ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
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S.P.L. Spare Parts Logistics, Inc.	)	ASBCA Nos. 54435, 54630
	)	
Under Contract No. DAAE07-92-D-A006	)	

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APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA
Chief Trial Attorney
LTC Daniel K. Poling, JA
CPT Sunny S. Ahn, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE TUNKS

On entitlement, we held that the government negligently prepared the estimate for a requirements contract and remanded quantum to the parties. *S.P.L. Spare Parts Logistics, Inc.*, ASBCA Nos. 51118, 51384, 02-2 BCA ¶ 31,982. On 27 October 2003, the contracting officer issued a final decision awarding appellant $206,883.87 plus interest (ASBCA Nos. 54435, 54630 (54435/54630), supp. R4, tab 220, ex. A at 7-8). Appellant appealed the final decision to this board on 25 November 2003, where it was docketed as ASBCA No. 54435. On 18 May 2004, the contracting officer issued a second final decision, reducing the award to $50,261.49 plus interest. As grounds for the reduction, the contracting officer stated that the first decision was in error and would result in a windfall. (54435/54630, supp. R4, tab 220, ex. F at 2) Appellant appealed the contracting officer's second final decision to this board on 26 May 2004 (54435/54630, supp. R4, tab 221). The appeal was docketed as ASBCA No. 54630 on 28 May 2004. Appellant's claim consists of $1,215,021.40 in increased fixed costs, $132,183.05 in unreimbursed variable costs and $51,084.92 in excess inventory (app. final statement of damages and costs dtd. 28 July 2004). The total amount of the claim is $1,398,289.37 plus interest.

BACKGROUND

The United States Army Tank-Automotive and Armaments Command (TACOM) maintains a wholesale inventory system of new and rebuilt parts that are used to manage

and service tanks, armored vehicles, trucks, and other types of ground equipment (*see* finding 1).[1] On 4 November 1991, TACOM issued a request for proposals (RFP) for a three-year requirements contract for new roadwheels for various combat vehicles. Contract Line Item Number (CLIN) 0006AA was for an estimated quantity of 31,361 M60/M88 roadwheels (*see* finding 23). Award of CLIN 0006AA was delayed by a Congressional inquiry into the propriety of TACOM's failure to restrict CLIN 0006AA to domestic sources (*see* finding 26). Due to the resulting delay to contract award, TACOM purchased 3,259 rebuilt wheels from its repair depot on 2 March 1992 (*see* finding 29). TACOM awarded the contract to appellant under the name A.V.S. Ltd. on 25 March 1992 at a firm-fixed-price of $158.15 per wheel (*see* finding 32).

The record reflects the following procurement history for the roadwheels:

1983 - 19,055 EACH - NEW

1984 - 10,000 EACH - NEW

1985 - 33,411 EACH - NEW

1986 - 45,000 EACH - NEW

1987 - 30,000 EACH – NEW

1988 - 11,562 EACH - (REBUILD)

1989 - 6,552 EACH - (REBUILD)

1990 - 6,050 EACH - (REBUILD)

1991 - 11,526 EACH - (NEW)

1992 - A.V.S. AWARD – DAAE07-92-D-A006
8,749 EACH – DELIVERY ORDER 0001
3,259 EACH – (REBUILD – **PRIOR** TO A.V.S. CONTRACT AWARD)
12,008 EACH TOTAL

1993 - 3,680 EACH (REBUILD)

1994 - 3,467 EACH (REBUILD)

1995 - 1,493 EACH (REBUILD)

[1] References are to the findings of fact in the entitlement decision, *S.P.L. Spare Parts Logistics, Inc.*, ASBCA Nos. 51118, 51384, 02-2 BCA ¶ 31,982.

1,788 EACH [(NEW)][2]
6,337 EACH – REBUILD **AFTER** A.V.S. CONTRACT
5,747 EACH – REBUILD **AFTER** A.V.S. CONTRACT
15,365 EACH TOTAL

(51118/51384, gov't supp. R4, tab 85, emphasis in original)

The M60 series tanks and the M88A1 recovery vehicle used the M60/M88 roadwheel. At the time this contract was awarded, the Army was in the process of replacing the M60 tanks with the M1 Abrams tank in both its active and reserve components. The Army planned to complete the replacement effort by the end of fiscal year 1996. The M88A1 recovery vehicle was largely outmoded at the time of contract award due to its inability to tow the M1 Abrams tank and the Army was in the process of redesigning the vehicle. The production decision for the redesigned vehicle was scheduled for the beginning of fiscal year 1994. (51118/51384, app. supp. R4, tab 104 at 4-5)

On 8 April 1992, TACOM issued delivery order (DO) 0001 for 8,749 wheels at a price of $1,383,654.30 (*see* finding 33). Shortly after TACOM issued DO 0001, the price of rebuilt wheels fell (*see* finding 35). Under TACOM's "repair first" policy, it purchased new assets only when the cost of rebuilt assets exceeded the "Maintenance Expenditure Limit" (MEL). The MEL was a specified percentage of the cost of new assets. When the cost of rebuilt assets was below the MEL, TACOM purchased rebuilt assets from its repair depot. When the cost of rebuilt assets was above the MEL, TACOM ordered new assets. (*See* findings 3, 10; 51118/51384, app. supp. R4, tab 104 at 6) TACOM did not inform appellant of its "repair first" policy prior to award (51118/51384, tr. 1/43, 55, 61).

TACOM's repair depot issued its quotation for fiscal year 1993 on 24 June 1992. Due to the decreased cost of rebuilt wheels reflected in the quotation, TACOM decided not to order any more wheels from appellant. (*See* finding 34; 51118/51384, app. supp. R4, tab 104 at 6) By September 1992, TACOM's requirements for roadwheels had decreased noticeably (*see* finding 35). On 6 November 1992, TACOM requested appellant to submit a termination proposal (*see* finding 38). After reviewing appellant's proposal, TACOM concluded that it was too expensive to terminate the contract. On 30 November 1992, TACOM advised appellant that it would not cancel the contract. (*See* finding 42)

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[2] The copy of the procurement history in the Rule 4 file indicates that the 1,788 wheels purchased in 1995 were rebuilt wheels. Since TACOM purchased 1,788 new wheels from North American in January 1995, we assume that this is an error (*see* finding 50).

TACOM approved the first article on 29 March 1993 (*see* finding 44). Thereafter, TACOM extended the delivery schedule for the roadwheels five times. Bilateral Modifications Nos. P00001, P00003, P00004 and P00006 were initiated by appellant and supported by reductions in the contract price. TACOM initiated Modification No. P00002 to compensate appellant for time lost due to its request for a termination proposal. (*See* finding 45) Although TACOM knew by 24 June 1992 that it would not order any more wheels from appellant, it did not advise appellant of that fact until 28 September 1994 (*see* findings 34, 46). On 5 December 1994, appellant requested permission to spread out the remaining deliveries so it could continue to run its factory. TACOM denied the request. (*See* finding 47)

Appellant has been paid for DO 0001 (54435/54630, supp. R4, tab 220, ex. B at 18). TACOM ordered 9,119 rebuilt wheels from its repair depot during the contract (*see* finding 49). On 13 January 1995, TACOM awarded an indefinite quantity contract for new roadwheels to North American Molded Products (North American). Although North American's contract is not in evidence, the record indicates that TACOM ordered 1,788 wheels from North American at a price of $48.93 per wheel on 13 January 1995 (*see* finding 50). The parties settled appellant's diversion claim on 6 February 2004. Paragraph 2 of the settlement agreement provides, in part, that: "this agreement does not settle the negligent estimate claim in ASBCA No. 54434 [sic], including any damages the Contractor might be entitled to for negligent estimates concerning the 1,788 road wheels involved in the breach of contract claim." (Gov't supp. resp. dtd. 1 June 2004, ex. C at 2)

In the entitlement decision, we held that TACOM's estimate was negligently prepared for three reasons. First, TACOM failed to adjust the estimate for its "repair first" policy. Second, TACOM failed to adjust the estimate for the reduction in the density of the M60 tank. Third, TACOM failed to adjust the estimate for the procurement of 3,259 rebuilt wheels it made shortly before award. In addition, we stated that TACOM's administration of the contract exacerbated appellant's difficulties.

CONTENTIONS OF THE PARTIES

As a result of TACOM's negligent estimate, appellant contends that its fixed costs were spread over 8,749 wheels instead of 31,361 wheels, resulting in increased fixed costs of $1,215,021.40. Appellant included $23.71 per wheel in its bid price for fixed costs (or $743,569.31 for 31,361 wheels). However, it alleges that it incurred actual fixed costs of $1,829,718.80 to produce 8,749 wheels (54435/54630, supp. R4, tab 218, ex. B; gov't br. at 23; app. final statement of damages and costs dtd. 28 July 2004). Thus, appellant asserts that it can only be made whole if its damages are based on its actual costs.

Appellant computes its damages by recalculating the fixed costs included in its bid price based on its alleged actual fixed costs and a "non-negligent" estimate. The non-negligent estimate is the number of wheels that would have been estimated but for TACOM's negligence. Based on the number of new wheels ordered during the contract, appellant argues that a reasonable non-negligent estimate would have been 10,537 wheels (gov't br. at 9-10). Using alleged actual fixed costs of $1,829,718.80 and a non-negligent estimate of 10,537, appellant recalculates its bid price to be $173.65 per wheel ($1,829,718.80 divided by 10,537). Appellant next computes the cost of producing a negligent estimate by dividing its alleged actual fixed costs by 31,361 to obtain fixed costs of $58.34 per wheel ($1,829,718.80 divided by 31,361). Appellant then subtracts the costs of producing a negligent estimate from the costs of producing a non-negligent estimate, which reflects alleged increased fixed costs of $115.31 per wheel ($173.65 minus $58.34). Finally, appellant multiplies increased fixed costs of $115.31 per wheel by 10,537, the total number of new wheels ordered during the contract (8,749 plus 1,788) which results in alleged damages of $1,215,020.40. Appellant's calculation is as follows:

Step 1: (Non-negligent estimate):	$1,829,718.80 @ 10,537 wheels	=	$173.65
Step 2: (Negligent estimate):	$1,829,718.80 @ 31,361 wheels	=	- 58.34
Step 3: (Increased fixed costs per wheel):	$173.65 - $58.34	=	115.31
Step 4: (Total increase):	$115.31 x 10,537 wheels purchased	=	$1,215,021.40

(App. final statement of damages and costs dtd. 28 July 2004[3])

TACOM agrees with the method proposed by appellant, but argues that appellant's actual fixed costs should not be used in the computation.[4] Since appellant allegedly incurred fixed costs of $1,829,718.31, but only included $743,569.31 in fixed costs in its bid price, TACOM argues that using actual costs would result in a windfall. TACOM also disagrees that 10,537 wheels is a reasonable non-negligent estimate. TACOM argues that a reasonable non-negligent estimate would have been 19,493 wheels. TACOM computes its non-negligent estimate by taking the average number of new wheels purchased during the five-year period between 1987 and 1991 (41,526 divided by 5), multiplying by 3 to obtain a baseline of 24,918. TACOM reduced the baseline by 3,259 for the wheels ordered before award and 10 percent for the reduced density of the M60 tank. Based on total fixed costs of $743,569.31 and a non-negligent estimate of 19,493, TACOM computes appellant's damages as follows:

Step 1: (Non-negligent estimate):	$743,569.31 @ 19,493 wheels	=	$38.15
Step 2: (Negligent estimate):	$743,569.31 @ 31,361 wheels	=	- 23.71
Step 3: (Increased fixed cost per wheel):	$38.15 - $23.71	=	14.44

[3] Appellant reduces alleged actual fixed costs to $1,820,542 in its post-hearing brief.

[4] TACOM also argues that appellant has overstated its actual fixed costs. We do not reach this argument.

Step 4: (Total increase): $14.44 x 10,537 wheels purchased $152,154.28

(Gov't br. at 52-53)

DECISION

The general rule in common law breach of contract cases is to award damages sufficient to place the non-breaching party in as good a position as it would have been had the breaching party fully performed. In *Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1328, 1336 (Fed. Cir. 2003), the Court of Appeals for the Federal Circuit explained this rule as follows:

> This rule sets the floor for damages, by ensuring that the non-breaching party suffers no pecuniary loss as a result of the breach. It sets the ceiling for damages as well, because the non-breaching party is "not entitled to be put in a better position by the recovery than if the [breaching party] had fully performed the contract." *Miller v. Robertson*, 266 U.S. 243, 260, 45 S.Ct. 73, 69 L.Ed. 265 (1924). Put another way, "the non-breaching party 'should on no account get more than would have accrued if the contract had been performed.'" *White v. Delta Constr. Int'l, Inc.*, 285 F.3d 1040, 1043 (Fed. Cir. 2002) . . . .

The parties agree that appellant's damages should be based on an adjustment of the bid price to reflect a non-negligent estimate (gov't br. at 31, app. br. at 4-6). First, the cost of producing a non-negligent estimate is computed by dividing appellant's total fixed costs (actual or projected) by the number of wheels TACOM would have ordered had the estimate not been negligent. Second, the cost of producing a negligent estimate is computed by dividing appellant's total fixed costs (actual or projected) by 31,361 wheels, the quantity of wheels TACOM estimated in the RFP and the contract. Third, the increased fixed costs caused by the negligent estimate are computed by subtracting the fixed costs of producing a negligent estimate (step 2) from the fixed costs of producing a non-negligent estimate (step 1). Fourth, the resulting per wheel increase is multiplied by the number of new wheels ordered during the contract. This method is consistent with the case law and we consider it to be an appropriate method for determining damages in this case. *Hi-Shear Technology Corp. v. United States*, 356 F.3d 1372, 1380-81 (Fed. Cir. 2004), and cases cited; *Rumsfeld, supra*, 325 F.3d at 1340-41, and cases cited.

We first determine whether appellant's damages should be based on its actual fixed costs or the fixed costs included in its bid price. As stated above, the purpose of a damages award is to put the non-breaching party in as good a position as it would have

been but for the breach. *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1021 (Fed. Cir. 1996). The price of a firm-fixed-price contract does not vary with the cost experience of the contractor. FAR 16.202-1; *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1303-04 (Fed. Cir. 1996). Thus, the best position appellant could have been in with respect to fixed costs would have been for TACOM to order all 31,361 wheels. Since appellant's alleged fixed costs of $1,829,718.80 exceeds the $743,569.31 in fixed costs appellant could have recovered if TACOM had ordered all 31,361 wheels ($23.71 times 31,361), basing damages on appellant's actual fixed costs would result in a windfall. *See Applied Companies*, 325 F.3d at 1336, *quoting Miller v. Robertson*, 266 U.S. 243, 260 (1924) (non-breaching party is "not entitled to be put in a better position by the recovery than if the [other party] had fully performed the contract"). Thus, we will base the damages calculation on the fixed costs in appellant's bid price.

We next determine what a reasonable non-negligent estimate would have been. Appellant argues that a reasonable non-negligent estimate would have been 10,537 wheels, which consists of all the new wheels ordered during the contract period (8,749 wheels from appellant plus 1,788 wheels from North American). Since the estimate in the RFP is a projection of future needs, we do not consider TACOM's actual requirements to be a valid basis for calculating damages. TACOM argues that a non-negligent estimate would have been 19,493 wheels. TACOM arrived at this figure by finding the average number of new wheels ordered between 1987 and 1991 (41,526 divided by 5) and multiplying by 3 years (8,306 times 3) to obtain a baseline of 24,918. TACOM reduced the baseline by 3,259 to 21,659 wheels to reflect the rebuilt wheels ordered before award and by 10 percent to account for the reduced density of the M60 tank, resulting in a non-negligent estimate of 19,493 wheels. This estimate is unacceptable because, among other things, it fails to reflect the drastic decline in new orders after 1987.

We find that a reasonable non-negligent estimate would be 11,675 wheels. Between 1987 and 1991, TACOM procured 41,526 new wheels or 8,306 wheels per year (41,526 divided by 5). We multiplied 8,306 by 3 to obtain a baseline of 24,918. Although TACOM adjusted its proposed non-negligent estimate by 10 percent for the reduced density of the M60 tank, we are persuaded that a reduction of 20 percent more accurately reflects the probable impact of the planned changeover to the M1 Abrams tank and the redesign of the M88A1 recovery vehicle (app. supp. R4, tab 104). This calculation yields a figure of 19,934. In order to reflect the decline in TACOM's requirement for new wheels and the resulting possibility that it would not order any new wheels at all (as in 1988–1990), we find that a reasonable decrement to the baseline would be 5,000, resulting in 14,934. Finally, we reduced 14,934 by 3,259, the quantity of wheels ordered as a result of the delay attributable to the Congressional inquiry, which results in a non-negligent estimate of 11,675. Based on the $743,569.31 in fixed costs included in appellant's bid price and a non-negligent estimate of 11,675, the fixed costs

of producing a non-negligent estimate would be $63.69 per wheel. Subtracting the fixed costs per wheel of producing a negligent estimate from the fixed costs per wheel of producing a non-negligent estimate results in increased fixed costs of $39.98 per wheel ($63.69 minus $23.71). Since the settlement agreement provides that the wheels diverted to North American are to be included in appellant's damages, we multiplied increased costs of $39.98 per wheel by 10,537, the total number of new wheels ordered from appellant and North American during the contract. Accordingly, appellant is entitled to $421,269.26 in increased fixed costs ($39.98 times 10,537 (8,749 plus 1,788)).

Appellant also seeks $132,183.05 in unreimbursed variable costs. This claim consists of $55,601 for excess discs and strips, $22,500[5] for painting and vulcanization equipment purchased by its subcontractor, and $47,682.05 for excess labor costs allegedly incurred to keep its factory in operation and its technical staff employed during the contract. To prevail, appellant "must show that but for the breach, the damages alleged would not have been suffered." *San Carlos Irrigation & Drainage District v. United States*, 111 F.3d 1557, 1562-63 (Fed. Cir. 1997). Put another way, the damages must "be the natural and proximate result of the breach." *Locke v. United States*, 283 F.2d 521, 526 (Ct. Cl. 1960).

The claims for excess strips and discs and painting and vulcanization equipment fail because appellant has failed to demonstrate that these costs were incurred solely as a result of TACOM's negligent estimate. *San Carlos Irrigation, supra*, 111 F.3d at 1562-63. Mr. Eli Cohen, appellant's president, testified that he purchased 11,000 pairs of discs and strips instead of the 8,749 pairs required to manufacture DO 0001 in order to obtain a better price (54435/54630, tr. 1/103). The painting and vulcanization subcontractor's invoice of 31 March 1995 states that the equipment was purchased as part of its "investments for the additional equipment required for production capacity and quantities of this contract" (51118/51384, R4, tab 44 at 4). The subcontractor did not testify. Standing alone, this is insufficient to establish that, but for the breach, appellant would not have incurred these costs. Appellant's claim for excess labor costs fails because TACOM unequivocally told appellant on 9 December 1994 that it was not going to order any more wheels from appellant for the duration of the contract (51118/51384, R4, tab 26). Thus, appellant stretched out its delivery schedule at its own risk.

Appellant next argues that it is entitled to $51,085 for excess inventory, consisting of 270 complete wheels, 760 strips, 392 rims, 72 metal wheels (without vulcanization or paint) and oil. Appellant argues that "[b]ased on an estimate of 31,361 wheels, it was completely reasonable for SPL to accumulate that small amount of excess inventory." (App. br. at 20) Given the fact that the government does not guarantee that it will order any particular quantity under a requirements contract, the risk of accumulating inventory

[5] Appellant decreased this claim to $22,500 in its reply brief.

in excess of that need for orders actually placed falls upon the contractor. *See* FAR 16.503.

CONCLUSION

Appellant submitted its certified claim to the contracting officer on 20 June 1995. The date on which the contracting officer received the claim is not in the record. In the ordinary course of the mails, we find that the contracting officer would have received appellant's certified claim on 23 June 1995. *E.g., Home Entertainment, Inc.*, ASBCA No. 52741, 01-1 BCA ¶ 31,379 at 154,941; *E-Systems, Inc.*, ASBCA Nos. 45771, 46409, 00-2 BCA ¶ 30,982 at 152,916. Accordingly, appellant is entitled to $421,269.26 plus interest from 23 June 1995.

Dated: 18 November 2005

ELIZABETH A. TUNKS
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. 54435, 54630, Appeals of S.P.L. Spare Parts Logistics, Inc., rendered in conformance with the Board's Charter.

Dated:

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