

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Raytheon Missile Systems Company ) ASBCA No. 57594  
 )  
Under Contract No. N00019-04-C-0569 )

APPEARANCES FOR THE APPELLANT:

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OPINION BY ADMINISTRATIVE JUDGE CLARKE  
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant timely<sup>1</sup> moves for reconsideration of our 18 March 2013 decision in *Raytheon Missile Systems Co.*, ASBCA No. 57594, 2013 ASBCA LEXIS 18 (18 March 2013).<sup>2</sup> This appeal involved liability for a price increase in JP-10 jet fuel used in the Tomahawk Missiles manufactured by appellant. We sustained the appeal as to that portion of the \$25.00 per gallon price relating to the construction of a Defense Fuel Support Point (DFSP) and purchase of JP-10 to stock the DFSP. We denied the appeal as to that portion of the price relating to losses experienced by the Defense Energy Support Center (DESC), Aerospace Energy Commodity Business Unit (CBU), on other commodities it manages. Raytheon asks that we reconsider the denial.

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<sup>1</sup> The government contends that appellant's motion is untimely. Board Rule 29 requires motions for reconsideration to be filed within 30 days from receipt of the Board's decision. Appellant received the Board's decision on 21 March 2013, making the motion due on 20 April 2013, a Saturday. Since 20 April 2013 is a Saturday, Board Rule 33(b) makes the motion due 22 April 2013. Appellant's motion was filed on 22 April 2013.

<sup>2</sup> Judge Thomas who participated in our decision has since retired.

## *Reconsideration*

We recently discussed the standard for reconsideration in *DODS, Inc.*, ASBCA No. 57667, 13-1 BCA ¶ 35,203 at 172,711, “[t]o prevail on reconsideration, the moving party must generally establish that the underlying decision contained mistakes in our findings of facts or errors of law or that newly discovered evidence warrants vacating our decision.”

## DISCUSSION

Raytheon argues that the Board erred in its factual and legal analysis. Although Raytheon approaches it from three different directions, the gravamen of its argument is that DESC did not adequately disclose that losses on other commodities would affect the price of JP-10. Raytheon concludes that as a result it was unable to assess its price risk, “[t]he fact that, as a legal and practical matter, Raytheon had no ability to assess, evaluate or manage that risk is evidence that this risk was not allocated to Raytheon under the contract” (app. mot. at 3). We disagree. Raytheon acknowledges in its motion that, “[e]ach year, DESC Aerospace Energy issues a pricing memorandum for all of the various aerospace fuels that it manages” (app. mot. at 4-5). From these memorandums Raytheon knew the identity and price history of all of the fuels managed by DESC Aerospace Energy CBU. This information combined with DESC’s published description of its standard price provided all the information necessary for Raytheon to assess the nature of the risk it was assuming.<sup>3</sup>

Raytheon was perfectly content to base its pricing of JP-10 on the price history for JP-10 alone. Mr. Walter Rogers, Raytheon’s Director of the Tomahawk program, discussed the risk they assumed:

3. Mr. Walter Rogers was Raytheon’s director of the Tomahawk program from December 2003 to June 2008 (tr. 1/55). He testified that DESC was the only source for JP-10 (tr. 1/87). He testified that Raytheon did not see much risk that the price of JP-10 would fluctuate much based on the price stability in the past (tr. 1/89). Raytheon did not consider asking for an economic price adjustment clause for JP-10 because of the low risk of price fluctuation (tr. 1/91). Mr. Michael Miller, an inventory management specialist for DESC, agreed that the price for JP-10 was relatively stable from 2001 through 2006 (app. supp. R4, tab 156 at 9-11, 41).

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<sup>3</sup> Including whether it needed to ask for more information about how the price was calculated.

*Raytheon*, 2013 ASBCA LEXIS 18, at \*4, finding 3. Mr. Rogers' testimony is supported by testimony by Ms. Denise Winger who purchased JP-10 for Raytheon and provided the \$14.00 figure to the proposal team. *Id.* at \*3, finding 2. Although Mr. Rogers testified that "Raytheon had assumed the risk that the price of JP-10 might fluctuate based on market conditions," the record is clear that Raytheon based its risk assessment solely on the price history of JP-10 and exhibited no concern about how it was calculated. *Raytheon*, 2013 ASBCA LEXIS 18, at \*13, finding 27. Raytheon's contemporaneous decision making lies in stark contrast with its argument in its motion.

The Board relied upon DESC's published description of its standard price in support of its conclusion that Raytheon "knew or should have known" that the price of JP-10 was not simply based on market conditions. *Raytheon*, 2013 ASBCA LEXIS 18, at \*6, finding 11. Raytheon contends that "[t]he Board's reading of this language is overly broad and places undue reliance on only one portion of the document" (app. mot. at 11). We view this as appellant arguing that the Board erred in its interpretation of the description – a question of law. Raytheon argues that "DESC's public disclosure does not clearly and unambiguously communicate that DESC could increase the price of one fuel commodity to offset the losses incurred on other communities" (app. mot. at 11). We disagree that such clarity is necessary. Specifically we interpreted the language, "[t]he budgeted cost of transporting, storing, and managing the government fuel system, including war reserve stocks and some adjustment to those costs which reflects whether the revolving fund lost or gained money during the previous year" to be sufficient to put Raytheon on notice that the price of JP-10 was influenced by losses in all commodities managed by the Aerospace Energy CBU. *Raytheon*, 2013 ASBCA LEXIS 18, at \*6, finding 11. We reaffirm that interpretation. We do not agree that more specificity was required to put Raytheon on notice that something other than "market conditions" was at play in the setting the price of JP-10. Raytheon's insistence in its motion on more precision is inconsistent with its willingness at the time to simply rely on price history to assess its risk. In a nutshell what our decision says is that as long as DESC's normal standard price setting process was followed, the contract allocated to and Raytheon accepted the risk that the standard price setting process might result in a higher price for JP-10. In our decision we concluded that DESC's calculating the price based on financing the DFSP and stocking it with JP-10 was not part of its normal standard price setting process.

It follows therefore that we reject Raytheon's contention that we were wrong in concluding that the government did not violate its implied duty of cooperation and noninterference as to the effect of losses on other commodities on the price of JP-10.

CONCLUSION

Having concluded that we did not err as a matter of fact or law, Raytheon's motion for reconsideration is denied.

Dated: 23 May 2013



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CRAIG S. CLARKE  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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

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. 57594, Appeal of Raytheon Missile Systems Company, rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals