337, 14-1 BCA ¶ 35,698, *aff'd as clarified on recon.*, 15-1 BCA ¶ 35,829. Familiarity with our decision is presumed.

The Board remanded the appeals to the parties to address quantum but the parties were unable to settle, and appellant sought reinstatement. On 23 April 2015, the Board granted reinstatement under ASBCA No. 59948 and issued an order on proof of costs/damages. Appellant filed its SOCD on 8 June 2015. The government filed its response on 8 July 2015.

On 16 July 2015, the Board issued an order requesting proposals from the parties on further proceedings. By email dated 28 August 2015, the parties moved to submit their quantum positions on the record pursuant to Board Rule 11. The Board approved the parties' request and issued a schedule, which allowed for the submission of additional evidence, briefing and oral argument.

FINDINGS OF FACT

Alleged Damages for Failure to Assign Mandated Personnel

1. Appellant's SOCD claimed damages based upon the contract price that appellant would have received if the government had assigned the registrars and temporary registrars, in full, as mandated by the contract modifications. Its claim for the base year is summarized below:

Registrars: Base Year

Total FFP Contract Amount	
360.50 months x $4,080 per month	= $1,470,840.00
Less: Amount Paid by Government	= $1,414,250.40
Less: Absent Registrars	= $816.00
Amount Due	= $55,773.60

(ASBCA No. 56257 (56257), SOCD at 4-5)

Temporary Registrars: Base Year

Total FFP Contract Amount	
354 months x $3,440 per month	= $1,217,760.00
Less: Amount Paid by Government	= $1,079,265.60
Amount Due	= $138,494.40

(56257, SOCD at 7)

2. Appellant's claim for the option year is summarized below:

Temporary Registrars: Option Year

Total FFP Contract Amount	
216 months x $3,509 per month	= $757,944.00
Less: Amount Paid by Government	= $160,074.61
Amount Due	= $597,869.39

(56257, SOCD at 11)[1] Appellant also appears to seek interest under the Prompt Payment Act (PPA) and the CDA. Appellant's certified claim dated 8 February 2006 (R4, tab 23) did not assert a CDA claim for PPA interest.

3. The government's response to the SOCD challenged appellant's quantum methodology on a number of grounds. The government contended that appellant improperly used the fixed contract rates—a gross revenue figure—without deducting any cost savings it realized by not providing the additional personnel required by the contract modifications (gov't resp. at 3). Appellant's SOCD stated that no deduction should be made because "expenses have already been incurred and paid by Appellant" (56257, SOCD ¶ 50). However, at oral argument, appellant conceded that appellant did not pay the wages for the standby registrars and temporary registrars that were not assigned by the government (tr. 19), and we so find.

4. With respect to the claim for the registrars for the base year, appellant deducted from the claimed contract rate/gross revenue figure the amount paid by the government for these registrars, which constituted the units delivered by appellant. The government was of the view that this deducted amount was inaccurate since it failed to account for those units actually assigned by the government to the various sites but not fully delivered by appellant due to the periodic absence of registrars (gov't resp. at 4). Appellant's damages formula compensated for absenteeism by crediting the government with 6 days of absence during the base year in accordance with the affidavit of Ms. Kenner, a corporate officer of appellant with personal knowledge of the contract (supp. R4, tab 88). The absentee credit was determined by obtaining a daily contract rate for the registrars of $136.00 ($4,080/month divided by 30 days) and multiplying that daily rate by 6 days of absence to obtain the credit of $816.00.[2]

5. With respect to appellant's claim for temporary registrars in the base and option years, since there was nothing of record indicating that these units were affected by absences, the government acknowledged that for purposes of quantum, the delivered/paid quantities were the same as the quantities actually assigned by the government (gov't resp. at 6).

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[1] Appellant's SOCD also asserted recovery for the government's failure to assign permanent registrars for the option year in the amount of $37,859.60 (56257, SOCD at 9), but at oral argument appellant acknowledged that it was unable to find a basis for such recovery in the Board's entitlement decision (tr. 23). This portion of appellant's claim is denied.

[2] We modify this absentee rate slightly to reflect that working hours under the contract were generally Monday through Friday (R4, tab 12 at 22), roughly 21 days per month, not 30 days per month as claimed. Using the former number to obtain a daily rate ($4,080 divided by 21), the credit for 6 days of absence is $1,165.71, not $816.00 as claimed.

Alleged Damages for Failure to Award First Award Term

6. Appellant's SOCD that calculated damages/lost profit for the government's failure to award the first Award Term is summarized as follows:

CLIN 2001—Project Manager	$196,116.00
CLIN 2002—Registrars	$1,782,480.00
Contract Amount if first Term Awarded	$1,978,596.00
Profit Rate on Contract (Base and Option Years)	**39.6%**
Lost Profit on first Award Term ($1,978,596.00 x 39.6%)	$783,524.02

(ASBCA 56337, SOCD at 3). Appellant also appeared to seek interest under the PPA and the CDA. Appellant's certified claim dated 20 December 2007 (supp. R4, tab 58) did not assert a CDA claim for PPA interest.

7. The SOCD stated that the profit rate of 39.6% was established by the profit rate that appellant experienced for the base and option years of the contract "as shown in the financial statement attached hereto as Exhibit 2" (56337, SOCD at 14). This financial statement was a "JOB SUMMARY REPORT" (JSR) dated 18 October 2007 that provided cost and revenue data for the contract. Appellant included the JSR in the supplemental Rule 4 file, and the document was admitted into evidence. (Supp. R4, tab 78)

8. The government challenges appellant's claimed profit rate as "implausibly high" (gov't resp. at 2). The government also contends that the JSR failed to rely on actual cost data to support the claimed actual profit rate (*id.*). The government's brief also argues that the JSR contained discrepancies and was so unreliable that it should be disregarded, and appellant should be awarded zero damages.

9. Appellant's SOCD also sought to expand its entitlement beyond that determined by the Board in its entitlement decision to include damages for the government's failure to award the second Award Term. In support, it proffered an Army procurement synopsis dated 11 January 2012 that provided notice of an exercise of an option under an IACS contract that was originally awarded on 9 January 2007. Appellant included this document in its Rule 4 supplement on 18 December 2015 (supp. R4, tab 89), but the government objected. By order dated 1 February 2016, the presiding judge sustained the government's objection and excluded the document, holding that it was of questionable relevance. He also ruled that it was untimely insofar as it should have been tendered during the entitlement proceedings in 2013 and appellant provided no explanation for its tender at this late date. We affirm that decision.

The DCAA's Review of the JSR

10. Per the government's request, the Defense Contract Audit Agency (DCAA) reviewed the JSR and the data provided by appellant, and issued a memorandum to counsel dated 19 October 2015. The government included the memorandum in the supplemental Rule 4 file, and the document was admitted into evidence (supp. R4, tab 100).

11. This DCAA memorandum provided "comments on CI2, Inc.'s calculation of its claimed profit rate of 39.6 percent and the supporting documents it submitted to the Government..." (supp. R4, tab 100 at 1). The memorandum also stated:

> The information provided in this memorandum is being provided for informational purposes only.... We have not specifically examined this information, nor do we express any opinion on the information as presented.

(*Id.*)

12. With respect to direct labor costs, DCAA found a discrepancy of $163,864 between the direct labor cost identified in the JSR for the contract, in the amount of $2,129,069, and the total amount found in the labor support documents, $2,292,933. Appellant did not dispute this discrepancy. DCAA also discovered that a number of employee W-2 forms were missing for certain employees. These W-2 forms were subsequently provided by appellant. (Supp. R4, tab 100 at 3-4)

13. With respect to the subcontract costs for Advanced Computer Technology (ACT), for fiscal year (FY) 03, DCAA compared the ACT costs in the JSR with those in the ACT General Ledger, and found that the latter contained costs in the amount of $170,197 that were not identified in the JSR (supp. R4, tab 100 at 5). This also was not disputed by appellant. For FY 03, the DCAA also found ACT costs in the amount of $581,565 that did not appear in the JSR (*id.*). Appellant explained that these payments to ACT were paid on other contracts (supp. R4, tab 85 at 2, ¶ 7). For FY 04, DCAA also identified two transactions, each in the amount of $16,020, that were not included in the JSR. This also was not disputed. (Supp. R4, tab 85 at 2, ¶ 6)

14. With respect to appellant's indirect costs, the JSR did not allocate appellant's actual indirect costs incurred for each fiscal year. Rather, the JSR relied upon a rate for "Fringe" at 7.2% for each fiscal year, and relied upon a rate for "General and Administrative" (G&A) at 4.1% (FY 03), 4.2% (FY 04), and 4.1% (FY 05). Appellant advised DCAA that these rates were its "contract rates," that is, the rates proposed by appellant to build up its price proposal and that was subject to the government's original

pricing review. (Supp. R4, tab 100 at 9) By memorandum dated 24 January 2003, the contracting officer determined that "[t]he WCC Financial Services Team considers [appellant's] indirect costs and overhead reasonable for the organizational structure proposed" (R4, tab 11).

DECISION

The RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981), sets forth the pertinent principles underlying the judicial remedies for breach of contract:

> Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee:
>
> (a) his "expectation interest," which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,
>
> b) his "reliance interest," which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or
>
> (c) his "restitution interest," which is his interest in having restored to him any benefit that he has conferred on the other party.

In this case, appellant seeks "the benefit of his bargain" arising out of the government breach of this contract. Accordingly, appellant's theory of recovery is based upon § 344(a), that is, the protection of its expectation interest, otherwise known as "expectancy damages."

ASBCA No. 59948—Damages for Failure to Assign Personnel Mandated by Contract Modifications

With respect to the measurement of expectancy damages, the RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) provides as follows:

> Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by

> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
> (b) any other loss, including incidental or consequential loss, caused by the breach, **less**
> **(c) any cost or other loss that he has avoided by not having to perform**. [Emphasis added]

This principle has been restated in many breach of contract cases. *See, e.g., Boston Edison Co. v. United States*, 658 F.3d 1361, 1369 (Fed. Cir. 2011), where the Court stated as follows:

> In *Southern Nuclear Operating Co. v. United States*, 637 F.3d 1297, 1304 (Fed. Cir. 2011), we explained that a non-breaching plaintiff bears the burden of persuasion to establish both the costs that it incurred and the costs that it avoided as a result of a breach of contract. The breaching party may be responsible for affirmatively pointing out costs that were avoided, but once such costs have been identified, the plaintiff must incorporate them into a plausible model of the damages that it would have incurred absent the breach. [Citations omitted]

See also Bluebonnet Savings Bank, F.S.B. v. United States, 339 F.3d 1341, 1345 (Fed. Cir. 2003) (breach damages must be reduced by the costs that plaintiff would have incurred absent the breach).

Appellant's damage calculations for this breach of contract fail to account for the costs that appellant avoided or saved through the government's failure to make the required personnel assignments. At oral argument, appellant conceded that it did not pay the wages of those personnel that were on stand-by but were not assigned as required (tr. 19). Notwithstanding, appellant's damage calculations are based upon the full, gross contract revenue for these registrars and temporary registrars (finding 1), which contract prices include a portion for wages that appellant did not pay. Under the well settled law above, appellant's "gross revenue" approach to the measure of breach damages is improper.

Appellant's methodology also results in placing appellant in a better position than if the government had fully performed and made all the required assignments. This is also contrary to the well-settled law. *See Bluebonnet Savings Bank*, 339 F.3d at 1344-45 (quoting *Mass. Bay Transp. Auth. v. United States*, 129 F.3d 1226, 1232 (Fed. Cir. 1997)) ("One of the basic principles of contract damages is that 'damages for breach of contract shall place the wronged party in as good a position as it would have been in, had the breaching party fully performed its obligation.' Thus, the

non-breaching party should not be placed in a better position through the award of damages than if there had been no breach.").

Based upon the foregoing, we must deny appellant's request for the gross contract revenue it would have realized if the government made all required assignments mandated by the contract modifications. Whether a fair "lost profit" percentage for the contract may be applied to these gross revenues will be addressed below.

ASBCA No. 59948—Damages for Failure to Award First Award Term

"To recover lost profits for breach of contract, the plaintiff must establish by a preponderance of the evidence...that: (1) the loss was the proximate result of the breach; (2) the loss of profits caused by the breach was within the contemplation of the parties...; and (3) a sufficient basis exists for estimating the amount of lost profits with reasonable certainty (citations omitted)." *Energy Capital Corp. v. United States*, 302 F.3d 1314, 1324-25 (Fed. Cir. 2002). We first address whether appellant has shown a loss that was the proximate result of the government's breach.

As we found in our entitlement decision, after appellant was wrongfully denied the first Award Term by the government, appellant pursued the new Request for Quotation under the GSA Schedule in the hopes of obtaining that award. Appellant submitted a proposal that slashed its unit monthly prices from those in the original contract. *See, e.g.*, Registrars, $4,080 (Base Year); $4,160 (Option Year); $4,244 (First Award Term); **$3,650** (GSA proposal) (R4, tab 12; supp. R4, tab 52 at 45). Prices were reduced for other personnel as well. It strains credulity that appellant would have pursued this new contract – at drastically *reduced* prices – if the base and option years were not otherwise profitable. We also note that if the government would have awarded appellant the first Award Term, as required, appellant would have been entitled to even higher revenues based upon the Award Term prices that appellant proposed under the original schedule (e.g., $4,244 per month for Registrars above).

We are persuaded that this contract was quite profitable for appellant, and that appellant was damaged by the government's failure to award to appellant the first Award Term. We are persuaded that appellant's loss was the proximate result of the government's breach and that this loss was within the contemplation of the parties and was reasonably foreseeable. We next address whether a sufficient basis exists in the record for estimating the amount of appellant's lost profits with reasonable certainty.

Given the discrepancies found in the JSR, many of which were undisputed by appellant (findings 12-14), we conclude that the record does not support appellant's claimed entitlement to lost profit on this contract in the exceptional amount of 39.6%. It does not follow, however, that this requires us to disregard the JSR and award zero damages to appellant, as the government argues. It is the Board's responsibility to

weigh the JSR and all the evidence of record.[3] We do not believe that the JSR should be disregarded. The major cost under this contract was direct labor. Appellant provided actual source data of employee salaries that, for the most part, substantiated the labor figures in the JSR (finding 12).

For Fringe and G&A, it is true that the JSR used the overhead rates that were part of its build-up of price for the original contract, in lieu of allocations of actual indirect cost for each fiscal year, but the record shows that prior to award the government considered appellant's indirect costs and overhead reasonable for the organizational structure proposed (finding 14). The government argues that perhaps appellant's actual indirect costs under the contract were so great that they caused a loss under the contract. The government cites no persuasive evidence to support such an argument, and it is also inconsistent with appellant's pursuit of the GSA schedule contract at reduced prices as stated above.

We believe a sufficient basis exists in this record for estimating the amount of lost profits experienced by appellant with reasonable certainty due to the government's failure to award appellant the first Award Term. We consider the JSR and all the evidence of record as a whole to provide for a fair estimate of appellant's lost profits under this contract in the amount of 15%, and we apply this estimated lost profit rate to appellant's lost revenues on the remaining claims herein.[4] *See* attached Appendix for the calculations. In this respect, we find instructive the Court's statement in *Bluebonnet Savings Bank, F.S.B. v. United States*, 266 F.3d 1348, 1355 (Fed. Cir. 2001):

> The ascertainment of damages is not an exact science, and where responsibility for damage is clear, it is not essential that the amount thereof be ascertainable with absolute exactness or mathematical precision: "It is enough if the evidence adduced is sufficient to enable a court or jury to make a fair and reasonable approximation." [Citations omitted]

We have considered all the government's arguments seeking to deny appellant all recovery but are not persuaded by them. Specifically we reject, for lack of proof, the government's contention that appellant is liable for spoliation of evidence. *See Ensign-Bickford Aerospace & Defense Co.*, ASBCA No. 57929, 13 BCA ¶ 35,322 (and cases cited therein).

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[3] The weight to be given any evidence "will rest within the discretion of the Board." Board Rule 11(d).

[4] We are mindful that appellant may have had different actual profit rates for registrars and temporary registrars under the contract, but we believe that the estimated contract-wide rate we have determined is fair and consistent with law.

CONCLUSION

With respect to ASBCA No. 56257, appellant is awarded $118,768.15, plus CDA interest from the date the contracting officer received the certified claim, dated 8 February 2006 (R4, tab 23), which absent proof of receipt, we deem to be 13 February 2006. With respect to ASBCA No. 56337, appellant is awarded $296,789.40, plus CDA interest from 2 January 2008, the date the contracting officer actually received the certified claim dated 20 December 2007 (supp. R4, tab 58).

ASBCA No. 59948 is granted in part consistent with this opinion (*see* Appendix for itemization of damages).[5]

Dated: 6 June 2016

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

[5] To the extent appellant also seeks PPA interest, we are without jurisdiction over the matter because appellant failed to file a CDA claim for this interest. *Firth Construction Co.*, ASBCA No. 51660, 00-1 BCA ¶ 30,587 at 151,048.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 59948, Appeal of CI^2, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals

Attachment:
Appendix

APPENDIX

CALCULATION OF DAMAGES ASBCA No. 59948

ASBCA No. 56257 Registrars: Base Year

Total FFP Contract Amount		
360.50 months x $4,080 per month	=	$1,470,840.00
Less: Amount Paid by Government	=	($1,414,250.40)
Subtotal	=	$56,589.60
Less: Absent Registrars	=	($1,165.71)
Subtotal	=	$55,423.89
Lost Profit at 15%	=	**$8,313.58**

ASBCA No. 56257 Temporary Registrars: Base Year

Total FFP Contract Amount		
354 months x $3,440 per month	=	$1,217,760.00
Less: Amount Paid by Government	=	($1,079,265.60)
Subtotal	=	$138,494.40
Lost Profit at 15%	=	**$20,774.16**

ASBCA No. 56257 Temporary Registrars: Option Year

Total FFP Contract Amount		
216 months x $3,509 per month	=	$757,944.00
Less: Amount Paid by Government	=	($160,074.61)
Subtotal	=	$597,869.39
Lost Profit at 15%	=	**$89,680.41**

ASBCA No. 56337 Damages for First Award Term

CLIN 2001—Project Manager	=	$196,116.00
CLIN 2002—Registrars	=	$1,782,480.00
Contract Amount/Gross Revenue first Award Term	=	$1,978,596.00
Profit Rate on Contract (Base and Option Years) **15.0%**		
Lost Profit on first Award Term	=	**$296,789.40**

TOTAL DAMAGES AWARDED.....$415,557.55
($8,313.58 + $20,774.16 + $89,680.41 + $296,789.40)