

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
GAP Instrument Corporation) ASBCA No. 55041
)
Under Contract No. DCA200-94-H-0015)

APPEARANCE FOR THE APPELLANT: Cyrus E. Phillips, IV, Esq.
Arlington, VA

APPEARANCE FOR THE GOVERNMENT: Jo Ann W. Meleskey, Esq.
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON APPELLANT’S MOTION FOR RECONSIDERATION

Gap Instrument Corp. (GAP) moves for reconsideration of our decision denying its claim for lost anticipatory profit caused by a government breach of the captioned Value Added Network (VAN) license agreement. Pursuant to this agreement, GAP was one of a number of VAN providers licensed to provide vendor access to a government small purchase electronic procurement system. *See GAP Instrument Corp.*, ASBCA No. 55041, 08-2 BCA ¶ 33,920.

GAP’s grounds for reconsideration are that (i) the Board “wrongly analogizes [GAP’s] claim to one only for a partial, rather than a total breach,” (ii) the government’s “failure to enforce mandatory requirements of the VAN license agreement was a total breach,” and (iii) “[g]iven a total breach, appellant’s expert testimony is not unpersuasive in the face of appellant’s actual market share” (app. mot. at 3, 6, 12).

Our prior entitlement decision in this appeal succinctly described the specific breach as follows: “In summary, respondent breached the agreement to the extent that respondent did not use, or failed to require affected contractors to use, the VAN providers in the period after the PAT report phase-in schedule, for electronic small purchase transactions involving the mandatory items.” *See GAP Instrument Corp.*, ASBCA No. 51658, 01-1 BCA ¶ 31,358 at 154,867.

We do not agree that our present quantum decision “analogizes” the government breach as partial rather than total. We considered the total market of 64,274 vendors claimed by GAP as being affected by the breach. We found on the evidence that no more

than 4,426 of those vendors were shown to have been engaged in electronic small purchase transactions with the government without using the licensed VANs during the claimed damages period. *Gap Instrument Corp.*, 08-2 BCA ¶ 33,920, at 167,851-52 (findings ¶¶ 3-5). However, whether the breach was total or partial has no relevance to the determination of GAP's probable share of the total market and provides no basis for assessing the persuasiveness of GAP's expert report on its probable market share.

On reconsideration, we find the grounds cited in GAP's motion without merit and reaffirm our decision denying the appeal.

Dated: 24 April 2009

MONROE E. FREEMAN, JR.
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

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. 55041, Appeal of GAP Instrument Corporation, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals