

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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M. Bianchi of California) ASBCA No. 37029
)
Under Contract No. DLA100-80-C-2290)

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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD
ON REMAND FROM THE COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

This appeal is on remand from the Court of Appeals for the Federal Circuit (CAFC). Appellant filed a brief on quantum, the Government filed a response to appellant's brief and, finally, appellant filed a reply brief on quantum. The appeal has been the subject of numerous opinions both at the Board and at the CAFC,¹ and while familiarity with those decisions is presumed it is appropriate to set forth a brief review of the facts and the decided cases so as to put the remand in perspective.

Bianchi was awarded a contract in 1979 to supply Air Force women's pantsuit coats in accordance with Purchase Description ENEU 78-7, which was later superseded by MIL-C-87160. The contract included a Value Engineering Incentive (VEI) clause, pursuant to which Bianchi submitted two Value Engineering Change Proposals (VECP), one recommending the contract requirement for five coats per box be changed to 10 or 20 coats with a corresponding increase in the depth of the boxes (VECP 1180), while the other proposed eliminating wasted space in the packing boxes by changing the number of coats per box from the contract requirement of five per box to 10 coats per box with no change in box dimensions (VECP 8780). The VECPs were not accepted by the contracting officer.

In 1980, another contractor, Vi-Mil, was awarded a contract for the same item of clothing as Bianchi, and pursuant to the VEI clause in its contract, Vi-Mil submitted a VECP proposing a change in the number of coats to be packed in each box. The Government accepted Vi-Mil's VECP in modified form.

Subsequently, in 1988, Bianchi filed claims for royalties under its previously rejected VECPs, and, after a contracting officer failed to issue decisions, appeals were made to this Board and docketed as ASBCA Nos. 37029 (VECP 1180) and 37071 (VECP 8780). While the Government conceded at trial that the Bianchi VECPs were constructively accepted when the Vi-Mil VECP was accepted, the Board, nevertheless, denied the appeals on the basis that the Bianchi contract was complete and the relationship had ended when the Vi-Mil VECP was accepted and thus there was no basis for constructive acceptance. *Bianchi II*. On appeal to the CAFC, the Board's decision was vacated as to entitlement and remanded to the Board to allow Bianchi to obtain discovery and present evidence on (1) the allegation that its VECPs were rejected in bad faith and (2) the allegation that Bianchi's VECPs were constructively accepted prior to termination of its own contractual relationship with the Government. *Bianchi III*.

Pursuant to the remand we held that the contractual relationship between Bianchi and the Government still existed at the time of the acceptance of the Vi-Mil VECP and thus we granted the appeals as to entitlement and proceeded to decide quantum. We held as to Bianchi's VECP 8780, in ASBCA No. 37071, for reasons not herein relevant, that Bianchi was not entitled to any royalties. As to Bianchi's VECP 1180, we held in ASBCA No. 37029, that the royalty period was contemporaneous with the royalty period of Vi-Mil (22 June 1984 to 21 June 1987), that the number of garments on which the royalty should be computed was also the same quantity as under the Vi-Mil contract (38,815), and that the royalty, or share of savings allowed was \$.3185 per garment. The total award was \$12,362.58 plus Contract Disputes Act interest. *Bianchi IV*.

On motion for reconsideration in ASBCA No. 37029, Bianchi questioned both our selection of the royalty period and our determination of the number of garments subject to the royalty. We rejected Bianchi's argument that DAC 76-26 mandated a different, more lucrative royalty period. As to the number of garments subject to the royalty, we set forth several different contentions appellant had taken in these proceedings as to the number of garments on which to base compensation. We stated that of the number sought on reconsideration, 106,550, when reduced by the number delivered internally from the DPSC Directorate of Manufacturing, which were not subject to royalty payments, "only 54,773 items remain[ed] in appellant's . . . calculation." *Bianchi V*. We thus affirmed our figure of 38,815 garments. *Bianchi V*.²

Bianchi appealed to the CAFC. The Court affirmed our determination of the royalty period, rejected Bianchi's contention that DAC 76-26 mandated a different more lucrative royalty period, and affirmed our exclusion of royalties on garments obtained from intra-agency sources. Bianchi's final basis for appeal was that substantial evidence did not support the Board's determination that Bianchi was entitled to receive royalties on only 38,815 garments. On that issue the Court questioned the Board's explanation as to why the evidence of the number of garments subject to the royalty propounded by Bianchi and its expert witnesses was less credible than the number obtained from the Vi-Mil royalty payment. The Court stated in part as follows:

In the absence of any support for the 38,815 figure other than that it was derived from the Vi-Mil recovery, and in the absence of any explanation for the rejection of the figures proffered by Bianchi, we are unable to determine why the Board selected the number of garments on which the Vi-Mil recovery was based rather than the number of garments calculated by Bianchi's expert. It may be that there is some flaw in the numbers adduced by Bianchi, but the Board did not point to any such flaw, and the government in its brief and oral argument did not do so either. Without some indication of why the Board chose the government's figure rather than Bianchi's, we are unable to determine whether the Board's selection of 38,815 as the number of garments subject to the VECP is supported by substantial evidence. Accordingly, we vacate the Board's order as to quantum and remand the case to the Board for further proceedings on the quantum issue, including an explanation for the Board's determination as to the number of garments subject to the VECP.

To resolve the remand, we make additional findings of fact relative to the number of garments subject to royalty payments for Bianchi. The numbering of these additional findings continues from where we left off in *Bianchi IV*.

Findings of Fact on Number of Garments Delivered During Royalty Period

36. Modification No. P00011 to the Vi-Mil contract, which was part of the evidentiary record made at trial (ex. A-1036 at 3) and P00012 to the Vi-Mil contract (Gov't cross motion for summary judgment, attach. 1), which was not, both evidence the number of garments subject to royalties under that contract. Modification No. P00012 was dated 3 October 1986, over eight months prior to the expiration of the Vi-Mil royalty period.

37. The database upon which appellant relied for determination of the number of garments delivered during a given royalty period was prepared by appellant's expert witness, Mr. James W. Sutherland (Sutherland) (tr. 2/8). Sutherland, an expert in the computer analysis of data, amassed procurement data on several different garments procured by DPSC, including the women's pantsuit coat at issue here. He used the same methodology for all of the garment types. (Tr. 2/38; exs. A-1000-02)

38. The underlying data used by Sutherland came from two sources. DPSC provided documents to Bianchi's owner who in turn gave those documents to Sutherland. Sutherland also received data from the HAYSTACK database, a procurement information source maintained by Information Handling Systems (IHS), a commercial establishment.

HAYSTACK included procurement information from multiple government sources, including DPSC. (Tr. 2/8-10)

39. Sutherland created a Total Procurement Database for each garment by combining information from IHS' HAYSTACK with information provided by DPSC (tr. 2/31-32). He was careful to eliminate duplicate records (tr. 2/32) and when he did not have information on a scheduled or actual delivery he used normal procurement lead time (the period between contract award and date of first scheduled delivery) to predict the most likely deliveries for a particular contract (tr. 2/33-34).

40. Following is a matrix depicting the quantities delivered during the Vi-Mil royalty period per Vi-Mil's P00011 and P00012 and the corresponding data for the same royalty period using data from the documents in the front cover of appellant's exhibit 1001 for Mil-C-87160, but excluding purchases with a prefix of SCO100 which are intra-agency transfers (tr. 2/65) not subject to royalties.

Comparison of Data Bases for Quantities Delivered During Royalty Period
(22 June 1984 to 21 June 1987)

<u>Contract Number</u>	<u>Quantities Per Vi-Mil</u> <u>P00011 and 12</u>	<u>Quantities Per Bianchi</u> <u>Data³</u>
DLA100-84-M-CB20	608	0
DLA100-84-M-CB45	706	705
DLA100-84-C-0724	4,440	4,365
DLA100-84-C-0751	1,606	1,575
DLA100-85-M-CA32	660	660
DLA100-85-C-0339	7,050	7,050
DLA100-85-C-0376	4,425	4,425
DLA100-85-C-0742	19,320	20,971
DLA100-85-M-CA32	0	660
DLA100-85-C-0339	0	150
DLA100-85-C-0339	0	3,525
DLA100-85-M-CA41	0	660
DLA100-83-C-0563	<u>0</u>	<u>6,686</u>
Totals	38,815	51,432

41. Except for the 608 garments purchased under Contract DLA100-84-M-CB20 (CB20) which was not included in Bianchi's data, the remaining contracts and quantities under the Vi-Mil modifications closely track corresponding data from Bianchi. The Bianchi data includes five additional groups of purchases not included under the Vi-Mil modifications, and while we do not know why that anomaly exists, we observe that Vi-Mil P00012 was executed over eight months prior to the end of the royalty period, much of the data was not subject to cross examination at trial and we have no evidence of how the Vi-Mil data was compiled.

42. We now find that the Bianchi underlying data generated by Sutherland on delivery of Air Force women's pantsuit coats is credible and may be used for determining the number delivered during the Vi-Mil royalty period. Thus, we add the quantity under contract CB20 not included in the Bianchi data to the quantity computed by Bianchi to yield a total of 52,040 (51,432 + 608) women's pantsuit coats delivered during the applicable royalty period and incorporating the constructively accepted Bianchi VECP 1180. At a royalty share of \$.3185 per garment, the Bianchi royalty payment computes to \$16,574.74.

DECISION

The CAFC remanded this appeal to us to explain the Board's determination of the number of garments subject to the VECP. We previously found the Vi-Mil quantities more reliable primarily because, unlike the Bianchi data, they were the subject of bilateral agreements and appeared to be undisputed by the parties to those agreements. Having reexamined that determination, we now decide that Bianchi's data is more reliable and determine that Bianchi is entitled to recover for a total of 52,040 garments (finding 42) at \$.3185 per garment for a total of \$16,574.74 together with CDA interest from 3 March 1988 until paid. *See Bianchi IV* at 141,863.

Appellant makes additional arguments, characterizing language in several of the Court and Board opinions as *dicta* with respect to what constitutes "essentially the same item" and thus urging us to include garments other than the women's pantsuit coat produced in accordance with Mil-C-87160 to calculate the royalty payments. These arguments are without merit, they go beyond the scope of the remand and they involve matters already decided and either not appealed or affirmed by the CAFC in the various decisions previously issued in this case.

The appeal is sustained as to quantum as set forth above, and, in all other respects, it is denied.

Dated: 28 December 2000

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

¹ *M. Bianchi of California*, ASBCA Nos. 36518, 37029, 37071, 37395, 37798, unpublished opinion dated 2 March 1990 (*Bianchi I*); *M. Bianchi of California*, ASBCA Nos. 37029, 37071, 93-1 BCA ¶ 25,309 (*Bianchi II*); *Bianchi v. Perry*, 31 F.3d 1163 (Fed. Cir. 1994) (*Bianchi III*); *M. Bianchi of California*, ASBCA Nos. 37029, 37071, 96-2 BCA ¶ 28,410 (*Bianchi IV*), *aff'd on recon.*, 97-1 BCA ¶ 28,767 (*Bianchi V*); *Bianchi v. Cohen*, No. 97-1394 (Fed. Cir. December 3, 1998) (*Bianchi VI*).

² The number 54,773 was incorrect. It should have been 51,342.

³ We recognize that there is a discrepancy between this total and the corrected total in footnote 2. In *Bianchi V* we relied on an attachment to appellant's motion for reconsideration, which attachment was apparently created for the motion. For Contract No. DLA100-85-C-0339 on line 12 of that attachment, 60 garments are shown to have been delivered, 30 in October and 30 in November 1985. Here, we relied on appellant's trial exhibit 1001 which showed on the same line, for the same contract, 150 garments delivered, 30 per month from October 1985 to February 1986.

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. 37029, Appeal of M. Bianchi of California, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals