

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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SUFU Network Services, Inc.) ASBCA No. 55306
)
Under Contract No. F41999-96-D-0057)

APPEARANCES FOR THE APPELLANT: Frederick W. Claybrook, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR RECONSIDERATION

On 15 January 2010 appellant moved for reconsideration of our 14 December 2009 decision, *SUFU Network Services, Inc.*, ASBCA No. 33506, 10-1 BCA ¶ 34,327, with respect to Count III, Hallway/Lobby DSN Phones, and recalculation of Count XVI, Lost Profits. SUFU states that it “does not raise substantive issues, but only requests a review and correction of calculations of the amounts of judgments granted by the Board.” Familiarity with the foregoing decision is assumed.

Respondent’s 22 February 2010 opposition to the motion contends that SUFU presumes what were the undisclosed details of the Board’s calculations and seeks the Board to adopt SUFU’s calculations. Respondent urges the Board to address only “clerical or clearly-disclosed, objective or otherwise indisputable” errors correctable pursuant to FED. R. CIV. P. 60(a) and not to attempt to exact an unreasonable measure of certainty in the Board’s jury verdict approximation of damages, whose nature is an inexact science. (Gov’t opp’n at 2-3) SUFU replied to respondent’s opposition on 24 February 2010.

After carefully reviewing the assertions in SUFI's 15 January 2010 motion, we reach the following conclusions with respect to Count III, Hallway/Lobby DSN Phones.

(a) Application of the 88.35% factor for the 43 known phones to the 95 unknown phones was erroneous, since the latter phones averaged 37.8 months usage. We accept SUFI's calculation of 1,628,027 breach minutes to correct the 88.35% error. (App. mot. at 5)

(b) SUFI's objections to what it presumes were constant usage levels of DSN calls during the months of breach and allegedly improper rounding of billable minutes, are not clearly disclosed, objective or otherwise undisputable errors and we will not reconsider our decision based on them. (c) Our 15 July 2009 decision on reconsideration included DISA call data for Ramstein phone numbers 480-6534 and 480-7521 in the Board's 4,274,690 minutes for 28 "known" DSN phones. We dismiss SUFI's 15 January 2010 motion to correct such inclusion as untimely. Board Rule 29. (d) SUFI's 1 July 2005 lost revenue claims, Counts I-XIV, each sought "[c]umulative prime interest rate (simple interest) from the mid-point of the applicable period through June 2005," including Count III, Hallway and Lobby DSN Phones (ex. B205, tab 4A at 123 *passim*). SUFI's 13 August 2007 brief stated that "for damages specified to have been incurred...over a particular period of months, SUFI calculated the interest from the midpoint of the period" (app. br. at 70, ¶ 107). SUFI's 15 January 2010 motion alleges that since damages were "front-loaded with 'unknown' numbers, the weighted midpoint for damages is February 21, 2000.... [and] requests that a weighted midpoint of March 1, 2000, be set or, at a minimum, the unweighted midpoint of March 1, 2001" (app. mot. at 11, underlining in original). We are not persuaded to calculate a "weighted midpoint," inconsistent with the unweighted midpoints we used in our prior decisions; there is no mistake to be corrected. Accordingly, we use the unweighted midpoint of 1 March 2001 for the date of accrual of Partial Settlement Agreement interest on the adjusted damages. (e) The application of the \$0.7965 difference between SUFI's weighted average revenue and cost rates to 1,628,027 breach minutes results in damages of \$1,296,723.50, a \$73,407.35 increase over the amount determined in our 14 December 2009 decision.

With respect to Count XVI, Lost profits, SUFI's requests that we recheck our 14 December 2009 lost profit calculation including Sembach line charges. We deny that request because our calculation of lost revenues for the Sembach lodgings was not a clearly disclosed, objective or otherwise indisputable error, and the amount we used was so near to SUFI's that it made no material difference in lost profits. Due to the additional award of \$73,407.35 on Count III, *supra*, we have recalculated Count XVI total lost profits using the steps set forth in our 15 July 2009 decision. We revise total lost profits from \$2,561,353 to \$2,646,116, an increase of \$84,763. Accordingly, we adjust the table

of principal amounts recoverable as set forth in our first reconsideration decision (09-2 BCA ¶ 34,201 at 169,096) to \$7,416,751.52 (\$7,258,581.17 + 73,407.35 (Count III) + 84,763 (Count XVI)). SUFI's 15 January 2010 motion is granted to the extent set forth above and the balance is denied.

Dated: 5 April 2010

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

MONROE E. FREEMAN, JR.
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals
(Absent on Extended Medical Leave)

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. 55306, Appeal of SUFI Network Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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