

IBCA

APPEALS OF JIM PHILLIPS CONTRACTING, INC.

Contract No. DAC992002

Decided: November 6, 2003

Bureau of Land Management -- Appeal Sustained

APPEARANCE FOR APPELLANT: Fred Simpson, Jr., Esq.

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OPINION BY ADMINISTRATIVE JUDGE PARRETTE

On February 10, 1999, after a formal solicitation and three responsive bids, the Idaho Office of the Bureau of Land Management (BLM) entered into an Indefinite Delivery/Indefinite Quantity road construction and repair Contract with Jim Phillips Contracting, Inc. (the Contractor or Phillips), the low bidder, for work in two Idaho forest areas. The first area, in the Idaho panhandle, ranged from north of Coeur d'Alene to south of St. Mary's, Idaho, and from the Washington border to the Montana border. It was covered by Contract Schedule A and was easily accessible. The second area, situated near Elk City in central Idaho, was covered by Contract Schedule B and was much less accessible.

The Contract contemplated five years of road work, with a guaranteed "minimum dollar value guarantee of services" of \$655,000 over its life--i.e., \$480,000 for work under Schedule A, and \$175,000 for work under Schedule B. The initial Contract period was only for one year, with four one-year extension options for each Schedule. The Contract was a unit-priced, indefinite delivery, indefinite quantity contract, not a requirements contract: BLM was free to also use other contractors if it chose to do so. On this Contract, BLM received bids of \$449,972; \$465,082; and \$597,340 for Schedule A work, and \$258,035; \$274,720; and \$317,935 for Schedule B work. On Schedule A work, the second lowest bidder was 6.5%, and the third lowest bidder 23%, above the low bidder. On Schedule B work, the second lowest bidder was 3.3%, and the third lowest bidder 33%, above the lowest bidder. Phillips Contracting was the lowest bidder on both.

Phillips Contracting was largely an Idaho/Montana forest road contractor, with existing offices in both Missoula, Montana, and Kellogg, Idaho. It had been in business since 1972 and had worked for several government agencies previously, including BLM. The Contract was larger than Phillips was used to, but Phillips was anxious to expand. When its winning bid of \$449,972 for Schedule A came in 48% below BLM's estimate, the Contracting Officer (CO) sought verification of the bid. She received it two days later, and the Contract was entered into on February 10, 1999. The initial pre-work conference was not held until April 5, 1999.

At the pre-work conference the CO's Representative (COR) "talked over a few roads on Schedule A" that "we are preparing to do this year" (emphasis added). A Notice to Proceed was issued the same day, with the Contract term to commence on April 6. But no task order to begin building the roads was issued until six months later, on October 18.

The normal construction season for road work in that part of Idaho was May or June through October or November, depending on the weather, but mainly July through September. By the time BLM's October 18 task order was issued, and the Contractor had mobilized at the site, snow had already covered the ground. Thus, on December 15, a winter suspension order was issued. A subsequent order to "resume work" (which had not yet begun) was not issued until August 15, 2000. The Contractor refused to accept the resumption order, asserting that the Contract had expired because the option to renew it for a second year had not been exercised. Phillips subsequently filed a claim for the entire \$655,000 guaranteed amount, despite never having performed any work. The claim was denied by the CO, and Phillips appealed to the Board. An oral hearing took place on May 21 and 22, 2003.

For the reasons set forth below, we sustain the Contractor's appeal and award damages, by jury verdict, in the amount of \$75,000.

The Option Issue

The Government argues vigorously that BLM did in fact exercise its second year option. One of its principal arguments is that BLM had never given Phillips any indication that the option would not be exercised; thus, the Contractor should have assumed that BLM intended for the Contract term to be extended. BLM contends:

There was no evidence that BLM took any actions or made any representations to Jim Phillips Contracting, Inc., during 1999 or 2000 suggesting it lacked the intent of extending the Contract performance period in order to meet the minimum guarantee order provisions. Jim Phillips testified he was never advised by anyone in the BLM that BLM did not intend to extend the road building Contract. (BLM's Proposed Findings of Fact)

The option clause was poorly written. It states:

52.217-9 Option to Extend the Term of the Contract (Mar 1989):

(a) The Government may extend the term of this Contract by written notice to the Contractor within 30 calendar days; provided, [that] the Government shall give the Contractor a preliminary notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension, (Underlining added)

The bold face type indicates BLM's insertion into the standard FAR provision, which provides a blank line for the agency to supply the insertion. Unfortunately, BLM's insertion does not make clear "within 30 days" of what? The date of the Contract? The end of the year? BLM doesn't say. That was BLM's first mistake. Its second was that no 60-day notice, or any preliminary notice of any kind, was ever given.

At the hearing, the CO testified that she had always intended to renew the Contract and that she had signed and mailed Modification No, 1 to that effect on February 8, 2000, two days prior to the anniversary date of the Contract award. She testified that: "Normally, modifications do not require any special certified mail

or anything special, we just send normal mail" (TR 437). But the Contractor testified that it never received any notice of the extension until July, and that he had assumed that BLM did not intend to exercise its option (TR 80-82). The record reveals no significant contact between the CO and the Contractor between December 1999 and July 2000 (TR 440).

However, on July 20, 2000, the Contractor's president, Janice Phillips, wrote to BLM saying that Modification No. 1 had been received on July 17, but that Phillips believed that the Contract had already expired and that it intended to claim the full \$655,000 minimum amount it had contracted for (AF 20). The CO responded to this letter on August 9 saying that she did exercise the option on February 8 and that the Contract was still in effect. She said that if the Government did terminate it for convenience, the Contractor would be entitled to any resulting costs (AF 21).

On August 15, 2000, BLM's COR issued a work resumption order for the work that had been suspended the previous December. The Contractor's response was an August 25 letter from its attorney reiterating that the Contract had already expired by its terms and that no further work would be performed under it. On October 4, Phillips wrote to the CO submitting a certified claim "for the minimum guaranteed contract amount of \$655,000" and asking for a decision within 60 days.

On January 30, 2001, the CO wrote to Phillips that the Government's option had been exercised on February 8, 2000, with an effective date of February 10. She said that BLM had used a similar procedure to extend another Phillips contract and that Phillips had accepted the extension without question. She explained that the purpose of the 60-day notice of intent to was "to allow the Contractor to request an adjustment in contract pricing based on a change in the Wage Determination wages," but that "since our contract was to carry the same Wage Determination throughout the life of the contract, there was no opportunity for you to request such an adjustment." Finally, since Phillips had refused to work under the Contract, she said she was terminating it for convenience. She also denied Phillips' claim because it had not shown any damages. She said this was her final decision (AF 24).

The Damages Issue

In its pleadings, the Government has exhorted us to agree that both the Contract option and the termination for convenience were effectively exercised and that therefore Phillips cannot legally recover anticipatory profits. We find, however, that there are three cases remarkably in point that collectively hold otherwise; namely, *Tecom, Inc.*, IBCA No. 2970a-1, [95-2 BCA 27,607; *Maxima Corp. v. United States*, 847 F.2d 1549 \(Fed. Cir. 1988\)](#), and [White v. Delta Construction International](#), 285 F. 3d 1040 (Fed. Cir. 2002). We will discuss them in turn.

The option language in *Tecom* was more specific than that in the Contract before us; namely, "The Government may extend the term of this contract by written notice to the Contractor within thirty (30) calendar days of [the] expiration date set forth in Section F911." etc. (emphasis added) - but *Tecom* nevertheless discussed whether the "within 30 days" could be construed to mean 30 days after the date in question. The Board summarily disposed of that issue, however, holding that it meant before the specified date, and noting that a contract is ambiguous only if it is reasonably susceptible of more than one interpretation (citing cases). 95-2 BCA 27.607 at 137,595. The same principle applies here.

More importantly, *Tecom* addressed the issue of when a notice to extend a contract

is effective; viz., "When there is no contrary agreement by the parties - and there is none here - an option exercise is effective on the date of receipt by the optionor" (emphasis added). [Dynamics Corp. of America v. United States, 389 F.2d 424; 182 Ct. Cl. 62, 76 \(1968\)](#), citing Corbin and cases. There is no evidence that Phillips received the notice until July, five months after the Contract's expiration date.

Tecom also adopted the rationale of [International Telephone and Telegraph v. United States, 453 F.2d 1283, 1289 \(Ct. Cl. 1972\)](#), that: "The parties never contemplated the giving of an oral notice and such a notice is not even mentioned in the contract. The oral notice is actually immaterial in affecting the legal rights of the parties and cannot, either singly or together with the late and untimely written notice, control the decision in this case." Tecom notes that the Armed Services Board reached the same result in Dynamics Corp.: "The Government's written correction was received by the appellant the day after the option expired and thus was ineffective because of its untimeliness. A timely oral notice plus an untimely written notice does not equal a timely written notice when that form of notice is mandated, as it was in this contract." [ASBCA No. 20882, 77-1 BCA 12,504 at 60,622](#). We note that in this case a definitive and timely exercise of a renewal option was all the more necessary because the 60-day preliminary notice requirement had been ignored.

If the Contract was never extended, then it terminated on February 10, 2000, when its first year had ended and the option to renew expired. The CO acknowledged during the hearing that a termination for convenience is not permitted after a contract term has expired (TR 468). Whether or not she knew that before preparing for the hearing is uncertain, but that is one of the points that Maxima, supra, makes abundantly clear:

The government recognized at oral argument, as indeed it must, that no decision has upheld retroactive application of a termination for convenience clause to a contract that had been fully performed in accordance with its terms. The asserted partial constructive termination for convenience was improper.

[847 F.2d at 1557](#). Maxima also emphasizes the need for fair dealing by the Government as well as by the contractor:

Neither the contractor nor the government can avoid its legal responsibilities by asserting ignorance. * * *

The need for mutual fair dealing is no less required in contracts to which the government is a party, than in any other commercial arrangement. 'It is no less good morals and good law that the government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government' [citing cases]." [847 F.2d at 1556](#).

In this Appeal, we therefore conclude that the contract extension option was not effectively exercised. The contract had expired by its terms and could not subsequently be terminated for convenience. Thus, the Government breached the contract by not ordering the amount of work it had contracted for, and Appellant's damages are not limited simply to profits on the work done, as it would be under a termination for convenience, but include anticipatory profits.

As to the measure of damages, White v. Delta Construction held that "[t]he primary objective of damages for breach is to place the non-breaching party 'in as good a position pecuniarily as he would have been by performance of the contract'," but not in a better position than if it had fully performed the contract. [285 F.3d 1040 at 1043](#). "Upon the government's failure to provide the guaranteed minimum amount of

work, Delta was entitled to recover the amount it lost as a result of that breach - no more and no less." [Id. at 1045.](#) The issue before us is how much profit did the Contractor lose?

Before discussing the testimony in this case, we note that the Federal Circuit recently refused to award anticipatory profits in a recent requirements contract case, [Rumsfeld v. Applied Companies, Inc., 325 F.3d 1328 \(CAFC 01- 1630, decided April 2003\)](#), where apparently no delivery had been made under the contract before it was successfully terminated for convenience. But that case involved simply a negligent quantity estimate -- there was no guaranteed minimum amount of work promised by the Government -- and because the termination for convenience was effectively accomplished in that case, the appellant's only entitlement was to profits on whatever products, if any, had been delivered prior to the termination. Here, the Government sought a termination for convenience only after the Contract had lapsed by its terms.

Testimony at the Hearing

By the time of the oral hearing, the Contractor had abandoned its claim for the full contract amounts; and both sides appeared to agree that the measure of damages should be as stated in Delta Construction, above; i.e., the amount of profit, if any, that Phillips would have made had the Contract been actually been performed. Thus, most of the hearing was concerned with attempting to ascertain that amount - an issue that produced substantial disagreement - although the Government continued to argue unpersuasively that it was the Contractor rather than BLM that breached the Contract. We reject that contention.

Appellant's Testimony

Both sides produced expert witnesses, along with testimony by the Contractor's principals and by the CO and the COR. Jim Phillips, the Contractor's vice president, testified that he went through the two bidding Schedules line by line, using the Forest Service's guidebook, to determine what the Contractor's costs would be compared to the bid price, and to ascertain the profit margin for each item (TR 86). He also used the Corps of Engineers's guide to determine mobilization hourly rates, although he intended to do much of the mobilization of the equipment himself. He testified that although the terrain covered by Schedule B was remote, and much of it was accessible only by gravel roads, the roads into it were generally two lane and well maintained. But because it was a remote area, his bid had included higher profit margins than for Schedule A tasks. He also explained that smaller jobs had larger profit percentages.

Access into Schedule A areas was largely by interstate highways and would involve no problems. Mr. Phillips did not calculate any profit for clearing and grubbing, which he called "a lost leader type of thing." Overhead of approximately 4 percent was included in his profit calculations. Overall, his projected profit figures ranged from 20 percent to 76 percent, and included such specific amounts as 20, 25, 28, 34, 37, 42, 58, 64 and 76 percent (TR 86 thru 122).

According to counsel's opening statement, profits for Schedule A work averaged 24 to 25 percent, and profits for Schedule B work averaged 38 percent, for a combined average of about 27.5 percent; and if that figure were applied to the guaranteed minimums, the overall Contract profit would have been between \$196,000 and \$200,000. When questioned on cross examination about his low bid prices, Mr.

Phillips said that he knew the area and had previously used several of the proposed suppliers, adding that with the unemployment rate "at about 38 percent" in the area, about a half hour on the telephone would quickly bring back his old operators, "especially on a Davis-Bacon [i.e., prevailing-wage minimum] job" (TR 160-161).

Mr. Phillips testified that he did not see an award of lost profits as some kind of windfall because he had been ready to perform Contract work but got no task orders in 1999 until the end of the year when it was too late to work; and when the same thing occurred in 2000, it meant he had not only lost work under the BLM contract but also that he had lost the prospect of other work, because as a small firm, his bonding capacity was adversely affected. His bonding company would go down the list of projects and ask their status, and if work was not going on under all of the existing contracts, they would be reluctant to increase bonding amounts. He had never before encountered a situation like this one where a project he had bid on never materialized. BLM never offered any explanation for its failure to order work under the Contract.

The Contractor's expert witness, Hugh Frame, had not completed college but was a retired former road and asphalt contractor who had an engineering and contract administration background with the former Bureau of Public Roads for 12 years. He then had gone to go to work for a paving company in Montana where he had bid and administered both government and private sector jobs (TR 178- 182). In 1972 he formed his own construction company, American Asphalt, where his goal was to "be low bidder and still make a profit and be able to complete the work and specifications." He subsequently formed a holding company, American Companies, which had three subsidiaries, American Asphalt, American Excavating, and American Line Builders, all of which were prime contractors involved in construction work, including road work for the Forest Service and on Federal highways, in the western United States, particularly Western Montana. One of his primary jobs was to evaluate subcontractor bids to make sure they could perform the work at the price they had submitted. Thus, he was very familiar with construction costs in the Western States (TR 183-189). He was familiar with the Corps of Engineers hourly rental rate guide, and he had gone over the Forest Service Cost Guide, as well as the Contractor's estimates and its financial statements. He did not use the rental rate Bluebook.

After a detailed examination of the Contractor's estimates (TR 202-220), Mr. Frame calculated that Phillips' profits would be \$102,799, or a 23 percent profit, on Schedule A work, which was a somewhat low number for that type of work (TR 221-222), and \$104,246, or a 40.4 percent profit, on Schedule B work (TR 225), for a combined total gross profit of \$207,045, or \$197,449 [27.9%] after minor overhead adjustments (TR 228).

Government's Testimony

The Government called as its expert witness Lamonte Joersz, a civil engineering technician and a U.S. Forest Service employee. He was an Idaho resident, also had not completed college, but had COR preconstruction analysis training and was currently involved in contract administration associated with road construction in Forest Service Region 1, which covers Clearwater National Forest areas in Montana, Northern Idaho, and part of North Dakota, plus BLM land. The land involved is mountainous with timber cover, and many of the roads are single lane with turnouts. In a typical year, the Forest Service constructs 20 to 25 miles of road, but the last three or four years were not typical because there were no timber sales. In the late '70s and early '80s the Forest Service did as many as 125 miles per year.

A typical year now involves three or four contracts, not counting a half dozen timber sales contracts.

Mr. Joersz began working for the Forest Service in 1967. His primary job is preconstruction contract preparation, including specifications and cost estimates. Sometimes he gets involved in construction as well. He has been certified as a COR in survey and design work (TR 250-261). BLM asked him to develop a cost estimate for the Contract using the 1998 Forest Service Cost Guide, and he has done so (TR 270). He has never personally bid on a project, worked as a contractor, or administered a contract. He is more familiar with roads and construction in the Clearwater National Forest than in the Northern Panhandle [of Idaho], but they are very similar because both involve mountainous timber (TR 272-273). For record purposes, Appellant objected to his testimony as an expert because he had never worked in the Northern Panhandle and had never prepared a commercial bid (TR 274).

The Forest Service began publishing very general cost guides in the '70's but they have become more complex as they have evolved and hopefully have become more precise (TR 262). The guides use Davis-Bacon and Bluebook rates and give examples of cost computations. Region 1 uses the guides put out by the Missoula regional office, but that office asks people within the region, including contractors, to check it each year for accuracy. Mr. Joersz has been involved in that procedure for six or seven years. Large corporations like Plum Creek and Potlatch generally accept the guide as the basis for sharing costs on cooperative roads. Mr. Joersz considered the guide a reliable source of cost price information for road construction and maintenance contracts in Northern Idaho. There is the best of the regional cost guides (TR 269-270). The Forest Service itself expects bids to be within a certain percentage of the estimates based on its cost guide, or it doesn't award the contract.

In Mr. Joersz's letter transmitting his cost estimate to BLM, he stated:

It appears that my cost estimate might in fact be higher than that of the contractor. Although the costs were developed in accordance with the 1998 Cost Guide, there are several items that require knowledge of exact conditions and locations to be extremely accurate. These are such items as clearing, needing to know exact volumes: mobilization, needing to know exact haul distances and times: and all haul items, needing to know distances and road conditions. These items required me to make judgment calls which I tried to stay in the middle on. Items like excavation, corrugated steel pipe, and surfacing are pretty much standard (emphasis added).

Mr. Joersz testified that "haul items," which were "almost impossible to estimate," included borrow haul, aggregate haul, and riprap haul. He therefore used information provided to him by the COR in making his estimate, but he acknowledged that it was also necessary to know where the material was coming from, what type of roads it's being driven on, and exactly how much work is going to be done at the site. He was not familiar with the Corps of Engineers' guide; in fact, he had never even seen it. He acknowledged that costs would change if Mr. Phillips himself did the truck driving and handled the mobilization. The types of roads involved in particular tasks had to be assumed, but higher average speeds on good roads would make a difference in costs.

Many of the items in the bid required judgment calls, and a few cents difference in their unit costs could cause a substantial variation in the end result, particularly on material costs. That was why Mr. Joersz chose the middle of the Forest Service Cost Guide range, to be fair to both sides. His profit estimate was \$9,122.81 on Schedule A and \$50,147.92 on Schedule B for a total of \$59,271, independently of any cost savings Phillips might have been able to achieve if the

facts were as represented by the Contractor's counsel on cross examination (TR 331-373).

Four questions were proposed to Mr. Joersz at the conclusion of his presentation. Appellant's counsel asked:

Q. Wouldn't you agree with me that a contractor that's been doing business in North and Central Idaho for the past 30 years would probably have a better idea as to what local prices were and what sources were and where those sources were at? His knowledge would be better than yours?

A. Yeah, I guess that could be a correct assumption.

Department counsel then asked:

Q. Would this be true - would any contractor who had a lot of contacts in North Idaho be able to do a better job of estimating costs than you've done here today?

A. Yes.

Q. Any contractor?

A. You know, by making the proper contacts, yes.

Q. What do you mean by proper contacts?

A. Well, knowing proper suppliers and locations.

The COR on the Contract, Will Perry, received his engineering degree in 1996 and subsequently began serving as a BLM district civil engineer. In 1998 he wrote the specifications and developed the cost estimate for the Contract solicitation. He also conducted the 1998 pre-bid conference but could not find his notes from that conference. He provided maps and information on the Contract work area to potential contractors and later to Mr. Joersz. He said that "the Kellogg area," where Appellant's Idaho office was located, had the majority of Contract work. A second pre-work conference was held on October 18, 1999, with respect to the first task order. Mr. Perry was in contact with the Contractor on another BLM job every week or two during the following summer, but the subject of this Contract came up only in passing.

Mr. Perry prepared a revised Schedule A cost estimate for the purpose of this litigation after receiving Mr. Joersz's revised report, because he (Perry) had a greater knowledge of the area. He arrived at \$546,348.50 as the cost of Schedule A work, including a 6% profit, but he admitted that he had no significant experience bidding on projects or contracts and that he did not have access to the kind of historical data that Phillips did. His original cost estimate for Schedule A was \$861,380, which was about \$300,000 more than Mr. Joersz's cost estimate. He was responsible for issuing task orders. Although the prime work season was from June through September, and culverts are generally placed from August through September, his resume work order was not issued until August 15. He agreed with Department counsel, with respect to Schedule B work, that because there would be more bidders on small contracts than on larger contracts, the greater competition would cause profit rates to go down.

Discussion

Indefinite delivery, indefinite quantity, or ID/IQ, option contracts presumably came into being in government contracting as a means of avoiding the loss of annual appropriations that must be either used or legitimately committed before the end of the fiscal year. Even commitments entered into before the end of the fiscal year generally can be for only one year; so annual renewals are required. Here, roads needed to be built and funds were apparently available, but -- especially in cold climates -- there is a limit to how much work can be done in a single year. Often the solution is a firm one-year contract for the entire amount of funding available but with options that extend the performance period and thereby permit the funds to be carried over into future years. If the money is not spent, or the contract is not renewed in its first year, the funds will likely be lost. Thus, in the first year of the Contract, BLM needed to spend the entire \$655,000 or else to timely exercise the renewal option. It did neither.

We do not know, of course, what BLM's actual work schedule might have been. It is possible that it originally did intend to spend the entire \$655,000 during the first work year of the Contract. But it is also entirely possible that BLM was primarily interested in simply locking in low unit costs for future work, or else in avoiding the loss of current funds, which could lapse if they were not committed during FY 1999.

Despite the large amount of funds committed to the Contract, no work was accomplished during its first year. In the absence of a valid Contract renewal, the Contractor is now entitled to whatever profits he would have made in that year under the Contract as written. Determining the amount of those profits now depends, as in many other cases, upon the knowledge, truthfulness, and credibility of witnesses.

Although the witnesses on each side appeared to be truthful, there were two witnesses with at least some degree of personal involvement; namely, Jim Phillips and Will Perry -- both of whom prepared separately an analysis of costs that they provided to one of the two experts, who then based their expert testimony largely on the materials they received. The problem is, whom should we rely on, and why?

Jim Phillips, the company vice president and job manager, had more than a quarter of a century of very similar work experience in the same State and in similar localities. He had numerous work-related personal contacts in those areas, including suppliers and work crews that he had used previously. Many of these sources were said to be currently available because of the very high unemployment rates in the area. BLM clearly had assumed that Phillips could do the work for the prices it bid, or else they would not have awarded it the Contract. On the other hand, the company was interested in expanding, and might have gambled that current costs would remain relatively constant over the five-year life of the Contract, a somewhat risky but necessary assumption. (See general discussion of the pricing of option contracts in Cibinic and Nash, *Formation of Government Contracts*, Geo. Washington Univ. 1998, pp. 1256 - 1276, *passim*) In addition, when Phillips had an opportunity to get out of the contract, it did so. Thus, without in any way questioning his honesty or integrity, it is obvious that Mr. Phillips's testimony might have been somewhat self-serving.

A similar issue arises in connection with the testimony of Will Perry, the COR who wrote the Contract specifications and performed the Government's cost estimate only two years after graduating from engineering school. His original estimate was nearly 60 percent above Phillips' bid price, giving rise to a need for BLM to verify the Contractor's bid. He subsequently became the COR on the projects, and it was he who failed to give the Contractor anything more than a single task order during the nearly two-year period that he assumed the Contract was in force. Finally, it was Mr. Perry who later prepared the Government's cost analysis in

preparation for this Appeal - the analysis also used by the Government's Forest Service expert, upon whom the Government's defense was largely based. Again, although we do not question Mr. Perry's honesty or integrity, there nevertheless appears to be at least some potential for personal bias or lack of complete impartiality in his testimony.

Since we are at least unwilling, if not unable, to attempt to determine whether Mr. Phillips or Mr. Perry was the more reliable witness, and do not want to rely merely on our own guesstimate, we are largely dependent on the conflicting testimony of the parties' two impartial experts in determining the amount of the Contractor's lost profit. We find that the two experts were equally credible, but that the testimony of Mr. Frame was the more reliable, for the following reasons.

The Government's expert, Mr. Joersz, testified on the basis of the Forest Service's annual cost guide, which essentially averages the costs reported by owners and contractors in the Region 1 Forest Service area; whereas, Mr. Frame testified on the basis of his own long-term personal contracting experience in the area, checking his results against the Corps of Engineers' similar cost guide. Both the Forest Service cost guide and the Corps's cost guide are intended to provide cost generalizations based on averaging. While the use of averaging to determine overall costs is entirely reasonable and is a valuable tool in evaluating pre-contract bids, as Mr. Joersz testified, a cost guide is not necessarily the most reliable means of determining an individual contractor's actual costs after the contract has been let. It is easier to infer a general proposition from averaging individual cases than it is to predict an individual outcome from a generalization - which perhaps is why Justice Oliver Wendell Holmes asserted that the life of the law is not logic but experience.

Appellant's counsel pursued this question at some length in his cross-examination of the Government's witnesses, as we have noted. He wanted to know if Mr. Joersz or Mr. Perry had ever done any contracting themselves, and the answer was no in both cases. He then presented these witnesses with seemingly minor variations in unit costs to illustrate convincingly what a substantial difference in overall costs small differences in line items could make if the estimates were off by such amounts. Mr. Joersz doubted that his figures were wrong but admitted that they might be. He readily agreed that an experienced local contractor might be able to achieve lower costs than he had projected.

Mr. Frame, an experienced contractor who had actually done similar work in the same general area for many years, thought that Appellant's profit projections for Schedule A were actually low. His analysis, however, calculated approximately the same \$200,000 in total profits that Mr. Phillips had projected. Since both men had extensive personal contracting experience, we are inclined to regard their combined testimony as more reliable than that of Mr. Joersz and Mr. Perry, both of whom relied primarily on the Government's cost guides for the area. See, e.g., [Harold A. Miller, 223 Ct. Cl. 352 at 366; 620 F.2d 812, 818.](#)

On the other hand, this would have been a five-year contract; and economic inflation, though now somewhat slowed, is still a fact of life. And in subsequent Contract years, a majority of the 38% of Idahoans said to be unemployed might well be back at work and unavailable. Thus, even though we might fully accept Mr. Frame's and Mr. Phillips's testimony as to probable profits had the Contract been only for one year, we cannot comfortably assume that the same profit margins would have been achievable in the Contract's next four years. Moreover, in order to save money, it is entirely possible that BLM might have deferred the majority of its task orders until the last year or two of the Contract when Phillips's costs arguably could be substantially higher. We have therefore found it necessary to arrive at an award by the jury verdict approach, rather than on the basis of the

Contractor's presentation alone.

Decision

We conclude that an appropriate award in this instance would be only 35 to 40 percent of the amount of profit calculated by Mr. Frame and Mr. Phillips; namely, \$75,000, and we award that amount, plus interest in accordance with the Contract Disputes Act.

Bernard V. Parrette

Administrative Judge

I concur:

Candida S. Steel

Chief Administrative Judge

IBCA No. 2000, IBCA No. 4319, IBCA No. 4320