

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
White Sands Construction, Inc.) ASBCA Nos. 51875, 54029
)
Under Contract No. DACA63-96-D-0022)

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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

ASBCA No. 51875 is an appeal from a final decision denying an \$805,000 claim for (1) breach of contract due to failure to award task orders that equaled the estimated maximum value of the contract and for (2) failure to provide a timely preliminary notice of the exercise of the second option year of the contract (third year of performance).

We granted the government's motion for partial summary judgment as to appellant's breach claim because the government ordered the guaranteed minimum quantity of work under this indefinite delivery indefinite quantity (IDIQ) contract. *White Sands Construction Inc.*, ASBCA No. 51875, 02-2 BCA ¶ 31,858. Remaining before us however, was the claim for improper exercise of the option.

After issuance of the decision on summary judgment, in a conference call on 24 May 2002, government counsel pointed out that the issue concerning the exercise of the option had not been quantified¹. On 25 June 2002, appellant submitted a claim to the contracting officer for a loss of \$258,671 during the second and third option years ("the quantum claim"), but it was not accompanied by a Contract Disputes Act certification (R4, tab 51). The claim was properly certified by letter dated 24 September 2002 addressed to the Board with a copy to government counsel (R4, tab 52). In a final decision dated 12

¹ The \$805,000 claim had covered the breach claim for the base year and the first option year only (R4, tab 2).

November 2002 the contracting officer referenced receipt of the proper certification² and denied the claim based upon the previous denial of the entitlement claim and because said claim was presented on a total cost basis (R4, tab 55).

The final decision on the quantum claim was timely appealed to the Board on 22 November 2002 and on 26 November 2002, was docketed as ASBCA No. 54029. ASBCA No. 54029 was consolidated with ASBCA No. 51875 and a hearing was held in Las Cruces, New Mexico. At the beginning of trial the claim was reduced to \$207,070.07 and subsequently, during testimony by appellant's president increased by \$40,500. Both entitlement and quantum are before us.

FINDINGS OF FACT

1. On 6 June 1996, the United States Army Corps of Engineers, Fort Worth, Texas District (government), awarded Contract No. DACA63-96-D-0022 to White Sands Construction, Inc. (appellant or WSC), an IDIQ job order contract (JOC) for construction and repair requirements at White Sands Missile Range, New Mexico. The contract, awarded under section 8(a) of the Small Business Act, was for a base year with four one-year options. (R4, tab 3) WSC is a general construction contractor located in Alamogorda, New Mexico, specializing in local, state and federal government contracts (R4, tab 1; tr. 34-35).

2. The contract contained the following provisions relevant to the appeals:

A. Clause F.4, PERIOD OF PERFORMANCE (52.9002-4000 JOC), which provides:

a. This is an indefinite quantity contract for the repair and/or construction of the items specified, effective for a 12 month period or for a period not to exceed the point where the stated maximum contract amount is reached (see Section H "MINIMUM CONTRACT VALUE"). This contract also provides for four (4) option periods (not to exceed a total of 48 months) to be exercised at the discretion of the Government. Should the estimated maximum base contract amount or option contract amount be reached prior to completion of the base period and/or option periods, the Government reserves the right to exceed the estimated maximum contract amount and/or option period contract amount. However, the Government will not exceed the total contract amount of \$15,000,000.

² We deem the certification to have been received by the contracting officer on 28 September 2002, allowing three days for mailing to Mr. Crosswhite and one day for Mr. Crosswhite to furnish it to the contracting officer.

b. Delivery or performance shall be specified in each individual delivery order issued under this contract. Performance time for individual delivery orders will be negotiated in accordance with Section H, "ORDERING PROCEDURES."

c. Each delivery order will also specify the date subcontractors will be on site performing work. This date will be negotiated, and work will be completed within the specified delivery performance time.

(R4, tab 3 at F.3)

B. Clause B.4, OPTIONS, provides:

a. The Government reserves the right to exercise options to extend the term of this contract as follows:

(1) From conclusion of the original twelve (12) month (base) period, for an additional twelve (12) month period (OPTION I).

(2) From the conclusion of the first twelve (12) month option period (OPTION I) for a second option period of twelve (12) months (OPTION II), followed by a third option period of twelve (12) months (OPTION III), and a fourth and final option period of twelve (12) months (OPTION IV).

b. This will result in a base period with four (4) option periods not to exceed sixty (60) months.

c. It should be noted that if the maximum base year or option period contract amount is reached before the completion of the base year or any option period, the Government reserves the right to exercise the next option period at that time. In addition, in accordance with the clause entitled "Option to Extend Services,[" the Government may require continued performance of any services within the limits and at the rates specified in the contract for an additional six-month period.

(R4, tab 4A at B-12)

C. Clause H.3, MINIMUM CONTRACT VALUE (52.9009-4000 JOC), states:

The guaranteed minimum quantity of work which will be required under this contract, and which will be initiated by one or more delivery orders, will not be less than \$100,000 for the base period and \$100,000 for each of the 4 option period extensions. The estimated maximum dollar value of the contract is \$3,000,000 for the initial contract period and \$3,000,000 for each of the 4 option period extensions. If the Government's requirements for the services set forth in the solicitation do not result in orders in the amount described as "estimated maximum," the event shall not constitute the basis for an equitable price adjustment under this contract.

(R4, tab 4(E) at H-1)

3. The cover sheet of the solicitation also specifically stated that the guaranteed minimum during the base period was \$100,000 (R4, tab 3).

4. The contract included Clause I.4, prescribed at FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989), which provided as follows:

(a) The Government may extend the term of this contract by written notice to the Contractor within the time specified in the schedule; provided, that the Government shall give the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract shall be considered to include this option provision.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed 60 months.

(R4, tab 4(F) at I-34) No time was specified in the schedule for extending the term of the contract (tr. 30).

5. Since the contract was awarded on 6 June 1996 and the base year was a 12-month period, the last day of the base year was 5 June 1997. Each option year thus should have run as follows:

Option I	6 June 1997 through 5 June 1998
Option II	6 June 1998 through 5 June 1999
Option III	6 June 1999 through 5 June 2000
Option IV	6 June 2000 through 5 June 2001

However, because different contract specialists worked on the contract, the effective dates of the options went somewhat awry. (Ex. D)³

6. Apparently after giving timely preliminary notice (tr. 47), on 5 June 1997, contracting officer Joan LoRe (LoRe) unilaterally exercised Option I stating it was to commence “beginning 5 June 1997, close of business” (ex. A). During the first option year of the contract, appellant billed the government for \$425,000 (R4, tab 6).

7. In 1998 Ruth Powell (Powell) was the government’s contract administrator in Ft. Worth, Texas and on Friday 3 April 1998 she drafted the preliminary notice of intent to exercise Option II and submitted it for the signature of LoRe (tr. 241, 244). LoRe, also located in Ft. Worth, signed the preliminary notice on 6 April 1998 and it was dated that day. While LoRe does not recall when it was mailed, it was office policy to place such letters in outgoing mail on the date she signed it. (R4, tab 8; tr. 278) The government used no other method to communicate its preliminary intent as it did not fax, or telephone or use overnight mail (tr. 33). Appellant has not produced the postmarked envelope. We find that the government mailed the preliminary notice on 6 April 1998.

8. The preliminary notice stated as follows:

Please consider this a preliminary notice of the Government’s intent to exercise its option to extend the construction effort in accordance with FAR Clause 52.217-0009, “Option to Extend the Term of the Contract[.]”

A formal notice exercising the option will be issued prior to the June 4, 1998 expiration date.

(R4, tab 8)

9. The preliminary notice was received by WSC on 13 April 1998 (tr. 33; ex. A- 2).

³ In response to a post-trial Board request, the parties jointly submitted additional evidence. Exhibit A is the exercise of Option I; exhibit B is the exercise of Option III; exhibit C is the exercise of Option IV; and exhibit D is an affidavit from contracting officer Ruth Powell explaining why the beginning and ending dates were inconsistent. The parties were unable to locate the preliminary notice for Option I.

10. WSC had marked Saturday, 4 April 1998 on its calendar for receipt of preliminary notice (tr. 32-33) and when it was not received by Monday, 6 April 1998, began soliciting other work and exploring other work options (tr. 33-34). According to Dennis Crimmins, appellant's vice president and director of operations, WSC had lost over \$400,000 during the first two years of the contract and did not want the contract extended. They were happy when they did not receive the preliminary notice within 60 days prior to the expiration of Option I. (Tr. 45, 48-49)

11. On 22 April 1998, WSC advised the government as follows:

The Government's preliminary notice of intent to exercise its option to extend the construction effort is not timely. It is ineffectual.

Pursuant to FAR 52.217-9, Option to Extend the Term Of The Contract, the preliminary notice must be received "at least 60 days before the contract expires."

The contract expires on June 4, 1998. The notice receipt was effected Monday and stamped April 13, 1998, or 52 days prior to contract expiration. The preliminary notice is ineffectual.

Appellant further advised that it might continue to work after contract expiration, but it did not waive its right to stop work or continue under a constructive change order or any other of its contract rights. (R4, tab 12)

12. On 8 May 1998, WSC reiterated that the government failed to give timely preliminary notice to extend the contract rendering an exercise of the following option year "late and ineffectual" (R4, tab 14).

13. By letter of 11 May 1998, LoRe responded to the WSC letters of 22 April and 8 May 1998. She referenced the provision in FAR clause 52.217-9 calling for preliminary written notice of intent to extend to be given at least 60 days before the contract expires and stated:

The current performance period under this contract will expire June 4, 1998. Your notification letter of the Government's intent to extend contract performance was dated April 6, 1998, which equates to exactly 60 days prior to the expiration of your performance period; therefore, the Government has fully complied with the language in this clause by giving you timely notification of 60 days.

Since White Sands Missile Range has indicated the need for continuance of this contract, a unilateral modification will be issued prior to the expiration date of June 4, 1998, directing your firm to continue performance under this contract.

(R4, tab 15)

14. Appellant disagreed with LoRe's analysis and, on 12 May 1998 Ray Nell Crimmins, appellant's president, stated that WSC received the preliminary notice on 13 April 1998, which was less than 60 days before the contract expired, and explained why she believed the date of receipt, not the date of mailing, controlled the timeliness of the notice. She reiterated that WSC considered the preliminary notice to be untimely and ineffectual. (R4, tab 16)

15. On 28 May 1998, the contracting officer issued unilateral Modification No. P00004 that exercised Option II, stating that the option period was effective "5 June 1998 through 4 June 1999." Modification No. P00004 was received by WSC on 3 June 1998. (R4, tab 26)

16. On 1 April 1999, the contracting officer issued the government's preliminary notice of intent to exercise Option III. A facsimile was received by WSC on 1 April 1999 and a mailed copy was received on 5 April 1999. Said notice stated that a formal notice exercising the option would be issued prior to the 4 June 1999 expiration date. (Exs. A-8, -9) On 4 June 1999, the contracting officer issued unilateral Modification No. P00007 exercising Option III and stating the option period was effective 4 June 1999 through 3 June 2000 (ex. B).

17. On 29 March 2000, the contracting officer issued the government's preliminary notice of intent to exercise Option IV. It was received by WSC on 30 March 2000. (Ex. A-10) On 2 June 2000, the contracting officer issued unilateral Modification No. P00009 exercising Option IV and stating the option was effective 3 June 2000 through 2 June 2001 (ex. C).

Claim submission

18. On 9 March 1998, WSC forwarded an evaluation to the contracting officer prepared by SSPEC, Inc., a hired consultant. The evaluation was in the nature of a factual and legal analysis purporting to demonstrate government liability for breach of contract due to its failure to order estimated contract quantities during the first year of performance and to date during Option I. (R4, tab 6) The agreement between WSC and SSPEC and its attachments make clear that the purpose of the services was to assist WSC in claim preparation (R4, tab 7).

19. On 4 June 1998, appellant notified the government that it considered the contract breached by the government in several respects, including the issue of late notice of preliminary intent to exercise Option II and the allegation of government failure to order sufficient work (R4, tab 17).

20. On 16 June 1998, Appellant submitted a letter to the contracting officer which referred to the 9 March and 4 June letters and purported to contain a certification of a claim for breach of contract in the amount of \$805,000 in accordance with the Contract Disputes Act, 41 U.S.C. § 605, and requested a contracting officer's decision. (R4, tab 18).⁴ The claimed amount was for breach damages during the base year (\$405,000) and Option I (\$400,000) for failure to order required quantities. Additionally, appellant claimed the contract was breached when the government failed to give timely notice of intent to exercise Option II. (*Id.*)

21. By final decision, dated 19 August 1998, the contracting officer denied the claim. The decision states that appellant had alleged, in its 16 June 1998 letter, that the government had breached the contract "due to a failure to award task orders that equaled the estimated maximum value of the contract" and that "a second basis for the claim [was] that the Government failed to provide a timely preliminary notice for the exercise of the second option year of the contract, releasing the contractor from further contractual obligations." (R4, tab 2) Appellant's timely appeal followed on 17 November 1998.

22. As originally submitted on 25 June 2002, the quantum claim was a total cost claim for \$258,671.51 essentially claiming the difference between receipts and expenditures during Option Years II and III (R4, tab 51).⁵ At the beginning of trial, the claim was reduced to \$207,070.07 (ex. A-16). During trial Mrs. Crimmins, who prepared the quantum claim, testified that she forgot to include the bonding costs for Option II and III and that those costs were incurred at the rate of \$13,500 per million dollars for an additional \$40,500 (tr. 117-18).

23. To determine receipts WSC sought to compute the total dollar amount of delivery orders awarded during Options II and III. Mrs. Crimmins deleted that portion of delivery order amounts attributable to New Mexico Gross Receipts taxes, which she admits were part of her payments from the government (tr. 118). A total of 41 delivery orders are included, 32 from Option II and 9 from Option III (ex. A-16). Delivery Order 66 was

⁴ The certification was defective under Federal Acquisition Regulation 33.207(c); however, after the Board pointed out the defect, an amended certification was subsequently filed.

⁵ Appellant did not include Option IV in the claim because only one delivery order was issued during that period and all personnel and equipment had been removed from the site (tr. 113).

incorrectly included in Option III when it should have been in Option II (ex. G-1) and the amounts we find below reflect that correction.

24. The claim is ultimately premised on a total dollar value of delivery orders without tax of \$2,968,295.08, \$2,508,548.15 for Option II and \$459,746.93 for Option III.

25. The government demonstrated that the dollar value of delivery orders and modifications to delivery orders issued during Option II was \$2,593,565.88. Liquidated damages of \$19,784.58 were assessed reducing the total to \$2,573,781.30 paid to WSC. (R4, tab 53; ex. G-1; tr. 152-53, 157) During Option III, delivery orders and modifications to delivery orders totaling \$568,716.72 were issued and when modifications to Option III delivery orders which were issued during Option IV are considered, the amount is reduced to \$496,518.24 (R4, tab 54; ex. G-1; tr. 155-56). That amount less \$650 in liquidated damages was paid to WSC (\$495,868.24) (tr. 157; R4, tab 54).

26. For its computations, the government made no changes with respect to the New Mexico Gross Receipts tax (tr. 181). We find as a fact that appellant, a resident of Alamogordo in Otero County, New Mexico, incurred New Mexico Gross Receipts tax at

the rate of 6.1875% at all times relevant to this claim.⁶ Applying that rate to the receipts from the government relative to delivery orders issued during Option II (\$2,573,781.30) yields \$159,252.72. When that rate is applied to the receipts from the government relative to delivery orders issued during Option III (\$495,868.24) it results in a gross receipts tax of \$30,681.85.

27. The expenses incurred by WSC are generally divided into cost of goods and overhead expenses (ex. A-16). The government dispatched an auditor, Sandra Armijo (Armijo), to review the WSC claim (tr. 317). Armijo was given the June 2002 claim to review (R4, tab 51), but when she arrived at the WSC offices on the morning of 21 January 2003 to perform her review she was given the revised claim (tr. 319, 320; ex. A-16).

28. Armijo testified that her audit plan was to verify costs by sampling certain transactions within a sampling of delivery orders. The delivery orders she chose to sample were those with high dollar values. (Tr. 318-19). Within each account she sought to verify

⁶ For the periods 1 January 1999 to 30 June 1999, 1 July 1999 to 31 December 1999 and 1 January 2000 to 30 June 2000, the rate was taken from the website: www.nm.us/tax/pubs/GrossReceiptsRates/gross_receipts_rate_sched.htm. For the period 1 January 1998 to 30 June 1998 and 1 July 1998 to 31 December 1998, the rate schedules were provided by facsimile from the New Mexico Taxation and Revenue Department.

individual transactions by referring to invoices or other supporting documents (tr. 320). To that end Armijo reviewed some actual invoices, time cards, certified labor reports as well as the WSC income statement. She testified that she requested but did not receive subcontracts and canceled checks and that there were some missing labor reports and missing invoices. (Tr. 320-22) In addition, Armijo says she was not provided the correct insurance policies she needed for her review (tr. 333).

29. Ray Nell Crimmins countered that the room in which Armijo worked contained 20 boxes of documents arranged by delivery order and these boxes included all payroll records, detailed trial balances and all the printouts associated with the detailed trial balances. The boxes also were said to include all of the insurance policies. (Tr. 433) Crimmins also attempted to give Armijo everything she requested, except for cancelled checks, which would have been near impossible to provide under the circumstances (tr. 434-441).

30. While Armijo drafted a report, it was not issued and is not part of the record in this case (tr. 347). However, she testified as to the results of her review. Each category of cost (except the one added at trial) is listed in the following table and each (including the one added at trial) is examined below:

Item of Cost	Option II	Option III	Total
Cost of Goods			
Miscellaneous Materials	250,014.24	88,978.96	338,993.20
Labor	253,269.43	146,095.12	399,364.55
Subcontractors	1,714,629.14	122,725.07	1,837,354.21
Other Direct Costs	315.82	201.54	517.36
Equipment Rentals	10,273.16	4,012.98	14,286.14
Outside Service	8,405.15	6,739.24	15,144.39
Quality Control	12,383.17	5,183.64	17,566.81
Superintendent	49,029.37	18,208.08	67,237.45
Site Office Expense			
ADP Requirements	15,276.60	15,276.60	30,553.20
Site Office Setup Costs	6,559.91	6,559.91	13,119.82
Office Costs/Fuel Expense	15,274.90	15,683.92	30,958.82
Consulting Fees	20,961.86	2,887.64	23,849.50
Insurance (Gen. Liability Subs)	908.21	0.91	909.12
Labor Burden			
Laborers/Carpenters	57,644.13	28,970.67	86,614.80
Superintendent	6,143.38	2,132.17	8,275.55
Clerical (corp./site office)	11,765.62	12,170.31	23,935.93
General Liability			

Laborers/Carpenters	8,735.29	4,232.96	12,968.25
Superintendent	1,649.86	612.77	2,262.63
Clerical (corp./site office)	4,032.57	4,187.80	8,220.37
Corporate Office Support	42,238.56	42,238.56	84,477.12
Corporate Office Equip./Auto	3,000	3,000	6,000
Office Site Management	74,137.43	78,618.50	152,755.93
Total	2,566,647.80	608,717.35	3,175,365.15
Less Delivery Order	-2,508,548.15	-459,746.93	-2,968,295.08
Amounts			
Claimed Loss	58,099.65	148,970.42	207,070.07

(Ex. A-16)

Materials

31. Mrs. Crimmins testified that there were invoices to back up these amounts, which were in individual delivery order files as were the back up for all the direct costs claimed (tr. 112). While the invoices are not part of the record in these appeals, the job cost detail reports are included and we find them credible (ex. A-19). The claim prices this item at \$250,014.24 in Option II and \$88,978.96 in Option III for a total of \$338,993.20. The government auditor questioned \$9,574 in Option II because the detailed trial balance did not agree with the amount (tr. 323). The job cost detail reports justify material costs of \$250,014 in Option II and \$101,007 in Option III for a total of \$351,021 and we find that amount was incurred in direct costs of materials (ex. A-19).

Direct Labor

32. The claim shows direct labor costs of \$253,269.43 in Option II and \$146,095.12 in Option III for a total of \$399,364.55. The auditor questioned \$4,611 in Option II and \$37,622 in Option III because the total on the income statement did not agree with the total of the delivery order balance sheet by those amounts (tr. 323-24). Using the job cost detail reports, we find that appellant incurred total direct labor costs for Option II in the amount of \$249,926.70 and for Option III in the amount of \$146,362.50 for a total of \$396,289.20 (ex. A-19).⁷

Subcontractor Costs

⁷ For Option II, the portion of the total labor attributable to carpenters is \$186,488.40 and in Option III the total labor attributable to carpenters is \$93,794.20. This distinction is important only for purposes of general liability to be discussed *infra*.

33. The claim includes subcontractor costs of \$1,714,629.14 in Option II and \$122,725.07 in Option III for a total of \$1,837,354.21. The auditor questioned all of these costs because she was not provided the actual invoices or other support for these costs (tr. 325). Using the job cost detail reports, we find that appellant incurred total subcontractor costs during the periods in question of \$1,714,628.80 and \$122,725.10 respectively for a total of \$1,837,353.90 (ex. A-19).

Other Direct Costs

34. Appellant includes other direct costs of \$315.82 (Option II) and \$201.54 (Option III) for a total of \$517.36. Based upon the job cost detail reports, the auditor did not question any of these cost, and nor do we (ex. A-19).

Equipment Rental Costs

35. Included in the claim are equipment rental costs of \$10,273.16 and \$4,012.98 for the two option periods respectively for a total of \$14,286.14. The auditor questioned \$282 and \$133 for the two periods because the total on the income statement did not agree with the total on the delivery order detail reports (tr. 326). Our review of the job cost detail reports found equipment rental costs of \$10,140.43 for Option II and \$4,012.98 for Option III for a total of \$14,153.41 (ex. A-19).

Outside Service

36. Appellant includes \$8,405.15 in Option II and \$6,739.24 in Option III for a total of \$15,144.39 for Outside Service (testing services) (ex. A-16; tr. 135). The auditor did not question these amounts (tr. 327). Based upon our review of the job cost details, we find \$8,537.88 for Option II and \$6,739.24 for Option III for a total of \$15,277.12 (ex. A-19).

Quality Control

37. For Quality Control, WSC includes \$12,383.17 for Option II and \$5,183.64 for Option III for a total of \$17,566.81. After her review of the certified labor reports and time cards the auditor questioned \$3,270 in Option II and \$3,497 in Option III (tr. 327-28). Our review finds \$12,383.19 for Option II and \$4,916.23 for Option III for a total of \$17,299.42 (ex. A-19).

Superintendent

38. The claim includes \$49,029.37 for superintendent costs in Option II and \$18,208.08 in Option III for a total of \$67,237.45. The auditor questioned none of the costs in Option II and \$2,092 in Option III due to a discontinuity between the detailed trial

balance and the income statement (tr. 328). Based upon or review, we agree with the numbers in the claim (ex. A-19).

ADP Requirements

39. This item was priced at \$15,277 per year based upon the initial outlay divided by 5 years (tr. 113). Clause H.31 of the contract required appellant to furnish certain specified ADP equipment which was to become the property of the government at the end of the contract (R4, tab 4E). Mrs. Crimmins explained to Ms. Armijo the total cost of ADP was a base year cost spread over the life of the contract. A prior audit verified a total of \$70,000 as the initial outlay and that amount spread over 5 years resulted in a per year cost of \$14,000 and thus the auditor questioned the difference between \$15,277 and 14,000 or \$1,277 per year, as do we. (Tr. 329-30) We therefore include \$14,000 in each year for ADP.

Site Office Setup Costs

40. These claimed costs of \$6,559.91 per year were computed using the same theory as for ADP Requirements (tr. 114, 330-31). They consist of items such as the cost of the office, septic tank, and yard fence. The auditor questioned them in total because she found no documents to support them (tr. 331). We similarly find no support for these costs in the record and therefore exclude them.

Office Costs/Fuel Expenses

41. This item, for \$15,274.90 in Option II and \$15,683.92 in Option III for a total of \$30,958.82, is a site office expense as well. The auditor reviewed the income statement and, for Option II, she reviewed the detailed trial balance. She selected specific transactions to test and testified she requested but was not given supporting documentation. Thus the auditor questioned all of this expense. (Tr. 332-33) Mrs. Crimmins testified with regard to this item as follows:

Q [by Mr. Burroughs] Okay. Office cost fuel expenditures, where would she [the government auditor] find that?

A [by Mrs. Crimmins] That comes into the income statement. If you go to '99 the income statement, there is a classification for any office supplies or any fuel. When you total those on the statement they total the line item on that.

(Tr. 451)

42. We referred to the income statements for 1999 and for 2000 (ex. A-19) and find the following operating expenses to constitute office costs/fuel expenses:

	1999	
fuel		4575.81
office expense		1803.32
office postage/shipping		745.89
office supplies and equipment		2652.93
telephone expense		690.63
Total 1999		10468.58
	2000	
fuel		5810.88
office expense		422.08
office postage/shipping		239.12
office supplies and equipment		640.56
telephone expense		3032.21
Total 2000		10144.85

While there may or may not be other costs properly included under this category they are not self-evident and are excluded due to failure of proof. The total allowed is \$20,613.43.

Consulting Fees

43. WSC includes \$20,961.86 in Option II and \$2,887.64 in Option III for a total of \$23,849.50 for consulting fees described as a fee paid to Mike Cassin of SSPEC (tr. 115). Appellant only documents a total of \$10,412.5 for this item (ex. A-19, consulting fees tab). Of that amount, \$2,187.50 was incurred during Option I. The remaining invoices appear to be for services of a legal nature. According to Dennis Crimmins, SSPEC was retained in February 1998 in order to help alleviate WSC's losses and to make a deal with the government that would release WSC from the contract. Mr. Crimmins also confirmed that Cassin gave contract law advice. (Tr. 57-58) These consulting costs are excluded as constituting claim prosecution costs.

General Liability Insurance

44. Insurance for \$908.21 and \$.91 respectively for a total of \$909.12 are included in the claim and the auditor questioned all of it because she was never given the right documents to review (tr. 333-34). Mrs. Crimmins testified the general liability insurance policy in her notebook shows the rate for the general liability insurance on subcontractors on a per \$1,000 basis and "if you take the subcontractor category under option year 3, 122,000, and multiply it by the rate per thousand it only came up to \$0.91" (ex. A-19; tr. 116). While the documents do prove the incurrence of costs for general liability insurance on subcontracted work in amounts exceeding the amounts claimed (ex. A-19, general

liability tab) the explanation does not result in the amount claimed no matter which of two rates are selected. We compute the amount to be included for this item by taking the lowest of the two rates given for each of the years and multiplying it by the amount allowed for subcontracting divided by \$1,000 since the rates are expressed in amounts per \$1,000. Thus, for Option II, since we allowed \$1,714,628.80, the computation is as follows:

$$\$1,714,628.80/1,000 \times \$0.364 = \$624.12$$

For Option III the computation is as follows:

$$\$122,725.10/1,000 \times \$0.298 = \$36.57$$

Therefore, we include a total of \$660.69 for liability insurance for subcontracts.

Labor Burden (Laborers, Superintendent, Clerical/Corporate and Site Office

45. Labor burden is six distinct line items in the claim and the amounts are set forth in finding 30. For each of three employee categories, there is an amount claimed in each year for (a) FICA, unemployment and workmen’s compensation; and (b) general liability. The auditor did not question the FICA rate, which was 7.65% for all categories, nor do we. Nor did she question the various rates for unemployment compensation and worker’s compensation. We find that the evidence supports the rates used in the claim. (Ex. A-19, labor burden tab). The rates to be applied to labor costs are as follows:

	Option II (%)	Option III (%)
Laborers and Carpenters		
Worker's Compensation	13.01%	10.08%
FICA	7.65	7.65
Unemployment Compensation	2.1	2.1
Total	22.76%	19.83%
Superintendent		
Worker's Compensation	2.78	1.96
FICA	7.65	7.65
Unemployment Compensation	2.1	2.1
Total	12.53%	11.71%
Clerical		
Worker's Compensation	0.36	0.32
FICA	7.65	7.65
Unemployment Compensation	2.1	2.1
Total	10.11%	10.07%

46. Appellant has proved the rate for clerical labor burdens but has failed to prove the amount of clerical labor on which to apply the labor burdens. Therefore, we disallow all of the claimed burdens, including general liability for this category.

47. As to General Liability, the auditor questioned the entire amount for laborers because she did not have the policy for the correct year (tr. 336). She similarly questioned the entire amounts for superintendent and for clerical due to a lack of documentation (tr. 338, 340). The general liability policy declarations in the record (ex. A-19) do support the rates and amounts claimed. In Option II, the policy covering the period 30 June 1998 to 30 June 1999, the superintendent⁸ is covered at the rate of \$38.755 per \$1,000 of payroll for that item. Carpentry is covered at the total rate of \$36.178 per \$1,000 of payroll. Drywall and electrical work is covered but the premium for those crafts is zero. No other labor categories are named. No clerical worker coverage is included in the policy.

48. For Option III, the policy covering the period 30 June 1999 to 30 June 2000, insures carpentry at the total rate of \$34.483 per \$1,000 of payroll, superintendent at the rate of \$33.646 per \$1,000 of payroll. Drywall, painting and electrical work is covered but carries no additional premium. As with the previous year, no clerical worker coverage is included in the policy.

49. Based upon the foregoing findings, we determine amounts allowed as follows:

Option II

Worker's Compensation, FICA and Unemployment

Laborers and Carpenters - $\$249,926.70 \times 22.76\% = \$56,883.32$

Superintendent $49,029.37 \times 12.53\% = 6,143.38$

General Liability

Carpenters $186,488.40/1,000 \times \$36.178 = \$6,746.78$

Superintendent $49,029.37/1,000 \times \$38.755 = 1,900.13$

Option III

Worker's Compensation, FICA and Unemployment

Laborers and Carpenters - $\$146,362.50 \times 19.83\% = \$29,023.68$

Superintendent $18,208.08 \times 11.71\% = 2,132.17$

General Liability

Carpenters $93,794.20/1,000 \times \$34.483 = \$3,234.31$

Superintendent $18,208.08/1,000 \times \$33.646 = 612.63$

Corporate Office Support

⁸ Referred to as executive supervisors in the policy.

50. Mrs. Crimmins estimated the time she spent on the project by claiming \$42,238.56 for each of the years. This amount is based upon her spending three days per week on this project. She testified that she spent one day per week on the site and the other two days she was involved with letter writing, reading, and helping with the accounting (tr. 140-41). Note 4 to the claim asserts her salary to be \$73,000 per year and the claim amount is computed at the rate of \$270.76 per day for 52 weeks ($270.76 \times 3 \times 52 = \$42,238.56$). She considered the amount to be fair and reasonable given the time she spent on the job. (Tr. 117) Ms. Armijo reviewed the income statement, detailed trial balance, W-2 reports and the Note 4. She questioned the entire amount because there was no way to verify that she actually worked three days on the contract.

51. While Mrs. Crimmins' testimony is self-serving and is not corroborated in any way, we recognize that she must have worked on the project, but find three whole days to be unreasonable when she was running an entire business comprised of more than just this project. For Option II we think a more reasonable estimate is two days per week, one day on site and one day involved in paperwork related to the project. For Option III when the work was reduced considerably, we allow only one-half day per week. We thus compute the amount allowed at \$270.76 per day, as follows:

$$\$270.76 \times 52 = \$28,159.04 \text{ for Option II}$$

$$\$270.76 \times 1/2 \times 52 = \$7,039.76 \text{ for Option III}$$

Corporate Office Equipment/Auto

52. Page 2 of the claim lists five vehicles covered by auto insurance, which is claimed at \$3,000 for each of the two years. The supporting documentation covers only payments made for the period 30 June 1999 to 30 June 2000, generally covering Option III. No documentation is included for the prior year, generally covering Option II. We include only \$3,000 for Option III.

Office Site Management

53. WSC includes \$74,137.43 for Option II and \$78,618.50 for Option III for a total of \$152,755.93 for office site management that apparently includes the project manager, office manager and quality control personnel at the site office. The auditor questioned all of these costs because she was not provided any documentation in support of them (tr. 344-45). We find these costs problematic as well. First of all, there is no documentation in the record to support them. Secondly, we observe that quality control and superintendent were already included and thus accounted for in the job cost detail reports. Therefore, office site management costs are excluded for lack of proof and possible duplication.

Bonds

54. The cost of bonds was added to the claim at trial said to be at the rate of \$13,500 per \$1,000,000. Appellant used the total costs included on the income statement (\$3,135,261.50) as the basis of the computation and thus claimed a total of \$40,500.⁹ This record supports only a payment of \$13,500 for Option III and none for Option II (ex. A-19, income statement 06-00 tab) and that is the only amount we include.

55. Based upon the foregoing findings, we summarize the costs included in our computation:

Item of Cost	Option II	Option III	Total
Cost of Goods			
Miscellaneous Materials	\$250,014.00	\$101,007.00	\$351,021.00
Labor	249,926.70	146,362.50	396,289.20
Subcontractors	1,714,628.80	122,725.10	1,837,353.90
Other Direct Costs	315.82	201.54	517.36
Equipment Rentals	10,140.43	4,012.98	14,153.41
Outside Service	8,537.88	6,739.24	15,277.12
Quality Control	12,383.19	4,916.23	17,299.42
Superintendent	49,029.37	18,208.08	67,237.45
ADP Requirements	14,000.00	14,000.00	28,000.00
Site Office Setup Costs	0.00	0.00	0.00
Office Costs/Fuel Expense	10,468.58	10,144.85	20,613.43
Consulting Fees	0.00	0.00	0.00
Insurance (Gen. Liab. Subs)	624.12	36.57	660.69
Labor Burden			
Laborers/Carpenters	56,883.32	29,023.68	85,907.00
Superintendent	6,143.38	2,132.17	8,275.55
Clerical (corp./site office)	0.00	0.00	0.00
General Liability			
Laborers/Carpenters	6,746.78	3,234.31	9,981.09
Superintendent	1,900.13	612.63	2,512.76
Clerical (corp./site office)	0.00	0.00	0.00
Corporate Office Support	28,159.04	7,039.76	35,198.80
Corporate Office Equip./Auto	0	3,000.00	3,000.00
Office Site Management	0.00	0.00	0.00
Bonds	0.00	13,500.00	13,500.00
Gross Receipts Tax	159,252.72	30,681.85	189,934.57

⁹ Using appellant's figures we get a different result: $\$3,135,261.50 / \$1,000,000 \times \$13,500 = \$42,326.03$.

	\$2,579,154.2		
Total		6	\$517,578.49 \$3,096,732.75

56. Appellant did not include profit in its claim and, on this record, we are unable to determine a reasonable rate of profit.

DECISION

Appellant contends that the preliminary written notice of intent to exercise Option II was untimely sent and received and that the failure to give timely notice was a breach of contract for which White Sands has suffered damages (app. br. at 3-6, 9, 11). The government, on the other hand, contends that the preliminary notice was timely sent and that the contract did not require said notice to be received within the required period (gov't br. at 34-38). The government argues alternatively that even if we find the notice was untimely, such late issuance was not a material breach of the contract. As to damages, respondent argues that many of the costs are not supported and we should disallow the amounts that were questioned by its auditor. Finally, respondent takes issue with appellant's use of the total cost method of computing its damages.

The contract expired on 5 June 1998, resulting in a due date of 6 April 1998 for the preliminary notice. Appellant did not receive the notice until 13 April 1998. With regard to the exercise of an option, as opposed to the preliminary notice of intent, the law is clear that an option must be exercised within the time set forth in the contract or if no time is set forth, it must be exercised during the period of performance then in effect. Unless otherwise agreed, the exercise of an option is effective only upon receipt by the optioner. *Contel Page Services, Inc.*, ASBCA No. 32100, 87-1 BCA ¶ 19,540.

The preliminary notice of intent should be accorded the same treatment. Clause I-4 of the contract expressly required the government to give a preliminary notice of intent to exercise the option 60 days before the contract expired as a condition to actually extending the contract. The preliminary notice is an integral component of the process by which the government binds the contractor to another contract term. The government failed to perform that component in a timely manner. In *Holly Corp.*, ASBCA No. 24975, 83-1 BCA ¶ 16,327 at 81,164, we stated:

In order to bind the optioner, "the notice by which the power of an option holder is exercised must be unconditional and in exact accord with the terms of the option." *Corbin on Contracts, supra*, § 264.

The preliminary notice of intent to exercise the option, in this case, was not in accord with the terms of the option. The later exercise of Option II was therefore ineffective, the contract came to an end on 5 June 1998 and there were no options to exercise in June of

1999 or 2000. *Space-Age Engineering, Inc.*, ASBCA No. 22901, 78-2 BCA ¶ 13,543 (preliminary notice of intent to exercise an option must be received within 60 days before the contract expires); *see also Grumman Technical Services, Inc.*, ASBCA No. 46040, 95-2 BCA ¶ 27,918. Therefore, WSC is entitled to an equitable adjustment for Options II and III, the years for which claims are made.

Damages

While the government challenge to the total cost methodology for computing the claim is ordinarily a valid one, it does not apply to these circumstances. The ineffective attempt to exercise an option gives a contractor the right to recover the costs it incurred in performing that work plus a reasonable profit on those costs. *Lockheed Martin Corp.*, ASBCA No. 45719, 00-2 BCA ¶ 31,025; *Varo, Inc.*, ASBCA Nos. 47945, 47946, 98-1 BCA ¶ 29,484 at 146,319, *rev'd on other grounds*, 179 F.3d 1363 (Fed. Cir 1999); *Chemical Technology Inc.*, ASBCA No. 21863, 80-2 BCA ¶ 14,728. The measure of recovery is the difference between the amount incurred plus profit and the amount received for the work. *Varo, supra* at 146,320.

Appellant has not claimed profit, but has computed its costs as the difference between what it incurred and what it was paid. Nonetheless, it is entitled to profit. We remand the question of a profit rate to the parties for negotiation. If an agreement is reached, the profit should be added to the costs we have found (see finding 55) and the total subtracted from the amounts found to have been paid to WSC (see finding 25). The result is the amount to be awarded together with interest from 28 September 2002 until paid. If unable to agree to a rate, the parties may bring the matter back to the Board for decision.

The appeal docketed as ASBCA No. 54029 is sustained and is remanded in accordance with this opinion. We dismiss ASBCA No. 51875 as moot.

Dated: 16 April 2004

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 51875, 54029, Appeals of White Sands Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUPE
Acting Recorder, Armed Services
Board of Contract Appeals