

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.
Washington, DC

APPEARANCE FOR THE GOVERNMENT: Jo Ann W. Melesky, Esq.
Trial Attorney
Defense Information Systems Agency
Scott Air Force Base, IL

OPINION BY ADMINISTRATIVE JUDGE FREEMAN ON
THE GOVERNMENT’S MOTION FOR APPROPRIATE RELIEF

This appeal is the “quantum phase” of an earlier appeal in which we found the government in breach of a licensing agreement. The agreement at issue licensed appellant as an approved value added network (VAN) provider for small purchase electronic commerce with the Department of Defense (DoD). The government breached this agreement by failing to require all vendors to use a DoD-licensed VAN provider for all such commerce after a phase-in period. *GAP Instrument Corporation*, ASBCA No. 51658, 01-1 BCA ¶ 31,358 at 154,867.

Appellant’s 16 March 1998 certified claim to the contracting officer sought damages for this breach in the amount of its alleged VAN development costs of \$93,606,515 (gov’t mot., encl. 1 at 2-3, app. opp’n at 2). Following our decision on entitlement, we issued an order on 8 June 2005 directing appellant to submit within 60 days a Statement of Costs due for the breach and directing the government to respond to that statement within 30 days of receipt. The order provided that the statement and response were to be considered as in the nature of a complaint and answer.

Instead of complying with our 8 June 2005 order, appellant on 3 February 2006 submitted a document to the contracting officer entitled “SUBMITTAL OF QUANTUM CLAIM RE: ASBCA NO. 55041, APPEAL OF GAP INSTRUMENT CORPORATION.” This document claimed \$143,910,000 in lost profits for the government breach of contract that was the subject of the entitlement decision and for various other alleged breaches of contract that were not part of the entitlement decision. In our decision of 28 July 2006, we struck the 3 February 2006 claim, granted the government summary judgment as to

any claim for lost profits prior to 4 April 1996 (the phase-in schedule period), and reinstated our 8 June 2005 order on proof of costs. *Gap Instrument Corporation*, ASBCA No. 55041, 06-2 BCA ¶ 33,375 at 165,455-56, 165,460.

On 28 September 2006, appellant submitted a “Statement of Costs” for lost profits in alternative amounts of \$132,637,000 and \$50,175,000. Both amounts are based on appellant’s projections of income and expense for the period 1 November 1994 through 17 September 1997, and on appellant’s estimate that it would have 18 percent of the market for VAN access to DoD. The difference in the two amounts is that the higher amount is based on a potential market of 300,000 VAN customers while the lower amount is based on a potential market of 124,265 customers. (Gov’t mot., encl. 2 at 1, 6, encl. 2, attach. 3 at 2, encl. 2, attach. 4 at 2) Before filing a response to appellant’s Statement of Costs, the government on 8 February 2007 moved for “appropriate relief.” Specifically, the government requests that “Appellant be required to certify its Proof of Costs as they constitute a new claim,” and that its Proof of Costs “must set forth a specific sum certain that Appellant intends to pursue at hearing.” (Gov’t mot. at 7-8)

Appellant opposes the motion stating that while the theory of damages has changed from development costs to lost profits, the damages under either theory arise out of the same operative facts of breach. With respect to the alternative sums, appellant states that Board Rule 6(a) does not require that the amounts stated in a complaint be precise, and that Board Rule 7 allows the amendment of pleadings to conform to the proof. Appellant further states that it “will shortly file a revised Statement of Costs, this to reflect a lost profits Claim based on 198,884 trading partners that were in October 1997 using Activity-specific DoD Electronic Data Interchange systems.” (App. opp’n at 2, 17-18) While an accounting spread sheet alleging \$85,011,000 in lost profits based on 198,884 potential VAN customers has been provided to the government, a revised Statement of Costs in that amount has not been filed with the Board to date.

The substitution of expectancy (lost profit) damages in appellant’s 28 September 2006 Statement of Costs for the reliance (development cost) damages in the certified claim to the contracting officer does not constitute a new claim for purposes of certification. Both types of damages arise out of the same operative facts of breach. *Advanced Communications Systems*, ASBCA No. 52592, 06-2 BCA ¶ 33,429 at 165,736. However, the 42 percent increase in the amount of damages in the \$132,637,000 alternative amount, over and above the amount in the certified claim, does constitute a new claim because there is no showing that the increase is due to any new information on damages that was not reasonably available to appellant on 16 March 1998 when it submitted its certified claim. *See Tecom v. United States*, 732 F.2d 935, 938 (Fed. Cir. 1984).

The requirement for certification of claims applies not only to the facts of entitlement but also to those of amount. This requirement is too easily circumvented if we allow an uncertified increase in amount based on facts that were clearly known or reasonably available to appellant when the certified claim was submitted. *See D.E.W., Inc.*, ASBCA No. 35173, 89-3 BCA ¶ 22,008 at 110,640. The facts and estimates on which appellant's \$132,637,000 lost profits claim is based were either known or readily available to appellant when it submitted its 16 March 1998 certified claim to the contracting officer. The potential VAN customer base of 300,000 DoD vendors was known by appellant as early as 18 May 1994.¹ Appellant's estimates of an 18 percent market share and of its cost and revenues in that market during the period 1 November 1994 through 17 September 1997 when the lost profits allegedly would have been earned, were clearly available to it six months later when it submitted its certified claim. Accordingly, we strike that portion of the \$132,637,000 that exceeds the \$93,606,515 that was certified to the contracting officer.

We deny the government's request that appellant be required to certify its "Proof of Costs" and set forth a specific sum certain that it intends to prove at hearing. By certification, we understand the government to mean certification under the provisions of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(c)(1). There is no statutory requirement for such certification of our pleadings. Moreover, our Rule 6 does not prohibit pleading of alternative amounts of damages, and our Rule 7 provides for amendment of pleadings to conform to the proof.

We note, however, the statement in appellant's 20 February 2007 opposition to the government's motion that it will "shortly" file a revised Statement of Costs based on a potential market of 198,884 VAN customers. In light of that statement, we suspend the present 27 April 2007 deadline for the government to respond to appellant's 28 September 2006 Statement of Costs. Within ten days of receipt of this decision, appellant will either file its revised statement or advise the Board that it has no further revisions to make. At that time, the Board will confer with the parties and set a new date for submission of the government's response to the 28 September 2006 Statement of Costs.

¹ *See GAP Instrument Corporation, supra*, 01-1-BCA at 154,862 (finding 12).

The government's motion for appropriate relief is granted to the extent indicated above and otherwise denied.

Dated: 23 April 2007

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