

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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SUFU Network Services, Inc.) ASBCA No. 55306
)
Under Contract No. F41999-96-D-0057)

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OPINION BY ADMINISTRATIVE JUDGE JAMES ON
APPELLANT'S MOTION FOR RECONSIDERATION
OF DECISION ON RECONSIDERATION

Appellant moved for reconsideration of the Board's 21 November 2008 decision, *SUFU Network Systems, Inc.*, ASBCA No. 55306, 09-1 BCA ¶ 34,018, on 11 issues. Our 15 July 2009 decision granted appellant's motion for reconsideration in part, denied the balance, and increased SUFI's recovery from \$3,790,469.65 to \$6,906,495.43. 09-2 BCA ¶ 34,201. Familiarity with the foregoing decisions is assumed.

On 20 August 2009 SUFI moved for "Reconsideration of Decision on Reconsideration" on several issues. Respondent moved to dismiss that motion on 28 August 2009 on the ground that a second reconsideration is unavailable under Board Rule 29 and case precedents. On 4 September 2009 SUFI opposed that motion to dismiss. On 21 September 2009 respondent submitted an opposition to SUFI's 20 August motion, to which SUFI replied on 24 September 2009.

The parties' foregoing motions present two questions. (1) Does SUFI's 20 August 2009 motion for reconsideration merely reargue issues decided in the original or the reconsideration decisions, or does it seek to correct new matters decided and

calculated in the reconsideration decision, not previously addressed by the parties? (2) If the Board may entertain SUFI's 20 August 2009 motion, is it entitled to relief?

I.

A motion for reconsideration will be denied when a party seeks to reargue issues on which it did not prevail in the original decision or upon reconsideration. *See Environmental Safety Consultants, Inc.*, ASBCA No. 53485, 05-2 BCA ¶ 33,114 at 164,103, 06-1 BCA ¶ 33,122; *Butt Construction Co.*, ASBCA No. 52081, 00-1 BCA ¶ 30,862 at 152,348.

However, this Board has amended an original decision to correct errors, *see Weststar, Inc.*, ASBCA Nos. 52837, 53171, 04-1 BCA ¶ 32,501 at 160,789 (Board has inherent authority to vacate or correct its decision even after the expiration of the period for the filing of a motion for reconsideration, "upon grounds similar to" FED. R. CIV. P. 60(b)). We have entertained a second motion for reconsideration, and granted or denied relief, to correct our prior decisions. *See Environmental Safety Consultants, Inc.*, ASBCA No. 53485, 05-2 BCA ¶ 33,073 at 163,934, 163,937 (corrected calculations in reconsideration decision). In the present appeal, SUFI's motion for a second reconsideration also raises issues of calculation errors in our prior reconsideration. Moreover, we are mindful that under SUFI's nonappropriated fund contract no appeal from our decision is allowed. Accordingly, we deny the government's motion to dismiss and address SUFI's motion for a second reconsideration on the merits.

II.

Count III Hallway/Lobby DSN Phones

(1) SUFI contends, and the Board agrees, that the "1 July 2005" date for accrual of interest on the Count III recovery was inconsistent with the parties' 1 April 2005 partial settlement agreement, ¶ 4(a) (app. mot. at 2), which provided: "The Air Force will be liable to pay interest on any amounts paid or recovered by settlement or judgment from the earlier of (i) the [1 July 2005] date of receipt of the claim or (ii) the date damages are actually incurred, until payment." *SUFI Network Services, Inc.*, ASBCA No. 55306, 06-2 BCA ¶ 33,444 at 165,773. SUFI's 20 August 2009 motion requested interest to run on awarded damages starting on the approximate mid-point of the period in which the damages were incurred (app. mot. at 3). Consistent with our 21 November 2008 decision using that criterion for the running of interest, *e.g.*, on Count XIII (09-1 BCA ¶ 34,018 at 168,256), we correct that date to 15 June 2001, the approximate mid-point of the DSN call data from September 1997 through May 2005, the period for which SUFI claimed damages (ex. B205, tab 4A at 122).

(2) SUFI contends that our damages calculation erred because: (a) it encompassed 100 rather than 93 months, (b) its 13% rate of off-duty calls did not reflect increased weekend and holiday non-duty hours and (c) it used the wrong “weighted average long-distance rates for revenue and cost” (\$.8175 and \$.1508 in the decision, 09-2 BCA at 169,089), rather than \$.9181 and \$.1216 (app. mot. at 3-5).

(A) The “100 months” figure in our decision was an initial data point in arriving at our jury verdict. We have reexamined that figure in light of the instant motion, and concluded that the 100 month figure was in error. The correct figure should be 88.35 months. Therefore, we correct the 4,274,690 total minutes for the 28 known hall/lobby DSN phones to 3,776,689 total minutes for such phones (4,274,690 x .8835).

(B) The record includes no direct proof of which calls on the DSN phones in the lodging hallways and lobbies during the contract performance were official and which were unofficial, and no direct proof of the exact or approximate proportion of military and civilian lodging guests. Military personnel can be required to perform duties 24 hours per day, seven days per week.¹ Of 67 lodging guests who complained of phone call mischarging that SUFI investigated, 3 were civilian and 64 were military personnel (R4, tab 81B at 2101-2441). Our estimate that 13% of hallway/lobby DSN phone calls “were during other than normal duty hours” was “in the nature of a jury verdict” (09-2 BCA at 169,089) and was reasonable. In this regard we note that there is no evidence for the basic assumption in SUFI’s damages calculations that, if the DSN phones had been removed from the lodging hallways and lobbies, unofficial calls of the same duration that were “free” to the caller on the DSN phones would have been made over the SUFI room phones and charged to the caller’s account.

(C) We have reexamined the evidence of the weighted-average long distance revenue rate and the weighted-average long-distance cost rate, and find that the Board used the wrong rates. Therefore, we correct the difference between the weighted average revenues and cost rates from 0.6667 (0.8175-0.1508) in our 21 November 2008 decision to 0.7965 (0.9181-0.1216).

(3) SUFI requests the Board to “extend its analysis” of DISA call records to encompass calls to the local operator patched worldwide and calls to toll-free numbers of

¹ SUFI cited no proof that “flight crews...were ‘off duty’ for the entire time they were in the lodgings” (app. mot. at 4 n.3). “Prime Knight” strategic airlift crews stayed at Ramstein lodging Nos. 538, 540-42 typically for 12 hours, during which they deplaned, rested and checked with schedulers, maintenance and command post and returned to their aircraft (tr. 1/172-73, 3/77, 80-82). Delta Squadron flight crews performed daily scheduling in Sembach lodging No. 210 (tr. 10/91-95).

other long-distance carriers (app. mot. at 5). SUFI reargues the same contentions it advanced in its 14 September 2007 post-hearing reply brief (app. reply br. at 53 n.31, citing its 13 August 2007 post-hearing brief, ¶ 381) and in its 24 December 2008 motion for reconsideration (app. mot. at 29). We deny this request. *See* Point I, *supra*.

Conclusion. The extrapolated minutes for 43 known phone numbers and 95 unknown government DSN phone numbers are 11,814,343 minutes (13,372,205 x .8835), which at the 13% non-official call rate produces 1,535,864 minutes. 1,535,864 minutes multiplied by the \$0.7965 difference between SUFI's weighted average revenues and costs produces \$1,223,316.15 in lost revenues, a \$64,333.74 increase to the amount determined in our first reconsideration decision. With respect to Count III, we grant SUFI's motion to the extent of the \$64,333.74 increase and correction of the date for accrual of interest to 15 June 2001, and deny the balance.

Count V Other Operator Numbers Patching

SUFI asserts that our first reconsideration decision erred by denying damages for operator numbers 480-6120, 480-1110 and 480-1113 (app. mot. at 9). SUFI argued the same point in its 24 December 2008 motion for reconsideration (app. mot. at 38 n.18, attach. C, tab 6A at 1B-1D). With respect to Count V, we deny SUFI's motion. *See* Point I, *supra*.

Count VII Delta Squadron

SUFI contends that because our first reconsideration decision corrected the date when SUFI first threatened to remove its two DSN phones from the day room, we erred by denying damages due to the involuntary continued use of those two phones (app. mot. at 10-11). SUFI's conclusion does not follow from its premise. In any event, SUFI presented the same involuntary use argument in its 24 December 2008 motion for reconsideration (app. mot. at 45-47). With respect to Count VII, we deny SUFI's motion. *See* Point I, *supra*.

Count XVI Lost Profits

SUFI asserts that our first reconsideration decision erred by (1) omitting by "oversight" the Count IX award of \$758,463 in our revision of the list of lost revenues in 11 counts in finding 337 (09-2 BCA at 169,095) and (2) misreading the ¶ 29 Performance Period clause as less than 15 years following site acceptance (app. mot. at 11-16).

(1) Finding 337 of our 21 November 2008 decision was made in the context of "FURTHER FINDINGS ON REVENUE SHARING" with respect to SUFI's "Revenue Sharing" offset calculations (09-1 BCA at 168,286-88). SUFI's revenue sharing was

based on lost revenues under 11 counts, which excluded Count IX (finding 335; R4, tab 92A at 2976-78; ex. B205, tab 16A at 419-20). Thus, our reconsideration decision intentionally omitted Count IX in modifying finding 337 with respect to revenue sharing (09-2 BCA at 169,095). However, the calculation of lost profits in Count XVI in both the 21 November 2008 decision and the 15 July 2009 first reconsideration decision inadvertently omitted the July 2000-May 2005 portion of Count IX lost revenues we awarded. Our recalculation of lost profits set forth below includes the July 2000-May 2005 portion of Count IX lost revenues.

(2) SUFI argues that there is a reasonable, harmonious reading of the Performance Period clause and the specified contract end date: (a) the contract end date in clause F.4 Term of Contract defines when bases can no longer be added to the Contract under delivery orders, and (b) the H.4 Performance Period clause defines how long the contractor is to operate on the bases that are awarded under delivery orders (app. mot. at 12).

SUFI points to no record evidence that at the time of contract formation, or of bilateral Modification No. P00008, both parties interpreted clause F.4 to establish a date after which the government could no longer add bases to the contract. SUFI in effect interprets the H.29 PERFORMANCE PERIOD clause to provide that it was entitled to operate its LFTS at the designated bases for *not less than* 15 years. SUFI acknowledges (app. mot. at 15) that evidence of such mutual interpretation repeats the same evidence cited in its 24 December 2008 motion for reconsideration (at 66-67). SUFI's interpretation of the H.29 clause to establish a minimum performance period notwithstanding that it stated "shall not exceed a period of 15 years" does not impress us as a reasonable, harmonious reading of the F.4 and H.29 clauses. With respect to Count XVI, we deny SUFI's motion, except as set forth below in our Conclusion.

Extra Work Hourly Rates (finding 11)

SUFI asserts that our reconsideration decision erred by denying overhead and profit on its change claims and profit on its breach claims (app. mot. at 17-19). SUFI argued the same points in its 24 December 2008 motion for reconsideration (app. mot. at 69-76). With respect to extra work hourly rates, we deny SUFI's motion. *See* Point I, *supra*.

Conclusion. Due to our additional award of \$64,333.74 on Count III, *supra*, we have recalculated Count XVI total lost profits using the same steps A-I set forth in our 21 November 2008 and 15 July 2009 decisions. Revised total lost profits are increased from \$2,273,601 to \$2,561,353. Accordingly, we revise the table of principal amounts recoverable in our first reconsideration decision (09-2 BCA at 169,096) to \$7,258,581.17

(\$6,906,495.43 + 64,333.74 (Count III) + 287,752.00 (Count XVI)). SUFI's motion for a second reconsideration is granted to the extent set forth above and the balance is denied.

Dated: 14 December 2009

DAVID W. JAMES, 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

MONROE E. FREEMAN, JR.
Administrative Judge
Acting 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. 55306, Appeal of SUFI Network Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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