ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Applied Companies, Inc.	)	ASBCA Nos. 50749, 50896, 51662
	)	
Under Contract No. SPO450-94-D-0108	)	

APPEARANCE FOR THE APPELLANT: Peter B. Jones, Esq.
Jones & Donovan
Irvine, CA

APPEARANCE FOR THE GOVERNMENT: Donald S. Tracy, Esq.
Chief Trial Attorney
Defense Supply Center Richmond (DLA)
Richmond, VA

OPINION BY ADMINISTRATIVE JUDGE DICUS
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

ASBCA No. 50749 is taken from a contracting officer's unilateral determination awarding termination settlement costs and profit. ASBCA No. 51662 is taken from a contracting officer's decision denying appellant's claim of $1,025,812.80 for anticipatory profits.[1] ASBCA No. 50896 is taken from the deemed denial of appellant's claim of $967,909.50 for anticipatory profits in the option year of the contract. The parties have filed cross motions for summary judgment in all three appeals.[2] We grant appellant's motion in ASBCA Nos. 50749 and 51662. We grant the Government's motion in ASBCA No. 50896.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

General Findings of Fact Applicable to all Appeals

The RFP and Development of the Estimates

1. This appeal concerns a contract for the purchase of cylinders to store R-12 and R-114 refrigerants, identified as "Class I Ozone Depleting Substances (ODSs)." The National Defense Authorization Act for Fiscal Year 1993, Public Law 102-484, § 325 (Oct. 23, 1992), required the Defense Logistics Agency (DLA or Government) to build and maintain a stockpile or reserve (reserve) of all ODSs sufficient to ensure their availability for mission critical uses by all military departments and Defense agencies beyond 1995. DLA was directed to assess the amount of Class I ODSs in all military and Defense agency

inventories, the amount that would be used by all such entities from 1992 to 1995, the amount that could be recycled, and the amount needed beyond 1995 for mission critical uses. (Govt. PFF 5)

2. DLA established the ODS Reserve Program Office (ODSRPO) to manage, build and maintain the reserve (Govt. PFF 6).

3. By June of 1993, ODSRPO had informed the Defense General Supply Center (DGSC),[3] the DLA entity responsible for acquisition of R-12 and R-114, that the military services and Defense agencies had only been able to provide "ballpark" reserve estimates of about three million pounds for both R-12 and R-114. However, it had not been determined what size or sizes of cylinders would be needed for storing this quantity of refrigerants. The Government contemplated first purchasing all cylinders, then furnishing them as Government-furnished property in follow-on contracts for the refrigerants themselves. (Govt. PFF 7)

4. Using the "ballpark" reserve estimates, the item manager attempted to compute the number of cylinders of each size needed for the reserve. The cylinders used for storing R-12 and R-114 come in three sizes. The item manager decided to compute cylinder size estimates by assuming that each cylinder size would be used to store the entire "ballpark" estimate. The result was that the RFP's estimated quantities for the purchase of cylinders were triple the actual storage capacity needed to accommodate the "ballpark" estimate for R-12 and R-114. (Govt. PFF 7-8; app. PFF 5-7)

5. DGSC issued Request for Proposals (RFP) SPO412-93-R-2670 on 14 July 1993, with an 13 August 1993 closing date. The resultant contract was to have a 12-month basic ordering period, with one option year. The RFP requested proposals for a requirements contract for compressed gas cylinders of 42, 122, and 1000 pounds water capacity to be used for R-12 and R-114 storage. At issue are the 42 lb. water-capacity cylinders at line items 0001 and 0004. Deliveries were required not less than 30 days (FOB origin) after mailing or otherwise furnishing the delivery order to the contractor. Three amendments were issued prior to the request for Best and Final Offers (BAFOs) which, among other items, changed the delivery requirement to 75 days. (50749 R4, tab 1; complaint)

6. The item manager's estimates were forwarded to the contracting officer, who incorporated them as annual estimates in the RFP. The RFP thus provided the following information in Section B for line items 0001 and 0004:

	[EST. ANNUAL QUAN.]
0001	62,945 EA

MIN QTY PER DELIVERY ORDER: 6295 EA
MAX QTY PER DELIVERY ORDER: 25,178 EA

. . . .

0004 56,550 EA

MIN QTY PER DELIVERY ORDER: 5655 EA
MAX QTY PER DELIVERY ORDER: 22,620 EA

(50749 R4, tab 1) The RFP further specified that the variation in quantity would be "plus 03% minus 03%." The estimated quantities were the same for the option year. (50749 R4, tab 1 at 5, 7)

7. The contract required that the cylinders contain valves manufactured by Superior Valve Company, later amended to include Ceodeux Co. as a source (Gov't PFF 3; 50749 R4, tab 1).

8. The RFP incorporated in full text the following standard clauses: Federal Acquisition Regulation (FAR) 52.216-18 ORDERING (APR 1984), FAR 52.216-19 DELIVERY-ORDER [sic] LIMITATIONS (APR 1984), and 52.216-21 REQUIREMENTS (APR 1984) and 52.233-1, DISPUTES (DEC 1991). The RFP also provided a notice stating as follows:

> The quantity shown in the schedule is an estimated annual quantity. The Government has attempted to provide its best estimates based on past and anticipated purchasing patterns.

(50749 R4, tab 1)

9. On or about 11 August 1993, Applied Companies, Inc. (Applied or appellant) submitted a proposal of $52.60 per unit for line item 0001 and $52.60 per unit for line item 0004, for the base and option years. In its proposal, appellant represented that it was a manufacturer of the cylinders and checked the appropriate block of the Walsh-Healey Public Contracts Act representation. Appellant further represented that it intended to perform the contract at its plant in San Fernando, California. (Gov't PFF 10)

10. Commencing in September 1993, the Government performed a pre-award survey. The survey documents indicate appellant's intention to manufacture the cylinders itself. (50749 R4, tab 10)

11. In December 1993, the ODSRPO had begun to receive more realistic estimates for reserve requirements. In early 1994, DLA instructed DGSC that the ODS Reserve

requirements were being audited by the Navy (the primary user of many ODSs to be placed in the reserve) and the Air Force, and to forbear awarding contracts for the entire estimated refrigerant requirements until completion of the audits. (Gov't PFF 17-18) By January 1994, the ODSRPO and the DGSC Item Manager, contract specialist and contracting officer were each aware that the estimated quantities in the RFP were faulty. (Admission 14)

12. In March 1994, the ODSRPO informed the DGSC Item Manager that DGSC would purchase 25% of the 2.9 million lbs. of R-12 and 1.3 million lbs.[4] of R-114 quantities for the reserve. The Item Manager was told on 14 March 1994 that, for fiscal year 1994, the reserve required purchase of 42 lb. cylinders as follows: 2,555 for R-12 and 1,037 for R-114. (Gov't PFF 20-21)

Contract Award and Performance

13. On 20 June 1994, after discussions, receipt of BAFOs, and without adjusting the RFP's estimated quantities, the Government issued a notice of award of line items 0001 and 0004 to appellant, at the price of $52.60 per unit for each line item. The contract was effective 20 June 1994 through 14 June 1995. (Gov't PFF 24-25; R4, tab 1; Govt. ex. 16).

14. By FAX dated 30 June 1994, Manchester Tank & Equipment Co. (Manchester) submitted a proposal to appellant for the purchase of 42 lb. cylinders at a unit price of $43.05, based on annual quantities of 100,000. Appellant and Manchester exchanged correspondence concerning the terms and conditions of such purchase throughout the summer of 1994. There is a dispute of fact as to when appellant and Manchester came to terms on the delivery order quantity and whether there was a contract for the remainder of the base year. (Gov't exs. 18-32, 34-36; app. supp. br. at 3; Gov't supp. br. at 5)

15. The contracting officer issued Delivery Order No. 0001 (DO 0001) to appellant on 16 August 1994, requiring 5,411 R-12 cylinders and 4,933 R-114 cylinders (for a total of 10,344 cylinders), with 90 day delivery, or by 15 November 1994. The parties subsequently increased the amounts ordered in (bilateral) Modification No. 000101 to DO 0001, increasing the quantities to equal the minimum line item quantities stated in the contract (6,295 for line item 0001 and 5,655 for line item 0004) for a total of 11,950 units. (Gov't PFF 43, 55; Gov't ex. 48)

Reduction of the estimated quantities

16. By letter dated 29 August 1994, the Government notified appellant as follows:

> [T]he Government has discovered that a significant mistake was made in calculating the estimates. Therefore, the Government has recalculated the requirements as follows:

LINE ITEM	. . .	[EST ANN. QTY]
0001		5952
MIN QTY PER [DO]	1488	
MAX QTY PER [DO]	5952	
[0004]		5426
MIN QTY PER [DO]	1357	
MAX QTY PER [DO]	5426	

The Government requested comments by 6 September 1994, and stated its intention to issue a modification that reflected the adjustments upon receipt of the comments. (50749 R4, tab 13)

17. By letter dated 29 August 1994, appellant advised Manchester of the change in estimated and minimum and maximum quantities for each line item. Manchester increased its quote on 6 and 12 September 1994 to $46.48 per unit, contingent on the use of Ceodeux valves at $14.85, if supplied by Manchester, for a total price of $61.33. (Gov't exs. 43, 45, 46)

18. By letter dated 13 September 1994, supplemented on 26 September 1994, appellant submitted a revised price of $2,060,743.13, a total based on an increase in unit price from $52.60 to $126.98, plus $615,945 in "under absorbed indirect costs" based on a modified Eichleay calculation. Appellant submitted with its letter a new unit cost breakdown sheet indicating per unit material costs of $61.33, which sum equaled Manchester's attached price quotations. (Gov't PFF 53, 56, 58; Gov't exs. 44, 52)

19. The Government approved Sherwood as an additional valve supplier on 23 September 1994 (Gov't PFF 57). Bilateral Modification No. 000103, dated 18 October 1994, extended the delivery date from 15 November 1994 to 15 December 1994. (Gov't PFF 68)

20. Manchester advised appellant that delivery of the cylinders would not be before early 1995. (Gov't exs. 66-68, 70-75) By letter dated 17 November 1994, appellant requested that the Government extend DO 0001's delivery schedule to 30 January 1995. (Gov't PFF 69; Gov't ex. 66) By letter of 9 December 1994 appellant committed to delivery of cylinders at the rate of 2,000 per week commencing 27 January 1995 and offered consideration of $1,600 (50896 R4, tab 45).

21. When delivery was not made on 15 December 1994, the Government issued a 21 December 1994 show cause letter to appellant. The letter asked appellant to explain

within 10 days why the contract should not be terminated for default for failure to deliver on 15 December 1994. (50896 R4, tab 46) Appellant responded in a 27 December 1994 letter in which, *inter alia*, it restated its commitment to complete the contract and make delivery by 27 January. Enclosed with the letter was a copy of its 3 October 1994 order to Manchester for the cylinders ordered by the Government in DO 0001. (50896 R4, tab 47) In a 6 January 1995 letter appellant stated it was continuing with performance and continued to incur costs. The letter further states "[i]n order to minimize damages in the event of the government's termination of this contract, it is requested that DGSC advise us post haste as to its intentions to proceed forward or terminate this contract." (50896 R4, tab 48) By letter dated 9 January 1995 the Government agreed to continue the contract if the 27 January 1995 delivery schedule was firm and the parties could agree on a price adjustment (50896 R4, tab 49). On 12 January 1995, the Government proposed an equitable adjustment to $79 per unit to resolve appellant's request for equitable adjustment (Gov't ex. 85).

22. Appellant certified its 13 September 1994 request for equitable adjustment by letter dated 23 January 1995 (50749 R4, tab 16).

23. There is no evidence as to when appellant learned that the Government awarded the contract knowing of the faulty estimate.

24. The contract was terminated for convenience by letter of 6 February 1995 (Gov't ex. 87). By letter dated 22 February 1995, the Government stated it would take no further action on appellant's 13 September 1994 claim, and requested that appellant submit a termination settlement proposal under which the claim would be resolved. (Gov't ex. 88)

25. By submission dated 23 February 1995, appellant submitted its termination settlement proposal in the amount of $1,654,495. The proposal included under absorbed overhead of $1,115,509. (Gov't PFF 87)

26. By letter dated 5 June 1996, appellant submitted a final revised settlement proposal, increasing the amount claimed to $1,791,499 (50749 R4, tab 65). An interim revision dated 10 May 1995 is not a part of the file (50749 R4, tab 30).

27. By unilateral determination dated 26 February 1997, the Government settled the termination settlement proposal for $295,253.00 as follows:

	COST CATEGORY ALLOWED	**AMOUNT DETERMINED**
a.	Work-in-Process Note: This is the full Audit computed value IAW previously provided data	$211,458.00

b.	Profit Note: This amount is determined to be commensurate with the contract risk and effort performed under this contract.	31,718.00
c.	Subtotal	$243,176.00
d.	Settlement Expense	3,000.00
e.	Settlements with Subcontractors	$49,077.00
	Subtotal	$295,253.00
f.	Less Prior Payments	
	Jan. 1996	(65,818.00)
	Feb. 1997	(163,617.00)
	Jan. 1997 Invoice in Process	65,818.00
	Balance due:	-- 0 --

The unilateral determination specifically denied appellant's claim of under absorbed overhead. (Gov't PFF 87; 50749 R4, tab 9)

ASBCA No. 50749

28. Appellant filed a timely appeal from the unilateral determination, which we docketed as ASBCA No. 50749. In its complaint, appellant alleged that the Government was negligent in computing the original estimates and that the Government's negligence constituted a breach of contract, entitling appellant to anticipated profits. Appellant alleged it had entered into agreements with suppliers to manufacture cylinders at a cost of $43.75 per unit, leaving in its unit price $8.85 in profit (the difference between $43.75 and appellant's bid price of $52.60). Appellant multiplied $8.85 by the originally estimated quantities for a total of $1,057,530, subtracted the Termination Contracting Officer's calculation of $31,718 profit, for alleged total damages of $1,025,812.80.[5] (Complaint)

ASBCA No. 51662

29. The Government filed a motion to dismiss ASBCA No. 50749 based on lack of jurisdiction over the breach claim. The motion asserted that appellant had never raised breach of contract or anticipatory profits. (5 August 1997 motion) There is no evidence that appellant reserved the right to claim breach damages during performance of the contract. After an 11 March 1998 telephone conference with the Government and the Board, appellant agreed to submit a breach of contract claim for $1,025,812.80 to the contracting officer in order to render moot (except as to interest) the jurisdictional issue (11 March 1998 memorandum of Telephone Conference Call). Appellant submitted the breach claim on 12 June 1998. The claim seeks anticipatory profits of $1,025,812.80 and is properly certified (Gov't ex. 95).

30. By letter dated 12 June 1998, the contracting officer issued a final decision denying the breach claim. The contracting officer admitted that the Government failed to exercise due care in the preparation of the estimates because the estimates were not based on all of the knowledge existing at the time of award. (Gov't ex. 96) Appellant's appeal therefrom was docketed as ASBCA No. 51662.

ASBCA No. 50896

31. By letter dated 14 May 1997, appellant submitted a claim to the contracting officer in the amount of $967,909.50 for appellant's anticipated profit if the Government had exercised its option to extend the contract period for an additional year. Appellant's appeal from the contracting officer's failure to issue a final decision was docketed as ASBCA No. 50896. In its complaint, appellant alleged that the Government's negligent estimate of its annual quantity was a breach of contract. It alleged that the Government's failure to exercise the option for the second year, and to order the estimated quantity of cylinders for that year, was the natural, probable, and foreseeable consequence of the Government's negligent quantity estimate. (PFF 88)

Additional General Findings

32. Appellant's initial offer included a completed SF 1411 which indicated that its unit price included zero profit and included a statement that the "[r]ates quoted are done . . . in order to secure the business. This will be the foundation of future commercial business in this product." (PFF 11) There is no evidence that appellant modified its profit position during subsequent extensions of the opening date or negotiations.

33. Appellant has submitted the declaration of Kent L. Fortin, appellant's Chief Financial Officer. He participated in the formulation of the bid. He stated that appellant relied on the estimated amounts (approximately 10,000 per month) stated in the solicitation, and that its bid prices were based on anticipated high-volume production, economies of scale, and amortization of initial, preparatory unbalanced manufacturing costs on a per unit basis over the estimated annual quantities for the base year and option year. Mr. Fortin also stated that the price for the cylinders was less than one half of the price that would have been offered if the Government's estimated annual quantities had been 12,000 cylinders. (App. br., Ex. B)

PRELIMINARY MATTERS

Appellant's Objections to the Government's 97 exhibits and PFF

Appellant generally objects to the Board's consideration of the Government's 97 exhibits since "they have not been tendered in accordance with established procedures"

(Statement and Objections at 2). Appellant did not further specify the basis for its objection. We deny the objection.

Of the remaining exhibits, appellant further objects on relevancy grounds to those that comprise copies of its own correspondence with subcontractors concerning pricing of the cylinders to be supplied by the subcontractor, which we conclude were exhibits 18-32, 34-36, 43, 45-46, 53-54, 56, 58, 62-63, 66-68, 70-76, 79-80. We have found many of the exhibits relevant and, to the extent we have cited to them, we deny appellant's objections. Appellant also objects to many of the PFF on the basis that they are not relevant, or not relevant for the purpose of resolving these motions (*see* Statement and Objections to PFF 11-13, 15, 26-42, 44-46, 49, 51-52, 54-56,58-65, 67-85). We deny the objections and have made findings of fact utilizing those PFF.

DECISION

Summary judgment is appropriate under FED. R. CIV. P. 56, which we look to for guidance, where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. This principle also applies in the case of cross-motions for summary judgment. *Town of Port Deposit v. United States*, 21 Cl. Ct. 204, 208 (1990). However, on cross-motions "counsel are deemed to represent that all relevant facts are before the [Board] and a trial is unnecessary." *Aydin Corp. v. United States*, 669 F.2d 681, 689 (Ct. Cl. 1982).

Evidence sufficient to establish the existence of a genuine material factual issue need not be in a form that would be admissible at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). However, more than mere assertions of counsel are necessary to counter a motion for summary judgment. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624 (Fed. Cir. 1984). The nonmovant may not rest on its conclusory pleadings, but must set out, in affidavit or otherwise, what specific evidence could be offered at trial. Failing to do so may result in the motion being granted. Mere conclusory assertions do not raise a genuine issue of fact. (*Id.*) The party with the burden of proof must support its position with "more than a scintilla of evidence." *Walker v. American Motorists Insurance Co.*, 529 F.2d 1163, 1165 (5th Cir. 1976).

The Government's Motion - ASBCA Nos. 50749 and 51662

The Government argues that the overestimate by the Government was not a breach. It also argues that, because appellant's proposal was on a "no profit" basis, appellant has not met its burden to show that it incurred any damage in the form of lost profits. Appellant responds that it suffered a breach and that it has met the *prima facie* showing of damages necessary for the entitlement phase of these appeals. As we find in addressing appellant's motion in ASBCA Nos. 50749 and 51662 that the Government breached the contract and that appellant has made a *prima facie* showing of damages, the Government's motion is denied.

Appellant's Motion - ASBCA Nos. 50749 and 51662

It is not disputed that the Government knew it would actually need about one-tenth of the quantities in the solicitation. It did not exercise reasonable care when that knowledge, acquired well in advance of contract award, was not factored into the contract estimates. The Government was, therefore, negligent, and appellant is entitled to compensatory damages for breach of the contract. *Womack v. United States*, 389 F.2d 793, 800 (Ct. Cl. 1968). Breach damages may include anticipatory profits. *Carchia v. United States*, 485 F.2d 622, 625 (Ct. Cl. 1973).

While we are considering appellant's entitlement to damages only in this phase of the appeals, and not quantum, there must be some evidence of damage. *See, e.g., Cosmo Construction Co. v. United States,* 451 F.2d 602, 605-06 (Ct. Cl. 1971) ("Evidence on damages or quantum is not totally excluded [from the merits phase of the proceeding], because there must be *some* evidence of damage to support a finding on liability. . . . [I]t is only sufficient to demonstrate that the issue of liability is not purely academic; that some damage has been incurred.")

Appellant has submitted evidence of a post-award arrangement with Manchester which, in effect, lowered its cost of performance and would thereby have made the contract profitable. Although the Government disputes this, we conclude that appellant has made a showing "sufficient to demonstrate that the issue of liability is not purely academic." *Id.* We grant appellant's motion and sustain ASBCA Nos. 50749 and 51662, with the understanding that one of the appeals will be dismissed during the quantum phase after an agreement is reached or a determination is made as to the date when interest begins.

ASBCA No. 50896

Appellant seeks anticipatory profits for the option year. Appellant does not dispute that the option was never exercised (app. reply at 9). We agree with the Government's contention that an option is a unilateral right which the Government is free not to exercise. *Government Systems Advisors, Inc. v. United States*, 847 F.2d 811 (Fed. Cir. 1988). We grant the Government's motion with respect to ASBCA No. 50896.

SUMMARY

We grant appellant's motion in ASBCA Nos. 50749 and 51662 and sustain those appeals. We grant the Government's motion in ASBCA No. 50896 and deny that appeal.

Dated: 26 February 2001

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

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

NOTES

[1] ASBCA No. 51662 is a protective appeal filed because the Government had moved to dismiss ASBCA No. 50749. The parties agreed that the substance of the appeals is identical and a decision in either appeal resolves both. The jurisdictional issue raised by the Government thus affects only interest. The parties agreed to defer the issue until the quantum phase.

[2] With its cross-motion, the Government has submitted Proposed Findings of Fact (Govt. PFF). The PFF are supported by 97 exhibits submitted by the Government, some of which are duplicated in the Rule 4 file. Appellant's motion also includes proposed

findings of fact (app. PFF). Appellant's response to the Government's cross-motion included a "Statement of Genuine Issues and Objections to Respondent's Statement of Uncontroverted Facts" (Statement and Objections) in which appellant responded to each of the Government's proposed findings. We have based many of our findings on the proposed findings of one or both parties where there is no dispute. In a few instances we have based our findings on the Government's proposed findings where appellant's objection is on the basis of relevancy.

[3] DGSC is now named the Defense Supply Center Richmond (DSCR). For continuity, we continue to refer to it as DGSC.

[4] The actual weight of required R-114 was 1,353,289 lbs. (PFF 21)

[5] Appellant's calculations are off by $.10.

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. 50749, 50896 and 51662, Appeals of Applied Companies, Inc., rendered in conformance with the Board's Charter.

Dated:

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