

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ATACS CORPORATION and : CIVIL ACTION
AIRTACS CORPORATION :
 :
v. :
 :
TRANS WORLD COMMUNICATIONS, INC. : NO. 92-5064

MEMORANDUM

O'Neill, J. September , 1997

This action, tried non-jury, arises out of a "teaming arrangement" between plaintiffs ATACS Corporation and AIRTACS Corporation ¹ and defendant Trans World Communications, Inc. ("TWC"). By Memorandum and Order dated May 28, 1997 I held that plaintiffs met their burden of proving that the parties entered into a binding, enforceable teaming agreement and that defendants breached that agreement. I also held that plaintiffs failed to prove that the teaming agreement contained a price provision or that lost profits or lost opportunity damages resulted from TWC's breach of the teaming agreement.² In addition, I requested that the parties submit supplemental findings of fact and conclusions of law on alternative measures of damages for defendant's breach of the teaming agreement. This opinion will constitute findings of fact and conclusions of law related to the proposed alternative measures of damages.

I. Restitution

Restitution damages are available for breach of contract where plaintiff fails to prove lost

¹ I will refer to both plaintiffs collectively as ATACS.

² See ATACS Corp. v. Trans World Communications, Inc., 1997 WL 299391 (E.D. Pa. 1997) for factual background. I will refer to my May 28, 1997 Memorandum and Order as ATACS I.

profits. See Pennsylvania Dep't of Transp. v. James D. Morrissey, Inc., 682 A.2d 9, 14 (Pa. Commw. Ct. 1996) (remedies for breach of contract include restitution damages).³ ATACS enriched TWC significantly through the teaming agreement. TWC was a fairly small company with no experience with contracts the size of the Greek project or with shelter integration. TWC's President, Garry Gist and others at TWC were concerned that it had insufficient technical expertise and foreign government contracting knowledge to bid and perform the contract. By teaming with ATACS, TWC benefited from ATACS' experience in the shelter integration and government contracting fields because ATACS provided constant advice on how to prepare the bid and technical proposal. ATACS suggested suppliers, produced spare parts lists, contributed technical advice, and allowed TWC access to the work it performed on the project prior to the teaming agreement. ATACS also provided TWC a technical proposal which it used to solicit bids from ATACS' competitors. Additionally, ATACS introduced TWC to AXON, the influential Greek agent which provided valuable assistance in negotiating and obtaining the final contract. TWC used all of these services and ATACS' name in its winning submission.

While it is clear that ATACS provided highly specialized, valuable consulting services, it is not clear how to quantify the value of those services. ATACS contends that the market value of its consulting services approximate those provided by AXON to TWC for which TWC paid \$1,288,349. AXON was an agent located in Greece with close contacts with the Greek government because its directors were former officers in the Greek Army. AXON acted as TWC's link to the Greek government by coordinated tests, providing information on the Greek budget and on the bidding process, successfully advocating for a change in the specifications which permitted TWC's radio

³ See also Restatement (Second) Contracts § 344, comment a (1981) (courts grant relief as restitution where party "conferred a benefit on the other party by . . . furnishing services under the contract. The court may then require the other party to disgorge the benefit that he has received by returning it to the party who conferred it.").

equipment to meet the specifications of the request for proposal, and assisting in negotiating the final contract. ATACS, on the other hand, contributed mainly technical assistance and general industry information. I find that the services provided by AXON were not substantially similar to those provided by ATACS, and therefore the amount paid to AXON by TWC does not provide a proper valuation of the market value of ATACS' services.

ATACS also contends that the Court should equate its introduction of TWC to AXON to its agreement with Fred Barakat which resulted from the settlement of a lawsuit by the Barakat family against NRUC, the former owners of ATACS.⁴ The settlement agreement provided that Barakat would discontinue business as ATACS Foreign Sales Corporation ("AFSC") and drop the lawsuit. In return ATACS agreed to pay Barakat 9% of revenues procured from certain foreign programs listed in the agreement. One of these projects listed was the Hellenic Army General Staff ("HAGS") contract, and the agent listed as associated with that contract was AXON. Plaintiffs contend that the Barakat fee is a finders fee for Barakat's introduction of AXON to ATACS and permitting ATACS to use AXON as its own agent. Plaintiffs further contend that those services provided by Barakat are the same services provided to TWC by ATACS -- introduction of TWC to AXON and allowing TWC to use AXON as its agent. Plaintiffs thus argue that their services can be valued as 9% of the contract price (\$3,137,278) or the amount ATACS would have paid Barakat had TWC awarded ATACS the subcontract (\$344,366).

I do not agree that plaintiffs presented sufficient evidence showing that the Barakat fee represents an accurate valuation of the services provided by ATACS. The Barakat fee resulted from the settlement of a lawsuit, and thus represents at least in part the parties' appraisal of the probability

⁴ See ATACS I, 1997 WL 299391 at *1 for more detailed explanation of the settlement agreement.

of success on the merits of the lawsuit and the likely award had Barakat succeeded. In addition, as part of the settlement agreement, Barakat agreed to discontinue business as AFSC which plaintiffs may have viewed as a significant part of the settlement agreement. Therefore, as neither AXON's fee as TWC's agent or the Barakat fee represent an accurate valuation of the benefit conferred on TWC by plaintiffs, plaintiffs have not presented sufficient evidence of restitution damages.

II. Disgorgement of Profits

Plaintiffs also suggest that disgorgement of TWC profits as the prime contractor (\$3,213,374) is a proper remedy for breach of the teaming agreement. Plaintiffs contend that without a knowledgeable, experienced integrator as a teammate, and without a powerful Greek agent, TWC would not have bid on and won the HAGS contract. While plaintiffs' contention may be correct, disgorgement of profits is not an appropriate remedy in this case.

Disgorgement is a unjust enrichment remedy where a court may "require the [breaching] party to disgorge the benefit that he has received by returning it to the party who conferred it." Restatement (Second) of Contracts § 344, comment a. Although read broadly this language might support disgorgement of TWC's profits in this case, Pennsylvania courts have disgorged profits in breach of contract cases only where a party breached a fiduciary duty. See Maritrans v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1284-85 (Pa. 1992); Sack v. Feinman, 413 A.2d 1059, 1065 (Pa. 1980). Plaintiffs have not referred the Court to any Pennsylvania authority supporting disgorgement under these facts, and the Court's research reveals none.

Disgorgement is also not a proper theory of recovery here because while plaintiffs' actions benefited TWC, the value of the benefit conferred falls far short of TWC's profits as the prime

contractor. TWC devoted substantial time and effort obtaining and performing the HAGS contract, and bore the risk of performing the contract. It is also undisputed that plaintiffs were not qualified to participate as prime contractors and could not have earned those profits themselves.

III. Conclusion

Plaintiffs proved that they entered into a teaming agreement with TWC and that TWC breached that agreement. Plaintiffs, however, did not provide the Court with sufficient proof to calculate the damages that arose from that breach, and therefore failed to meet their burden of proof as to damages.⁵ I will enter judgment in favor of plaintiffs and award them only nominal damages of \$1.⁶

⁵ See Note, The Legal Effect of Government Contractor Teaming Agreements: A Proposal for Determining Liability and Assessing Damages in Event of Breach, 91 Colum. L. Rev. 1990, 2037-49 (1991) where author discussed alternative theories of calculating damages in breaches of teaming agreements and the associated difficulties of proof.

⁶ See Scobell, Inc. v. Schade, 688 A.2d 715, 719 (Pa. Super. 1997) (holding that any breach of contract entitles injured party to at least nominal damages); Grabowski v. Quigley, 684 A.2d 610, 617 (Pa. Super. 1996) (same).