

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

**THIS OPINION WAS INITIALLY ISSUED UNDER
PROTECTIVE ORDER AND IS BEING RELEASED TO THE
PUBLIC IN REDACTED FORM ON SEPTEMBER 21, 2000**

RESPONDENT'S MOTION FOR
PARTIAL SUMMARY RELIEF DENIED: May 12, 2000

GSBCA 14732

AT&T COMMUNICATIONS,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Richard J. Conway, Robert J. Higgins, and J. Andrew Jackson of Dickstein Shapiro Morin & Oshinsky LLP, Washington, DC, counsel for Appellant.

Robert H. Koehler, Michael J. Schaengold, James A. Hughes, Jr., William E. Slade, Norah V. Dabney, and Thomas Michael Guiffre of Patton Boggs LLP, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK, PARKER, and NEILL.**

BORWICK, Board Judge.

Respondent, General Services Administration, (respondent or GSA), moves for partial summary relief concerning breach claims which appellant, AT&T Communications, Inc. (appellant or AT&T), has filed against the Government under the FTS2000 contract and modification PS251 to that contract. We deny respondent's motion because genuine issues of fact are in dispute, making a grant of the motion inappropriate.

Background

The claims

AT&T appeals from the GSA contracting officer's decision of October 2, 1998, denying multiple claims under the Federal Telecommunications Service 2000 (FTS2000)

contract for long distance telecommunications service. AT&T also appeals from the Government's affirmative claim against AT&T.

AT&T's principal claims in counts I-IV stem from what AT&T maintains is improperly taken volume discounts that GSA did not earn. These are the counts at issue in respondent's motion for summary relief. Complaint, Introduction.

In 1988, GSA awarded two mandatory use FTS2000 contracts, Network A, constituting 60 percent of the Government's FTS2000 requirements, to AT&T and Network B, constituting 40 percent of the Government's FTS2000 requirements, to Sprint. Complaint, IVA.4.-6.

The contract was divided into three periods. Prior to the second and third contract periods, GSA reserved the right to conduct two additional competitions between AT&T and Sprint designed to redetermine prices and to reallocate requirements. The solicitation described this process as price redetermination/service reallocation (PR/SR). Complaint, IV.B.8.

GSA conducted a PR/SR in year seven of the contract (Year 7 PR/SR). Complaint, IV.D.12. AT&T alleges that it was GSA's intent in the Year 7 PR/SR to maintain ongoing service from the two contractors through the ten-year life of the FTS2000 contract. AT&T alleges that GSA intended that no further service reallocations were intended, and that the winning offeror's new traffic would be allocated in accordance with actual revenue projections at the time of the final competition and based upon then-existing contract prices. Complaint, IV.D. 13.-15.

In the Year 7 PR/SR solicitation, GSA promised to identify agencies and requirements that would be transitioned and GSA assumed the obligation to identify new Government organizations that were required to buy FTS2000 contract services from the vendor to which they were transitioned. Complaint, IV.D.16.

The Year 7 PR/SR process involved three possible award scenarios: Scenario 1 would allocate 40 percent of Sprint's Network B requirements to AT&T; Scenario 2 would allocate 40 percent of AT&T's network A requirements to Sprint; Scenario 3 would preserve the then-existing service allocation of 60 percent AT&T and 40 percent Sprint. Complaint IV.E.20.

AT&T alleges that each contractor was required to submit a single set of fixed-price tables for all contract services and features for the final three-year contract period. Complaint, IV.E.21. During the pre-award process for the Year 7 PR/SR, GSA gave each FTS2000 Service Contractor (FSC) the opportunity to propose a discount specific to each scenario to be applied to the FSC's total monthly invoice, exclusive of taxes and Service Oversight Center charges. Complaint, IV.F.23.

AT&T alleges that it proposed a Scenario 1 specific discount expressly dependent upon a Scenario 1 award and upon GSA identifying and transitioning specific agencies and requirements to AT&T. Complaint, IV.G.24.-26. AT&T alleges that GSA accepted AT&T's

Scenario 1 proposal, which resulted in bilateral Modification PS251. Modification PS251 identified the entire United States Department of the Treasury (Treasury) and the Internal Revenue Service's (IRS's) 1-800 service as requirements to transition. IV.G.27.-28.

AT&T alleges that based upon the award and GSA's promise to transition those services, it immediately began to provide the Government with the conditional network-wide discounts. Complaint, IV.G.27.-28.

AT&T alleges that GSA failed to transition Treasury, and particularly the IRS 1-800 service; that GSA informed AT&T that the Treasury transition would be substantially delayed and that IRS refused to proceed with the 1-800 service transition until after the 1995 tax season ended in May 1996; and that GSA never required Treasury and IRS to effect a complete transition. Complaint, IV.H.29. AT&T alleges that GSA refused to cooperate with AT&T to ensure a successful execution of Modification PS251 and also hindered transition activities that GSA was able to undertake. Complaint, IV.G.31. Despite the alleged actions and inactions, AT&T alleges that GSA continued to take the network-wide price discounts that were expressly conditioned on prompt transition of what AT&T calls the Treasury requirements. Complaint IV.G.32. AT&T charges GSA with breach of contract, misrepresentation, withholding superior knowledge, and mutual mistake. Complaint, Counts I-IV.

Appellant claims that Modification PS251 is a requirements contract. Respondent moves for partial summary relief on counts I-IV of the complaint, claiming that FTS2000 is an Indefinite Quantity/Indefinite Delivery (IDIQ) contract and that Modification PS251 did not change the contract to a requirements type.¹

The contract and modification PS251

The FTS2000 contract provided:

H.3. Type of Contract

¹ AT&T also claims constructive change due to alleged Government change in PEG Count/Make Busy and Hunt Sequencing features, breach for alleged GSA failure to pay service initiation charges, and breach for alleged GSA failure to pay the proper amount for switched voice service charges. Complaint, Counts V-VII. The Government also asserts an affirmative claim that AT&T delayed the transition from Network B to Network A, causing the Government to use the higher-priced Sprint for necessary services during the delay period. The Government claims it thereby lost the benefit of AT&T's discount and seeks from AT&T an amount representing the discount the Government would have obtained had AT&T timely completed the transition. Government's Answer, 19-20. These matters are not addressed in respondent's motion.

This contract is a fixed price, indefinite quantity type contract with economic price adjustments and a form of prospective price redetermination as described in Section H.14.

H.4. Minimum Dollar Guarantee

- a. The minimum dollar guarantee for this contract shall be [\$270 million for Network A] which shall be obligated within the first four years of the contract. . . .
- b. The Government is under no obligation to purchase service under this contract beyond the minimum dollar guarantee.

Appeal File, Exhibit 1 at H-5 (Amendment 14, September 21, 1988).

The contract also provided:

H.14 Price Redetermination and Reallocation of Service

H.14.1 General

The unit prices and the total estimated price, if any, stated in this contract shall be periodically redetermined in accordance with this clause, except that (1) the prices for supplies delivered and services performed before the first effective date of price redetermination (see H.14.2 below) shall remain fixed and (2) in no event shall the total amount paid under this contract exceed the maximum contract ceiling specified in H.5.

Appeal File, Exhibit 1 at H-21 (Amendment 8, January 28, 1988).

For purposes of PR, performance was divided into successive periods, the first period commencing from the date of contract award to the end of month forty-eight, with the second and third periods each lasting thirty-six months from the end of the last preceding period. Appeal File, Exhibit 1 at H-21 (§ H.14.2) (Amendment 8, January 28, 1988).

The contract provided:

H.14.3 Selection of Requirements for Reallocation

- a. The government shall select requirements for reallocation between the two networks using a target of 40% for each network's estimated revenue over the remaining life of the contract using prices then in effect and usage forecasts developed by the government.

- b. The government will select requirements for reallocation based on an analysis which identifies those requirements which are the least advantageous to the government as delivered and priced at that point in time. The analysis will included consideration of:
 - 1. Prices compared to the other FTS2000 service contractor and to the external market
 - 2. Service quality
 - 3. Ease and estimated cost of transition
 - 4. Impact on users and their applications
 - 5. Alignment with agency allocations (i.e., on a whole agency basis, with consideration of community of interest and accommodation of consolidated boards, to the extent practicable)
 - 6. Ability to maintain ongoing competition between two contractors through the remaining service life
 - 7. Other factors concerning price, quality, and reliability of service to the Government.

Appeal File, Exhibit 1 at H-21-22 (Amendment 8, January 28, 1988).

The solicitation distinguished between PR and SR. The objective of PR was to:
determine, based on consideration of both cost and technical factors, whether to adjust the target revenue split currently in effect between the two FSCs.

Appeal File, Exhibit 2 at C-2 (§ C.8.1) The objective of SR was to

reallocate FTS2000 forecast traffic (as necessary) to achieve the target revenue split over the remaining life of the contracts based on the scenario chosen in PR and considering the forecast revenue split for the remaining life of the contract.

Id.

The Year 7 PR/SR solicitation document stated that: "The Government will identify the agencies, services and features to be reallocated at [the] time of Year 7 PR/SR contract modifications." Appeal File, Exhibit 2 at C-10 (§ C.8.3.2).

The Year 7 PR/SR solicitation document showed a "potential target revenue share" of 76 percent for Network A and 24 percent for Network B. Appeal File, Exhibit 2 at C-3

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(¶ C.8.1). Scenario 2 showed a potential target revenue share for Network A at 36 percent and network B at 64 percent. Scenario 3 was the existing 60/40 revenue split. Id.

Modification PS251 provided:

Changes to the FTS2000 network traffic will be necessary as a result of this modification. The following agency will transition from Network B to Network A: Department of Treasury, including IRS 800 service.

Appeal File, Exhibit 8 at 3 (¶ h).

Time for transition

AT&T alleges that GSA required transition within six months after the Year 7 PR/SR award. Complaint, IV.D. 16.-19. The Year 7 PR/SR solicitation provided that it was the "Government's intent that all required transitions be accomplished within a maximum of 6 months, unless otherwise notified by the Government." Appeal File, Exhibit 2 at C-8 (¶ C.8.2.3). GSA, relying on a cryptic letter from "John" (unidentified) to "Dick" (unidentified) dated October 22, 1995, alleges that an AT&T document shows that AT&T understood that the time for transition was nine months. Respondent's Statement of Undisputed Facts (RSUF) at 30 and Respondent's Motion for Partial Summary Relief, Exhibit 15. In response, AT&T has submitted a deposition from the author of that letter, in which the author states that AT&T planned for a six-month transition at the insistence of the Government. Appellant's Opposition to Respondent's Motion for Summary Relief (Appellant's Opposition), Exhibit 10 at 74-75.

Transition responsibilities and existence of alleged breach

AT&T alleges that the Government during the Year 7 PR/SR negotiations and after award promised AT&T full transition of Treasury and IRS, when it knew that Treasury and IRS services would never be fully reallocated or that such reallocations would be substantially delayed. Complaint, Count II, ¶¶ 68, 70 and Count III, ¶¶ 78-79. AT&T points to GSA's transition responsibilities set forth in the Year 7 PR/SR solicitation document. Appellant's Statement of Genuine Issues (ASGI) at 10. The solicitation document provides that GSA would establish a Transition Control Center (TCC) as a single point of contact for the transition. Appeal File, Exhibit 2 at C-10 (¶ C.8.3.2). The TCC responsibilities included, but were not limited to, "providing transition guidance," "approving the number of locations to be cut over per phase," "overseeing downsizing of either Network A or Network B access and network switches," "providing to the gaining FSC with [sic] the names, addresses, and telephone numbers of the available LGCs [Local Government Contacts] and Designated Agency Representatives (DARs) no later than 20 calendar days from date of Year 7 PR/SR contract modifications," "providing to the gaining FSC the available user location inventories and traffic data," and "coordinating services requests with SOC personnel that are required to implement service reallocation." Appeal File, Exhibit 2 at C-11 (¶ C.8.3.4).

GSA denies it breached the contract in any way. In its answer, GSA alleges that the "responsibility to transition service was with the gaining vendor, AT&T." Answer, ¶ 86.

GSA points to a portion of the Year 7 PR/SR that states: "Following Year 7 PR/SR contract modifications, both FSCs shall be responsible for any transition due to service reallocation. The gaining FSC shall be responsible for developing the associated plans defined herein and for providing all reallocated services and features for an agency transitioning to its network." Appeal File, Exhibit 2 at C-7 (§ C.8.2.1). Respondent alleges that the time frame for transitioning IRS was properly adjusted, as allowed by the contract. Id. Respondent alleges that "any failure to meet the 76%-24% split was due to AT&T's inability to carry out its responsibilities to transition traffic promptly and without error." Id.

Severity of alleged breach

If there was a breach, GSA alleges that it was minor. GSA claims that AT&T received during contract period three 71.4 percent of the total revenue versus 28.6 percent of the total revenue for Sprint. RSUF at 9 (§ 23); Respondent's Motion for Summary Relief, Exhibit 16. Respondent maintains that AT&T received more than 93.9 percent of the estimated 76 percent estimated target revenue share. RSUF at 9 (§ 23).

Appellant disputes that the alleged breach was minor. Appellant notes that the percentage calculations for Sprint's share were based on price reductions from Sprint's Scenario 1 price, effective October 31, 1996, that GSA demanded from Sprint after the award of Modification PS251. ASGI at 6. In this regard, the solicitation states that "reallocation will depend on the actual revenue split at the time of price redetermination, which will depend on the prices resulting from the selected scenario and the traffic projections for the remaining life of the contract (through month 120)." Based upon pricing in effect at the time of PR/SR 7, AT&T states the actual revenue split at 68.8 percent for AT&T and 31.2 percent for Sprint. Appellant's Motion for Summary Relief, Exhibit 2.

AT&T states that it only received "55 percent" of the revenue it should have received from the Treasury transition. Appellant's Motion for Summary Relief, Exhibit 4.² Based upon the total revenue share received by AT&T after the award of Modification PS251, AT&T argues that it received only a .6% increase as a result of the Treasury Transition, which was only 7.7 percent of what GSA promised to transition. ASGI at 6. How appellant arrived at those figures is unclear.

Right to adjust transition

GSA states that it has the non-compensable right under the contract to adjust the transition schedule. Respondent's Motion for Partial Summary Relief at 10. AT&T, relying on the deposition testimony of the contracting officer, states that the right to adjust the transition schedule could only be for cause and did not give carte blanche to the Government

² That exhibit is the declaration of Appellant's expert David S. Williams. Mr. Williams has calculated that after Modification PS251, AT&T earned _____ in Treasury revenue while Sprint earned _____. Appellant's Exhibit 4 at 2. The total of the two revenue streams is _____ =50.63%, not 55%.

to refuse to transition work. ASGI ¶ 27; Appellant's Opposition to Respondent's Motion for Summary Relief, Exhibit 10.

Summary of parties' positions

Respondent states that:

In December 1988, GSA awarded two FTS 2000 contracts dividing the FTS 2000 telecommunications network into two networks: Network A and Network B. "Network A," constituting a target 60% of the total projected ten-year revenues for FTS2000 was awarded to AT&T. "Network B," comprising a target 40% of the total projected ten-year revenues for FTS2000 was awarded to Sprint. For the initial revenue allocation, the **"requirements for each network [were] derived from an approximate 60%/40% division of FTS [the Government's predecessor long distance telecommunications system voice grade traffic]."**³ (Record Citations Omitted.)

RSUF ¶ 6. Respondent also notes that in discussing the mechanics of the PR/SR process, the reallocations involve "an estimated target 40 percent" of the other network's forecasted revenue, and that notwithstanding the reallocation process "the Government does not guarantee the revenue shares for any period of the contract." Respondent notes that during contract periods I and II, the revenue split fluctuated substantially from the 60%/40% target; in contract period I, the revenue split was 47.7% AT&T/52.3% Sprint and in contract period II, the revenue split was 65.7% AT&T and 34.3% Sprint. RSUF ¶ 12 (Record Citations Omitted.)

Respondent states that GSA's concept paper states that the Government had no contractual obligation to ensure that the "FSCs . . . consistently obtain the revenue share applicable to a particular contract period." Respondent states that during the negotiations, in response to a question from Sprint, the Government stated that "based on the Scenario selected as a result of the PR process, the SR process will result in services to be transitioned to obtain the new revenue split. The Government will not fine tune the revenue split after this initial adjustment has been completed." RSUF ¶ 13 (Record Citation Omitted.) In its statement of uncontested facts, respondent quotes those portions of the contract and the PR/SR solicitation document which emphasize the notion of the revenue split as a "target." RSUF ¶¶ 14-18. (Record citations omitted.) Respondent notes that in response to an AT&T question before the award of the PR/SR modification, it explicitly told AT&T that "the revenue split is a target, not a contractual guarantee," RSUF ¶ 19, and that AT&T understood the Government's position because in its proposal AT&T told the Government that it demonstrated the desire and the capability to accommodate growth to an "estimated 76 percent of the FTS2000 program revenue." RSUF ¶ 20.

Respondent argues that Sections H.4 and H.5 of the contract provide the minimum dollar guarantee of \$270,000,000 which the Government fulfilled during contract period II

³ The brackets in this quotation are inserted by respondent.

and notes that “except as necessary to fulfill the minimum contract guarantee, the government was not obligated or required to satisfy its requirements for the services described from the contractor.” RSUF ¶ 26.

Appellant takes issue with the implications of these paragraphs that GSA’s alleged obligation to transition all of the Department of Treasury work was a “merely an aspirational goal.” ASGI ¶ 1 (Citations omitted.) Appellant, relying on the language of the modification itself, states that the contract “is unambiguous in its requirement that all Treasury revenue (including IRS) transition from Sprint’s network to AT&T.” ASGI ¶ 1. Appellant argues that in its choice of the word “requirements” in paragraph H.14.3 of the Year 7 PR/SR solicitation document, GSA recognized that the SR process would result in “rewarding the winning contractor with additional requirements and associated revenue to be reallocated to the winning vendor.” *Id.* Appellant also relies on the deposition testimony of the contracting officer as confirmation of GSA’s understanding that transitioning of all of the Department of the Treasury was a requirement, not just a “target.” ASGI ¶ 6. (Citations omitted.)

In refuting the notion that the minimum contract guarantee relieved the Government of its obligation to transition the Department of the Treasury to appellant, AT&T notes that the FTS2000 contract was a mandatory use ten-year contract which limited the provision of long distance services to two vendors, AT&T and Sprint, and that throughout the life of the contract, the Government assigned specific agencies and agency requirements of a quantifiable nature to AT&T. AT&T relies on the plain meaning of the modification and the aforementioned deposition testimony of the contracting officer.

Discussion

Board Rule 108(g)(1) provides that a motion for summary relief should be filed “only when a party believes that, based upon uncontested material facts, it is entitled to relief in whole or in part as a matter of law.” Rule 108(g)(1) is modeled on Rule 56, Federal Rules of Civil Procedure. We therefore rely on our own precedent and on Federal court decisions construing Rule 56 in evaluating the motion.

We are obliged in ruling on motions for summary relief to draw all inferences in favor of the party opposing the motion; a motion for summary relief is proper only on those facts about which we “need not function as an arbiter among differing versions of every factual reality for which evidentiary support has been presented.” Cable Electric Products, Inc. v. Genmark, Inc., 770 F.2d 1015, 1020 (Fed. Cir. 1985). All significant doubt over pertinent factual issues must be resolved in favor of the party opposing summary relief. Digicon Corp. v. Department of Commerce, GSBCA 14257-COM, 98-2 BCA ¶ 29,998. Summary relief is appropriate only when there are uncontested material facts (or in the words of Rule 56, no genuine issue of material fact) and the movant is entitled to judgment as a matter of law. Armco, Inc. v. Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986.)

Our duty at the summary relief stage of proceedings is not to weigh the evidence, but to determine the existence of disputed material facts. Anderson v. Liberty Lobby, 497 U.S.

242, 249 (1986); Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990, 1003 (3rd Cir. 1993) (district court's summary judgment reversed in suit challenging set-aside program as violative of Equal Protection Clause where defendant presented evidence of racial discrimination sufficient to defeat motion).

In this matter, there are disputes of material fact that prevent us from granting respondent's motion for summary relief. The parties disagree over the basic facts of transition. They disagree as to whether the transition was supposed to take place in six or nine months. While the initial time was six months the Government could extend the time. There are factual issues as to whether the Government extended the transition time to nine months and whether AT&T agreed to any extension.

While both parties agree that the transition of Treasury from Network B (Sprint) to Network A (AT&T) did not proceed in a smooth manner, the parties disagree as to who bears responsibility for the unhappy circumstances. The Government argues that transition was totally appellant's responsibility and that the transition difficulties were of appellant's making. AT&T argues that it was ready and able to transition in a timely manner, but its inability was due to GSA's failure to properly guide the transition as required by the contract. The primary factual dispute as to this aspect of the case is whether AT&T or the Government (both GSA and Treasury) was the predominant cause of the difficulties in effectuating the transition. There are disputes of fact as to whether GSA carried out its transition responsibilities under paragraphs C.8.3.2 and C.8.3.4 of the contract and whether AT&T performed its transition responsibilities under paragraph C.8.2.1. There are disputes of fact as to whether the GSA misled AT&T into believing that it would receive IRS-800 service before the 1995 tax season ended in May of 1996, when, allegedly, GSA knew before it executed modification PS251 that IRS did want to transition that service until after May 1996.

The parties dispute the nature of the contract. Appellant maintains that Modification PS251 made the contract a requirements contract; that the Government made an unconditional promise to transition Treasury and IRS; that the Government breached the promise, entitling AT&T to damages. Appellant accuses the Government of diverting work to Sprint when AT&T was contractually entitled to the work. In contrast, respondent states that the FTS2000 contract was an IDIQ contract; that the contract contained all of the standard clauses usually found in an IDIQ contract, and that the SR process was to achieve a target, and that the seemingly unconditional language of the modification regarding the Treasury transition must be understood in the context of meeting the target. In short the Government argues that, despite the unconditional language of the modification, the Government had no contractual obligation to order services in excess of \$270,000,000, which was the minimum guaranteed under the contract.

Whether a contract is to be construed as a requirements or an indefinite quantities contract depends on whether the contract gives the seller the exclusive right to meet all of the buyer's requirements. Coyle's Pest Control, Inc. v. Cuomo, 154 F.3d 1302, 1305 (Fed. Cir. 1998). We are to look behind the label of the contract to determine "what were the legal rights for which the parties bargained." Crown Laundry and Dry Cleaners, Inc. v. United States, 29 Fed. Cl. 506, 515 (1993). Often, as here, this determination involves questions of material fact. Id.; Information Systems and Networks Corp., ASBCA 46119, 96-1 BCA ¶

28,059, at 140,120. The minimum guarantee clause in the contract, and the contractual language regarding the "target" revenue splits, contrast vividly with the unconditional language of modification PS251 as to transition of Treasury and IRS. We must therefore examine the negotiation record resulting in modification PS251, and hear testimony of witnesses about the negotiations, to determine whether the Government intended to fully transition Treasury and the IRS 800 service, or whether the unconditional commitment implied in the wording of the modification was as flexible as the Government's reading of target revenue split and the minimum guarantee.

There are disputes of fact whether any Government adjustment to the transition schedule was for unanticipated events, or simply to justify GSA's or Treasury's refusal to transition.

Respondent argues that restitution is not available as a contract remedy, and that appellant is limited to the remedies under the contract's standard delay of work, changes or termination for convenience clauses. Respondent's Motion for Partial Summary Relief at 24- and 25. Appellant argues that its claims do not involve delay, changes or a partial termination for convenience:

First, placing to one side the fact that GSA yet again ignores AT&T's claims for misrepresentation, superior knowledge, and mistake, none of which are "under the contract claims" that can be defeated by such clauses--these clauses could not preempt AT&T breach claims unless they provided AT&T with complete relief . . . and "complete relief" in this case context means a reasonably adequate substitute for damages available in a breach case.

Appellant's Opposition at 37 (citations omitted).

Since the enactment of the Contract Disputes Act eliminated the distinction between claims of breach and claims arising under the contract, contractors have been able to submit claims of breach to the contracting officer and have those claims decided either by the Court of Federal Claims or the appropriate board of contract appeals. Yankee Atomic Electric Co. v. United States, 42 Fed. Cl. 223 (1988). Thus we have awarded breach damages where a remedy- granting clause has not provided complete relief. Travel Centre v. General Services Administration, GSBCA 14057, 99-2 BCA ¶ 30,521, at 150,715, appeal docketed No. 00-1126 (Fed. Cir. Dec. 15, 1999) (awarding breach damages in a non-definite quantity contract); Atlantic Garages, Inc., GSBCA 5891, 82-1 BCA ¶ 15,479, at 76,711 (awarding breach damages in a negligent estimates case involving a requirements contract). Of course, assuming it has any right to recover, whether AT&T may recover under a breach theory or under one of the FTS2000 contract's standard clauses awaits development of the record as to the nature of the Government defalcation, if any.

Nor can we grant respondent's motion on the availability of restitution. Restitution is an available alternate remedy for breach, when the breaching party's non-performance is so material and substantial that it goes to the essence of the contract. The breach must be so severe as to discharge the injured party from any further contractual duty on its part. 5 Corbin On Contracts, 562 § 1104 (1964). Put another way, the breach must be "total." 3

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Restatement of Contracts, 2d, § 373 (1981). Thus the Court of Federal Claims has awarded restitution damages to savings and loans arising out of the contract breach found in United States v. Winstar Corp. 518 U.S. 839 (1996). The Court found that the "complexity, breadth, and the length of the contract which was breached make it difficult to award expectancy damages," and that the "extent of the breach and consequent difficulty in awarding lost profits does not, and should not, however, immunize the government from paying appropriate damages." Glendale Federal Bank, FSB v. United States, 43 Fed. Cl. 390, 404 (1999). Boards of contract appeals have also awarded restitution damages in unusual cases. See, e.g., Newhall Refining Co., EBCA 363-7-86, et. al., 89-3 BCA ¶ 23,142, at 111,146, (restitution damages awarded in contract for sale of oil when Government through innocent misrepresentation forced buyer to purchase more oil than it bargained for, at time of declining oil prices).

Whether the Government's alleged breach is so severe as to be called a "total breach" or to "go to the essence of the contract" remains to be seen. There are contested facts concerning the percentage of business AT&T actually lost as a result of the Government's alleged failure to transition Treasury and IRS.

Finally, respondent argues that because the contract is at an end, restitution cannot be awarded. Respondent relies on the hoary rule that "the injured party has no right to restitution if [it] has performed all of [its] duties under the contract and no performance by the other party remains due other than payment of a definite sum for that performance." 3 Restatement of Contracts, 2d § 373 (1981). AT&T, however, argues that it was not allowed to fully perform because it did not obtain the Treasury work to which it was entitled.

Decision

Because genuine issues of material fact are present in virtually every aspect of this case, respondent's Motion for Partial Summary Relief is **DENIED**.

ANTHONY S. BORWICK
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

ROBERT W. PARKER
Board Judge