ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Applied Companies, Inc.	)	ASBCA Nos. 50749, 54506
	)	
Under Contract No. SPO450-94-D-0108	)	

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OPINION BY ADMINISTRATIVE JUDGE DICUS
ON THE GOVERNMENT'S MOTIONS TO DISMISS

These appeals involve a contract for the purchase of cylinders from appellant, Applied Companies, Inc. (Applied). Following the remand from an entitlement decision by the United States Court of Appeals for the Federal Circuit, the government has moved to dismiss the appeals on jurisdictional grounds. The government's motions to dismiss ASBCA Nos. 50749 and 54506 are denied.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

1. In the National Defense Authorization Act for Fiscal Year 1993, Public Law No. 102-484, § 325 (Oct. 23, 1992), Congress required the Defense Logistics Agency (DLA) to build and maintain a stockpile or reserve of Ozone Depleting Substances (ODSs) including R-12 and R-114 refrigerants. *Applied Companies, Inc.*, ASBCA Nos. 50749, 50896, 51662, 01-1 BCA ¶ 31,325 ("*Applied I*") (findings of fact (FOF) 1).[1] DLA established the ODS Reserve Program Office (ODSRPO) to manage, build, and maintain the reserve. *Id.*, (FOF 2).

2. The Defense General Supply Center (DGSC) was the DLA entity responsible for acquisition of R-12 and R-114. *Id.*, (FOF 3).[2] DGSC issued Request for Proposals (RFP) SPO412-93-R-2670 in July 1993. *Id.*, (FOF 5). The government sought proposals for a

[1] The Board denied reconsideration of this decision in *Applied Companies, Inc.*, ASBCA Nos. 50749, 51662, 01-2 BCA ¶ 31,430.

[2] DGSC is now the Defense Supply Center Richmond. *Applied I*, (FOF 3 n.3).

requirements contract to purchase compressed gas cylinders to store R-12 and R-114. *Id.*, (FOF 1, 5). The contract was to have a 12-month ordering period and one option year. *Id.*, (FOF 5).

3. For the line items at issue, 0001 and 0004, the RFP stated the following:

	[*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

Id., (FOF 6). It also provided a notice that the quantity shown in the schedule was an estimated annual quantity, and that the government attempted to provide its best estimates based on past and anticipated purchase patterns. *Id.*, (FOF 8). As we previously found, however, the RFP's estimated quantities were triple the actual storage capacity needed. *Id.*, (FOF 4).

4. In August 1993, Applied submitted a proposal of $52.60 per unit for line item 0001 and line item 0004 for the base and option years. *Id.*, (FOF 9). By January 1994, the ODSRPO and DGSC Item Manager, contract specialist, and contracting officer were aware that the estimated quantities in the RFP were faulty. *Id.*, (FOF 11). In June 1994, without an adjustment of the RFP's estimated quantities, the government awarded line items 0001 and 0004 to appellant at the price of $52.60 per unit for each line item. *Id.*, (FOF 13). The contract was effective 20 June 1994 through 14 June 1995. *Id.*

5. In paragraph I244, the contract incorporated by reference FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984) (R4, tab 1, continuation sheet at 17 of 29). This provision allowed the government to terminate work under the contract, in whole or in part, if the contracting officer determined that termination was in the government's interest. FAR 52.249-2(a). Following termination,

the contractor was to submit a termination settlement proposal. FAR 52.249-2(e). The contracting officer and contractor could agree on the amount to be paid or remaining to be paid because of the termination including "a reasonable allowance for profit on work done." FAR 52.249-2(f). If they did not agree on the amount to be paid because of the termination of work, the contracting officer was to pay the contractor an amount determined under FAR 52.249-2(g).

6. In August 1994, the government proposed a significant reduction in the estimated, minimum, and maximum quantities for each line item. *Applied I*, (FOF 16). Appellant submitted a revised price of $126.98 per unit in September 1994. *Id*., (FOF 18). After further communications between the parties, the delivery date was extended to 15 December 1994. *Id*., (FOF 17-20). Applied did not make delivery, and the government issued a show cause letter. *Id*., (FOF 21). Appellant responded to the letter restating its commitment to complete the contract and proposing to make delivery by 27 January 1995. The government agreed to continue the contract if the 27 January date was firm and the parties could agree on a price adjustment. In January 1995, the government offered an equitable adjustment to $79 per unit to resolve appellant's request for a price adjustment. *Id*.

7. The government terminated the contract for the convenience of the government in February 1995. It later stated that it would not take further action on Applied's September 1994 claim and asked appellant to submit a termination settlement proposal under which the claim would be resolved. *Id*., (FOF 24).

8. In late February 1995, appellant submitted a termination settlement proposal in the amount of $1,654,495. *Id*., (FOF 25). The proposal included $1,115,509 in underabsorbed (or unabsorbed) overhead. *Id.* The unabsorbed overhead is found in Schedule B and in Schedule D appellant seeks profit of 12 percent ($178,519) based principally on application of the 12 percent to unabsorbed overhead (R4, tab 21). In an amended proposal dated 10 May 1995 the unabsorbed overhead in Schedule B is referenced in Exhibit A, which explains that the amount of unabsorbed overhead is derived from a calculation which uses estimated contract sales through the full contract performance period to 30 June 1995 (R4, tab 30, ex. A at 1). Thus, appellant sought unearned but anticipated overhead and profit. The amount claimed by appellant was increased to $1,791,499 in a 5 June 1996 submittal to the termination contracting officer. Attachment A to the submittal was titled UNABSORBED OVERHEAD AFTER TERMINATION FOR CONVENIENCE. In Attachment A appellant quotes from a treatise asserting "the measure of damages is the profit **(including reasonable overhead)** which the seller would have made from the full performance of the contract" (emphasis in original). It also includes a reference that states "unabsorbed overhead has been allowed in the exceptional circumstances." (R4, tab 65, attach. A at 2, 4) The issue of recovery of profit through full performance and unabsorbed overhead was thus before the contracting officer.

9. On 26 February 1997, the government issued a unilateral determination of the termination settlement proposal in the amount of $295,253. Of that amount, $211,458 was for work-in-process and $31,718 was for profit. *Applied I*, (FOF 27).

10. A timely appeal from the unilateral determination of the termination settlement proposal was docketed as ASBCA No. 50749. *Id.*, (FOF 28). The notice of appeal stated that Applied "appeals from the final decision of the contracting officer dated February 26, 1997" and that the amount in dispute was $1,025,813. It also forwarded the complaint. In its complaint in ASBCA No. 50749, Applied alleged that the government had breached the contract by negligently estimating the quantities of cylinders needed under the contract. Appellant sought the profit ("which term includes reasonable fixed burden") it would have earned on the originally computed estimates less the profit awarded in the unilateral determination, $1,025,812.80. (Compl., ¶¶ 14, 15)

11. In August 1997, the government moved to dismiss ASBCA No. 50749 arguing that Applied had not asserted a breach claim or sought anticipatory profits. *Applied I*, (FOF 29). As the result of a telephone conference between the Board and the parties, appellant agreed to submit a breach of contract claim for $1,025,812.80 to the contracting officer "to render moot (except as to interest) the jurisdictional issue." *Id.* Applied did so, and, in June 1998, the contracting officer denied the claim. *Id.*, (FOF 30). In July 1998, appellant appealed the decision which was docketed as ASBCA No. 51662. *Id.*

12. In May 1997, appellant filed a claim for its anticipated profits if the government had exercised the option to extend the contract for an additional year. The appeal from the contracting officer's failure to issue a decision on this claim was docketed as ASBCA No. 50896. *Id.*, (FOF 31).

13. The parties filed cross-motions for summary judgment as to ASBCA Nos. 50749, 50896, and 51662. In ASBCA Nos. 50749 and 51662, the Board found that the government had breached the contract by negligently formulating the original contract estimates. *Applied Companies, Inc.*, 01-1 BCA ¶ 31,325 at 154,734. Appellant was therefore entitled to compensatory damages which might include anticipatory profits. *Id.* In ASBCA No. 50896, the Board ruled that appellant was not entitled to anticipatory damages for the unexercised option year. *Id.* at 154,735. On a government request for reconsideration of the decision in ASBCA Nos. 50749 and 51662, the Board affirmed its earlier decision. *Applied Companies, Inc.*, ASBCA Nos. 50749, 51662, 01-2 BCA ¶ 31,430.

14. The government appealed the Board's decisions in ASBCA Nos. 50749 and 51662 to the United States Court of Appeals for the Federal Circuit. The Court affirmed the Board's decision. *Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1328 (Fed. Cir. 2003), *cert. denied*, __ U.S. __, 124 S. Ct. 462 (2003) (*"Applied II")*. The Federal Circuit first held that the Board did not err in finding that the government breached the contract by

including negligently prepared estimates in the solicitation and that appellant was entitled to recover damages resulting from the breach. *Rumsfeld v. Applied Companies, Inc.*, 325 F.3d at 1335. Although only entitlement had been before the Board, the Court found it appropriate to offer guidance on damages and went on to hold that Applied was not entitled to anticipatory profits. *Id.*, at 1335-42. It then set out alternative methods for measuring damages depending on whether or not Applied had delivered cylinders before the contract was terminated. *Id.*, at 1341-42.

15. By letter dated 12 February 2004, appellant requested that the Board "initiate proceedings for determination of quantum" in ASBCA Nos. 50749 and 51662. Applied stated that it was seeking $1,116,916. The Board, in keeping with its normal administrative practice in the quantum phase, docketed a quantum appeal that was assigned ASBCA No. 54506. It did not, at that time, reinstate ASBCA Nos. 50749 or 51662. Applied was directed to submit a statement of costs due appellant in accordance with the Board's decision on ASBCA Nos. 50749 and 51662. The government would then have 30 days in which to respond to appellant's statement.

16. Applied submitted a Statement of Damages Due in the amount of $1,116,911 in early April 2004. The Statement characterizes the damages sought as "burden costs," which we construe in context as synonymous with unabsorbed overhead. The government responded by filing motions to dismiss ASBCA Nos. 50749 and 54506,[3] whereupon the Board reinstated ASBCA No. 50749. Appellant thereafter filed an opposition to the motions to dismiss.

DECISION

Both motions to dismiss challenge the subject-matter jurisdiction of the Board. With respect to ASBCA No. 50749, the government asserts that appellant's claim was never presented to the contracting officer. Regarding ASBCA No. 54506, the government argues, in essence, that appellant's claim is too late. As to both appeals, we find that the relevant facts are undisputed and that, under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, *as amended*, the appeals are properly before the Board.[4]

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[3] The government has not moved for dismissal of ASBCA No. 51662.

[4] It is not clear, beyond the running of interest, what practical effect the granting of the government's motion in ASBCA No. 50749 would have, since there is no challenge to ASBCA No. 51662. Moreover, ASBCA No. 54506 is the administrative result of appellant's request to initiate quantum proceedings in ASBCA Nos. 50749 and 51662. We cannot consider anticipatory profits, as *Applied II* precludes anticipatory profits from our consideration, and, as set forth herein, there is no doubt that ASBCA No. 50749 presented overhead, albeit in a different amount, to the contracting officer.

ASBCA No. 50749

The key premise of the motion to dismiss ASBCA No. 50749 is that Applied's appeal was limited solely to a breach of contract theory and a request for anticipatory profits. Neither that theory nor that measure of damages had, in the government's view, been presented to the contracting officer as required by the CDA, 41 U.S.C. § 605(a). Therefore, the government argues, the Board did not have jurisdiction to hear the appeal.

We find that the claim in appeal ASBCA No. 50749 included the essential issue over which respondent asserts we lacked jurisdiction—recovery of anticipatory profit. While not specifically referring to "anticipatory profit" as such, the 10 May 1995 and 5 June 1996 modifications to the Termination Settlement Proposal effectively placed the issue before the contracting officer by reference to the measure of damages as including profit through the full performance period of the contract (finding 8). This necessarily entails recovery of profits anticipated but unearned. Such anticipatory profits are not recoverable as part of a termination for convenience settlement, but as breach damages. *Nolan Brothers, Inc. v. United States*, 405 F.2d 1250 (Ct. Cl. 1969). Appellant thus implicitly placed the government on notice of its breach theory. The contracting officer's decision was a unilateral determination of what appellant was entitled to as a result of the termination for convenience and must be presumed to confront all of appellant's bases for and elements of recovery. Appellant's appeal from that determination was sufficient, in the circumstances of this case, to place before the contracting officer, and thus before the Board, its entitlement to anticipatory profits.

Moreover, the Termination Settlement Proposal also made ample reference to unabsorbed overhead, the basis on which appellant currently seeks redress, so the appeal suffers from no jurisdictional disability on that score. Nor is there any failing arising from the notice itself. A notice of appeal must reflect dissatisfaction with a contracting officer's decision and indicate an intention to appeal to the Board. *Brunner Bau GmbH*, ASBCA No. 35678, 89-1 BCA ¶ 21,315 at 107,487. The Board reads notices of appeal liberally. *Id*., at 107,488. The notice of appeal in ASBCA No. 50749 demonstrated both dissatisfaction with the unilateral determination and an intention to appeal that determination. It is correct that the notice of appeal stated that the amount in dispute was $1,025,813 which was the amount calculated in the complaint under an anticipatory profits theory, but the anticipatory profits claimed expressly included overhead ("burden") (findings 10, 16) . However, nothing prevents an appellant, in the proper circumstances, from attempting to add new theories or attempting to change the amount sought. *Trepte Construction Co.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385-86. Further, there is no indication in the notice of appeal that Applied intended to accept any part of the contracting officer's decision (finding 10). *See Brunner Bau GmbH*, 89-1 BCA at 107,488. We decline to view Applied's notice

of appeal as an attempt to limit the appeal to a breach of contract theory with damages measured by lost profits.[5]

ASBCA No. 54506

It is the Board's practice to bifurcate entitlement and quantum. ASBCA No. 54506 is the quantum alter ego of ASBCA Nos. 50749 and 51662, and our jurisdiction in that appeal, in the circumstances, sinks or swims with our jurisdiction in ASBCA Nos. 50749 and 51662. The motion to dismiss ASBCA No. 54506 is based essentially on the same premise as the motion to dismiss ASBCA No. 50749. The government says that instead of appealing the 26 February 1997 contracting officer's decision, Applied attempted to file an appeal based on a claim that had not been presented to the contracting officer. It argues that, even though we found appellant's notice of appeal timely, and even though it states that it "hereby appeals from the final decision of the contracting officer dated February 26, 1997," somehow appellant did not file a valid appeal within ninety days and the contracting officer's decision became final and was no longer subject to review under the CDA. 41 U.S.C. §§ 605(b), 606. Thus, according to the government, appellant cannot, at this point, assert a quantum claim that attempts to revive a claim barred by the statute of limitations, and ASBCA No. 54506 must be dismissed.

Manifestly, Applied filed a notice of appeal from the 26 February 1997 contracting officer's decision. Moreover, insofar as the government's argument is an attempt to persuade us that the notice of appeal was ineffective because unabsorbed overhead was not presented to the contracting officer, the facts are otherwise. The government includes the following in paragraph 3 of its STATEMENT OF FACTS: "Appellant's complaint [in ASBCA No. 50749] did not contain the words "unabsorbed overhead . . . ." Mot. at 3. While literally true, the complaint does state that "fixed burden" is included within the amount sought for anticipatory profit (finding 10). We have construed "burden costs" as synonymous with unabsorbed overhead as used in appellant's Statement of Damages Due in ASBCA No. 54506 (finding 16). We see no reason to construe it differently in the context of the complaint in ASBCA No. 50749. Most importantly, however, the amended Termination Settlement Proposals contain various references to recovery of overhead and unabsorbed overhead (finding 8). Unquestionably, unabsorbed overhead (or burden) was presented to the contracting officer.

[5] The Board's decision in *Arctic Corner, Inc.*, ASBCA No. 29545, 85-1 BCA ¶ 17,763, does not require a different result. *Arctic Corner* involved a contracting officer's decision on three separate claims. The notice of appeal mentioned only one of the claims. In contrast, the contracting officer decision in these appeals was solely a decision on appellant's termination settlement proposal. It cannot be said, as it could in *Arctic Corner*, that appellant did not appeal that decision.

We ruled above that ASBCA No. 50749 included all of the contentions made by appellant before the contracting officer. The contracting officer's unilateral determination was therefore the subject of an appeal, did not become final, and is properly before the Board. It follows that the quantum claim (docketed as ASBCA No. 54506), which presents assertions, or variations thereon, made to the contracting officer prior to the unilateral determination, is also properly before the Board.

For the above reasons, the government's motions to dismiss ASBCA Nos. 50749 and 54506 are denied.

Government's Response to Appellant's Statement of Costs

Applied argues that the government waived its right to respond to its Statement of Damages Due, as it did not file its response within the time set by the Board. The Board finds that, although denied, the motions to dismiss were an appropriate response to the Statement of Damages Due. The government's filing of the motions in place of a response did not result in the loss of the government's right to address the amount of appellant's recovery.

Dated: 16 July 2004

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

(Signatures continued)

I concur

MARK N. STEMPLER

I concur

EUNICE W. THOMAS

Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

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, 54506, Appeals of Applied Companies, Inc., rendered in conformance with the Board's Charter.

Dated:

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