

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
LA Limited, )  
LA Hizmet Isletmeleri ) ASBCA No. 53447  
 )  
Under Contract No. F61354-97-H-0001 )

APPEARANCE FOR THE APPELLANT: Mr. M. Levent Adali  
Director

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF  
Chief Trial Attorney  
Richard L. Hanson, Esq.  
Deputy Chief Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TODD

Appellant did not receive satisfactory response to its proposals for settlement of the amount due pursuant to the Board's decision on entitlement and requested a decision of the quantum aspects of the appeal. In *LA Limited, LA Hizmet Isletmeleri*, ASBCA No. 52179, 01-1 BCA ¶ 31,319, we held appellant entitled to recovery in part on some of its claims for compensation for losses suffered in performance of its concessionaire contract for dining services at the United States Air Force Izmir Air Station in Izmir, Turkey. Familiarity with that decision is presumed. The parties have submitted the appeal for decision on the written record pursuant to Board Rule 11 without oral hearing.

FINDINGS OF FACT

Background

1. Appellant wrote to the Board that it had not been able to reach agreement with the Government after receiving the Board's decision on entitlement. Appellant sent the Board a copy of its settlement proposal, dated 9 April 2001, to the contracting officer. (App. facsimile ltr., dated 30 Jun 2001, to ASBCA) On 10 July 2001, the Board assigned docket number ASBCA No. 53447 to the quantum aspects of the appeal and sent the parties its Order on Proof of Costs requiring appellant's submission of a Statement of Costs and the Government's Response.

2. On 11 August 2001, appellant requested that the Board consider its settlement proposal, dated 9 April 2001, the required Statement of Costs.

3. On 30 November 2001, the Government provided the Board with a status report. The Government objected to appellant's failure to substantiate its claims and alleged a lack of responsiveness to the Board's Order on Proof of Costs. The Board notified the parties that it considered pages three through six of appellant's submission to the Board, dated 30 June 2001, appellant's Statement of Costs. Supporting documentation was enclosed therewith, and the Board required appellant to make available to the Government additional documents supporting the costs claimed. Appellant's itemization was:

Claim 1	\$ 2,665
Claim 3	27,193
Claim 4	120,000
Claim 5	32,631
Claim 6	62,000
Claim 7	135,957

The total amount of appellant's claims was \$380,446. The Board ordered the Government to file its response in schedule format with reference to appellant's Statement of Costs no later than 4 March 2002.

4. On 12 March 2002,<sup>1</sup> appellant filed a response to the Government comments on its claims in a letter, dated 12 February 2002, from the contracting officer, Mr. Anthony R. Edwards. Appellant stated that revised claims in the total amount of \$208,464 were its last and final proposal. Appellant's itemization of the revised claims<sup>2</sup> was:

Claim 1	\$ 1,960
Claim 3	10,000
Claim 4	15
Claim 5	32,631
Claim 6	62,000
Claim 7	101,873

Appellant enclosed copies of additional documents in support of its claims. (App. Itr., dated 12 Mar. 2001)

5. By letter dated 28 May 2002, the Government objected that the Board had failed to require appellant to file a statement of costs responsive to the Board's Order on Proof of Costs. The Government asserted it was unable to respond to appellant's Statement of Costs because with two exceptions it lacked supporting documentation. The Government responded with a critique on an item-by-item basis of appellant's listing of claimed costs

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<sup>1</sup> The letter bears the date 12 March 2001, which is an apparent erroneous statement of the year.

<sup>2</sup> Appellant did not include Claim 4 for \$15 in the total of its claims.

that the Board considers to be the Government's Response. The Government continued to expect the Board to force the appellant "to do what every other claimant has to do, provide sufficient detail, along with supporting documentation and certification, so that its claim can be audited, negotiated, and resolved." (Gov't ltr., dated 28 May 2002)

6. On 29 May 2002, the contracting officer's final decision signed by Mr. Edwards partially denied appellant's claim for \$208,464 for failure to produce adequate supporting documentation and data and provided a final offer for settlement purposes only of \$3,044.25. (COFD)

7. By memorandum dated 13 September 2002, the Defense Contract Audit Agency (DCAA) responded to the contracting officer's request for audit support for appellant's claims. DCAA enclosed draft results of its examination questioning the claimed amounts in total. DCAA based its conclusions on a lack of supporting documentation and certification provided with the claim and the failure of appellant to provide any additional supporting data or clarifications that it requested. Appellant did not provide DCAA access to its records. (DCAA Memorandum (DCAA Memo), dated 13 Sept. 2002)

### Appellant's Claims

#### Claim 1 - Computer Equipment

8. Appellant claimed \$1,960 for the costs of the computer equipment, plus interest. The costs are supported by an invoice, dated 4 July 1997, for 261,280 Turkish lira. (App. stmt., encl. 1) Appellant's conversion of Turkish lira to U.S. dollars for this claim has not been disputed by the Government. The contracting officer required delivery of the computer equipment as a condition for payment of the costs. (App. stmt. at 2; gov't resp. at 6) Appellant explained that it could not be returned because Mr. Adali had left it at the contract facility (app. ltr., dated 12 Mar. 2001). The contracting officer calculated the depreciated value of the computer equipment as \$784 (COFD).<sup>3</sup>

#### Claim 3 - Cleaning

9. Appellant initially claimed \$20,000 for its increased cost of cleaning, plus interest. The Board held appellant entitled to compensation for work that was in addition to routine daily cleaning at the beginning of the contract. Appellant has described the cost as including overtime paid to its employees, cleaning equipment (*e.g.*, detergent), and lost income on days the dining facilities were closed without reference to the time the costs were incurred. (App. stmt. at 2) Appellant reduced this claim to \$10,000 (app. ltr., dated

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<sup>3</sup> Using a standard method of straight line depreciation, the computation was \$1,960 divided by five years less zero salvage value times two years, the number of years in the original term of the contract ( $1,960 \div 5 - 0 \times 2 = 784$ ).

12 Mar. 2001). Appellant enclosed documentation of facility health inspections and its income from the Government, but has not provided payroll documentation, employee time cards, or vendor invoices to support the amount of cleaning cost claimed (app. stmt., encls. 2 to 4 and 21 to 24). The contracting officer had no support for the costs claimed and denied this claim in its entirety (COFD).

#### Claim 4 - Late Payments

10. Appellant claimed \$120,000 in interest and fines paid as a result of the Government's alleged 15 late payments. There were three late payments for which the Board held appellant entitled to a Prompt Payment Act penalty. *LA Limited, LA Hizmet Isletmeleri, supra*, at 154,703. The Government calculated the amount due and stipulated an amount of \$15 payable for this claim. Appellant has agreed to this amount. (COFD at 2; gov't resp. at 7, app. ltr., dated 12 Mar. 2001)

#### Claim 5 - Disposable Supplies

11. Appellant claimed \$32,631 for disposable supplies. Appellant estimated the costs incurred based on a cost of \$300 a week for 20 months, the actual term of the contract, and added an amount for interest charges ( $300 \times 20 \times 4 = 24,000 + 8,631 = 32,631$ ). Appellant submitted as supporting documentation copies of Government documents mentioning both the Akin Restaurant and the TIPs Snack Bar to show that more than one dishwasher was malfunctioning. (App. stmt. at 2, encls. 2, 20) The Government's Response relied on information from the contracting officer that the dishwasher was broken for only eight days and a more accurate total estimate of the cost of paper products for those days based on historical usage and actual cost was \$300. According to the Government, appellant would be entitled to 38 percent of that amount. The Government requested evidence from appellant of what was actually paid for paper products during the eight-day period and sufficient information to determine the quantities that were in excess of the amount for which appellant was responsible. (Gov't resp. at 7) Appellant did not change its claim, but stated that the dishwasher, according to documentation of a sanitation inspection, was never heating up to proper temperatures (app. ltr, dated 12 Mar 2002 at 2, attach. 2). The contracting officer has stipulated that \$300 was payable for this claim (COFD).

#### Claim 6 - Happy Hours

12. Appellant claimed \$45,600 in loss of net receipts resulting from discounted prices for services during happy hours, plus interest. Appellant based the claim on 38 percent of an estimated weekly cost of \$1,500 ( $1,500 \times 20 \times 4 = 120,000 \times .38 = 45,600$ ). (App. stmt. at 2). Appellant did not provide supporting documentation, but stated that it would be found in the happy hour contracts in the NAFI (Non-Appropriated Fund Instrumentality)/Services files. Appellant further stated that it had "never been issued any

documentation about the charges, payments, purchases etc by nafi” (app. ltr., dated 30 June 2001 at 1).

13. The contracting officer calculated an estimated loss of net receipts as \$7,296. He based this estimate on historical data from the NAFI Services department that the food cost approximately \$100 to \$300 per week. The contracting officer applied 38 percent to an average cost of \$200 for the original two-year term of the contract ( $200 \times 24 \times 4 = 19,200 \times .38 = 7,296$ ). (Gov’t resp. at 8) Appellant continued to request Government research of happy hour contracts (app. ltr., dated 12 Mar. 2001). The contracting officer did not have access to the contracts, which had been destroyed after three years, but found the same information in audit reports from the contract period. Based on this documentation, the contracting officer calculated<sup>4</sup> the amount to which appellant was entitled and withdrew the Government’s previous estimate. He stipulated an amount of \$1,257.50 payable for this claim. (COFD) The DCAA draft report noted the contracting officer’s determination and summarized the calculations as follows:

The contracting officer determined from government records that LA Ltd.’s happy hour cost for the two years was \$40,565 and that normal industry discounts were three to five percent. This resulted in a total of \$2,028 of discount cost of which LA Ltd.’s share would be 62 percent.

(DCAA Memo at 5) We have found the contracting officer’s calculations erroneous and revise the amount due to \$1,323.68.<sup>5</sup>

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<sup>4</sup> The contracting office calculated the difference in revenues for happy hours based on an industry standard and NAFI/Services practice of approximately three to five percent discount. The gross receipts for happy hour contracts were used to determine the higher revenues appellant would have received as 62 percent of the difference. Gross receipts for the first year of the contract of \$21,608.49 multiplied by five percent was the amount added to gross receipts to determine higher revenues of \$22,688.91 ( $21,608.49 \times .05 = 1,080.42 + 21,608.49 = 22,688.91$ ) and find the difference in revenues of which appellant was entitled to 62 percent, or \$669.86 ( $22,688.91 - 21,608.49 = 1,080.42 \times .62 = 669.86$ ). Based on gross receipts of \$18,956.34 for the second year of the contract, the contracting officer found appellant entitled to \$587.65 as its share of the revenues ( $18,956.34 \times .05 = 947.82 + 18,956.34 = 19,904.16$  and  $19,904.16 - 18,956.34 = 947.82 \times .62 = 587.64$ ). The contracting officer found the difference between the full price and the discounted price was \$2,028.24, and appellant’s 62 percent share was \$1,257.50 ( $1,080.42 + 947.82 = 2,028.24 \times .62 = 1,257.50$ ). (COFD, attach. 2)

<sup>5</sup> To determine the higher revenues when application of a five percent discount gave gross receipts of \$21,608.49, the calculation should have been based on finding the amount as 95 percent of the unknown number (x). Since x times .95 equals

### Claim 7 - The Strike

14. Appellant claimed strike losses in connection with (a) taxes, social insurance, interest, and fines payable to the Turkish government, (b) Mr. Adali's loss of income, (c) Mr. Adali's loss of income on another job, and (d) the sale of Mr. Adali's house in the total amount of \$135,957, including interest charges (app. stmt. at 3, 5).

15. Appellant claimed that it had not received the amount of \$2,950 provided by Contract Modification No. P00006, dated 12 November 1998, for payment of taxes and insurance related to the employees' salaries earned during the strike and could not pay the Turkish government when the payments were due. Appellant claimed it owed the Turkish government \$8,600, including interest and fines as a result. (*Id.* at 3) Appellant revised this claim to \$23,573 (app. ltr., dated 12 Mar. 2001). Appellant submitted government documents which contain the amounts of Turkish lira from which appellant allegedly determined this dollar amount. The documents were not translated from Turkish. DCAA was unable to verify their applicability to appellant's claim. (DCAA Memo at 6)

16. Appellant initially claimed \$46,000 in loss of income. The amount of the claim including interest was \$62,543. (App. stmt. at 3) After a meeting with Government representatives, Mr. Adali stated that he agreed that he should have been making \$15,000 during the strike period (app. ltr. dated 12 Mar 2001). The claimed loss of other income was \$12,000 for which appellant claimed \$16,315 with interest (app. stmt. at 3).

17. Appellant claimed losses of \$58,499, including interest, as a result of the sale of Mr. Adali's house to meet obligations for payment of employee salaries, taxes, insurance, and accounting fees (*id.*). The claim was revised to \$50,000, which was asserted as the current value of the house. In its revised claim, appellant added an item for accounting fees in the amount of \$13,300. The total revised claim for strike losses was \$101,873. (App. stmt.; app. ltr, dated 12 Mar. 2002)

18. The Government's Response suggested payment of the claim on the basis of the difference between revenues based on sales during the strike and estimated average revenues before and after the strike based on sales of approximately \$50,000 to \$60,000.

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21,608.49, x equals 21,608.49 divided by .95, or 22,745.77. The difference between the higher revenues and the discounted gross receipts gives appellant \$705.11 as its share of revenues for the first year ( $22,745.77 - 21,608.49 = 1,137.28 \times .62 = 705.11$ ). By the same calculation the higher revenues applied to the second year of gross receipts, were \$19,954.04 and appellant's share was \$618.57 ( $18,956.34 \text{ divided by } .95 = 19,954.04 - 18,956.34 = 997.70 \times .62 = 618.57$ ). Appellant's total entitlement for loss of revenues is \$1,323.68 ( $705.11 + 618.57 = 1,323.68$ ).

The appropriate percentage amount of this difference could be payable as appellant's lost revenue. The Government could also reimburse appellant for its payment of employment taxes, but not any interest or penalties, owed to the Turkish government for the time of the strike. The Government had no obligation to advance funds for the payment of these taxes. (Gov't resp. at 8)

19. The contracting officer attempted to substantiate the claim for employee taxes and insurance with monthly tax statements from the Turkish government. The contracting officer was concerned as to the applicability of the statements and concluded that they did not substantiate the total amount that appellant was claiming. The contracting officer determined that the statements showed that appellant owed total taxes, including all interest and penalties, to the Turkish government of only \$1,375.50. The contracting officer decided that \$687.75 was payable on this claim. (COFD)

### DECISION

Appellant has the burden of proving quantum with respect to its affirmative claims. To meet its burden of proof, appellant must establish both the reasonableness of the costs claimed and their causal connection to the event on which the claim is based. *Delco Electronics Corp. v. United States*, 17 Cl. Ct. 302, 319 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990) (table); *American Mechanical, Inc.*, ASBCA No. 52033, 03-1 BCA ¶ 32,134 at 158,898. The contractor must prove the amount of loss with sufficient certainty so that determination of the amount for which the Government is liable will be more than mere speculation. *See Lisbon Contractors, Inc.*, 828 F.2d 759, 767 (Fed. Cir. 1987); *J. W. Cook & Sons, Inc.*, ASBCA No. 39691, 92-3 BCA ¶ 25,053 at 124,863. Where liability is clear and a fair and reasonable approximation is possible, it is "legal error for the board to fail to enter an award for damages in the nature of a jury verdict." *S.W. Electronics & Manufacturing Corp. v. United States*, 655 F.2d 1078, 1088 (Ct. Cl. 1981). Costs may not be charged against the Government unless actually incurred. *Riverside Research Institute v. United States*, 860 F.2d 420, 424 (Fed. Cir. 1988); *Aislamientos y Construcciones Apache S.A.*, ASBCA No. 45437, 97-1 BCA ¶ 28,632 at 142,958. Where the contractor fails to provide accounting or other evidence to substantiate its allegations of a quantum recovery, it has not met its burden of proof and is therefore not entitled to payment. *Reese Industries*, ASBCA No. 29029, 86-2 BCA ¶ 18,962, at 95,746.

The Government maintains that appellant has relied upon unsubstantiated generalizations and allegations and sought dismissal of the appeal without prejudice for failure to submit a properly documented and certified claim. We sustained the adequacy of appellant's claim in ASBCA No. 52179, the entitlement phase of the appeal, which is part of the record in the subject appeal. When the Board sustains an appeal as to entitlement only and remands the matter to the parties for determination of quantum, the Board retains jurisdiction. The fact that the present proceedings have been assigned a new docket number as a matter of administrative docket management procedure does not affect the nature of

the proceeding. *Swanson Group, Inc.*, ASBCA No. 53496, 02-1 BCA ¶ 31,800. Appellant has not changed the nature of its claims and is not precluded from changing the amounts of its claims after certification was complete. The extent of the documentation of the claim is a matter of proof that goes to the merits to be decided on the complete record that the parties have presented.

In its final submission the Government did not dispute the conclusions of the contracting officer that are based on the record in the appeal. Specifically, the Government stated:

[W]e believe that the Board has everything it needs to conclude its efforts on these claims. The contracting officer's 29 May 2002 final decision . . . provides the Board with thoughtful and thorough analysis, including value judgments that are more generous than warranted by Appellant's claim.

Letter, dated 13 September 2002, from Richard L. Hanson, Esq. to ASBCA (Recorder) at 1. Accordingly, we have accepted the concessions in the contracting officer's final decision.

Appellant has added amounts for interest charges to several of its claims. Allowance of interest on a claim against the Government requires an explicit waiver of sovereign immunity, either by way of a specific statute or express contract provision. *Fidelity Construction Company v. United States*, 700 F.2d 1379 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 826 (1983); *Caterpillar Tractor Company*, ASBCA No. 30186, 86-1 BCA ¶ 18,538. Appellant points to no basis for recovery of these interest charges, and we have found none.<sup>6</sup>

The amount due and payable for computer equipment is established by appellant's invoice. The equipment was left in the possession of the Government (finding 8). Therefore, we find no basis for the Government to demand return of the equipment as a condition for payment of the full amount of costs appellant incurred to purchase it. Appellant is entitled to recover \$1,960.

Appellant failed to provide evidence to substantiate its allegations of \$10,000 for increased cleaning costs and is not entitled to payment.

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<sup>6</sup> Under the Contract Disputes Act (CDA), 41 U.S.C. § 611, a contractor is entitled to interest on amounts found due on claims at rates established by the Secretary of the Treasury. The basis for our jurisdiction of this concessionaire contract is not the CDA, but the Disputes clause in the contract. *LA Limited, LA Hizmet Isletmeleri*, ASBCA No. 52179, 00-1 BCA ¶ 30,865.



We have concluded that appellant is entitled to \$15 in penalties for the Government's late payments.

We are not persuaded by appellant's evidence that a fair and reasonable estimate of the costs incurred for purchasing excess disposable supplies when it could not use Government-furnished dishwashers was \$24,000. In the absence of evidence on which we can make an independent estimate, we accept the contracting officer's calculation. Appellant is entitled to \$300 for disposable supplies.

We are not persuaded by appellant's evidence that its loss of revenues from NAFI's use of discounted prices for services during happy hours was \$45,600. Appellant received supporting documentation that was in the possession of the Government. The contracting officer's determination of the amount due was based on evidence of gross receipts for happy hour contracts and the industry standard discount which NAFI adopted in its pricing (finding 13). Appellant has not provided any calculation of its loss of revenues on the basis of the NAFI records it requested to dispute the Government's determination. Based on the evidence and the corrected calculations of the amount due, appellant is entitled to \$1,323.68 for loss of revenues from happy hours.

Appellant was provided compensation for losses related to the strike in Contract Modification No. P00006. The modification specified the amount of \$2,950 as taxes and insurance. Since appellant did not have funds to make these payments to the Turkish government, it did not obtain receipts required for Government reimbursement. There is no question that the employees were paid the salaries provided by the modification, and the corresponding amount contemporaneously calculated as owing the Turkish government for taxes and insurance was therefore due. Appellant is entitled to recover \$2,950. The parties dispute the full amount due the Turkish government, and we are unable to determine any other amount that could be payable by appellant from the government forms that have not been translated or shown to be applicable to the contract during the period of the strike. Appellant has failed to establish the Government's liability for any additional amounts owing the Turkish government related to the strike.

Appellant's claims for Mr. Adali's loss of income and losses resulting from the sale of Mr. Adali's house are personal losses that were suffered by an individual director of the contractor company and are not compensable costs incurred or damages suffered by appellant. *See LA Limited, LA Hizmet Isletmeleri, supra*, 00-1 BCA at 152,361. Appellant failed to substantiate any accounting fees for which the Government could be liable. Appellant is not entitled to payment of its other losses claimed as resulting from the strike.

#### CONCLUSION

Appellant is entitled to an equitable adjustment of \$6,548.68 for:

Claim 1 - Computer Equipment	\$1,960.00
Claim 3 - Late Payments	15.00
Claim 4 - Disposable Supplies	300.00
Claim 5 - Happy Hours	1,323.68
Claim 6 - The Strike	2,950.00

The appeal is sustained in part and otherwise denied.

Dated: 4 December 2003

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LISA ANDERSON TODD  
 Administrative Judge  
 Armed Services Board  
 of Contract Appeals

(Signatures continued)

I concur

I concur

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

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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. 53447, Appeal of LA Limited, LA Hizmet Isletmeleri, rendered in conformance with the Board's Charter.

Dated:

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