ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Applied Companies, Inc.	)	ASBCA Nos. 50749 and 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 RESPONDENT'S MOTION FOR RECONSIDERATION

Respondent has moved for reconsideration of our decision in these appeals. In *Applied Companies, Inc.,* ASBCA Nos. 50749, 50896, 51662, 01-1 BCA ¶ 31,324, we found it undisputed that respondent had been negligent in the preparation of estimates and awarded the contract knowing that the estimates were significantly inflated. We held that this constituted a breach of the contract by respondent and granted appellant's summary judgment motion in ASBCA Nos. 50749 and 51662. We granted respondent's cross-motion in ASBCA No. 50896, which sought damages for option years. Respondent argues that the Board erred as a matter of law in holding that a contract breach occurred when respondent awarded the contract knowing that its quantity estimates were negligently prepared. According to respondent, this was a misrepresentation and, as such, inadequate to support a finding of breach. Respondent does not argue that any of our findings of undisputed facts was in error. Familiarity with our decision is presumed.

We found that the contracting officer was aware of the negligent estimates by January 1994, that the contract was nonetheless awarded on 20 June 1994, that the first delivery order was issued on 16 August 1994, and on 29 August 1994 respondent informed appellant of the error in the estimates (findings 11, 13, 15, 16). The disparity exceeded 90 percent (findings 6, 12). However, according to respondent:

> The act of awarding a requirements contract with erroneous estimates is not a breach of contract. A breach of contract occurs when a party fails to perform a duty owed under a contract.

(Motion at 2)

The timing of events and the state of the contracting officer's knowledge at critical times amply demonstrate that the contracting officer knew of the disparity well in advance of award and issuance of the first delivery order but took no action until after award and issuance of that delivery order. We think the contracting officer had an affirmative duty to disclose the accurate estimates before award. The contracting officer could not, with impunity, withhold that information, which was vital to pricing the deliverable items. *Womack v. United States*, 389 F.2d 793, 800 (Ct. Cl. 1968) (a material misrepresentation amounting to breach found where estimates used in the IFB were negligently prepared); *Snyder-Lynch Motors, Inc. v. United States*, 292 F.2d 907, 910 (Ct. Cl. 1961) (withholding information that the cost of parts would greatly exceed original estimate constituted a breach); *Ragonese v. United States*, 120 F. Supp. 768, 771 (Ct. Cl. 1954) (withholding of information on quantity of water constituted a breach). In breaching that affirmative duty, respondent's actions gave rise to a claim for total breach, which would encompass anticipatory profits. *Carchia v. United States*, 485 F.2d 622, 625 (Ct. Cl. 1973); RESTATEMENT (SECOND) OF CONTRACTS, § 243 cmt. a. (1981) ("No precise general rule can be stated for determining in all cases when a breach gives rise to a claim for damages for total breach . . . however [the most significant type is where] the breach occurs before the injured party has fully performed . . . .")

Respondent concedes that it breached its duty to use reasonable care in preparing the estimates, but argues this "was not a breach of a contractual promise, and is not compensated by award of anticipatory profits." We disagree. Perhaps some possibility existed that respondent could have fully performed or otherwise cured the breach caused by the negligent estimates, but it did not. Instead, it issued the 29 August 1994 letter (finding 16) which repudiated any contractual obligation created by the estimates and thereby impaired the face value of the contract by 90 percent. Whether viewed as a repudiation following a breach, RESTATEMENT, § 243 (2), or a repudiation not associated with a separate breach, *id*., § 250, the breach is total. In either case, appellant is entitled to be made whole, and here that includes anticipatory profits to the extent they can be proved.

We have considered respondent's arguments and affirm our original decision.

Dated: 21 May 2001

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

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

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 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