



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER  
AND IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY  
ON SEPTEMBER 19, 2007**

RESPONDENT'S MOTION FOR SUMMARY RELIEF DENIED;  
APPELLANT'S CROSS-MOTION FOR SUMMARY RELIEF GRANTED IN PART:  
September 12, 2007

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ADMIRAL ELEVATOR,

Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

W. Charles Bailey, Jr., of Simms Showers LLP, Baltimore, MD, counsel for Appellant.

Seth Binstock and Lucinda E. Davis, Office of the General Counsel, Social Security Administration, Baltimore, MD, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **DeGRAFF**.

**DANIELS**, Board Judge.

This case involves a contract between Admiral Elevator (Admiral) and the Social Security Administration (SSA) for maintenance of elevators and escalators at SSA facilities.

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The issue to be decided, on cross-motions for summary relief, is which of the parties is responsible for whatever loss Admiral suffered because some of the elevators were unavailable for maintenance for much longer than SSA had projected. Because the agency directed the contractor to price its offer on the basis of the agency's projections and the contractor complied with this direction, we hold that the agency is responsible for the loss. Because we lack information at this stage of the proceedings as to the extent of the loss, we reserve determination of quantum until later.

#### Uncontested Facts<sup>1</sup>

On December 20, 2002, SSA issued a request for proposals (RFP) for elevator and escalator maintenance and service at SSA's Woodlawn, Maryland, headquarters building complex and its Baltimore, Maryland, Metro West facility. Respondent's Statement of Uncontested Facts (RSUF) ¶ 1; Appellant's Statement of Uncontested Facts (ASUF) ¶ 1; Appeal File, Exhibit 1 at P.04.

The RFP envisioned that the contract would cover a base period and as many as four option periods. Appeal File, Exhibit 1 at P.10. Each of these periods would be one year in duration. *Id.*, Exhibit 2 at 51. The RFP mandated that each offeror provide a "per-unit" price for each elevator and each escalator during each of the periods. *Id.*, Exhibit 1 at P.17-P.20; ASUF ¶ 2.

The RFP's section B-6, "Contractor Personnel," set a floor on the number of personnel who would be assigned to the maintenance work:

Not less than two (2) qualified elevator maintenance mechanics must be on duty and physically present **at all times** to provide the services specified in this contract between the hours 6:00 a.m. to 6:00 p.m. Monday through Friday, excluding Federal Holidays, at the SSA Main Complex buildings. The Metro West Complex shall have continuous coverage for services between the hours 6:00 a.m. to 7:30 p.m. Monday through Friday excluding Federal Holidays. Not less than two (2) qualified full-time (8 hours/day) elevator maintenance mechanics are to be on duty and physically present i.e., overlapping shifts of

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<sup>1</sup> Each of these facts was asserted by at least one of the parties to be uncontested, and that assertion was not challenged by the other party. In a few instances, we have quoted from a document at greater length than a party quoted in its proposed uncontested facts.

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6:00 a.m. to 2:30 p.m. and 11:00 a.m. to 7:30 p.m. to provide the services specified in this contract.

RSUF ¶ 2; Appeal File, Exhibit 2 at 36 of RFP. This provision was incorporated into the contract which was awarded to Admiral. RSUF ¶ 2.

Notwithstanding the requirement that a minimum number of mechanics be physically present, the number of elevators to be maintained was to vary during the course of the contract. The RFP's section B-1, "Scope of Work," explained:

During the course of this contract, elevators and escalators will be taken out of service for building renovations and elevator modernization. The contractor will not be required to provide service for said equipment during any building renovation or modernization project. The price for units not in service will be deducted from the contract on a monthly basis. The following schedule shows the anticipated time frame the equipment will be out of service. All time frames are approximate.

- The Operation building is scheduled to be renovated in August 2003. The entire building renovation project will be for approximately 24 months. . . . Only fifty percent (50%) of the equipment in the Operations building will be out of service at any one time. The elevator maintenance contractor, under this contract, will be responsible for the maintenance/repair of Operation[s] building elevators in service. After the renovation[] work is completed, the contractor, under this contract, shall then be responsible for maintaining the elevators/escalators for the entire building.
- An elevator modification project is schedule[d] for the NCC [National Computer Center] . . . , Supply Building . . . and West High Rise . . . for the period January 2003 through April 2004. The elevator modernization contractor will be responsible to maintain these elevators until the modification is complete for a particular elevator plus a one-year warranty period. The warranty completion dates will be different for each elevator.

The elevator maintenance contractor, under this contract, will not be responsible for these elevators during the[ir] respective modification/warranty periods.

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- **All labor hour requirements for on site mechanics, as described in the specifications of this contract, shall remain the same during any and all renovation/moder[niz]ation work.**

RSUF ¶ 2; Appeal File, Exhibit 2 at 21-22 of RFP. These provisions were incorporated into the contract which was awarded to Admiral. RSUF ¶ 2.

SSA based the approximate time frame for the Headquarters Complex construction and renovation on information provided by the General Services Administration (GSA), which was responsible for issuing and administering the contracts for that work. RSUF ¶ 3.

After reading the RFP, prospective offerors posed questions about the per-unit pricing structure. In amendment 2 to the RFP, SSA responded to one of these questions as follows:

The offeror is to insert the monthly price (labor, parts, materials and any other costs) for maintaining each elevator/escalator in Table A. Section B-1, Scope of Work, advises offerors of the approximate time frames certain elevators will not be maintained under the proposed contract. The Government will notify the contractor in writing of the elevators not to be maintained under the contract and the time frames. This will result in the contractor adjusting its monthly invoices by deducting the monthly maintenance amount(s) for the particular elevator(s) listed in Table A.

RSUF ¶ 5; ASUF ¶¶ 4, 5; Respondent's Exhibit 1 at 001897; Appellant's Exhibit 4 at 001897.

Prospective offerors continued to question the pricing structure. In amendment 3 to the RFP, SSA provided the following question and answer:

Question:

After reviewing amendment[s] No[s]. 1 and 2 of the referenced solicitation it appears that there is still a conflict regarding labor requirements and line item deductions that may be used during the term of this contract as described below.

As it is currently stated now, . . . the minimum on-site labor hour requirements will not change regardless [of] equipment being removed from the contract and line item deductions being utilized.

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As an example, if the current pricing structure remains the same, the SSA could remove all equipment at the Headquarters complex and still require the contractor to provide 2 mechanics on-site 12 hours a day with no means to invoice for this labor cost. . . .

If the contractor is not permitted to reduce on-site labor proportionately to the equipment being maintained under this contract, then some means of pricing must be incorporated into the pricing sheets to account for the on-site labor separately from the individual equipment line item pricing. . . .

Response:

. . . .

The information on the renovation work i.e., estimates regarding when the elevators will be out of service/not required to be maintained under the proposed contract was stated in order to assist offerors in their management plans for contract operations and contract pricing. The Government will provide the contractor, in writing, the listing [of] elevators [for which] maintenance and repairs are not required/to be suspended with specified dates. As stated previously, to perform all of the contract requirements, the contractor must have the flexibility to augment the on site work force on an as needed basis. The requirement for on-site elevator mechanics is not sufficient to satisfactorily perform all of the requirements.

The example in the above question states that the Government could remove all equipment at the Main Complex and still require on site mechanics. It is NOT the intention of the Government to take significant amounts of equipment from the contract that would result in lack of work/insufficient amount of work for the contractor's on-site elevator mechanics. It is again emphasized that the contractor, at various times, will need to provide additional personnel, other than the on-site personnel, to satisfactorily perform the services. It is intended that there will **always** be a sufficient number of elevators to be maintained and repaired/requirements to be performed by the on site elevator mechanics.

ASUF ¶ 6; Appellant's Exhibit 4 at 001895-96.

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Even after issuance of amendment 3, one prospective offeror, Elevator Control Service (ECS), questioned the SSA contracting officer about the required pricing structure. This firm asked, “[H]ow do contractors recoup costs spread over line items that are deducted?” The firm suggested that SSA ask offerors to propose a single line item for fixed on-site labor, so that the line items for the various elevators and escalators would consist of variable costs only. ASUF ¶ 7; Appellant’s Exhibit 5.

The contracting officer asked the leader of an SSA Office of Acquisition and Grants audit team for advice as to the letter from ECS. The team leader responded:

The creation of an additional line item for fixed labor costs as recommended by ECS could help offerors with their pricing[;] however, it does not appear to be a material issue to me.

By definition, fixed labor costs will not change as the number of elevators change[s;] therefore, I agree with ECS that per unit monthly maintenance charges will increase as elevators are taken out of service (fewer elevators to absorb fixed costs) and decrease when these elevators are placed back in service. However, ECS knows that there are 54 elevators, and has a pretty good idea of the number of elevators that could be out of service at any given time. ECS, therefore, should be able to predict with some degree of confidence the maximum impact that the removal of elevators would have on the fixed cost portion of the monthly maintenance unit price. ECS therefore can protect itself by pricing this risk into its bid prices. All offerors can do this.

ASUF ¶¶ 8-10; Appellant’s Exhibit 7.

Similarly, in deposition testimony, an SSA contracting officer who was involved in this project agreed that it would be reasonable for a contractor to rely on SSA’s estimated time frames in constructing its proposal. ASUF ¶ 12.

In response to the RFP, Admiral submitted a proposal which included a monthly charge for each piece of equipment which would be covered by the contract. RSUF ¶ 7. Admiral used SSA’s out-of-service time estimates as the basis for constructing its proposal. ASUF ¶ 11.

SSA accepted Admiral’s proposal by awarding a contract to the firm on May 12, 2003. The contract has an effective date of June 1, 2003 and is for services over a five-year period

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(one base year and four option years). SSA has exercised all options through the date of this opinion. RSUF ¶ 9.

Although the renovation and construction work on the Headquarters Complex under contracts administered by GSA was supposed to have started in January 2003, it actually began around the time that Admiral started work under the contract at issue in this case (June 2003). RSUF ¶ 10. The time required for completion of the renovation and construction exceeded -- in some instances by many months -- the estimates provided in the RFP which led to Admiral's contract. RSUF ¶ 11; ASUF ¶¶ 13-15. Two SSA employees could not explain in their depositions why the work under the GSA contract took so long to complete. ASUF ¶¶ 16-17. There is no question, however, that Admiral was in no way responsible for any of the delays. ASUF ¶ 18.

Admiral was at all times ready to perform its duties under its contract. ASUF ¶ 19. Because of the delays in renovating elevators under the GSA contract, and the concomitant unexpectedly lengthy removal of elevators from Admiral's maintenance responsibility, however, Admiral incurred costs which it did not recover. ASUF ¶ 20. On January 26, 2006, Admiral submitted to an SSA contracting officer a claim for "loss revenue." In the claim, Admiral asserted that it was entitled to lost revenue from the date that each piece of equipment was supposed to be returned to Admiral's maintenance responsibility, per the estimated construction renovation schedule in the RFP (and resulting contract), through the date on which each piece was actually returned to Admiral's responsibility. RSUF ¶ 12; ASUF ¶ 21. The total amount claimed for the period through January 31, 2006, was \$158,722. Appeal File, Exhibit 5.

This claim was not certified when it was filed. Appeal File, Exhibit 5. On or about November 29, 2006, Admiral certified the claim. Respondent's Motion for Summary Relief at 7.

The contracting officer denied the claim. In doing so, he explained:

SSA's decision not to return the elevator/escalator units to service (due to building renovation) amounts to a constructive partial termination for convenience of Admiral Elevator's contract . . . . As a result, the total amount of the claim is denied and is not payable because when there is a termination for convenience or constructive termination for convenience, anticipatory profit or lost revenue [is] not due to a contractor.

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When the Government terminates a private contractor pursuant to a termination for convenience clause in a contract, recovery is limited to costs incurred and profit on the work done[;] recovery of anticipated profit is precluded. *See generally, Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988).

The termination for convenience clause in [the] contract<sup>2</sup> . . . gives SSA the broad right to terminate for convenience and precludes Admiral Elevator's recovery of anticipatory profits or lost revenue as requested in the . . . claim . . . . For the reasons set forth above, Admiral Elevator's claim is denied.

RSUF ¶ 13; Appeal File, Exhibit 11.

### Discussion

Each party has asked the Board to resolve this appeal by granting its own motion for summary relief and denying the opposing party's motion. Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must

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<sup>2</sup> This provision reads:

The Government reserves the right to terminate this contract, or any part hereof [sic], for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

RSUF ¶ 2; Appeal File, Exhibit 2 at 45 of RFP.

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be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When both parties move for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001). The mere fact that the parties have cross-moved for summary relief does not impel a grant of one of the motions; each motion must be independently assessed on its own merit. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001).

The contract at issue here required Admiral to have at least two mechanics on duty at all specified times, but it did not state unqualifiedly how many elevators and escalators those mechanics (and others who might be assigned to contract work) would have to maintain. The uncertainty as to the number of elevators to be maintained resulted from the fact that while Admiral's contract was in effect, various elevators were to be renovated under a separate contract with the General Services Administration and were not to be available for maintenance by Admiral.

This arrangement posed difficulties for pricing the contract. SSA directed offerors to provide a per-month price for each elevator and escalator, so that if a piece of equipment was not to be maintained in a particular month, the price for that item would be deducted from contract payments for that month.

In the same solicitation provision which described the pricing scheme, the agency provided information about the renovation effort. It provided a schedule "show[ing] the anticipated time frame the equipment will be out of service" and said the "time frames are approximate." As to the Operations Building, the "renovation project will be for approximately 24 months. . . . Only fifty percent (50%) of the equipment in the . . . building will be out of service at any one time." As to the National Computer Center, Supply Building, and West High Rise, the project was scheduled "for the period January 2003 though April 2004" and the maintenance contractor would not be responsible for maintaining any of these elevators "until the modification is complete for a particular elevator plus a one-year warranty period."

The estimates as to the duration of renovation work turned out to be incorrect. The renovation project started later than anticipated and ended much later. The principal question in this case, as presented in the cross-motions for summary relief, is which of the parties should bear the financial impact of the errors in the estimates.

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SSA views the contract as a fixed price instrument under which Admiral bore the risks of the estimates being incorrect. Admiral understood the unique aspects of the arrangement, SSA maintains. It knew that the time frames during which elevators were to be removed from its maintenance duties were “approximate” and therefore cannot recover as if those time frames had been promised to be certain. SSA, following its contracting officer’s theory, contends that a “partial constructive termination for convenience of the contract by the Government” limits any recovery to costs incurred for work performed; because Admiral performed no maintenance work on various elevators at the times they were taken out of service, the contractor incurred no costs as to those elevators during those times.

Admiral urges that because SSA instructed offerors to use the agency’s time estimates as a basis for constructing their proposals, and then “breached its promises” that the renovations would be completed as promptly as anticipated and that there would always be enough units in service sufficient to cover the contractor’s costs of keeping the requisite number of mechanics on site, the agency must bear the risk of the contractor’s losses. Admiral characterizes the erroneous estimates as misrepresentations and, citing to *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 728-29 (Fed. Cir. 1997), maintains that it should prevail because it honestly and reasonably relied on those misrepresentations in the contract documents to its detriment.

In our judgment, Admiral’s view of the case is correct. Before any proposals were submitted in response to SSA’s RFP, prospective offerors asked questions about the per-unit pricing structure contemplated by that solicitation. In response to one of those questions, the agency in solicitation amendment 3 provided important information:

The information on the renovation work i.e., estimates regarding when the elevators will be out of service/not required to be maintained under the proposed contract was stated in order in order to assist offerors in their management plans for . . . contract pricing. . . .

It is NOT the intention of the Government to take significant amounts of equipment from the contract that would result in lack of work/insufficient amount of work for the contractor’s on-site elevator mechanics. It is again emphasized that the contractor, at various times, will need to provide additional personnel, other than the on-site personnel, to satisfactorily perform the services. It is intended that there will **always** be a sufficient number of elevators to be maintained and repaired/requirements to be performed by the on site elevator mechanics.

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This response makes clear that SSA intended that offerors use the agency's estimates as a basis for their contract pricing and additionally expected offerors to construct their pricing on the assumption that the costs of the mandated on-site personnel would be recovered, under the per-unit, per-month pricing structure, no matter how many elevators were to be maintained in any particular month.<sup>3</sup> Internal communications among SSA employees involved in the procurement and the deposition testimony of an SSA contracting officer confirm the agency's expectations as to use of the estimates by offerors. This case is consequently like several others in which the Court of Appeals for the Federal Circuit and its predecessor Court of Claims found an agency responsible for the losses which a contractor suffered because, in pricing the contract, it reasonably relied on material, incorrect agency representations in solicitations. Among these cases are *Brown*, 132 F.3d at 729 (erroneous representation as to soil content, due to incorrect washed sieve analysis); *Summit Timber Co. v. United States*, 677 F.2d 852 (Ct. Cl. 1982) (erroneous representation as to boundaries within which timber could be cut, due to incorrect markings); *Everett Plywood & Door Corp. v. United States*, 419 F.2d 425 (Ct. Cl. 1969) (erroneous representation as to volume of timber available for cutting in oddly-shaped area, due to incorrect estimates by inexperienced personnel); and *United Contractors v. United States*, 368 F.2d 585 (Ct. Cl. 1966) (erroneous representation as to subsurface conditions, due to incorrect soil borings). Indeed, the contractor's position is even stronger in this case than it was in those, because here the contractor not only was expected to rely on the key information, but also was told to rely on that information.

Whether SSA was negligent in estimating the amount of time that elevators would be removed from Admiral's maintenance responsibilities is immaterial. Similarly, the date on which SSA knew that the estimates were incorrect -- whether before the renovation work began or after it was completed -- is unimportant. What is critical is that the agency's representations were erroneous, that the agency directed offerors to rely on them in constructing their pricing schemes, and that the successful offeror did indeed rely on those misrepresentations. See *Summit Timber*, 677 F.2d at 859.

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<sup>3</sup> By way of contrast, the Court of Appeals found that an offeror could not reasonably rely on the information provided by an agency in a solicitation where the solicitation stated, "The Government in no way warrants the data contained in the AMP Data Library. The Government will not reimburse the Contractor for any cost incurred as a result of using data provided in the data library or allow a schedule slippage due to defects in the data provided." *Grumman Aerospace Corp. v. Wynne*, No. 2006-1482, slip op. at 3, 9-10 (Fed. Cir. Aug. 17, 2007).

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The concept of a “partial constructive termination for convenience” has no application to the situation in which the parties found themselves here. The Court of Appeals has explained that “a governmental breach of contract may be construed as a termination for the convenience of the government when changed circumstances justify the reallocation of risk to the contractor.” *Maxima Corp. v. United States*, 847 F.2d 1549, 1552 (Fed. Cir. 1988). “The purpose of the [termination for convenience] clause is not to authorize unilateral renegotiation of a contract after it has been fully performed.” *Id.* at 1555. Here, no circumstances existed which might have justified the reallocation of risk to Admiral. The sole purpose of the purported partial termination was for SSA to unilaterally renegotiate the contract, after years of performance by Admiral which were sufficiently good that SSA exercised its options to continue the contract, so as to reduce SSA’s financial liability.

On the basis of the above analysis and conclusions, we deny SSA’s motion for summary relief and grant Admiral’s cross-motion to the extent that we agree that the contractor is entitled to recover its damages. What those damages are remains uncertain, however. Admiral has requested, at various times, that it be awarded three different amounts of money. In its claim, the contractor asked for \$158,722, the amount it says it would have received under the contract’s per-unit, per-month pricing structure, through January 2006, for maintaining elevators which were renovated if those elevators had been returned to service as promptly as SSA had anticipated. In its complaint in this appeal, the contractor said that it suffered lost labor costs in the amount of “at least \$171,945.73” during fiscal year 2005 and an additional “at least \$60,505.68” from January through May 2006 “in performing its contractual duties once the elevator[s] and/or escalators had been renovated and returned to service.” In its motion for summary relief, Admiral asks the Board to “award it at least \$114,710.58” in unpaid overhead costs resulting from SSA’s failure to return elevators to service as promptly as expected. Each of these amounts is predicated on a different set of calculations, and it is not clear which amount or which set of calculations Admiral believes is most appropriate. We will have to leave for later, on the basis of a fully-developed record, a determination of the precise amount that Admiral should receive.

In making this determination, our objective will be to put Admiral in just as good a position as the one in which it would have been -- no better and no worse -- had the elevators been returned to the contractor’s maintenance responsibility at the times they would have been, had SSA’s estimates been correct. *White v. Delta Construction International, Inc.*, 285 F.3d 1040, 1043 (Fed. Cir. 2002). This result will treat Admiral fairly, given its pricing of the contract in accordance with SSA’s instructions. No specific methodology for establishing the amount of recovery is prescribed; we will accept any workable, sensible approach which meets the goal we have set out. *Hi-Shear Technology Corp. v. United States*, 356 F.3d 1372,

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1381-82 (Fed. Cir. 2004) (referencing *Rumsfeld v. Applied Cos.*, 325 F.3d 1328 (Fed. Cir. 2003), and *Everett Plywood*).

We note, as to the determination of amount, SSA's suggestion that we have no jurisdiction to consider whether Admiral should receive overhead costs because the claim presented to the contracting officer involved only lost profits. The premise behind this suggestion is faulty. The claim presented to the contracting officer was based on per-unit, per-month charges for elevator maintenance. Those charges involved whatever labor, materials, overhead, and profit Admiral had factored into its prices -- not solely lost profits. To the extent that the contractor includes any or all of those elements in the amount it attempts to justify as we proceed with the case, we will consider those elements.

#### Decision

SSA's motion for summary relief is **DENIED**. Admiral's cross-motion for summary relief is **GRANTED IN PART**. The presiding judge will contact the parties to establish a schedule for further proceedings in the case.

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STEPHEN M. DANIELS  
Board Judge

We concur:

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CATHERINE B. HYATT  
Board Judge

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MARTHA H. DeGRAFF  
Board Judge