

FAIRFAX OPPORTUNITIES UNLIMITED, INC.,)	AGBCA No. 97-181-1
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Appellant)	
)	
Representing the Appellant:)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

March 13, 2000

Before POLLACK, WESTBROOK, and HOURY, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK. Separate Dissent by Administrative Judge HOURY.

POLLACK, Administrative Judge.

This appeal arises out of a claim for \$26,303, under Contract No. 53-3AEJ-5-30003 between the Agricultural Research Service, U. S. Department of Agriculture (ARS or Government), and Fairfax Opportunities Unlimited, Inc. (Fairfax or Appellant). The contract between the parties was a requirements contract (with option years) to provide, among other items, copier services covering Fiscal Year 1995 with options for 1996 through 1998. This appeal involves a dispute over the proper compensation for copier services provided during the period from March 1996 through February 1997. At the time this appeal was filed, the Board had already conducted a hearing in AGBCA No. 96-178-1, which dealt with the same basic issues as this appeal; however, that appeal dealt with a dollar claim for the period March 1995 through February 1996. At the request of the parties, this appeal was stayed pending the result of the decision on the earlier case.

The Board rendered a decision in the earlier case on January 30, 1998, AGBCA No. 96-178-1, 98-1 BCA ¶ 29,556. In the decision we found that Appellant was entitled to an adjustment in the price of its bid per copy, because in response to a request for historical data, the Government failed to provide Appellant with its most recent information, and instead provided a response which was inadequate. After the decision was issued, the parties attempted to negotiate a settlement for the remaining years of the contract, using the first decision for guidance. The parties did not reach an agreement. Thereafter, Appellant requested that the stay be lifted and the appeal proceed. In proceeding with this appeal, Appellant has limited the issue to the adjustment of the unit price bid for the copier portion of the contract for each of the option years, and has provided additional evidence seeking to adjust some of the numbers used by the Board in the prior decision. Other issues that were addressed in the first decision and which were also initially addressed in Appellant's claim to the CO are no longer at issue in this appeal.

FINDINGS OF FACT

PROCEDURAL HISTORY

1. This appeal is from a decision by the CO dated May 5, 1997, which denied Appellant's claim for compensation for additional copier costs for the period from March 1996 through February 1997. The Appellant filed a timely appeal on July 1, 1997, which the Board then docketed as AGBCA No. 97-181-1. (Appeal File (AF) 3, 4.) The appeal involved parallel legal and factual matters to those in AGBCA No. 96-178-1, already the subject of a hearing, and which was awaiting decision. The new appeal, at the request of the parties, was placed in a stay status pending the outcome of the Board decision in the earlier case (AF 5).

2. On January 30, 1998, the Board issued its decision in AGBCA No. 96-178-1 (AF 6). After not hearing from the parties, the Board wrote the parties on April 1, 1998, to learn whether the parties intended to proceed with this appeal (AF 8). Thereafter, the parties engaged in discussions in an attempt to settle the new appeal and the remaining out years; however, those discussions ultimately did not reach fruition. Finally by letter of June 17, 1998, the Board was advised that the parties had reached an impasse in negotiations. Appellant requested that the Board schedule further proceedings. This was reiterated in a formal request dated June 23 (AF 18). By letter of July 14, 1998, the Board lifted the stay and requested that Appellant file a Complaint.

3. By letter of August 7, 1998 (AF 21), with attached exhibits A through E, the Appellant filed its Complaint, decreasing its claim for this appeal (what it calls Claim 2) to \$26,303. Appellant noted that it sought recalculation of the amount due for lost revenue due to the Government inaccurately estimating copier service needs. Fairfax continued that the "Court," meaning the Board, concluded (in the earlier decision) that there was an adjustment due Fairfax. Appellant then said, "The Court specified a methodology for calculating the amount due. We have no issue with the methodology." Appellant then, however, challenged some of the numbers used by the Board in calculating the recovery in the Board's earlier decision and asked that a recalculation be made. Appellant focused on three specific areas:

(1) First, it challenged the basic cost figure used by the Board in the calculation of damages and for year two contended that the Board should use the figure \$159,550 as the costs. That figure is the calculated costs or revenue for the time period of March 1996 through February 1997. The new cost figure reflects escalation agreed to in the original contract for the time period stated. In the original decision, the Board used the expected revenue or costs of \$153,156, which was the figure used by Appellant to come up with its calculation of per copy price for the first year and which was the figure upon which escalation for each of the additional years was based.

(2) As a second challenge, Appellant asserted that while paper and supplies are variable costs driven by volume, services are not entirely driven by volume. More specifically, Appellant stated that the service technician work specified by the contract caused it to schedule the service technician based on expected volume and not what turned out to be the actual volume. In the original decision, the Board included as variable costs the entire costs stated for services and supplies and thus put none of the costs for the technician in the fixed costs.

(3) Finally, the third challenge involved the determination by the Board to use 5,570,010 copies as the number of copies that would have reflected the most current data. Appellant said that the Board should have used 5 million copies as there was clear downward trend in copying for the prior years of the contract and Appellant would have built an estimate on the continuation of the declining volume, had the Government provided more data.

The ARS has contested Appellant's position on each issue.

SUMMARY OF FACTS LEADING UP TO DISPUTE:

4. For purposes of this decision, we will provide a limited summary of the facts leading up to the dispute over the copy price. A more detailed description of the events and rationale for the Board decision can be found in Fairfax Opportunities Unlimited, Inc., the earlier decision.

5. The Government issued a solicitation which called for proposers to provide a per-copy cost for an estimated number of copies. Vendors were to be paid on a per-copy basis. Appellant used the Government's estimated quantity of 6 million copies per year to calculate its bid for the first year and for the additional years. The Board in its decision in AGBCA No. 96-178-1, found that in May 1994, during the solicitation process, the Appellant and other bidders had asked if the Government had any additional historical data. The Government responded by providing only 1 month's data, rather than providing information in the Government's possession as to other months, up to March 1994 (which was more current). The actual quantity copied by the contractor was significantly less than the estimate used by the Government, and also significantly less than the quantity indicated by the 1-month response to the May 1994 inquiry. While the Board stated that there was no specific

formula for determining when the Government fails in its responsibility to provide an estimated quantity, under the facts in the Fairfax appeal, the Board determined that the Government was liable because it did not show due care.

6. The Board concluded that had the Government used the prior year copy count (April 1993 through March 1994) of 5,570,010, that would have been a defensible number for estimating purposes. That number was then used by the Board in the formula for determining compensation.

7. The final element determined by the Board in deciding compensation was to break out the variable costs (those costs which would increase or decrease in conjunction with variations in the number of copies made) and the fixed costs. The Board determined that any recovery should be based solely on the effect of the incorrect estimate on fixed costs. For purposes of this appeal, Appellant has expressed agreement in principle with such formula. (Appellant's submission of March 11, 1999 (App. 3/11 submission).)

8. In the earlier decision, the Board identified as variable costs, (1) services and supplies, costed at \$35,400, and (2) paper, costed at \$20,607. The Board determined fixed costs by deducting those two figures from the total estimated costs of \$153,156 used in bidding. That left the Board with fixed costs of \$97,149 which when divided by 6 million copies yielded .01619 per copy. The Board then took that same \$97,149 and divided it by 5,570,010 to arrive at a copy price of .01744. The difference between the figures was then multiplied by the number of copies made during the claim period to establish the additional compensation due Appellant. The Board anticipated that the parties would apply this difference to the additional years.

PRESENT CLAIM

9. In its present claim, Appellant presents evidence which it asserts should lead the Board to change the per-copy figure for the year involved on this claim. Essentially the Appellant attempts to replicate the Board methodology in figuring the compensation, but (1) substitutes different numbers for the costs of work, (2) proposes a different allocation of fixed versus variable costs, and (3) proposes a different number of copies as the divisor instead of the 5,570,010 copies used by the Board. (App. 3/11 submission.)

10. In support of the proposed changes, Appellant presents the following. As to the costs of work or what Appellant describes as "Expected Revenue," Appellant provides expected revenue figures for years 1995, 1996, 1997, and 1998. Only 1996, however, is at issue in this appeal. Appellant contends that in calculating its claim for March 1996 through February 1997, the expected revenue or cost should be \$159,550 rather than the \$153,156 used by the Board. The new figure reflects that during the time period, the rate increased from October 1996 through February 1997 from .0263 per copy to .0270 per copy. The increase is the escalation set out in the contract. While Appellant does set out figures for individual years, its bid and the per-copy figure for each ensuing year were based on the calculation of first year costs. (App. 3/11 submission.)

11. As to variable and fixed costs, Appellant sets out a chart which shows for each year its budgeted costs, its paper costs, its service and supply costs and what it describes as fixed costs on lost copies. Appellant then provides a "Total Fixed Costs." In terms of variable costs used by the Board in the earlier decision, Appellant acknowledges that paper is a variable cost and the total taken by the Board was proper. As to supplies, Appellant points out that supplies were rolled into the costs of "Supplies and Services." Appellant states that the portion of supply and services costs which are attributable to supplies and which include toner, filters, minor repair parts is 20 percent of the rate offered. Major repairs due to damages to the machine are covered by business insurance and therefore are included in the G & A costs. Therefore, Appellant agrees that $\$35,400 \times .2 = \$7,080$ is warranted as a variable cost. As to the services portion, Appellant acknowledges that services are priced against volume. However, Appellant continues that when the technician is not used because copy volume is down, salary expenses, which Appellant says represent 75 percent of the supply and services costs do not decrease. The contract required that a technician be available on 4 hours notice. According to Appellant, it is not possible to use temporary services to meet that strict demand. The Appellant does accept 5 percent reduction for technician travel or \$1,770. Therefore, of the \$35,400 which the Board included as a variable cost for supplies and services in the first decision, Appellant says that \$8,850 can be deducted rather than the \$35,400 deducted by the Board as a variable cost. This would increase the \$97,147 used by the Board as fixed costs to \$125,893.

12. Although Appellant states in its brief that the technician was full time, its submissions state otherwise. In fact, at Tab B, page (p.) 3 of Appellant's submission, Appellant shows that in pricing the technician, its pricing strategy was as follows:

Pricing strategy: Maintenance Technician salary \$42,000 annual; time and travel 268 hours; \$5,862.50 per year; at 6 million copies is \$.0010 per copy. The fixed costs associated with the service technician in the first year is \$.0010 times the 1,219,933 shortfall or \$1,192[sic].

At Tab B, p.5, under Fixed Costs 1996, Service, Appellant described the fixed costs of Appellant's subcontractor, Consolidated Photocopy Company, Inc. (CPC) for the maintenance technician to be \$20.60 per hour x 268 hours divided by 6 million or .0010 per copy. Taking Appellant's own numbers, it shows Appellant expected a total of \$5,520.80 as the fixed costs of the technician for 1996. (App. 3/11 submission.)

13. Finally, Appellant says that the figure of 5,570,010 copies used by the Board to determine the copies should be changed to 5 million copies. Appellant bases this on what it says was a downward trend in copies in the years prior to the contract and on references by Appellant to 5 million copies in various documents filed in the early stages of the claim. To support its position, Appellant pointed out that in 1992, the Government made 9 million copies, and in 1993 the volume dropped to 6.1 million, Appellant then calculated an extrapolation of reducing quantities which it said it would have bid upon had it had the 1992 and 1993 data. (App. 3/11 submission, Tab A, Exhibit D.)

14. The original decision set out monthly quantities for each month from October 1992 through September 1994. Using those numbers the annualized figure if one used October 1993 through March 1994 would have yielded 5,237,784 copies and the figures for January, February and March 1994, (the latter at over 500,000 copies), showed an upward trend. (AF 6.)

DISCUSSION

This is a dispute over quantum. The Appellant has agreed that the methodology used by the Board in AGBCA No. 96-178-1 was an appropriate means of determining an adjustment. Appellant, however, has attempted to substitute various figures in lieu of the numbers used by the Board in the earlier decision and asserts that such substitution will provide a more accurate result.

First, Appellant does not appear to fully understand the basis of the Board's calculation, which is not an attempt to recalculate the bid price based on hindsight. Rather, the Board decision was based solely on what the Board believed would have been a legally sufficient estimate had the Government met its obligation and provided the most current data at the time of the solicitation and bid. In deciding the earlier appeal, the Board was very specific in defining where the Government erred. We said that the Government erred when it responded to Appellant's and other bidders' request for more historical data in May 1994. At that time, it was obligated to provide the "most recent data," which was data up to March 1994, instead of only the December 1993 figure, which was misleading and furthermore inaccurately confirmed the 6 million estimate used in the solicitation. We were clear to point out that the Government did not have an obligation to create data, and further noted that there was no specific litmus test and each situation had to be examined on its own merits. (Findings of Fact (FF) 5, 6.)

What we then did was to come up with a figure which represented what would have been a fair estimate, given what was reasonably known at the time. It is important to emphasize that we are dealing with an estimate and as such, there are reasonable variations in the final figures used. The figure of 5,570,010 was considered at that time, and is still considered, a fair number. There is not sufficient evidence to scientifically recreate what Appellant would have bid, nor do we find any basis for concluding that the Appellant would have gone through the analysis it now uses to support the proposed changes. For example, if we took October 1993 through March 1994 and annualized that figure, we would yield 5,237,784. However, if we looked at the figures for January, February and March 1994 (and in fact the number for March was over 500,000 copies) there was a definite upward trend. (FF 14.) The point is, that the numbers do not provide the "clear" picture portrayed by Appellant. Appellant's calculations by which it attempts to justify a lower figure are based on hindsight and we do not accept the change from the estimate of 5,570,010 which we used in the earlier decision.

We also do not find any basis to change the revenue or cost figure. Appellant based its pricing and costing on the first year. But for adding in escalation, it did not recalculate its anticipated revenue or costs for each year to arrive at a new copy price. This appeal is about determining the difference between what would have been bid and what was bid. The first year difference therefore answers

that question and the only adjustment would be to apply the escalation factor to the difference in the copy figure for each year. (FF 10.)

While we do not find any basis to change the copy number or costs, we do find that one figure should be changed. In the original decision we treated all services as a variable cost. We are convinced from the factual evidence presented by Appellant with this appeal that a portion of the technician cost was fixed. However, the number supported by the Appellant's own submission is at best \$5,520.80. While this is less than the figure stated in the pricing strategy of \$5,862.50, the \$5,520.80 figure is explained and is not conclusory. Further, given the number of copies involved, either figure yields essentially the same amount of recovery. (FF 12.)

Therefore the fixed costs are increased from the \$97,149 we found in our first decision to \$102,669.80. That sum is divided by 5,570,010 copies and 6 million copies respectively. The difference in the copy rate was .00132 per copy (.01843 - .01711). When that figure is multiplied by the number of copies made during the second year of 4,458,123, the compensation due Appellant is \$5,884.72 for the period of March 1996 through February 1997. The escalation factor for the second year should be applied to this total to arrive at the final figure.

DECISION

Appellant's appeal is sustained to the extent of \$5,884.72 plus an adjustment for the second year escalation factor.

HOWARD A. POLLACK
Administrative Judge

I concur:

ANNE W. WESTBROOK
Administrative Judge

Separate Dissenting Opinion by Administrative Judge HOURY.

I dissent from the majority opinion granting \$5,884.72. The majority considered three matters necessary to granting this amount that are *res judicata*. I would grant the appeal in the amount of \$5,573 based upon the Board's prior decision. The majority opinion establishes a precedent that allows Appellant to file additional appeals on the same issue for the contract periods February 1997 - March 1998, and April 1998 - September 1998. The decision encourages needless litigation and affords Appellant multiple opportunities to adjudicate the same appeal.

The appeal arises under Contract No. 53-3AEJ-5-30003 between the Agricultural Research Service (ARS), U. S. Department of Agriculture, and Fairfax Opportunities Unlimited, Inc., of Alexandria, Virginia (Appellant). The contract, an indefinite quantity, requirements contract covering part of fiscal year 1995, with options for fiscal years 1996, 1997, and 1998, was for support services for a mail room, a supply room, and a copy center that included 15 satellite copier stations. This appeal involves only the copier center portion of the contract, which Appellant subcontracted to Consolidated Photocopy Company, Inc. (CPC). Appellant's \$41,074.25 claim, at issue in this appeal, was based on the Government having ordered only 4,458,123 copies for the March 1996 - February 1997 period, in lieu of the 6,000,000 copies estimated.

The Prior Appeal

In the prior appeal, the Board granted Appellant \$5,975 on a \$31,702 claim. Fairfax Opportunities, AGBCA No. 96-178-1, 98-1 BCA ¶ 29,556. Appellant's prior claim was based upon the March 1995 - February 1996 period, when the Government ordered 4,780,067 copies. Appellant calculated its claim by multiplying its bid prices by the 1,219,933 copy underrun. The Board rejected Appellant's theory, but found that the Government's 6,000,000 copy estimate was not based on the most current information available, concluding that the estimate should have been 5,570,010. In this indefinite quantity contract, Appellant accepted the risk that the Government would order fewer copies than estimated, but not the risk that the estimated quantity was not based on the most current information.

In the prior appeal, by multiplying its bid price by the actual copy underrun, Appellant's claim represented lost revenues (recurring expenses, nonrecurring expenses, and profit), rather than any realistic claim for damages actually incurred. The claim also represented Appellant's attempt to shift to the Government, Appellant's risk of having the actual quantities differ from estimates. Moreover, although Appellant subcontracted the bulk of its copying effort to CPC, no written contract was offered showing Appellant's obligations to CPC. Appellant provided no evidence of actual cost or profit, even though Appellant was in the best position to do so, having already incurred the expenses, if any, it was claiming.

Because of Appellant's claim derivation and lack of proof in the original appeal, the Board was placed in the position of calculating damages based upon Appellant's inadequate proof. Consequently, the Board subtracted CPC's alleged recurring costs of \$35,400 for supplies and

services, and \$20,607 for paper, from Appellant's \$153,156 bid for copying, for a remainder of \$97,149, representing nonrecurring costs and profit. It would have been logical for Appellant to have allocated its \$97,149 nonrecurring expenses over the 6,000,000 estimated copies for a nonrecurring cost of \$.01619 per copy. Allocating the \$97,149 over the more accurate 5,570,010 estimated copies would have resulted in a nonrecurring cost of \$.01744 per copy, \$.00125 more than the nonrecurring expenses for the 6,000,000 copies.

The Board concluded that with a proper estimate, Appellant's unit prices would have increased by \$.00125. Therefore, when the \$.00125 difference is multiplied by the 4,780,067 copies actually ordered by the Government for the March 1995 - February 1996 period, the \$5,975 product was the reasonable measure of damages incurred by Appellant, as a result of the \$153,156 copy services cost, the \$97,149 nonrecurring expenses cost, and the Government's estimate being revised to 5,570,010 copies based on the most current information. The Board sustained the appeal in this amount. Thus, the Board's decision established a formula allowing the parties to calculate damages for the balance of the contract periods, barring a compelling reason to reopen the record. Neither party requested reconsideration of the Board's decision, which became final and binding when not appealed. 41 U.S.C. 607(g).

The Present Appeal

Appellant's present appeal is from the denial of its claim for \$41,074.25. That claim is premised on the fact that the Government ordered only 4,458,183 copies for the March 1996 - February 1997 period. Based upon the application of the \$.00125 per copy found by the Board to be an appropriate measure of damages in the prior appeal, Appellant is entitled to \$5,573 (4,458,183 x \$0.00125). The majority has granted Appellant \$5,884.72 on the basis of Appellant's bare allegations that the \$35,400 for supplies and services is not volume driven, thus requiring an increase in the nonrecurring expenses already determined by the Board. Further, the majority considered but rejected Appellant's bare allegations that the \$153,156 copy cost should be increased to \$159,550, and that the corrected Government estimate of the number of 5,570,010 copies should be reduced. All these matters are *res judicata*.

Regarding the *res judicata* issue, it was Appellant who proffered its claim for lost revenues as its measure of damages. There simply was no sound reason for Appellant to have failed to present probative evidence regarding the nature of its costs during the pendency of the first appeal, including its present assertions that a portion of the \$35,400 for supplies and services is actually a nonrecurring cost. Appellant also failed to request reconsideration. As stated above, the Board's decision became final. Even in the context of this new appeal, Appellant has offered no compelling reason for the Board to reconsider its decision, or to disregard matters that are *res judicata*.

Res judicata precludes not only every matter which was offered and received to sustain or defeat a claim, it also precludes any other admissible matter that might have been offered for the same purpose. Nevada v. U.S., 463 U.S. 110, at 129-130 (1983). Thus, even a complaint in the Court of Federal Claims was dismissed on the basis of *res judicata*, where prior litigation before the

ASBCA could have included the claim basis plaintiff sought to assert. Phoenix Petroleum Co. v. U.S., 40 Fed. Cl. 862 (1998). Here, the majority fails to apply *res judicata* to the Board's own decision, or to explain why it fails to do so.

EDWARD HOURY
Administrative Judge

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