

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Portable Water Supply Systems Co., Ltd.) ASBCA No. 49813
)
Under Contract No. AOT-4005-C-00-4175-00)

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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

Appellant has appealed a final decision by the contracting officer for the United States Agency for International Development (AID) denying a claim for additional costs. Only entitlement is before us for decision. A three-day hearing was held.

FINDINGS OF FACT

1. Frank T. Blackburn (Blackburn) was employed by the San Francisco, California Fire Department for 34 years, retiring in 1991 as Senior Assistant Chief for the Financial District. During 1986 to 1991 he also served as Director of Earthquake Preparedness for the city. (Tr. 1/39-40)

2. On behalf of the City, Blackburn developed an emergency water system for earthquake response which included water purification. During the 1989 Loma Prieta earthquake in the San Francisco Bay area, he supervised emergency water response and used an above-ground water supply system to control fires burning out of control in the Marina District when all the water mains were broken. (Tr. 1/39-40) This above-ground water system was also designed to be used to provide safe drinking water following earthquakes to prevent outbreaks of cholera and dysentery (tr. 1/41).

3. During part of Blackburn's term as Director of Earthquake Preparedness, now-Senator Dianne Feinstein was Mayor of San Francisco (tr. 1/41), having served as Mayor from 1978-1988. She began service as a United States Senator from California in 1992 (Fall 2000 Congressional Yellow Book (vol. 26, no. 3) at 1084).

4. In 1991, after retirement from the City, Blackburn was one of eight people who formed a company called Portable Water Supply Systems Co., Ltd. (PWSS) (tr. 1/41-42). The business was organized to perform emergency water supply work and also to build and sell equipment to Government agencies and others wanting an emergency water supply system (tr. 1/42). Blackburn was president of PWSS (R4, tab 1) and Robert Donohue (Donohue), a co-founder of the company, was vice president (tr. 1/45, 2/69). Donohue had previously been employed by the San Francisco Fire Department for 32 years, having served as Battalion Chief and as Director of Training for the entire department (tr. 2/69-70).

5. In 1994 and at all times relevant to this appeal, Michael Mahdesian (Mahdesian) was Deputy Assistant Administrator for the Bureau of Humanitarian Response at AID and in that position he had oversight for the Office of Foreign Disaster Assistance (OFDA) (tr. 2/158-59). Mahdesian was a political appointee who hailed from Los Angeles. He had worked in politics throughout California including work on Senator Feinstein's campaign for Governor of California. (Tr. 2/159)

6. Gerard (Pete) Bradford, III (Bradford) at all times relevant to this appeal was Assistant Director for Operation Support in OFDA (tr. 3/5-6).

7. In central Africa, on 6 April 1994, President Juvenal Habyarimana of Rwanda and President Cyprien Ntaryamira of neighboring Burundi were killed when the plane in which they were riding was fired upon while landing at Kigali airport, the capital of Rwanda. At the time of the crash, the United Nations maintained a peacekeeping force in Rwanda trying to enforce a cease-fire following a three-year civil war between the Rwandan Government and rebels of the Rwandan Patriotic Force (RPF) which was composed of the country's former Tutsi rulers. (News Services, *Two African Presidents Are Killed in Plane Crash; Leaders of Rwanda, Burundi May Have Been Shot Down*, WASH. POST, 7 April 1994, First Section at A18, available at LEXIS, News Library, Major Papers File)

8. Following the plane crash, the civil war resumed and in three and one-half months more than 2 million Rwandans fled to surrounding countries and an estimated 200,000 to 500,000 persons were killed (Raymond Bonner, *Rwandan Rebels Name Cabinet of Hutu and Tutsi, but Those Fleeing Are Still Fearful*, N.Y. TIMES, 20 July 1994, Section A at 6, available at LEXIS, News Library, Major Papers File). By mid-July 1994, the RPF controlled most of Rwanda, declared a cease-fire and on 19 July 1994 announced a new government made up of both Hutu and Tutsi. Prior to the announcement of a cease-fire, on 14-15 July 1994, about one million people fled to Zaire¹ "creating a humanitarian crisis of unprecedented proportions." (R4, tab 1 at 5)

9. The town of Goma, Zaire sits on the border with Rwanda, adjacent to Lake Kivu with a volcano nearby (tr. 1/87). As of 22 July 1994, an estimated 1.2 million Rwandan refugees had descended on Goma and refugee camps were overwhelmed and short of food, water and medicine. Relief workers in Goma reported on 21 July 1994 that in the prior 24-

hour period, hundreds of Rwandans had died of cholera and thousands more might die in the next few days. Cholera is a contagious intestinal disease caused by bacteria and is spread through untreated sewage. (Michael Kranish, *Clinton Pledges \$ 41m to Rwanda; Aides say US troops will assist relief effort*, BOSTON GLOBE, 22 July 1994, Section National/Foreign at 1, available at LEXIS, News Library, Major Papers File) There was an urgent need in Goma for purified water to stop the cholera epidemic (tr. 1/44; R4, tab 1 at 5).

10. The Rwandan tragedy was widely reported in the news media (tr. 1/44). A friend of Blackburn's who formerly worked for the Federal Emergency Management Agency heard those reports, called Blackburn and suggested that he and his company could utilize its equipment and know-how to help stop the dying in Goma. Further she suggested that Blackburn call Senator Feinstein, who both of them knew, to seek her assistance in arranging a manner by which PWSS could fill that need. (Tr. 1/43)

11. On Thursday 21 July 1994,² Blackburn called the Senator's Chief of Staff, Hadley Roth (Roth), who was a friend of his. Blackburn told Roth that PWSS had been watching television reports on what was going on in Goma, asked Roth to contact the Senator and tell her that "if they chose to send us to Africa, we have the means and capability to provide the water supply to stop the cholera epidemic." (Tr. 1/43-44)

12. Mahdesian was also aware of the great exodus of Rwandan refugees to Goma, testifying that all the refugees were on a fairly inhabitable place flanked by volcanoes and stating:

The earth was hard. It was very difficult, if not impossible to dig latrines. People . . . had cholera and other diarrheal diseases. People were dying. It was a horrendous situation. And the only water available was really from the lake next to Goma, and that water had problems.

There was a methane gas content to it. And we were advising and all health officials of the UN were advising that people not drink that water directly. And the water was the critical element at that point. If the people in the – they were not yet quite camps. They were, you know, a mass of refugees.

If they did not get water quickly, many thousands if not tens of thousands would suffer or die.

(Tr. 2/160-61)

13. Similarly, Bradford knew of the situation in Zaire in July 1994. He described it as follows:

There was a substantial displaced population, a couple hundred thousand people that had run out of Rwanda. They were mainly, I believe, Hutus, and they had gone out onto a place where there was no water, and I think a few days before that, we'd received reports that . . . there was an outbreak of cholera, and in those situations water is very important because it kills people pretty quickly.

So we were under a lot of duress to try to provide water for this displaced population, and there was a lot of discussion. . . . We were planning with the Department of Defense to see what kind of mobilizations might be possible with them, and the Department of State obviously had a lot of interest.

So there were a lot of meetings and things going on at the time.

(Tr. 3/7-8)

14. Because of geographic and logistical problems, many of the private volunteer organizations (PVO), the traditional purveyors of water and sanitation services, did not want to assist in the relief effort in Goma so Bradford felt that AID had to get involved (tr. 3/52-53).

15. Following receipt of Blackburn's call, Roth talked to Senator Feinstein, who apparently called President Clinton (tr. 1/45). The Senator's office (probably Roth) then called Brian Atwood, Administrator of AID and advised of Blackburn's interest in providing water purification services in Goma (tr. 1/45, 100-01, 3/6).

16. Atwood in turn called Doug Stafford (Stafford), who was Assistant Administrator for the Bureau of Humanitarian Response at AID. Stafford was Mahdesian's supervisor and Bradford was in Stafford's office when Stafford received the call from Atwood. (Tr. 2/159-60, 3/6) While neither Stafford nor Atwood testified, Bradford believed that Feinstein's office had given them a contact for a volunteer who was ready to head out to Africa and deal with the situation in Goma, but that this volunteer needed transportation from the West Coast to Goma (tr. 3/6-7).

17. Six or seven hours after Blackburn's initial call to Roth, and still on 21 July 1994, Roth reported to Blackburn the extent of the contacts that had been made and advised him that AID wanted to have a conference call the next day (tr. 1/45).

18. Mahdesian called Blackburn on Friday afternoon 22 July 1994, after getting the telephone number from Roth. He called from a speaker phone in the OFDA front office and Bradford was present. (Tr. 2/160-61) Blackburn received the call in his office in California and, while Donohue was present, they were not on a speaker phone so Donohue heard only Blackburn's side of the conversation (tr. 1/45, 2/71-72).³ This was the first of several telephone conversations on 22 and 23 July 1994 between Blackburn of PWSS and Bradford and/or Mahdesian of AID. The testimony is confusing about what was said during which of the several conversations and, in many instances, the parties have diverse recollections of what was said.

19. It is undisputed that Blackburn discussed the technical abilities of his group with Bradford and Mahdesian in one or more of these telephone conversation (tr. 1/46, 2/75, 162, 3/8). The AID representatives were surprised, yet pleased, when Blackburn advised that his group was capable of supplying water for 1.5 million people which exceeded what was needed at Goma (tr. 1/46, 3/8). AID asked for additional information, so Blackburn drafted a letter which he faxed to Mahdesian on 22 July 1994 (ex. A-1). The letter was on PWSS stationery which identified it as a company, enclosed technical information on the equipment and the methodology proposed to be used, included information on PWSS's background and capabilities and stated in part as follows:

It was a pleasure to speak with you and your staff regarding our capability to assist in the refugee camp water supply problem.

....

The portable water system has many capabilities, its use for long distance systems to supply refugee camps is cost effective and very practical.

....

We look forward to this challenge and the opportunity to offer some help and relief to the people in the refugee camps.

(Ex. A-1)

20. The parties differ markedly over what was said about the legal status of PWSS. Blackburn recalls being asked by Bradford if his group was a nonprofit organization and Blackburn testified as follows:

And I said, "No, we are not a nonprofit organization."

And he [Bradford] said, “Well, then how are we going to pay for this?”

....

And I said we have a standing emergency equipment rental contract with the U.S. Forest Service. I said this contract is good with any Government agency, Federal agency, and it’s also good worldwide.

And he said, “Fax me a copy of it.” And we faxed them a copy of it.

....

And then . . . after he had the document and we were discussing it – still on the phone. . . . He got it and he said . . . “Good, we can work with this,” quote, unquote.

And I said, “Certainly you can work with it.” I says, “However,” I says, “it does not cover water purification equipment because the Forest Service doesn’t get involved in that.” I says, “We will have to add on the . . . rental rate for the eight water purification units later.”

I said, “Right now we have 48 hours to mobilize. There’s no time to do that right now.”

He agreed. And he agreed to that. He says, “That’s acceptable.” And we – we then proceeded on that premise.

(Tr. 1/54, 56-57)

21. Bradford recalls that prior to entering into a fairly lengthy discussion about pumping capacities he asked Blackburn in their first conversation if he and his group were volunteering for the work and recalls that Blackburn answered “yes” (tr. 3/8). Bradford thought Blackburn was still in the process of organizing the effort and that the group was an embryonic PVO that had urgently needed technical capacity and was trying to organize to provide humanitarian assistance (tr. 3/9). In his mind, there was no indication a profit was sought by Blackburn’s group for the endeavor (tr. 3/10).

22. Mahdesian claims that he did not learn until weeks after the initial conversations that PWSS was a for-profit group; before then, he believed them to be a volunteer group

doing good works that wanted to be reimbursed for its costs (tr. 2/166). He also recalled that Blackburn mentioned the U.S. Department of Agriculture (USDA) (U.S. Forest Service) contract, but he understood it to be just a reference if AID wanted to check out their “bona fides” (tr. 2/164).

23. After several conversations between Blackburn and AID, PWSS was given the order to mobilize and they prepared the equipment and supplies and readied the personnel (ex. A-17 at 1). On 23 July 1994, Michael Reagan of AID’s OFDA wrote to Nicole Peacock in the Department of State (DOS), under the subject “Humanitarian Assistance for Rwanda Refugee Crisis *Emergency Airlift Requirement from Travis AFB to Goma Zaire,*” stating in part as follows:

Request DOS Memorandum to Deputy Assistant Secretary of Defense for Humanitarian and Refugee Affairs (USDP-HRA), be initiated to airlift a water purification system, trucks, supplies and Frank T. Blackburn[,] head of party, with seven personnel from Travis AFB to Goma, Zaire. The shipment is estimated to be 34 short tons. The volume of the shipment will be variable depending on how the equipment is packed. The equipment includes two trucks at approximately [sic] 26,000 pounds each, one pickup truck at 6000 pounds, two pumps at 7,500 pounds each and additional assorted support equipment for the rest of the weight. This equipment has been identified as a priority for the humanitarian relief effort by USAID/OFDA for the Rwanda Refugee Crisis. The materials will be moved to Travis AFB and be ready for shipment on Sunday July 24th. Portable Water Supply Systems Co. (PWS) is prepared to have the material in place to meet our schedule. The movement of the equipment should be given a high priority to meet the need for water in the Goma area. The equipment and personnel will report to Brendan Doyle, Head UNICEF Chief Water Engineer at Goma.

Favorable and rapid consideration of this request will be greatly appreciated. We would like to see this equipment in place and working by 27 July.

(Ex. A-2 at 7; R4, tab 12)

24. Travel orders were issued by DOD for the PWSS personnel on 24 July 1994 for special mission travel in support of Rwandan relief and in Block 16, Remarks, the orders provided in part:

COMMERCIAL TRAVEL IS NEITHER AVAILABLE,
READILY OBTAINABLE, NOR SATISFACTORITLY [SIC]
CAPABLE OF MEETING THE TRAVEL REQUIREMENT.
THESE EMERGENCY SUPPLIES ARE URGENTLY
REQUIRED ITEMS FOR WATER PROVISIONS/SANITATION
ACTIONS BEING TAKEN TO PREVENT THE SPREADING
DISEASES. ALL OFFICES ARE REQUESTED TO
FACILITATE ONWARD MOVEMENT OF PERSONNEL AND
EQUIPMENT. PURSUANT TO THE AUTHORITY
PROVIDED IN SECTION 93 DEPARTMENT OF DEFENSE
APPROPRIATION ACT, P.L. 102-396, TITLE 10 U.S.C.,
SECTION 2551 EMERGENCY CONTRACT RENTAL
AGREEMENT, USDA/USDIA OF-294 (R5-6300-171)(4/90).
REF JOINT STAFF MSG 240358Z JUL 94

(Ex. A-2 at 8)

25. The order to airlift the water purification system and PWSS passengers was issued by LT COL Raymond Hebert, of The Joint Staff, to several entities including Travis Air Force Base (AFB). The legal authority cited for the operation included "Emergency Contract Rental Agreement, USDA/USDIA OF-294 (R5-6300-171) (4/90)." The contract named was the same U.S. Forest Service contract Blackburn testified he cited to AID. (Tr. 1/76-78; R4, tab 13) AID disavows having given the U.S. Forest Service contract citation to DOD (tr. 3/13-14) and, while Blackburn had conversations with DOD personnel arranging the travel, he refers to the U.S. Forest Service contract citation in his testimony without disclosing whether or not he gave that information to them (tr. 1/76, 80-81).

26. Blackburn and six other PWSS personnel reported to Travis AFB, California on Sunday 24 July 1994 (tr. 1/82-83; ex. A-17 at 1). They received inoculations from military doctors and the PWSS equipment was loaded on the airplane. The equipment included eight water purification units and eight repair kits purchased by PWSS from Goodman Ball, Inc. (GBI) (tr. 1/51-52). The plane, a C-5 Galaxy, departed Travis AFB at 4:00 AM on Monday 25 July 1994 and flew 22 hours non-stop to Goma, Zaire (tr. 1/83-84).

27. Upon landing at Goma a large crowd of people surrounded the plane as PWSS unloaded. They drove to the safety of some tents where French military troops were located. (Tr. 1/85-86) Subsequently, U.S. Military personnel arrived who were assigned to give them security and support and they departed the airport in a convoy of military vehicles (tr. 1/86-87).

28. Hundreds of dead bodies lined the streets as they were escorted to a location near Lake Kivu (tr. 1/89). Within four hours PWSS modified an existing army water purification system by adding outdoor faucets so that they were accessible to the refugees

(tr. 1/91). Within days they had set up their own water purification equipment, consisting of eight purification units, each of which could process 3,000 gallons per hour (tr. 1/91).

29. Eric Doebert (Doebert), Director of Marketing for PWSS, remained behind in the California office. On 26 July 1994, pursuant to a request from Reagan of OFDA, Doebert provided by facsimile the amounts of consumable supplies (diatomaceous earth, chlorine, and diesel fuel) needed for the project. He also attached the cover sheet for the PWSS contract with the USDA Forest Service. Said contract at a daily rate of \$2,875.00 purported to cover four operators and the following specific equipment:

MISCELLANEOUS: HOSE TENDER WITH COMPLETE
PORTABLE WATER SYSTEM EQUIPMENT. DODGE-VAN
PELT HOSE TENDER LIC# E-187236 CA VIN# 4581597121

HYDRO SUB PUMP ON TRAILER LIC# X-428423 CA VIN#
0191220

(Ex. A-3) The U.S. Forest Service contract did not cover purification equipment (tr. 1/57).

30. By facsimile dated 9 August 1994, Peter Smith of OFDA requested that Doebert answer the following questions by return facsimile:

1. For billing purposes, please provide the start date that PWSS will use to invoice OFDA for the use of the water system that is operational in Goma.
2. Please provide the price per pound that PWSS pays for diatomaceous earth and the price per pound that PWSS pays for chlorine to operate the PWSS water system in Goma.
3. Please provide faxed quote of freight charges that PWSS will incur when shipping supplies (hose fittings, etc[.]) from San Francisco to Frankfurt. As stated earlier, OFDA will provide transport of such equipment from Rhein-Main (Frankfurt) to Goma.

(Ex. A-9)

31. The record does not include a specific response to that request, however, on 15 August 1994, Doebert faxed cost projections for extending the Goma operations which amounted to a daily rate of \$16,442.47. Doebert promised other figures shortly, including the costs incurred from the date of the initial emergency response. (Ex. A-10)

32. The eight water purification units, which were operational as of 29 July 1994, had been purchased by PWSS from GBI and Blackburn testified he had intended to charge

AID a rental rate for them (tr. 1/93-94). Apparently that intention was not communicated to AID in such a way that Bradford understood it because he testified that he did not learn of the PWSS desire to charge a rental rate until much later, after performance was completed (tr. 3/25-26).

33. GBI became concerned about whether it would receive payment from PWSS for the water purification units sold to them and thus contacted OFDA on 16 August 1994. In furtherance of that conversation GBI wrote to OFDA on 17 August 1994 and offered to discount the eight water purification units located at the site in Goma, Zaire in exchange for the Government issuing a purchase order directly to them. GBI expressed concerns with receiving payment given the fact that a contract had not been awarded to PWSS and the fact that Blackburn and his group were in Africa. The letter also noted that if the contract was directly with GBI there would be no further questions of who has title to the equipment. (R4, tab 15)

34. In 1994, Georgia Beans (Beans) was employed by McFadden and Associates. McFadden had a contract to negotiate and document relief grants and contracts for OFDA. (Tr. 2/144) Beans' job was to enter into negotiations with potential contractors and grantees and then prepare documentation for the contracting officer's signature (tr. 2/145). She first heard of PWSS on or about 17 August 1994, indirectly, when she was consulted by an AID logistics officer on an issue concerning the GBI offer to sell the water purification units directly to AID. She advised the logistics officer that since PWSS had a 30-day payment period and the period had not expired, OFDA should not enter into an agreement with GBI. (Tr. 2/147, 149-50)

35. Beans' next involvement with PWSS was on Sunday 21 August 1994, when she received a call from Bradford advising her of an urgent need for her to come to work that day and negotiate a contract with PWSS. She met with Bradford that day and he explained to her that the reason for the urgency was that PWSS had been working in the field in Goma, that a contract was in process but not finalized, but that the situation had suddenly changed because the military was leaving within three to ten days and a contract needed to be in place prior to departure of the military. (Tr. 2/150-51)

36. Bradford told Beans that he only learned PWSS was not a PVO and expected to be paid for the water purification service after PWSS had been transported to Goma. It was Beans' understanding, based on her conversations with Bradford, that the military, at no charge to PWSS, had been providing lodging, food, and limited labor for the pumping units as well as diesel fuel, generators, and other support operations. (Tr. 2/152-53)

37. Beans was given a proposal prepared by PWSS and was given a figure for a daily rate that she was told was customarily charged by PWSS for their water purification service. Initially it was her understanding that the rate was an all-inclusive rate that included equipment and personnel (tr. 2/154). At the time she did not distinguish the operation of

purification from the operation of pumping. She was told that the daily rate she was given was from a contract with another Government agency but she did not see that contract at the time (tr. 2/155).

38. Bradford told her that since he started out with the understanding that PWSS was a PVO, and he had told them he would make them whole for any costs they incurred in the operation, his direction to her was to formalize a contract with PWSS whereby they were made whole, where they are basically reimbursed for the costs they incurred (tr. 2/155-56). Thus, when Beans entered into negotiations with PWSS her intent was to reimburse them for their actual costs (tr. 2/157).

39. Using the proposal that had been given to her, Beans contacted Doebert in California and negotiated directly with him based on what was provided in the proposal (tr. 2/172). Doebert initially confirmed to her that he was authorized to negotiate and enter into a contract on behalf of PWSS (tr. 2/173).

40. Although there was a line item in the proposal for rental of water purification units, she indicated to Doebert that AID was not interested in a rental agreement, and that they were interested in purchasing the water purification units (tr. 2/173). They agreed on a purchase price that included not only the actual cost to PWSS for acquiring the equipment from GBI, but also included the cost to PWSS of procuring that equipment and preparing it for shipment (tr. 2/176-77).

41. Beans and Doebert had one long phone conversation on that Sunday where they discussed the substance of each line item in the proposal (ex. A-10) and may have had subsequent ones that same day to clarify certain points (tr. 2/174). They talked about the support the military was providing and that part of the purpose of the contract was to allow PWSS to go out and subcontract to replace that support (tr. 2/175).

42. Once they discussed all aspects of the proposal and had come to an agreement on each of the costs and a fee for acquisition of the purification units, there was no further discussion about rental versus purchase of purification units. When Beans indicated she was going to finalize the contract documents, type them, and fax them to Doebert for his signature, Doebert told her he did not have the authority to sign the contract, only Blackburn could sign. (Tr. 2/180)

43. The PWSS home office engaged in negotiations with AID, with Blackburn's knowledge and approval, and he was kept informed of the developments (tr. 1/143-44).

44. At the conclusion of Beans' negotiations with Doebert, she briefed the contracting officer, Sharon Zavestoski, who was at home that day and they "agreed that since we had come to a conclusion on the negotiations and we had agreed on a price, that she did not have to drive in that day and sign it. She would sign it on the 22nd, on the Monday when

she came in in the morning.” (Tr. 2/182) Beans faxed the agreement to PWSS, either to Doeber in California or to Blackburn in Goma, or to both; she cannot recall specifically (tr. 2/181). In any event she received the contract cover sheet back with Blackburn’s signature dated 22 August 1994. Zavestoski reviewed and signed the agreement on Monday 22 August 1994 (tr. 2/182; R4, tab 1). While the contracting officer, Zavestoski, testified that she did not know whether Bradford made a commitment to make PWSS whole (tr. 2/101), she later testified that the rationale for making the effective date of the contract retroactive to 24 July 1994 was because PWSS incurred costs from that date and she “thought it was necessary to do that so [PWSS] could get paid.” (tr. 2/108-09).

45. Appellant contends herein that the contract was signed by Blackburn under duress. The basis for that contention appears to be that PWSS feared for their own safety with the pending departure of U.S. Military support and PWSS was forced to sign the agreement in order to obtain private security. PWSS personnel were housed in tents within a barbed wire encampment adjacent to Lake Kivu and armed U.S. Military guards patrolled outside at night for the first month (tr. 1/127-29). The military had only planned to stay for 30 days. After about 30 days the cholera epidemic had been broken and the refugee situation had stabilized. According to Blackburn, ten days prior to 22 August 1994, the military informed AID officials in the field and Blackburn that they were leaving on that date. (Tr. 1/129-30)

46. Since the military was leaving, PWSS needed to find local suppliers for fuel, food and security because the military had been providing those services (tr. 1/131). Blackburn testified that his crew was “very much concerned because of personal safety” and that at night there was gunfire although it is unclear where the gunfire occurred (tr. 1/132). Ten days before the military was to leave, Blackburn talked to Greg Garbinski about making some type of arrangements for PWSS to be paid an amount to purchase security (tr. 1/133). Garbinski also advised Blackburn around that time that AID wanted to extend the project (tr. 1/137), but Garbinski had no contracting authority (tr. 1/139).

47. As the date for departure of the military neared, Blackburn noted that there was nothing in place to extend the operation or to provide fuel, food and security for the crew in Goma. Around 2:00 PM on 22 August 1994, the proposed contract arrived by fax and Blackburn noted the line item for purchase of the purification units. Blackburn testified that he was disturbed at that time that the sale price for the purification units did not include mark-up or profit to his company for selling the equipment to the Government. By the time he received the contract he knew he could get the food, fuel and security through a local business man named Salim Lalani but could not finalize the transaction until he could be assured of his ability to pay for it. The U.S. Military had departed two hours earlier. (Tr. 1/150, 152-55)

48. The following exchange ensued at the hearing between Blackburn and his counsel concerning the state of affairs at the time of receipt by Blackburn of the contract for his signature:

Q (By Mr. Gdanski) Now at this time, at this particular point in time of that day, had you gotten your new security guards yet?

A (Mr. Blackburn) No, it was only then. And then he [Garbinski] told Lalani – we still didn't have a written agreement on it. He guaranteed to Lalani verbally that the Government would pay him, and to get the security and to provide us with food and fuel.

Q Were you still concerned because Lalani hadn't provided the security physically yet?

A Well, Mr. Lalani – listen, in Africa, the people that really make the economies work over there are people from India that have lived there for about two or three hundred years, and he's a native of another country.

And those guys are sharp businessmen. So he was very concerned about getting – he wanted cash. But he said he'd give them ten days and then he had to get paid.

Q But at the time in which you were handed the contract, faxed document, --

A That's when they told us that they would give us the security and the rest of the stuff.

Q Had you signed it yet?

A No, I had to sign it. No, I had to sign it.

Q When you say you had to sign it?

A Well, if I didn't sign it then we would have shut everything down. You know, then people wouldn't have got – I mean, all kinds of things would have happened.

(Tr. 1/153-54)

49. PWSS maintained a daily log and the entry for 22 August 1994, 1100 hours, authored by Blackburn, provides as follows:

Army leaves the pump station. USAID ok's contract @ 1000 hrs. Salim La Lani is given contract for 74K to provide local support and security. Much confusion at the job site upon the U.S. Army leaving, and no security for PWSS at least 2-3 hrs. Arrangements finally put in place. Many local people & NGO's⁴ come onto job site and take many things. Once the Zaire Army Security is in place everything is OK. . . . We spend first night on the job site with Zaire Army as security not the U.S. Army.

(Ex. A-18)

50. Thus, Blackburn signed the contract and then was able to secure a commitment from a local supplier for food, fuel and security (tr. 1/154).

51. Accordingly, upon the signature of the contracting officer on 22 August 1994, Contract No. AOT-4005-C-00-4175-00 (the contract) was awarded to PWSS (R4, tab 1). The contract was retroactive to 24 July 1994 because, according to Beans, PWSS had been providing the service since that time and AID wanted to make sure they were reimbursed for costs incurred from the date of deployment. The end date for the contract was 21 September 1994. (R4, tab 1, ¶ B.1; tr. 2/185)

52. The stated purpose of the contract was in part as follows:

The purpose of this contract is to obtain water purification equipment and services for the Rwandan refugees located in Goma, Zaire. Contractor shall be responsible to provide all equipment and personnel necessary to operate and maintain 8 pumping stations capable of purifying 1,440,000 gallons of water per day. The Agency for International Development (AID) will airlift equipment and personnel to Goma, Zaire. Equipment not purchased hereunder which is the property of the contractor, will be returned at U.S. Government expense via ocean freight.

(R4, tab 1, ¶ B.1)

53. The contract was awarded in an amount not to exceed \$857,449.00.⁵ Said amount included several components: (1) a fixed daily rate for operation of contractor-owned pumps and personnel to operate and maintain the equipment; (2) a fixed price for purchase by AID of the eight GBI water purification units and eight repair kits for the purification units; (3) reimbursement of actual costs for travel not provided by the U.S. Military; (4) reimbursement of miscellaneous administrative costs incurred under the contract to maximum amounts stated in the contract price breakdown; and (5) reimbursement of the cost of fuel, oil, repairs, security and personnel support from 23 August 1994 to end of contract. According to the contract, for the 30 days prior to 23 August 1994, fuel, oil, repairs, security, housing and first aid were provided by the incident command. (R4, tab 1)

54. Section B.2 provided that the not-to-exceed price set forth in the contract -

. . . consists of a fixed daily rate for operation of contractor-owned pumps and purification equipment, purchase of the water purification equipment and reimbursement for actual costs incurred in fuel, oil, repairs, security, personnel support, travel and miscellaneous headquarters expenses.

(R4, tab 1) While the subject of damaged equipment needing replacement was never specifically discussed in the negotiations (tr. 2/191-92), we do not construe “repairs” to exclude replacement when that is a more cost-effective means of achieving said repairs.

55. The project was satisfactorily completed (tr. 3/57) and operations ceased on 20 September 1994; over the next several days, PWSS packed and loaded its equipment (ex. A-18 at 24).

56. As a result of the operations at Goma, several items, including various sizes and lengths of hoses were damaged (exs. A-29, -30, -40; tr. 2/11-17). Frank R. Treanor (Treanor), a Battalion Chief for the San Francisco Fire Department took accumulated vacation time to go to Goma to supervise PWSS operations on 7 September 1994 (tr. 2/80-81, 86). Treanor personally inspected the equipment and compiled a damaged equipment list (tr. 2/94). Use of hose in Goma was abnormal since vehicles constantly drove over it subjecting it to uncommon wear and tear (tr. 2/96). Treanor verified the damage to all the hoses listed (tr. 2/87-88, 90-91). The “reducer” on the list, a device that screws onto a hose, was damaged and could no longer screw onto the hose (tr. 2/95). Treanor did not verify damage to a pair of portable battery chargers on the list.

57. We find that, except for the battery chargers, the equipment on the list prepared by PWSS was in fact damaged due to unusual wear and tear due to its use at Goma. By invoice number 5686 dated 29 September 1994, PWSS invoiced AID for the replacement costs totaling \$16,239. Payment of the invoice for the damaged equipment was disapproved by AID on 26 October 1994 for the stated reason that it was “not covered per contract.” (R4, tab 18)

58. On 7 February 1995, Blackburn wrote to AID with regard to the disallowance of the PWSS invoice for damaged equipment and asserted entitlement to the replacement costs of said equipment based upon Section B.2 of the 22 August 1994 contract with AID which provided for reimbursement for “repairs.” In addition, Blackburn asserted entitlement based upon paragraph 10 of its contract with the U.S. Forest Service. It was Blackburn’s view that mobilization and dispatch of PWSS to Goma was done pursuant to the U.S. Forest Service contract. In support of that view he states Bradford agreed with the provisions of the U.S. Forest Service contract and that DOD used that contract as a funding authority for transportation of PWSS personnel and equipment to Goma. (R4, tab 4) There is absolutely no evidence that a U.S. Forest Service contracting officer was involved in any way in the transactions between PWSS and AID.

59. Attached to Blackburn’s 7 February 1995 letter was the cover sheet of the U.S. Forest Service contract and one additional sheet which included paragraph 10, “Loss, Damage, or Destruction” which states:

The Government will assume the risk for loss, damage, or destruction of equipment rented under this contract, provided that no reimbursement will be made for loss, damage, or destruction when (a) due to ordinary wear and tear, or (b) negligence of Contractor or Contractor’s agents caused or contributed to loss, damage, or destruction, or (c) damages caused by equipment defects unless such defects are caused by negligence of the Government or its employees.

(R4, tab 4)

60. By letter dated 24 April 1995, over seven months after the end of the Goma project, PWSS advised AID that an audit of its AID and USDA contracts had “revealed that PWSS owned and operated eight water purification units from July 22 through August 21 without compensation as required by agreement with Gerard Bradford.” PWSS acknowledges that AID purchased the units on 22 August 1994, but contends that for the period prior thereto, 21 July to 21 August 1994, the units were operated as rental equipment. Thus, PWSS submitted invoice number 5713 in the amount of \$168,640 which was computed by using a daily rental rate per unit of \$680 for eight water purification units and 31 days. (R4, tab 5)

61. By letter dated 14 June 1995, AID informed PWSS of its intent to disallow costs sought in invoice numbers 5686 (damaged equipment) and 5713 (rental of purification units) (R4, tab 8). Blackburn responded on 15 June 1995 by a letter in which he set forth his position on his entitlement to the rental cost of the purification units and requested a meeting to discuss the two claims. Blackburn contended that he and Bradford agreed prior to his departure from California for Goma that PWSS would respond to the crisis under the provisions of the U.S. Forest Service rental agreement, which he contends he faxed to Bradford. Moreover, he says he and Bradford specifically discussed the fact that the U.S. Forest Service agreement did not cover the rental fee for the water purification equipment and they agreed they would determine that rate later. (R4, tab 9) AID declined the meeting in a letter dated 19 June 1995 (ex. A-25-1).

62. On 5 January 1996, PWSS requested a contracting officer's decision on its claim for \$186,879.00, the total sought for invoice numbers 5686 and 5713. The contracting officer advised PWSS that its certification was incomplete and on 14 February 1996, the certification was properly made and submitted. (R4, tab 20) On 30 April 1996, the contracting officer issued a final decision denying the claim (R4, tab 2) and by letter dated 1 May 1996, said decision was timely appealed to the Board (Board files).

DECISION

Appellant's 81-page brief includes several proposed findings which concern the damaged equipment (app. br. at 26-27, 30-31), however, insofar as we can determine, appellant's brief does not include a discussion of the legal or contractual basis for its damaged equipment claim. We rely, therefore, on the position taken in Mr. Blackburn's 7 February 1995 letter (*see* findings 59-60). Appellant contends therein that it is entitled to compensation for damaged equipment based upon section B.2 of the 22 August 1994 contract providing for reimbursement for "repairs" and based upon paragraph 10 of the U.S. Forest Service contract.

In support of its claim for rental of the eight purification units from 21 July to 21 August 1994, appellant relied in June 1995 on an alleged agreement between Blackburn and Bradford that the project would proceed based upon the provisions of the U.S. Forest Service contract and that the rental rate for the purification units would be determined later since the U.S. Forest Service contract did not cover purification units.

In his opening statement at the hearing, counsel for appellant introduced several new theories of recovery. First he stated that three "controlling" case precedents (*Paroscientific, Inc.*, IBCA No. 3230, 95-1 BCA ¶ 27,318; *Reliable Disposal Company, Inc.*, ASBCA No. 40100, 91-2 BCA ¶ 23,895; and *Miller Elevator Co., Inc. v. United States*, 30 Fed. Cl. 662 (1994)), stand for the proposition that "even not formally warranted contracting officers have the authority to bind the Government and to permit [sic - commit]

the Government to a financial obligation premised on the circumstances and the exigencies of the matter at hand.” Interspersed with that discussion, counsel uses the terms “ratification,” and “quantum merit” as theories of relief. (Tr. 1/24-25) Further, at the hearing appellant sought to show that the 22 August 1994 contract was signed under duress and consequently should not be used to bar recovery of the rental cost of the purification units.

In its brief, appellant again cites *Paroscientific, Reliable Disposal* and *Miller Elevator* and further discusses its position on duress. Additionally, for the first time, appellant makes an argument for reformation based upon mutual mistake.

Hovering over both claims is the specter of the U.S. Forest Service contract. Appellant relies on that contract in part as authority for both claims. We deal with that issue first.

The “formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.” RESTATEMENT (SECOND) OF CONTRACTS, § 17(1) (1981). Such manifestation of mutual assent requires each party to either make a promise or begin performance. *Id.* § 18. As to misunderstandings, the Restatement provides as follows:

(1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and

(a) neither party knows or has reason to know the meaning attached by the other

Id. § 20.

Perhaps due to the urgency with which the project in Goma was planned and implemented, and not because we believe one side or the other testified untruthfully, each party ended the discussions with a different understanding of the nature of the arrangement they had made.

From the AID perspective, Bradford and Mahdesian believed PWSS to be a group of volunteers wishing to do good by providing a service sorely needed in Goma and coveted by AID as part of its mission. To that end, AID believed it had agreed to cover all of PWSS’s costs for the operation. Initially, AID did not believe it was entering into a contractual arrangement; they believed and intended to provide a grant that would make PWSS whole.

From the PWSS perspective, Blackburn intended to be paid something other than costs and thought that he and AID had agreed to be bound by the U.S. Forest Service rental agreement and that they would later agree on a cost for renting the purification units.

Under these circumstances, the manifestation of mutual assent is not established since the parties attached materially different meanings to their manifestations and neither party knew or had reason to know the meaning attached by the other. *See id.*; *ECC International Corp. v. United States*, 43 Fed. Cl. 359, 369 (1999) (an express contract requires intent to be bound and such intent must be expressed in a manner capable of understanding); *Kasel Manufacturing Co.*, ASBCA No. 26975, 89-1 BCA ¶ 21,464 (where record contains such varying expressions of the results of a meeting where questioned settlement agreement was negotiated, we cannot find that the parties achieved the requisite meeting of the minds.) In the absence of mutuality of assent, no enforceable contract arose between AID and PWSS prior to departure of PWSS for Goma.

Moreover, Mahdesian had no contracting authority and Bradford's authority was limited to small purchases under \$25,000. To be bound, an agreement must be approved on behalf of the Government by an officer with actual authority to do so. *See Penn-Ohio Steel Corporation v. United States*, 354 F.2d 254, 267 (Ct. Cl. 1965), citing *Federal Crop Insurance Co. v. Merrill*, 332 U.S. 380 (1947). Therefore, the U.S. Forest Service contract may not provide a basis for relief to appellant as to either claim.

We have reviewed the three cases cited in appellant's opening statement and in its brief and do not find them to the contrary. *Paroscientific, supra*, is a non-precedential, non-appealable decision from the Department of Interior Board of Contract Appeals, issued under an alternative disputes resolution agreement and authored by one judge. *Paroscientific* in no way stands for the proposition urged by appellant that unwarranted contracting officers under certain circumstances may be authorized to bind the Government.

In *Reliable Disposal*, an ASBCA opinion, we discussed a situation in which the actual authority of a Navy operations officer might be implied from the circumstances of that particular transaction, but ruled that no resolution of the issue by us was necessary because a responsible contracting officer had ratified by implication the questioned conduct of the operations officer. *Supra*, 91-2 BCA at 119,716-17.

The third and final case cited is *Miller Elevator*. In *Miller Elevator*, a contracting officer had delegated certain, but not all, authority to a contracting officer's representative (COR) who was also the Field Office Building Manager who re-delegated his authority to an Assistant Field Office Building Manager who coincidentally and independently had contracting authority up to \$1,000. The assistant approved additional work outside the scope of the elevator maintenance contract with Miller. In finding such work to be authorized by the implied authority of the Assistant Field Office Building Manager, the

Court of Federal Claims said that generally only actual authority binds the Government, but stated:

Implied authority, however, also binds the Government. *Branch Banking & Trust Co. v. United States*, 120 Ct.Cl. 72, 87, 98 F.Supp 757, 766, *cert. denied*, 342 U.S. 893, 72 S.Ct. 200, 96 L.Ed. 669 (1951). Implied authority binds the Government where a Government representative without actual authority exercises an integral part of the duties assigned to that Government employee. *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed.Cir.1989) (quoting Ralph C. Nash, Jr. & John Cibinic, Jr., *FORMATION OF GOVERNMENT CONTRACTS* 43 (1982)). If a question of authority arises, whether express or implied, then the plaintiff bears the burden of proof. *Kania v. United States*, 227 Ct.Cl. 458, 465, 650 F.2d 264, 268, *cert. denied*, 454 U.S. 895, 102 S.Ct. 393, 70 L.Ed.2d 210 (1981); *Consortium Venture Corp. v. United States*, 5 Cl.Ct. 47, 49 (1984), *aff'd* 765 F.2d 163 (Fed.Cir.1985). Here, albeit without realizing such, the plaintiff presents evidence of implied authority, particularly in view of the express delegation of authority from the COR.

30 Fed. Cl. at 693-94. Thus, the Court based its decision on the presence of an express delegation of authority to the Assistant, a fact which is not present in the instant case. There has been no showing that either Bradford or Mahdesian had an express delegation of authority to enter into a contract of the sort contended by PWSS and *Miller Elevator* is inapplicable here.

We next examine the 22 August 1994 contract to determine whether the claim for damaged equipment is recoverable under that document. The Government argues in its brief that:

The contract is silent, as were the negotiations . . . on payment for damaged equipment [Appellant] provide[s] nothing on which to base such a claim. The contract . . . includes “repairs” under reimbursable costs, but there is no suggestion that PWSS was not reimbursed for all repair bills which it submitted or even that it submitted any repair bills for the fire hoses

(Gov’t br. at 38)

While the contract did not refer explicitly to payment for damaged equipment as opposed to “repairs,” the parties, at a minimum, clearly intended that PWSS receive

reimbursement for all of its costs. Bradford communicated that to Beans and she testified it was her goal to make the contractor whole. Beans briefed Zavestoski who clearly intended to reimburse PWSS for its costs. In the context of these communications, we do not construe “repairs” to exclude replacement (*see* finding 54). Thus we sustain the appeal as to the claim for reimbursement of the actual replacement costs of the damaged equipment (exclusive of the batteries).

Finally we consider appellant’s claim for payment of rental for the purification units for the one month prior to execution of the 22 August 1994 agreement. There is no dispute that Doebert was authorized to negotiate the agreement for purchase of the purification units retroactive to 22 July 1994. Nor is there any dispute that Blackburn knew the 22 August 1994 document did not include rental costs for the units and that he was authorized to execute said contract on behalf of PWSS. Appellant contends however, that said contract including a provision with which it disagreed was signed under duress in light of the impending departure of the military security and the absence of replacements, the securing of which required execution of the agreement. In short, PWSS contends that fear for the security of its persons and property required them to sign the agreement.

First of all we observe the manner in which this claim arose. Over seven months after the end of the project in Goma, PWSS advised the Government that an audit had revealed that PWSS owned and operated eight purification units for one month without compensation. Such revelation over seven months after the project ended and eight months after execution of the 22 August 1994 contract under “duress” tends to diminish the veracity of that expressed fear which compelled Blackburn to sign a contract with which he disagreed. *See Drake-Merritt-Roe, A Joint Venture*, ASBCA No. 15119, 72-2 BCA ¶ 9732 (“One who relies upon duress to avoid his contract must repudiate it promptly or at least within a reasonable time after he ceases to be vulnerable to the duress.”).

With respect to the proof necessary to make a case for duress, we stated in *Home Entertainment, Inc.*, ASBCA No. 50791, 99-2 BCA ¶ 30,550 at 150,862, as follows:

The defense of duress, so as to avoid the obligations of a contract, requires proof that one party involuntarily accepted the terms of the other, circumstances permitted no other reasonable alternative, and the circumstances were the result of coercive acts of the other party. *See Systems Technology Associates, Inc. v. United States*, [30 CCF ¶ 70,829] 699 F.2d 1383, 1387 (Fed. Cir. 1983).

To demonstrate that it has met its burden of establishing the elements necessary to show duress appellant in its brief states:

The facts in our case show that the Appellant meets this situation and that in order to obtain the security which it felt, premised on the acts and conditions that existed were necessary and which were to replace previously provided US Armed Forces security, required him [Blackburn] to enter and sign the second contract in the field, even though he had requested that all such contractual actions be negotiated with the home office.

(App. br. at 4)

The factual premise upon which appellant relies is simply not the facts we have found. The fact is the contract was negotiated with the home office and it was not signed by the home office because the home office advised that only Blackburn, who was in the field, could sign the agreement. Thus the reason Blackburn found himself with a contract to sign in the field as the military was leaving was because he had apparently failed to communicate to his home office that the home office could execute the contract. Moreover, the Government was expending effort to get the contract executed because AID was also concerned about making sure PWSS had services in place before the U.S. Military departed. There is no evidence of coercive acts committed by Government officials. Accordingly, we find appellant has failed to prove duress so as to avoid the consequences of the 22 August 1994 contract with AID.

The claim for damaged equipment is granted and is remanded to the parties to negotiate quantum. The claim for rental of the purification units is denied.

Dated: 26 March 2002

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

¹ While Zaire is now known as the Democratic Republic of the Congo (Central Intelligence Agency, THE WORLD FACTBOOK, at <http://www.cia.gov/cia/publications/factbook/geos/cg.html>), we will use the term Zaire, because it was the official country name when these events occurred.

² Blackburn testified that he called Roth on Wednesday but when his testimony is read in context, especially in light of subsequent phone calls and events, it was more likely to have occurred on Thursday, and we so find.

³ Blackburn testified that he was told that Michael Reagan (Reagan) was present in the AID office during the first phone call (tr. 1/45), but neither Bradford nor Mahdesian mentions Reagan as having been present.

⁴ An NGO is a non-government organization and is sometimes used interchangeably with PVO, private voluntary organization (tr. 3/9-10).

⁵ The Government has not contended that the not-to-exceed amount will be surpassed if these claims are sustained.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 49813, Appeal of Portable Water Supply Systems Co., Ltd., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals