UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: June 17, 2008
(CORRECTED VERSION: Issued June 20, 2008)

CBCA 470

ADMIRAL ELEVATOR,

Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

W. Charles Bailey, Jr., of Simms Showers LLP, Baltimore, MD, counsel for Appellant.

Seth Binstock and Lucinda E. Davis, Office of the General Counsel, Social Security Administration, Baltimore, MD, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **DeGRAFF**.

DANIELS, Board Judge.

The Social Security Administration (SSA) contracted with Admiral Elevator (Admiral) to maintain elevators and escalators at SSA's Woodlawn, Maryland, headquarters building complex and its Baltimore, Maryland, Metro West facility. The contract ran from June 1, 2003, through May 31, 2008. In an earlier opinion, we determined that SSA was obligated to pay Admiral more than it previously had for maintenance duties under the contract. *Admiral Elevator v. Social Security Administration*, CBCA 470, 07-2 BCA ¶ 33,676. In this opinion, we determine the amount SSA is obligated to pay.

The contract contained a unique pricing structure. Admiral had to have a specified minimum number of maintenance mechanics on duty at each location during specified hours. The contractor was paid for its services on a per-elevator and -escalator, per-month basis, with the amount dependent on the number of elevators and escalators in operation during each month. Before the contract was awarded, SSA warned Admiral and other prospective offerors that during the life of the contract, many elevators and escalators would be removed from service while another contractor was renovating and modernizing them. A prospective offeror questioned how costs could be recovered under the pricing structure, given that the number of elevators and escalators to be removed from service and the duration of that removal was uncertain, but the labor requirement was firm. SSA told offerors (including Admiral) to use the agency's estimates as to number and duration in making their pricing plans. Admiral followed this direction. Elevators and escalators remained out of service for far longer than SSA had projected, however. As a result, Admiral was not able to recover its labor costs in the way it expected. *Admiral Elevator*, 07-2 BCA ¶ 33,676.

In our earlier decision in this case, we explained that in determining the amount of money that Admiral lost because it relied on SSA's erroneous estimates in constructing its per-elevator and -escalator, per-month maintenance prices --

> our objective will be to put Admiral in just as good a position as the one in which it would have been -- no better and no worse -- had the elevators been returned to the contractor's maintenance responsibility at the times they would have been, had SSA's estimates been correct. *White v. Delta Construction International, Inc.*, 285 F.3d 1040, 1043 (Fed. Cir. 2002). This result will treat Admiral fairly, given its pricing of the contract in accordance with SSA's instructions. No specific methodology for establishing the amount of recovery is prescribed; we will accept any workable, sensible approach which meets the goal we have set out. *Hi-Shear Technology Corp. v. United States*, 356 F.3d 1372, 1381-82 (Fed. Cir. 2004) (referencing *Rumsfeld v. Applied Cos.*, 325 F.3d 1328 (Fed. Cir. 2003), and *Everett Plywood [& Door Corp. v. United States*, 419 F.2d 425 (Ct. Cl. 1982)]).

Admiral Elevator, 07-2 BCA at 166,731-32.

At our hearing on this aspect of the case, Donald Wadhams, the director of the Division of Facilities Contracts within SSA's Office of Acquisitions and Grants, testified that the difference between the amount Admiral was paid for maintenance under the contract and the amount it would have been paid if the agency's estimates had been correct is $259,293.60. This figure is inclusive of the entire contract period -- through May 31, 2008. Transcript at 153-70; *see also* Respondent's Exhibit 1 at 2. In its brief, SSA adopts the

number put forward by Mr. Wadhams (except for twelve cents -- the brief says the difference was $259,293.48). Respondent's Post-Hearing Brief at 5. Admiral accepts the figure $259,293. Appellant's Post-Hearing Brief at 4-5; Appellant's Reply Brief at 2.

Shawn Clasing, Admiral's co-owner, testified that Admiral's pricing for maintenance of elevators and escalators was predicated on the industry standard that ten percent of the price would be consumed by costs of materials and parts used for maintenance. Consequently, if SSA's projections as to elevators and escalators being out of service for renovation had been correct, and Admiral had received additional payments for maintenance, the contractor would have incurred costs of ten percent of those payments for parts and materials. Transcript at 65-66. According to Mr. Clasing, Admiral would not have incurred any additional costs for labor or anything else, since it would not have needed any more personnel to perform the work. *Id.*; *see also id.* at 95. This testimony went unchallenged, so we accept it.

On the basis of the agreed-upon figure for the difference between the amount Admiral was paid for maintenance and the amount it would have been paid if the agency's estimates had been correct, and the unchallenged testimony as to costs Admiral would have incurred to achieve these revenues, we tentatively conclude that Admiral is entitled to be paid $233,364 -- $259,293 less ten percent.

We reach this conclusion tentatively because SSA poses four defenses to Admiral's claim, and the number must be reduced to the extent that any or all of these defenses are found to have merit. We now examine the defenses.

First, SSA asserts that because the agency paid the contractor, over the life of the contract, more than three million dollars for services other than maintenance, Admiral is already in a better financial position than the one in which it would have been if the contract had been performed as initially projected. Therefore, says SSA, the Board should not award Admiral any additional money. Respondent's Post-Hearing Brief at 4-6.

We reject this argument because it misconstrues the structure of the contract. The contract states that its "objective . . . is to acquire the on-site services of an elevator/escalator maintenance contractor." Appeal File, Exhibit 2 at 21. Toward that end, the contract included per-elevator and -escalator, per-month pricing for maintenance. *Id.* at 10-19. The contract also required the contractor to provide service calls and additional services. *Id.* at 25-26, 38; *see also* Respondent's Exhibit 4 at Tab 13. The contract did not include any funds for these calls and services, however; this work was paid for through contract modifications only when it was expressly authorized by SSA officials. Appeal File, Exhibit 2 at 38; Respondent's Exhibit 4. Similarly, repairs which involved parts and

materials which cost more than $10,000 were performed by Admiral and paid for by SSA, but only through contract modifications which provided for additional payments.[1] *See* Respondent's Exhibit 4 (which includes all contract modifications through the date of our March 12, 2008, hearing). Thus, all the work other than maintenance which Admiral performed for SSA was expressly priced and compensated as work additional to and different from the maintenance services that constituted the portion of the contract which was priced in advance. Payments for the non-maintenance services, as Admiral suggests, must be considered separately from payments for the maintenance services. SSA's proposal that we diminish one of the payments because the other was fairly made at agreed-upon prices is manifestly unfair.

SSA's second defense is that any additional money the Board awards to Admiral should be limited because the contractor failed to mitigate its damages. SSA asserts that Admiral could have reduced its loss on the maintenance portion of the contract by assigning its on-site maintenance personnel to work on additional services and repairs. Respondent's Post-Hearing Brief at 9.

In response, Admiral notes that the contract specifically stated that its labor hour requirements for mechanics performing maintenance duties "shall remain the same during any and all renovation/moder[niz]ation work." Appeal File, Exhibit 2 at 22. Diverting the maintenance mechanics from their contracted-for duties, Admiral contends, would be inconsistent with the contract. Further, the contractor asserts, if it had used maintenance personnel for separately-compensated repair work, it would have effectively billed SSA twice for the same individuals' time, and that would have been inappropriate and unfair. The contractor had practical reasons, as well, for not diverting maintenance personnel to other duties. Admiral's Mr. Clasing had worked as a technician for the company that had held the previous contract for maintaining SSA's elevators and escalators. He knew that that

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[1] The contract defined "repairs" as "unscheduled work required to prevent the breakdown or failure of an elevator/escalator, or to put an elevator/escalator back in service after a breakdown or failure" and provided for them in the following way: When the cost of the materials and parts needed to perform an individual repair job was estimated to be $3000 or less, Admiral was to do the work at its own cost. When the cost of materials and parts was estimated to be more than $3000 but less than $10,000, Admiral was to do the work after receiving formal notification from SSA to do so, and the contractor was to absorb only the first $3000 of the cost. The contract stated, "Repairs expected to cost $10,000.00 or more per repair for materials and parts only are not a part of this contract and may be performed by Government employees or other contractors." Appeal File, Exhibit 2 at 27; *see also* Appellant's Exhibit 40.

company had often used mechanics who were supposed to be performing maintenance for SSA to do work elsewhere. Maintenance of the SSA elevators and escalators suffered, he said, while the contractor benefited by double-billing for the services of the mechanics. Mr. Clasing testified that he was determined to ensure that such a situation would not occur while his company held the contract. Transcript at 99-100, 134-35. We find persuasive Admiral's justification for not reassigning maintenance mechanics to other work.

Even if we believed that Admiral could and should have had its maintenance mechanics perform some of the other work assigned to the contractor, we would be hard-pressed to find that Admiral's recovery should consequently be reduced by any particular amount. Mr. Clasing testified that his maintenance mechanics stayed busy (though perhaps not as busy as they might have been) performing their assigned duties. Transcript at 95. But SSA presented no evidence (such as testimony of individuals who observed those mechanics during their work days) on the basis of which we could conclude that a specified percentage of their time could have been spent on other assignments without diminishing the quality of the maintenance.[2]

The third defense SSA advances is odd. The agency contends that Admiral's "alleged damages should be reduced by the amount of the contract price it has failed to invoice to date." Respondent's Post-Hearing Brief at 8. In this regard, SSA asserts, "Over the life of the contract, Admiral Elevator has failed to invoice the full contract price amount by a total of $27,067.64." *Id.* We read this statement to be an acknowledgment that SSA owes Admiral more than it has paid for services performed under the contract. If this is so, we do not understand how the statement might affect the amount that SSA owes as to the matter before us. This matter, which involves payments which would have been made, had

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[2] We also reject a subsidiary argument made by SSA as to this failure-to-mitigate defense. The agency contends that Admiral sometimes over-staffed the maintenance portion of the contract and consequently incurred more labor costs than necessary. Respondent's Post-Hearing Brief at 10-11. This argument is irrelevant to the matter before us, in which Admiral's recovery is dependent on the revenues the contractor would have obtained, and the costs it would have incurred in performing work associated with receipt of those revenues, if SSA elevators and escalators had been returned to Admiral's maintenance responsibilities as promptly as SSA had projected. Whatever labor costs Admiral has already incurred cannot be recovered through this appeal. Those costs are neither revenues the contractor would have obtained if the machines had been returned to service as projected nor additional costs which would have been incurred to obtain those revenues. If Admiral over-staffed the maintenance portion of the contract, it has already suffered financially, and will continue to suffer financially, as a result of its decision.

elevators and escalators been available for maintenance as projected, is entirely separate from invoiced amounts for maintenance which was actually performed. In response to SSA's argument, Admiral says, "There does not appear to be any evidence that Admiral under-invoiced SSA." Appellant's Reply Brief at 12. Thus, although SSA seems to believe that Admiral could invoice it for additional money, Admiral thinks that it could not do so. In any event, we conclude that the defense is inapplicable to the claim before us and therefore do not reduce, on this basis, the amount to which Admiral is entitled here.

SSA's fourth and final defense is that "Admiral Elevator's alleged damages should be reduced by SSA's payment for Admiral Elevator's repair work on the Operations Buildings escalators in June -- December 2006." Respondent's Post-Hearing Brief at 7. Admiral does not address this issue directly in its reply brief. As close as the contractor comes to the issue is its continued contention that compensation should be forthcoming under the maintenance portion of the contract for all elevators and escalators which were out of service for periods additional to those on which contract pricing was based.

On this defense, we agree with SSA. The solicitation presented estimates of the times that elevators and escalators would be out of service, and therefore unavailable for the contractor's maintenance, while another contractor was renovating and modernizing those machines. Appeal File, Exhibit 2 at 21-22. The solicitation amendment which effectively directed offerors to price their maintenance work on the assumption that those estimates were correct also specifically referenced "information on the renovation work." Appellant's Motion for Summary Relief, Exhibit 4 at 001895-96 (*see Admiral Elevator*, 07-2 BCA at 166,728). The escalators in question -- numbers 1 through 12 in the Operations Building -- were out of service from October 2003 through January 2006, and again from June 2006 until later in that year. Respondent's Post-Hearing Brief at 7; Transcript at 9-10 (citing Stipulation 18); Respondent's Exhibit 3. The second time these escalators were out of service, the reason was not that they were being renovated or modernized by another contractor, but rather, that they were being repaired by Admiral. Respondent's Exhibit 4 at Tabs 35-38. Thus, the escalators were out of service during the later times for a reason different from the one on which contract pricing should have contemplated unavailability for maintenance. The expectations on which Admiral relied in constructing its pricing proposal were not affected by this unavailability, so the contractor's recovery should not include payment encompassing these periods of time.

Escalators 1 through 4 were not maintained by Admiral (while repairs were being made) from June 1 to September 30, 2006. Escalators 5 through 8 were not maintained from June 1 to October 14. Escalators 9 through 12 were not maintained from June 1 through December 31. Respondent's Exhibit 3. Thus, the escalators were not maintained for a total of 61.81 escalator-months. The contract price for maintaining these escalators during this

period (part of option period 3) was $562 per escalator per month. Appeal File, Exhibit 2 at 18. Thus, the total revenue which Admiral would have received if it had maintained the escalators instead of repairing them was 61.81 times $562, or $34,737. We deduct this amount from the agreed-upon figure of $259,293 which the contractor would have received if all elevators and escalators had been available for maintenance at all times additional to those on which contract pricing was based. The net revenues on which we calculate Admiral's recovery are therefore $224,556.

As explained earlier, to ensure that Admiral receives only the money it would have obtained if SSA's projections as to duration of the other contractor's renovation and modernization activities had been accurate, we must deduct from $224,556 the ten percent of that figure that Admiral would have spent on parts and materials if it had actually maintained the elevators and escalators for which payment is appropriate. The net amount which Admiral would have received, and which we now award, is $202,100.

Decision

The appeal is **GRANTED IN PART**. The Social Security Administration shall pay to Admiral Elevator $202,100. The Social Security Administration shall also pay to Admiral Elevator interest on that amount, at rates prescribed in accordance with statute, from the date on which the contractor's January 26, 2006, certified claim was received by the contracting officer until the date of payment. 41 U.S.C. § 611 (2000).

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STEPHEN M. DANIELS
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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MARTHA H. DeGRAFF
Board Judge