ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Simplix | ) | ASBCA No. 52570 |
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| Under Contract No. DCA200-94-H-0015 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE DICUS
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant Simplix has filed a 13 April 2006 motion for reconsideration of our decision issued 14 March 2006 denying Simplix's appeal. *Simplix*, ASBCA No. 52570, 06-1 BCA ¶ 33,240. Simplix takes exception to one of the Board's findings and contends that we erroneously denied lost profits damages. It also asserts that it is "[t]he Board's duty in this appeal to make a jury verdict determination of damages" (mot. at 12). The government responds that the Board's findings are correct and that we properly determined that Simplix was not entitled to damages. Upon reconsideration, we affirm our 14 March 2006 decision.

Simplix starts by asserting there is "no support in this record" for finding 20, which set forth the Board's analysis of the PAT Report data and concluded that the number of vendors in the system was significantly smaller than Simplix alleged. Contrary to Simplix's "no support" assertion, finding 20 (06-1 BCA at 164,713) contains parenthetical references to eight Bates-numbered record citations from the PAT Report.[1] Simplix then goes on through nine numbered paragraphs to make more detailed arguments about finding 20. Paragraph 9 is principally composed of a copy of a page

[1] The government points out that one of its witnesses "did a literal extraction of the number of vendors specifically identified in the PAT Report [82,065]" (gov't reply at 5).

allegedly from a DoD handbook, *Introduction to Department of Defense Electronic Commerce, a Handbook for Business*. The *Handbook* is not part of the record. It is mentioned in a footnote to Rule 4, tab 35, which is a GAO report. We do not understand how counsel can expect the Board to consider a document merely referenced in a footnote and not part of the record. As to the rest, we analyzed the evidence and disagree with Simplix. Further comment on the persuasiveness of Simplix's contentions about finding 20 is unwarranted.

Simplix next argues the Board's decision is erroneous as a matter of law. That argument ignores the Notice of Entry of Judgment Without Opinion of the United States Court of Appeals for the Federal Circuit in *CACI International, Inc. v. Rumsfeld,* 04-1495, April 7, 2006, which affirmed our opinion in *CACI International, Inc.,* ASBCA Nos. 53058, 54110, 05-1 BCA ¶ 32,948.[2] In *CACI,* the contract was identical and the facts were too similar to justify a departure from that decision here. Indeed, finding 65 in that opinion found the same number of vendors (124,265) as finding 20 in *Simplix.* There, we based our finding on a different section of the PAT Report with similar data. *CACI, supra,* 05-1 BCA at 163,243; *Simplix,* 06-1 BCA at 164,713. We denied lost profits damages in *CACI,* as we did in *Simplix*. In *CACI* we reasoned that VAN contracts are more like requirements contracts than any other form of contract we could identify, and that the PAT Report estimates presented an issue similar to that found in negligent estimates disputes in requirements contracts. *CACI, supra,* 05-1 BCA at 163,251-52. Simplix argues that *Ace-Federal Reporters, Inc. v. Barram,* 226 F.3d 1329, 1332 (Fed. Cir. 2000), should be followed and an approximation of lost profits damages awarded. However, the reach of *Ace-Federal* has been limited by *Rumsfeld v. Applied Companies, Inc.,* 325 F.3d 1328 (Fed. Cir. 2003), *cert. denied,* 540 U.S. 981 (2003). We said in *CACI*:

> Allowing lost profits here would convert the VLA from an agreement with no minimum guarantee of business to one that guaranteed the level projected by the PAT Report estimate, a process eschewed by the Court in *Applied Companies,* and affirmed in *Hi-Shear Technology Corp. v. United States,* 356 F.3d 1372, 1380 (Fed. Cir. 2004), where the Court said "*Applied Cos*. makes it clear that, *regardless of the evidence,* as a matter of law lost profits on unordered quantities are not available to a contractor in a case such as this" (emphasis added).

*CACI, supra,* 05-1 BCA at 163,252.

[2] Counsel for Simplix was also counsel for CACI and presumably had received a copy before filing this motion (gov't reply, app. 1). We note, however, the judgment was not issued as a mandate until 30 May 2006.

Simplix also argues that we erred in our holding that the fact that Simplix's profits would have come from non-government contracts, and not the contract at issue, rendered the alleged profits too uncertain to be allowable (mot. at 10-11). In *CACI*, citing Federal Circuit precedent, we denied recovery of lost profits and observed that profits from third-party contracts are ordinarily not sufficiently certain to be allowable. *CACI, supra,* 05-1 at 163,252-54. We said in *Simplix* "[a]s CACI was and is a well-established and competent company with substantially more resources than Simplix we think the uncertainty of damages principle applies more starkly here than there." 06-1 BCA at 164,725.

The other difficulty Simplix faces is that we found neither of its witnesses to be probative on critical matters. *Simplix*, 06-1 BCA at 164,725-27. We then offered the following comment:

> Proving lost profits presents a daunting challenge under the VLA. Even setting aside for the moment the "no cost" basis of the VLA, had the PAT report been fully implemented, a VAN and its customer base would have been exposed to a wide variety of changing conditions. We do not believe that wide variety of conditions, which would involve a variety of disciplines, and the manner in which an individual VAN would accommodate those conditions, can be presented through a non-breach damages model without engaging in an unacceptable level of conjecture. Even a much more conservative model than presented here, based on the smaller market we have found from the PAT report and assuming profit margins based more on the facts of the VANs' experience, would have an impossible task in establishing persuasively what the economic fortunes of Simplix would have been. We are persuaded that resolution of such claims involves a highly speculative inquiry and presents a great risk that the VANs will collect a windfall. Such damages have been held unrecoverable in suits against the United States. *Ramsey v. United States,* 101 F. Supp. 353 (Ct. Cl. 1951), *cert. denied,* 343 U.S. 977 (1952).

06-1 BCA at 164,727-28. On reconsideration, we stand by that comment.

Finally, as to our alleged "duty in this appeal to make a jury verdict determination" (mot. at 12), we have no basis on this record to do so. We have held that

lost profits are not allowable here. A jury verdict determination of lost profits damages is still an award of lost profits. We decline the invitation to place form over substance. Upon reconsideration, we affirm our 14 March 2006 opinion.

Dated: 13 June 2006

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 No. 52570, Appeal of Simplix, rendered in conformance with the Board's Charter.

Dated:

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