

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Free & Ben, Inc.) ASBCA No. 56129
)
Under Contract No. W91GY0-07-C-0056)

APPEARANCE FOR THE APPELLANT: Mr. Ben Emosivbe
President

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
Robert T. Wu, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING

Free & Ben, Inc. (F&B) entered into a \$6.1 million firm fixed-price contract with Joint Contracting Command-Iraq/Afghanistan (JCC-I/A or the government) to provide 126 medium 5-ton cargo trucks for delivery to Taji Warehouse, Baghdad, Iraq. The trucks were intended to be transferred to the Iraqi government. After award, F&B requested the government to issue an End Use Certificate (EUC) because its supplier needed one as a condition for exporting the trucks from Japan. The government refused to provide an EUC contending that the contract says nothing about issuing one. When F&B made known that it could not deliver the trucks without an EUC, the government terminated the contract for cause pursuant to Federal Acquisition Regulation (FAR) clause 52.212-4(m). F&B appealed the termination contending that its failure to perform was excusable and the termination should therefore be converted to one for the convenience of the government.

FINDINGS OF FACT

1. The Multi-National Security Transition Command-Iraq (MNSTC-I) was a command within the Multi-National Forces-Iraq responsible for the buildup of Iraqi defense forces and police by equipping, training, and preparing Iraqi forces in ultimately assuming control of Iraq (tr. 2/32).

2. JCC-I/A was a part of MNSTC-I (tr. 1/38). MNSTC-I Support Division (MSD) was the JCC-I/A contracting unit responsible for supporting MNSTC-I's contracting and procurement requirements (tr. 2/32). The MSD was divided into three teams: (1) the Commodities Team, (2) the Services Team, and (3) the Source Selection

Team (tr. 2/32). The Commodities Team was responsible for procuring vehicles and other equipment for the Iraqis (tr. 2/33).

3. Organizationally, MNSTC-I had several units: J4 was one of the units responsible for transportation and convoy operations (tr. 1/103-4). Contract requirements such as procurement for vehicles generated by the operation side of MNSTC-I were fulfilled by the contracting side of MNSTC-I or MSD (tr. 1/40).

4. During the relevant time period leading to the termination of the disputed contract for cause, Lt Col Bradley T. Riddle, USAF (Lt Col Riddle) was the contracting officer (CO). Lt Col Riddle was the chief in charge of MSD. (Tr. 1/179-80) He served in Iraq from January to July 2007 (tr. 1/36). While he was in Iraq, he had an unlimited warrant issued by the Principal Assistant Responsible for Contracting-Iraq (PARC-I) of JCC-I/A (tr. 1/44; ex. 519¹).

5. LCDR Jadon Lincoln, USN (LCDR Lincoln) of the Navy Supply Corps was MSD's Commodities Team Chief (tr. 1/152). LCDR Lincoln served in Iraq between February and September 2007 (tr. 1/152). He joined Lt Col Riddle's group in April or May 2007 (tr. 1/51). LCDR Lincoln sat in the same office "within a stone's throw, ten feet" from Lt Col Riddle (tr. 1/52). LCDR Lincoln had a \$5 million warrant initially. His warrant was increased to \$10 million effective 19 July 2007. (Tr. 1/53, 112, 163, 180; ex. 520) At the time F&B's contract was terminated for cause on 25 July 2007, LCDR Lincoln's warrant for each contract action was \$10 million (tr. 1/160).

6. 1Lt Robert S. Lady, USAF² (1Lt Lady) was the contract administrator of Contract No. W91GY0-07-C-0056 (Contract 0056) (tr. 1/180, 2/138). 1Lt Lady was in Iraq from February to August 2007 (tr. 2/29). He was assigned to MSD's Commodities Team (tr. 2/29). 1Lt Lady sat "across the hall and down maybe another 20 feet or so" from Lt Col Riddle (tr. 1/54-55). At all times relevant to this appeal, 1Lt Lady had a \$1 million warrant (tr. 1/55). Since he had a warrant, he acted at times as a CO and at other times as a contracts manager (tr. 2/37).

7. On 18 April 2007, MSD issued Solicitation No. W91GY0-07-R-00041 for 126 "Medium Cargo Truck (Including Shipping)" in accordance with the specifications attached (R4, tab 2 at 2). The cargo trucks were procured for the Samarra Brigade which was "an army unit of Iraqi soldiers that was going to be established to defend the area

¹ Pursuant to the Board's direction, each party submitted hearing exhibits in a trial notebook. F&B's trial notebook contains tabs 100-131. The government's trial notebook contains tabs 500-518. These tabs will be referred to in this decision as exhibits (exs. or ex.). At the hearing, additional exhibits, exs. 519-523 were received.

² 1Lt Lady has since been promoted to Captain.

around Samar[r]a” (tr. 1/93). The solicitation required delivery to be made to Taji Warehouse in Baghdad, Iraq, and required delivery of all items by “no later than **30 June 2007**.” It further stated “offeror may propose delivery schedule.” (*Id.*) The solicitation told offerors that for solicitation information to call “1Lt Robert Lady” and provided his e-mail address, Robert.lady@pco-iraq.net as the point of contact (*id.*). The cover letter to the solicitation package told offerors “Offers shall be submitted by electronic e-mail not-later-than **2 May 2007, 2000 local time**, Baghdad, Iraq” (R4, tab 2).

8. The solicitation told offerors that the resultant contract would be subject to FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (SEP 2005) (R4, tab 2 at 3). A “commercial item” is “Any item...that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes,” including those items that could be made to meet government requirement with minor modifications. *See* FAR 2.101.

9. The solicitation included FAR 52.212-1, INSTRUCTIONS TO OFFERORS – COMMERCIAL ITEMS (SEP 2006) which included this provision: “(e) *Multiple offers*. Offerors are encouraged to submit multiple offers presenting alternative terms and conditions or commercial items for satisfying the requirements of this solicitation. Each offer submitted will be evaluated separately.” (R4, tab 2 at 9)

10. The solicitation told offerors that, initially, all proposals would be evaluated to determine if the proposed vehicles met the minimum requirements of the specifications (R4, tab 2 at 13). It identified four factors that the government would use to evaluate offers: (1) Technical Capability, (2) Past Performance, (3) Iraqi Socio Economic Program, and (4) Price (*id.*).

11. Delivery schedule was stated as a “Technical Capability Subfactor” as follows:

Technical Capability Subfactor: Delivery schedule – As this item is necessary for the continuous build-up of forces in Iraq, the time frame in which the entire quantity of items can be delivered is of high importance. Offerors shall provide the best possible delivery schedule within the shortest period of time. In addition to this schedule, offerors shall provide evidence of ability to meet the proposed schedule. This may include such items as commitments from dealers or evidence of availability of the number of vehicles they propose. Contractor must affirmatively demonstrate that it is able to take possession of the completed vehicles, effect transportation, and clear all processing through Iraq to ensure

delivery by the proposed time. Contractor may initiate partial deliveries immediately upon award.

(R4, tab 2 at 11)

12. The five-page specifications required that the vehicles be painted in “desert tan.” They required removable troop seating “for a minimum of 20 personnel with gear, in the cargo body” and stowage on the vehicle for the seating when not in use. In addition, they required the vehicles be provided with “a removable weather-resistant soft cover and support structure” that “will not impede or interfere with the transporting of personnel and gear or the use of a machine gun on the weapon mount,” and “stowage...on the vehicle for the soft cover and support structure.” (R4, tab 21 at 3, 5) The specifications did not require the trucks to be fitted with mountings for arms or other specialized military equipment. We find the modifications required were minor in nature and the trucks being procured were “commercial items” as defined in FAR 2.101.

13. Mr. Ben Emosivbe (Emosivbe) was and is president of F&B. In preparing to submit an offer in response to the cargo truck solicitation, he sent a letter to Zayani Motors W.L.L. (Zayani), a dealer for Mitsubishi Fuso Truck and Bus Corporation of Japan (Mitsubishi Japan) in the Kingdom of Bahrain, as well as Tata Motors, Ltd. (Tata) (India), Leyland Trucks Ltd. (Leyland) (U.K.) and Kamaz Group of Companies (Kamaz) (Russia) (tr. 2/159-60). Due to his concern that these firms might themselves submit an offer directly to the government, Emosivbe was careful not to send them the five-page specifications. He testified he disclosed the specifications “in a different way.” (Tr. 2/161)

14. Joel Fernandez (Fernandez) was Assistant Manager of Fleet Sales at Zayani (ex. 523 at 6-8). He testified in April 2007 he received an e-mail from Emosivbe indicating an interest in buying trucks (*id.*). Though he was never given the truck specifications (*id.* at 30-31), Fernandez came to understand from his conversations with Emosivbe that the trucks might be used for military purposes because of the need for troop seating and other features (*id.* at 36-37). According to Fernandez, he responded to Emosivbe’s inquiry with price quotes and catalogs (*id.* at 8, 10). From the catalogs, Emosivbe determined that the Mitsubishi Fuso 5-Ton Long Cargo Truck suited his purpose. He testified “At that point, what I did was I quickly put an order of what I wanted.” (Tr. 2/165)

15. Because Mitsubishi did not have 126 trucks in stock, Emosivbe was told that the trucks would have to be special ordered (ex. 523 at 39). He was told that the lead time for shipping the trucks from Japan to Bahrain would be three months from the time an order was placed (*id.* at 12-13, 39-40). He was told in order for Mitsubishi to process the order F&B would need to make a 30% down payment of the total price with the balance payable upon delivery (*id.* at 42-43).

16. As the discussions between Fernandez and Emosivbe went, Zayani “would just bring the truck[s] to Bahrain, and anything to do with the modification...would be...[F&B’s] responsibility” (ex. 523 at 38). Thus, the trucks were to be shipped from Japan with “standard white color” (*id.* at 19). Emosivbe was told, to the extent manufacturing could be accelerated, some trucks could be delivered in 60 or 70 days (tr. 3/67-68), and once in Bahrain, Zayani could arrange to have the white trucks painted in desert tan (tr. 2/209, 3/53). Once modified, shipping the trucks from Port Manama in Bahrain to Port Basra in Iraq would take 10 to 25 days (tr. 3/61-62). Additional time would be needed to bring the trucks to Baghdad.

17. An EUC is “a written agreement in connection with the transfer of military equipment or technical data to the United States that restricts the use or transfer of that item by the United States.” Department of Defense (DoD) Directive No. 2040.3 dated 14 November 1991, ¶ 3.1. (*See also* tr. 1/58, 168, 2/40)

18. Normally when the government determines that an EUC would be issued, the solicitation would specify delivery to take place within a time frame after an EUC is issued (tr. 1/176-77; ex. 521). The cargo truck solicitation contains nothing to indicate that the government would be willing to execute an EUC restricting its ability to transfer the trucks to a third party.

19. In his communications and discussions with Fernandez, the subject of obtaining an EUC never came up. Emosivbe acknowledged that, at the time, he did not know he needed an EUC. (Tr. 2/166, 175-76) Fernandez testified that Emosivbe never mentioned anything relating to an EUC (ex. 523 at 28). According to him, Mitsubishi was not concerned about an EUC because F&B would modify the trucks locally and it was “his issue to do that kind of modification. All I would supply is the truck in Bahrain FOB. Anything apart from that was all Ben’s responsibility.” (*Id.* at 37-38)

20. Thirteen offers, including F&B’s, were received (ex. 522). Offers were received from companies based in Europe and Asia (*id.*). None, including F&B, mentioned that an EUC would be needed for delivery (tr. 1/198). Despite the fact that offerors were encouraged to submit multiple offers, and despite having contacted Tata, Leyland and Kamaz, F&B submitted only one offer – to provide 126 Mitsubishi Fuso 5-Ton Long Cargo trucks for \$6,161,400.00, including delivery (R4, tab 4).

21. After evaluating all of the offers, MSD eliminated all those that did not meet the evaluation criteria, and forwarded the remaining offers to J4 for technical evaluation (tr. 2/124-25). Only two offerors were found to be technically acceptable: F&B and Nour USA. Of the two, Nour USA rated higher in technical acceptability, and F&B offered a lower price and faster delivery. (Tr. 2/126) F&B’s offer stated “[t]ransportation and delivery from country of origin to delivery destination in Iraq is

included in the contractor's cost," and delivery would take place "Not-Later-Than **May 31 after Contract Award.**" The offer also said "Acceleration and partial delivery is acceptable at no additional cost to Delivery location in IRAQ." (R4, tab 4 at 9) In making its offer, F&B had not conferred with Mitsubishi Japan. In its brief, F&B refers to Mitsubishi Japan as "the ultimate supplier" and "the manufacturer of all Mitsubishi Fuso brand to the Middle East including Bahrain" (app. br. at 38 n.18). Since F&B had a "satisfactory" technical evaluation and the lowest price, and met other evaluation criteria, it was determined to be the Lowest Price Technically Acceptable (LPTA) offer (tr. 2/125).

22. On 9 June 2007, 1Lt Lady by e-mail asked F&B to confirm (1) its delivery time since the 31 May 2007 delivery date in F&B's offer had passed, and (2) that its offer included cargo beds for all trucks and not just the base steel frames pictured in its proposal (R4, tab 5). Emosivbe's 11 June 2007 e-mail reply confirmed the 90-day delivery period and said "acceleration and partial delivery is acceptable at no additional cost to delivery location." 1Lt Lady's e-mail reply the same day said "Got it, thanks." (*Id.*) In confirming the 90-day delivery period, Emosivbe had not checked with, nor received confirmation from, Mitsubishi Japan, the truck manufacturer, as to its willingness to ship to Iraq or to Iraq via Bahrain. On 21 June 2007, 1Lt Lady e-mailed F&B asking for confirmation of its \$6,161,400.00 bid. Emosivbe confirmed the bid by return e-mail the same day. (Ex. 500)

23. According to Emosivbe, he "intensified" his "research" after he received 1Lt Lady's e-mail seeking confirmation of his offer (tr. 2/167). He testified "somebody told me about an EUC" (tr. 2/169). As he researched, he found more information about the topic: "There were [sic] a lot of information that I read" (tr. 2/170).

24. On 21 June 2007, Emosivbe called Lina Damico (Damico). Emosivbe testified he called Damico because "I know her and she has worked in [the European] [P]arliament" (tr. 2/171) and "she knew a lot of the legislation" (tr. 2/172). At the hearing, Damico testified that she advised Emosivbe of "the necessity to get an end user certificate, and that's also very important" (tr. 3/80-81).

25. As a part of the motion papers filed in connection with the government's motion for summary judgment, F&B has alleged, referring to a telephone log, that "[p]rior to signing the contract on 21 [sic]³ June, 2007, Appellant called on respondent, raising the issue of EUC, to which 1Lt Robert Lady, responded, 'that would be taken care of.'"⁴ On the question of whether 1Lt Lady promised him before he signed the contract that the EUC would be "taken care of," Emosivbe testified:

³ The 21 June 2007 date was cited in error. As the contract shows, both the CO and Emosivbe signed the contract on 23 June 2007 (R4, tab 1).

⁴ See *Free & Ben, Inc.*, ASBCA No. 56129, 09-1 BCA ¶ 34,127 at 168,742.

Q. And then you asked him for an EUC?

A. Because that was the original reason why.

Q. And then his response to you was what?

A. I recall I think he said it would be taken care of. Should I win the award, it will be taken care of. But he is not sure if I will win it. But he cannot say it for certain if I will win.

(Tr. 2/225) When pressed further on cross-examination, Emosivbe testified:

Q. I'm not asking for your impression of the conversation.... I'm asking for your recollection of how the conversation occurred verbatim. What was said and in what order, if you can recall?

A. What I recall was that would you provide me with an EUC, should this contract be awarded? I think and he said it will be taken care of.

(Tr. 2/229)

26. 1Lt Lady testified that the only communication he had with F&B was his e-mails to Emosivbe seeking confirmation that "the price he had offered was still valid and that delivery terms could be met as scheduled" (tr. 2/51). He testified that he "did not speak with anyone from Free & Ben prior to award," and that he "did not tell Free & Ben that an EUC would be taken care of" (tr. 2/54, 108). He explained EUCs were fairly uncommon, and that issuance of an EUC would have significantly impacted the delivery schedule and would have had to be coordinated through J4 to see if that was "even a possibility." He testified "We wouldn't have just said that issuing an EUC was acceptable without knowing about it ahead of time" (tr. 2/54). Moreover, since 1Lt Lady knew that the cargo trucks were procured for the Iraqi Army, we do not believe he would have agreed to provide an EUC which would have restricted the government's ability to transfer the trucks.

27. With respect to his claim that 1Lt Lady told him that the issuance of an EUC "would be taken care of," Emosivbe acknowledged at the hearing that apart from his

telephone log⁵, he has no follow-up e-mail, no follow-up letter and no other written record to support the alleged promise (tr. 2/213-14, 237). Moreover, at various times after award when providing an EUC became an issue, and when the government proceeded to consider termination of F&B's contract, Emosivbe never once mentioned the promise 1Lt Lady allegedly made to him on 21 June 2007 (tr. 2/237-39). Nor did Emosivbe mention this alleged promise after he appealed the CO's termination and filed F&B's complaint. The first time this alleged promise surfaced was on 14 October 2008 when F&B filed its last response to the government's motion for summary judgment (motion papers No. 4). If 1Lt Lady's alleged promise was what led Emosivbe to sign the contract on 23 June 2007, it was too important an event not to have been confirmed in writing at the time, or brought up immediately when the possibility of termination loomed. In the absence of credible evidence, we do not believe Emosivbe reached 1Lt Lady by telephone on 21 June 2007, and consequently, no promise that an EUC would be "taken care of" was, or could have been, made.

28. Emosivbe had a second telephone conversation with Damico on 22 June 2007 during which Damico brought up the Wassenaar Arrangement, an export control regime agreed to by the member states to control the export of military items. She advised Emosivbe "All the conditions that one country put forward" must be respected, "[o]therwise there would be some problems to go on." (Tr. 3/86)

29. Contract 0056 was awarded to F&B the next day. Lt Col Riddle signed as CO for the government; Emosivbe signed for F&B as its president on 23 June 2007 (R4, tab 1). Lt Col Riddle testified "there was not an EUC issue raised to my attention" from issuance of the solicitation through award of the contract (tr. 1/60). LCDR Lincoln testified that he did not recall 1Lt Lady speaking to him about F&B requesting an EUC prior to award (tr. 1/182-83). The contract as awarded was for 126 Mitsubishi Fuso 5-Ton Long Cargo trucks, including shipping, for the firm fixed-price of \$6,161,400.00 (R4, tab 1). Delivery to Taji Warehouse in Baghdad, Iraq, was required to be completed by "no later than **90 Days ARO**." Partial delivery was authorized. The contract included FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (SEP 2005) (the Commercial Items clause). Paragraph (m) of this clause authorizes termination for cause if the contractor "fails to provide the Government, upon request, with adequate assurance of future performance." Documentary evidence shows that on 23 June 2007, F&B awarded a \$763,000 subcontract to Daylight Engineering Ltd. (Daylight Engineering), a Nigerian firm, to provide custom fitted vehicular covers and removable troop seating for the trucks. (Ex. 508 at 55; tr. 2/185-87, 206)

⁵ The telephone log in evidence shows only the dates and times calls were made, the locations from which calls were made, the durations of calls, and the charges for the calls. The log does not contain a record of any conversations that might have taken place. (See ex. 119)

30. Prior to signing the contract, Emosivbe knew that the Mitsubishi Fuso trucks he offered were to be exported from Japan. Prior to signing the contract, Emosivbe did not contact Mitsubishi Japan, the supplier of the Fuso trucks, nor the Ministry of Economy, Trade and Industry (METI), the appropriate export control authority of the Japanese government, on what was needed to clear delivery through Iraq. We find F&B's subsequent inability to deliver the Fuso trucks stemmed from these failures.

31. After Contract 0056 was awarded, Emosivbe for the first time called Mitsubishi Japan. This took place on 25 June 2007, two days after award. (Tr. 2/176-77, 197) Emosivbe explained that he called Mitsubishi Japan to coordinate with the manufacturing source since the trucks would be manufactured in Japan (tr. 2/177). According to Emosivbe, he spoke with a Mr. Suzuki (tr. 2/196), and based on his verbal description that "this is a military truck" that would be sent to the U.S. Army in Iraq (tr. 2/179-80), Suzuki apparently concluded that a license, which Emosivbe interpreted to be an EUC, would be required (tr. 2/182). In its notice of appeal of 3 August 2007, F&B stated that it was "first notified of the need for an End User Certificate by its supplier's on June 25, 2007" (notice of appeal at 4 of 39). Mr. Suzuki did not testify. There is no evidence that he reviewed the truck specifications or coordinated his views with METI.

32. According to Fernandez, from Zayani's (Mitsubishi's dealer in Bahrain) standpoint, "the costings were done, the prices were given," but the transaction was never concluded with F&B (ex. 523 at 24-25). Zayani provided Emosivbe an invoice and was "just waiting for the money to be transferred" (*id.* at 22).

33. Emosivbe e-mailed 1Lt Lady on 2 July 2007 with the following message:

I wanna [sic] talk to you specifically about the 5 ton Medium Truck. Can you issue me a signed end user certification? This is very important because of the military application of these vehicles. If you are not busy, when can I reach you by phone? Thanks.

(R4, tab 5) 1Lt Lady testified that this e-mail raised a "new issue" relating to the delivery of the trucks (tr. 2/62), and it was the first time Emosivbe mentioned that an EUC would be required (tr. 2/59).

34. 1Lt Lady responded by e-mail on 4 July 2007:

This requirement does not require an EUC and it isn't just a matter of issuing one. It is a very lengthy process. Please let me know if this will be an issue.

(R4, tab 5) According to 1Lt Lady, shortly after this e-mail was sent, Emosivbe called pleading for an EUC and said "it would impact him financially" if an EUC was not issued. 1Lt Lady testified during this call Emosivbe made no mention of any prior oral commitment to provide an EUC. (Tr. 2/65-66)

35. Emosivbe's 5 July 2007 e-mail said "an EUC from your department is required for the delivery of the Mitsubishi into Iraq." The e-mail went on to say that the manufacturer of the Tata truck "did not request an EUC for the export of their troop carrier, instead they relied solely on the purchase order issued by your department to us." Emosivbe proposed to substitute Tata trucks "with all the features mentioned in the award." (R4, tab 5) If this Tata truck was the same one F&B considered prior to submitting its offer, the truck was not offered by F&B under the solicitation's multiple offer option. Consequently, the truck was not evaluated by the government for acceptability.

36. Emosivbe took up the matter with the CO directly. On 6 July 2007, he sent Lt Col Riddle, the following e-mail:

Your purchase order dated June 21, 2007 has been received by our firm, but the delivery of these trucks cannot be fulfilled without the inclusion of an End User Certificate (EUC), which states that the end user could neither re-export the vehicles or hand them over to another entity within the country of Iraq. This is strictly the policy of the country and the company manufacturing these vehicles.

We are requesting that you either provide us with an EUC for your order or approve the TATA trucks, we have provided for the items you have requested. The manufacturer of the TATA trucks did not require an End User Certificate for this order.

To ensure our quick delivery, please comply with this request as soon as possible. Thank you Sir, for your consideration of this matter.

(R4, tab 6)

37. 1Lt Lady reported to his superior LCDR Lincoln at 6:54 p.m., 6 July 2007, that F&B had insisted that it could not deliver the trucks "unless we provide him with an EUC." The e-mail went on to say that F&B believed "that if we won't issue him an EUC, he has the right to provide a completely different vehicle, which is something we obviously cannot accept." The e-mail said "The only other offer found to be technically

acceptable for this requirement is \$10M more, but was rated higher in terms of technical acceptability.” 1Lt Lady told LCDR Lincoln that J4 was consulted and was “willing to make the change to the other company.” The e-mail recommended that “we attempt to Terminate for Convenience and move on to the next company.” LCDR Lincoln’s reply the next morning said “Concur with your recommendation to offer a T4C to the contractor at no cost to the Government then award to the next company that would have gotten the award.” (Ex. 501)

38. 1Lt Lady’s e-mail to F&B on 7 July 2007 said:

In accordance with the Department of State regulation that we follow concerning End User Certifications (see link below), the vehicles on contract W91GY0-07-C-0056 do not require an EUC. This contract is for standard commercial vehicles with very minor modifications and they do not fall under Category VII for Tanks and Military Vehicles. We will not issue an EUC for this requirement, because none is required. Since you have indicated that you will not be able to fulfill the terms of our contract, I am forced to consider terminating the contract for cause. Please advise me as to whether or not you will be able to deliver the required trucks.

We have also reviewed your request that we accept similar Tata trucks as an alternative. However, accepting a product other than what has already been evaluated and contracted for is not an option. Feel free to contact me if you have any questions.

(R4, tab 7) As LCDR Lincoln explained, it would not be fair to the other offerors to accept a truck that had not been evaluated in accordance with the published evaluation criteria (tr. 1/201).

39. LCDR Lincoln’s e-mail reply on 7 July 2007 instructed 1Lt Lady to draft a Commander’s Critical Information Report (CCIR) to “T4C (cause) the current 5Ton truck contract with Free & Ben.” The e-mail stated that he received legal advice that in order to award to the next contractor in line, “we cannot T4C (convenience)...we would have to terminate for cause.” The e-mail went on to say that a show cause notice can be issued 48 hours after a CCIR has been completed, and once the contractor was given the opportunity to respond, termination of the contract could follow. (R4, tab 7)

40. Emosivbe’s e-mail to LCDR Lincoln on 10 July 2007 reported “We are working out a deal with Japan to ensure that the trucks are enrouted [sic] via Kuwait or Jordan if the war in Iraq was what prompted them to request an End User Certificate for

this kind of trucks.... I understand we have your verbal approval that these trucks are destined for the Iraqi troops only and will not be re-exported.” Emosivbe’s e-mail went on to say “I want you to know that while you are considering the easy option we gave you, we are busy working on an alternative route for the trucks you’d requested.” (R4, tab 10; notice of appeal, encl. 20)

41. Puzzled by Emosivbe’s representation of “verbal approval,” LCDR Lincoln responded on 10 July 2007 at 9:37 a.m.:

I don’t understand your e-mail and I’m not sure with whom you had the below conversation. Are you stating that you are providing the vehicle listed in the contract as required? As stated before, there are no plans to issue an EUC for these vehicles. Please advise on your intentions immediately.

(R4, tab 10; notice of appeal, encl. 21) Emosivbe never answered the question who gave him the verbal assurance that the trucks would not be re-exported. This is another example of attributing to others a promise never made to him.

42. At 10:32 a.m., 10 July 2007, Emosivbe e-mailed LCDR Lincoln with the following news:

I just ended a lengthy meeting with top officials of Mitsubishi, they agreed to configured the trucks as specified in your requirement, but they are unwilling to ship the trucks via Kuwait or Jordan into Iraq without an EUC issued by your department. It is a precaution, because of the war, they say. We are offering you Tata Trucks or Leyland trucks in return and we are ready to keep the term of the contract. I look forward to hearing from you soon.

(R4, tab 9)

43. Emosivbe advised LCDR Lincoln by another e-mail later on 10 July 2007:

Sadly, Mitsubishi has just call off the deal, because of the government unwillingess [sic] to certify that those trucks will not be reexported by the Iraqi troops, onced [sic] they are in Iraq. We deeply regret this situation as we are trying to do our best to ensure that the government gets the goods in a timely fashion. Thanks.

(Notice of appeal, encl. 22)

44. Emosivbe then let LCDR Lincoln know by another 10 July 2007 e-mail that in addition to the Tata or Leyland trucks, he could also offer Kamaz trucks at no additional cost “if the government does not want to issue an EUC for the delivering of the Mitsubishi we are proposing” (R4, tab 10). Although it could have elected to do so, F&B never offered the Tata, Leyland and Kamaz trucks before the offer due date. Consequently, none of the trucks proposed as a substitute had been evaluated by the government for acceptability.

45. Separately, Emosivbe forwarded to LCDR Lincoln a four-page attachment showing a sketch of the Tata, Leyland and Kamaz trucks on the first page followed by a listing of the minimum equipment/description of the trucks as possible substitutes for the Mitsubishi Fuso trucks (ex. 508 at 68-72). Other than his representation of conformance, no actual specifications of the Tata, Leyland and Kamaz trucks were presented to the government for evaluation (tr. 1/204-5).

46. A CCIR was used for informational purposes (tr. 1/212). It was sent up the chain of command to the flag officer or the commanding general (tr. 1/79, 214) so that he could assess any “mission impact” of military operations (tr. 2/92, 114-15). In this case, equipping the Samarra brigade could be impacted if the cargo truck contract were to be terminated (tr. 1/78).

47. On 10 July 2007, LCDR Lincoln sent up a CCIR which alerted the Commanding General of the upcoming “Issuance of Show Cause notice leading to Termination for Cause.” The CCIR gave the following explanation for the proposed action:

Contractor has requested an End Use Certificate, which is not required for this contract. Contractor has not provided any proof that an EUC is being requested by country providing vehicles. Since contractor is not receiving an EUC, he has shown that he will not be able to deliver in accordance with the terms and conditions of this contract.

(Ex. 505) With respect to “Mission/customer impact of a termination,” the CCIR reported “Contract will be awarded to the next contractor who would have otherwise been awarded the contract. Delivery time for new contract is acceptable to the customer and will not have a negative mission impact.” With respect to “Underlying causes for performance deficiencies,” the CCIR reported “Poor planning and contract execution on the part of the contractor.” With respect to “Plans to re-procure. How will a new contractor overcome the same problem,” the CCIR reported “New contractor has more experience with vehicle shipments and did not request an EUC. However, contractor will be asked to review the EUC requirement before award.” (*Id.*)

48. Apparently unfamiliar with an EUC, and needing further explanation of what the CCIR meant in terms of poor planning and contract execution on the contractor's part, CDR Chris Sosa within the CCIR chain of command asked LCDR Lincoln for further explanation by e-mail on 11 July 2007. LCDR Lincoln responded by e-mail the same day:

An EUC is a written agreement in connection with the transfer of military equipment or technical data to the U.S. that restricts the use of that item by the U.S. This includes direct use by or for the U.S. Government in any part of the world and transfer by means of grant aid, International Military Education and Training Programs, Foreign Military Sales, and other security assistance and armaments cooperation authorities.

... The contractor did not request or reference a need for an EUC until after award. The significance of this situation is that the issuance of an EUC would allow the contractor additional time to make delivery. From my understanding, it could take up to 45 days or more to obtain an EUC and the contractor is then given "X" amount of days to deliver after receipt of EUC (this information is normally placed in the contract before award). Furthermore, the contractor has confirmed today that he cannot provide the vehicles as contracted for, even with an EUC.

What I meant by poor planning and contract execution is that the contractor signed the contract fully aware that there was no reference or agreement to provide an EUC for this procurement.

....

We will still be able to meet the customer's required delivery date by awarding to another contractor.

(Ex. 521)

49. On 12 July 2007, 1Lt Lady sent F&B a notice to show cause. The notice said that since F&B had shown it would be unable to perform Contract 0056 "within the time required by its terms," and "cure the conditions endangering performance" under the contract, the government was considering terminating the contract for cause. The notice gave F&B ten days after receipt to present written evidence bearing on the question of

whether its failure to perform was due to causes beyond its control and without its fault or negligence. (R4, tab 11) 1Lt Lady wrote the show cause letter with input from LCDR Lincoln and legal counsel (tr. 1/109). In connection with Contract 0056, 1Lt Lady's role was that of a contracts manager (tr. 1/109-10). Even though he used his other title "Contracting Officer," on the show-cause notice, 1Lt Lady explained that he sent the show cause letter in his "administrative function in managing the existing contract and relaying information to the contractor" (tr. 2/93).

50. Apparently responding to an inquiry he initiated, Emosivbe received the following e-mail dated 12 July 2007 from Hironori Saito, First Secretary, Embassy of Japan:

Dear Mr. Emosivbe:

My name is Hironori Saito, in charge of economic affairs at the Embassy of Japan.

According to the Foreign Exchange and Foreign Trade Act in Japan, one who is going to export/transfer arms and dual-use items (including military trucks or vehicles) is required to obtain an appropriate license from the Ministry of Economy Trade and Industry (METI).

Exporters are required by METI to obtain documents from the intended end-user (eg. letter of assurance from the end-user, a copy of the contract). In detail, please find the following website (available in English);

<http://www.meti.go.jp/policy/anpo/index.html>

<http://www.mofa.go.jp/policy/un/disarmament/policy/annex1.html>

If you have further technical questions, please contact METI directly [sic]:

Security Export Control Licensing Division
Ministry of Economy, Trade and Industry
TEL: +81-3-3501-2801

Best regards,

Hironori Saito

First Secretary
Embassy of Japan

(Ex. 112, encl. 1 at 2)

51. METI is the Japanese government entity that controls export of goods from that country.⁶ There is no evidence that F&B contacted METI. There is no evidence that METI reviewed the cargo truck procurement and the specifications and concluded that, under Japanese law, an EUC was required. The Embassy e-mail provided general information with respect to the export and transfer of arms and dual-use items. It did not constitute “proof,” as F&B would maintain, that the appropriate Japanese government authority had determined that an EUC was required to export the Mitsubishi Fuso trucks.

52. Apparently at Emosivbe’s request, the First Secretary of the Embassy of Japan also sent the same e-mail to LCDR Lincoln, 1Lt Lady and Major Mark Micchio, JCC-I/A’s legal representative (tr. 2/73) on 12 July 2007 (ex. 112, encl. 3 at 2-4). LCDR Lincoln testified when this e-mail was received, the CCIR had already been sent up the chain of command (tr. 1/235-36).

53. On 18 July 2007, F&B sent its response to the show-cause letter addressed to the CO (R4, tab 13). The response disagreed with the government’s position that the procurement was for “standard commercial vehicles with very minor modifications” (*id.* at 3 of 18) and contended that since the trucks were to be used as “troop carriers,” the procurement would fall under the Wassenaar Arrangement to which both the United States and Japan were signatories. F&B acknowledged that the Wassenaar Arrangement “allows each Participating State to determine at domestic level its own definition of the term ‘military end-use.’” F&B contended that its inability to effect delivery of the trucks was excusable. (*Id.*) F&B contended that the CO was forewarned by DFARS 225.802-71 of a possible request for signing an EUC when purchasing an item from a foreign source (*id.*). It also contended that since “it was a unilateral mistake by the government to have requested Free&Ben to verify 5-ton Cargo trucks without any reference to Mitsubishi,”⁷ it should be permitted to offer “another brand name for the 5-tons cargo trucks” as a “cure for the government refusal to issue an End User Certificate” (*id.* at 4 of 18). Other than placing the blame entirely on the government, F&B’s response provided no assurance that, short of receiving an EUC, it would be able to deliver the Fuso trucks in accordance with its contract.

⁶ See gov’t br. at 16.

⁷ F&B offered only Mitsubishi trucks. It is not clear why the government would ask F&B to verify trucks F&B did not offer. Since Mitsubishi was F&B’s supplier, it was F&B’s obligation to ascertain what Mitsubishi’s export policy was before submitting a proposal to the government.

54. Lt Col Fred M. Kmiecik, USAF (Lt Col Kmiecik) replaced Lt Col Riddle as Chief of MSD on or about 18 July 2007 (tr. 1/80, 91). On 24 July 2007, he sent Lt Col Kristen A. Nelson of JCC-I/A an e-mail which asked: "We submitted a CCIR request to terminate the subject contract, can you tell me if we have the green light to go forth?" Lt Col John A. Jacobson, USAF, replied the same day on behalf of JCC-I/A, "You hacve [sic] the green light to go!" (Ex. 506) Since the purpose of a CCIR was for assessing mission impact, we interpret JCC-I/A's "green light" comment to say going forward with termination would not impact MNSTC-I's mission, and not as substituting its decision for that of the CO's.

55. On 25 July 2007, LCDR Lincoln, as CO, terminated Contract 0056 for cause. The termination letter told F&B that Contract 0056 was terminated effective immediately upon receipt of the notice, and the notice constituted a final decision of the CO and F&B had the right to appeal under the Disputes clause, FAR 52.233-1, of the contract. The specific reason given for the termination was summarized as follows:

(2) Reason for Termination: A request for an End User Certificate (EUC) was received on 6 July 2007. As this Contract does not require an EUC, the request was rejected. In addition, your response to a "Show Cause Notice" dated 18 July 2007 detailed your company's inability to perform in accordance with the terms and conditions of this contract. It is in the Government's best interest to exercise its right to terminate this contract for default in the interest of procuring the required material from an alternate source.

(R4, tab 14) The termination letter was attached to 1Lt Lady's e-mail he sent on 25 July 2007 (R4, tab 16).

56. LCDR Lincoln testified that his decision to terminate for cause was driven by two factors: First, obtaining an EUC would take 45 to 60 days, and that was unacceptable to the "requirements folks." Second, even though there was no EUC requirement in the solicitation, "if an EUC was required, we felt that the contractor should have known that prior to submitting his proposal." (Tr. 1/189-90)

57. The government subsequently awarded a contract for the cargo trucks to Nour USA, the only other technically acceptable offeror (ex. 522; tr. 1/197, 2/120, 123). As 1Lt Lady explained, accepting an alternate truck from F&B that had not been evaluated would be tantamount to allowing F&B to submit offers after the time for submission of offers had expired and would thus compromise the integrity of the procurement process (tr. 2/76). Since F&B provided no actual technical data from its substitute suppliers, the government, could not, in any event, have evaluated the proposed alternative trucks (tr. 1/208, 2/74-75).

58. Emosivbe's 25 July 2007 e-mail to 1Lt Lady said "it is clear from this and your previous emails that you have made up your mind to award the contract to the next company." In another e-mail to 1Lt Lady on 27 July 2007, Emosivbe said "Your termination notice is biased and fraudulent. Its [sic] design [sic] to, avoid opening up the items for rebidding." (R4, tab 16) Also, on 27 July 2007, F&B sent 1Lt Lady a certified claim in the amount of \$787,760 (app. supp. R4, tab 5).

59. On 1 August 2007, LCDR Lincoln, as CO, issued Modification No. P00002. This modification confirmed that Contract 0056 was terminated in its entirety for cause, and it also decreased the contract amount by \$6,161,400.00. (R4, tab 17) By letter dated 3 August 2007, F&B appealed the CO's termination of its contract for cause. The Board docketed the appeal as ASBCA No. 56129 on 10 August 2007.

60. Prior to the commencement of the hearing on 5 April 2010, the Chief Trial Attorney of the Army Contract and Fiscal Law Division in a memorandum dated 3 March 2010 sought assistance from the Staff Judge Advocate (OSJA), U.S. Forces – Japan. The memorandum asked OSJA to coordinate and meet with METI for the purpose of assisting the U.S. Government in the interpretation of Japanese Export Control Laws. The memorandum briefly described the nature of the dispute and forwarded the solicitation and the truck specifications. The memorandum asked to have a METI representative made available to testify at the ASBCA hearing on 7 April 2010, either in person or via telephone, or, "[i]f METI declines to provide a representative to testify...that METI provide an official statement on the issues discussed." (Ex. 511, encl. 4)

61. As a result of a meeting between an OSJA representative, and his interpreter, and the Deputy Director, Security Export Control Policy Division of METI, METI stated it would consider writing a statement answering specific questions posed in writing. In confirming this arrangement, government counsel's 18 March 2010 letter forwarded two specific questions and let METI know that "[l]egal procedures require that we file this statement with the Tribunal [ASBCA] prior to the hearing and no later than April 2, 2010, and a response prior to that date, if possible, is very much appreciated." (Ex. 511, encl. 3)

62. METI's written answer to government counsel's written questions did not arrive in time for the hearing. Without objection from F&B, the Board left the record open to receive the statement and gave F&B the opportunity to submit a statement in rebuttal. By letter dated 16 April 2010, the government forwarded METI's statement in Japanese, and a translated version of the statement from two METI officials, Keiya Iida, Director, Security Export Control Policy Division, METI, and Hiroaki Machii, Deputy Director, Security Export Control Policy Division, METI. The Japanese to English translation was performed by Atsuhiko Nakayasu, who certified that he was fluent and

conversant in the English and Japanese languages and that his translation was accurate. (Ex. 511)

63. F&B's 20 April 2010 letter objected to the government's 16 April 2010 submission from METI on the basis that the submission was made "after the Board's ruling that no further evidence be submitted by both parties following the hearing date of 9th April 2010." This objection is not well taken. At the conclusion of the hearing on 9 April 2010, the presiding Administrative Judge said except for what the government was to provide from the government of Japan and F&B's rebuttal thereto, he was going to close the record. (Ex. 511; tr. 3/125) The Board closed the record by order dated 5 May 2010 after F&B submitted its rebuttal.

64. F&B also asks us to reject the government's translation of the METI officials' statement because Nakayasu was not qualified under FED. R. EVID. 604 as an expert in translating Japanese to English and vice versa. F&B contends Nakayasu's certification was no more than his self-assessment, and was insufficient to ensure accurate translation of METI's position (app. br. at 34-35). This objection is well taken.⁸ Accordingly, we make no findings with respect to METI's position on whether Japan, as a matter of its national legislation and policy, required an EUC for this particular procurement.

65. F&B's 20 April 2010 rebuttal included a 19 April 2010 e-mail Emosivbe sent to Kaoru Sato at kaoru.sato@daimler.com with a copy to Takeshi Horiuchi at takeshi.horiuchi@daimler.com with the subject "MITSUBISHI FUSO TRUCKS."⁹ The e-mail posed the following questions and answers (in bold) which Takeshi Horiuchi sent back to Emosivbe on 20 April 2010:

On June 25, 2007 I called your firm concerning the
exportation of 126 Mitsubishi Fuso trucks to Iraq. Among
other things, we discussed was that the trucks were for

⁸ F&B cites *United States v. Bailon-Santana*, 429 F.3d 1258, 1261 (9th Cir. 2005) where the Court said:

Where a certified interpreter is not "reasonably available," *see* 28 U.S.C. § 1827(b)(2), Federal Rule of Evidence 604 provides a means for the court to qualify an individual as an interpreter, employing the methodology used for qualifying expert witnesses. One way or the other, however, the record must reflect a determination, based on something more than the individual's say-so, that he has the requisite translating ability.

⁹ Government counsel's 20 April 2010 letter advised the Board that it has no objection to F&B's submission in rebuttal to the government's submission.

military use, to be modified with troop seating, troop cover, military desert tan color and will be used in carrying weapons such as a machine guns. The respond [sic] I got then was that because those trucks will be used in carrying machine guns; and will be used in a military environment, you are not allowed to export the trucks without a license. Based on this response I want to ask the following:

1. Is this still your company's policy regarding the sales of your vehicles for military prupose [sic]

=>**Yes**

2. Is this policy approved by Meti.

=>**METI is not in position to approve our company policy.**

3. Should I decide to modify these vehicles into troop Carriers outside Japan, would I still be affected by this policy.

=>**We cannot export vehicles which will be used in a military environment, therefore you will be affected by this policy even if you modify outside Japan.**

4. Do I need to provide an End User Certification (EUC)?

=>**Yes**

(Ex. 511, app. 20 April 2010 ltr., encl. 2) We find Mitsubishi's requirement for an EUC was, at best, a company policy based on Emosivbe's limited representation as to the nature and use of the trucks. We find F&B has failed to show that the requirement for an EUC in this case was a matter of Japanese national legislation or export policy.

DECISION

Default termination is a drastic sanction that should be imposed "only for good grounds and on solid evidence." *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). The government bears the burden of proof that a default termination is justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987). Once the government establishes default on the contractor's part, the burden shifts to the contractor to prove that the default was excusable. *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996); *Free & Ben, Inc.*, ASBCA No. 56129, 09-1 BCA ¶ 34,127 at 168,742; *Double B Enterprises, Inc.*, ASBCA Nos. 52010, 52192, 01-1 BCA ¶ 31,396. We have said that the principles that apply under the FAR clauses that govern termination for default apply with equal force under the termination for cause provision of the commercial items clause. *General Injectables & Vaccines, Inc.*, ASBCA

No. 54930, 06-2 BCA ¶ 33,401 at 165,593, *aff'd*, 519 F.3d 1360 (Fed. Cir. 2006), *reh'g denied*, 527 F.3d 1375 (Fed. Cir. 2008).

The government contends that the termination for cause was justified on two grounds: First, the government says that F&B failed to provide adequate assurance of future performance upon request. Second, the government contends that the termination could alternatively be justified under the theory of anticipatory repudiation. (Gov't br. at 30) F&B frames the issue as "a disagreement...between Free&Ben and the contracting authority over the issuance of an End User Certificate and the acceptance of alternative sets of vehicles" (app. br. at 5).

Was the Government Required to Issue an EUC?

Department of Defense Directive (DoD Directive) No. 2040.3 of 14 November 1991, defines an "End Use Certificate" or "EUC" as "a written agreement in connection with the transfer of military equipment or technical data to the United States that restricts the use or transfer of that item by the United States." DFARS 225.802-71, End use certificates, anticipates that the government may be requested to sign an EUC when purchasing an item from a foreign source:

Contracting officers considering the purchase of an item from a foreign source may encounter a request for the signing of a certificate to indicate that the Armed Forces of the United States is the end user of the item, and that the U.S. Government will not transfer the item to third parties without authorization from the Government of the country selling the item. When encountering this situation, refer to DoD Directive 2040.3, End Use Certificates, for guidance.

DoD Directive No. 2040.3 "[e]stablishes policies, assigns responsibilities, and prescribes procedures for signing EUCs on foreign defense items" (¶ 1.2). Paragraph 4, BACKGROUND AND POLICY of this Directive states:

This Directive is intended to authorize the execution of EUCs when such a certificate is necessary to facilitate purchases of foreign products when the purchase of such products is in the best interest of the United States.

4.1 The Military Departments and other DoD Components purchase products produced by allies and friendly countries and participate in cooperative development programs to promote interoperability, standardization, and an

expanded procurement base, and to obtain products that best meet U.S. needs at the lowest cost.

4.2 U.S. worldwide security responsibilities are extensive and recognition of these special circumstances has resulted in long-time acceptance in international agreements, by allies and friends, of the need for flexibility in the authorized uses or transfer of purchased or co-developed articles and data. In various circumstances, international agreements have recognized that permissible use of an item or data for U.S. “defense purposes” as defined in paragraph 3.2....

Paragraph 3.2 of the Directive defines “Use for Defense Purposes” to include “direct use by or for the U.S. Government in any part of the world and transfer by means of grant aid, International Military Education and Training (IMET) programs, Foreign Military Sales (FMS), and other security assistance and armaments.”

F&B contends that the government was “forewarned” by DFARS 225.802-71 “of a possible request for signing an EUC when purchasing an item from a foreign source” (app. br. at 34), implying the government should have disclosed this possibility in the solicitation. DFARS 225.802-71 and DoD Directive No. 2040.3 are for guidance by government officials and protection of the government’s interest. They do not “form the basis for a contractor’s right of action.” *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1454 (Fed. Cir. 1997) (holding the primary purpose of the Cancellation of Item clause is to protect the government’s interest by encouraging government officials to monitor the availability of funds for each fiscal year and to provide notice to contractors, and violation of the clause may not form the basis for a contractor’s right of action).

In any case, that some countries might require an EUC could be ascertained through normal research, especially for someone engaged in the business of importing goods from foreign countries. When Emosivbe “intensified” his research after he was asked to confirm his offer, someone told him about an EUC (finding 23). On 21 June 2007, his consultant, Damico, told him getting an EUC was “very important” (finding 24). On 22 June 2007, before he signed the contract, Damico advised him that under the Wassenaar Arrangement, the conditions put forward by a member country must be respected (finding 28). We conclude that the fact that an EUC could be required by some exporting countries was something that F&B could itself determine through proper research. And, F&B was in the best position to do so because it knew from which country the trucks it offered would be exported.

The cargo trucks being procured were for the Samarra brigade “an army unit of Iraqi soldiers that was going to be established to defend the area around Samarra”

(finding 7). Buying trucks for transfer to the Iraqis was consistent with the “Use for Defense Purposes” as defined in DoD Directive No. 2040.3. We do not believe signing an EUC was necessary: Although the specifications required troop seating, they also required stowage for the seating when not in use. Moreover, although the removable soft cover and the support structure of the trucks were required not to interfere with “the use of a machine gun or the weapon mount,” the specifications did not require the trucks to be fitted with mounting for arms or other specialized military equipment. (Finding 12) We have found that the modifications required were minor and did not convert the trucks from being “commercial items” as defined in FAR 2.101 (findings 8, 12). Notably, of the 13 offers received from vendors based in Europe and Asia, including F&B, none asked the government to sign an EUC as a condition for delivery (finding 20).

Although not strictly applicable because the cargo truck procurement did not involve the import to, and export from, the United States of defense articles, in determining whether it would be appropriate to sign an EUC, the government followed the Department of State regulations (finding 38). The Department of State regulations are promulgated pursuant to the Arms Export Control Act, 22 U.S.C. § 2778. This Act authorizes the President to control the export and import of defense articles and defense services. The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services was delegated to the Secretary of State by Executive Order 11958, as amended. 22 C.F.R., Subchapter M, International Traffic in Arms Regulations (ITARs) implements that authority. By virtue of delegations of authority by the Secretary of State, ITARs are primarily administered by the Deputy Assistant Secretary of Defense Trade Controls and managing Director of Defense Trade Controls, Bureau of Political-Military Affairs. 22 C.F.R. § 120.1 (2007).

22 C.F.R. Part 121 sets out the United States Munitions List. CATEGORY VII of this list relates to TANKS AND MILITARY VEHICLES. It provides:

(c) Military trucks, trailers, hoists, and skids specifically designed, modified, or equipped to mount or carry weapons of Categories I [FIREARMS, CLOSE ASSAULT WEAPONS AND COMBAT SHOTGUNS], II [GUNS AND ARMAMENTS] and IV [LAUNCH VEHICLES, GUIDED MISSILES, BALLISTIC MISSILES, ROCKETS, TORPEDOES, BOMBS AND MINES] of this section or for carrying and handling the articles in paragraph (a) of Categories III [Ammunition/ordnance for the articles in Categories I and II of this section] and IV [Rockets (including but not limited to meteorological and other sounding rockets), bombs, grenades, torpedoes, depth charges, land and naval mines, as well as launchers for such defense articles, and demolition blocks and blasting caps] of this section.

The cargo trucks being procured required only that their soft covers and support structures be built so that they did not impede or interfere with the use of a machine gun on the weapon mount. The specifications did not require the trucks to be fitted with mountings or arms for other specialized military equipment. (Finding 12) Since the trucks were not required to be specifically designed, modified, or equipped to mount or carry weapons listed in Category VII of the U.S. Munitions List, they were not military trucks as defined in that list. We conclude, therefore, the government did not need to offer to sign an EUC in its solicitation to procure the cargo trucks.

Did F&B Anticipatorily Repudiate the Contract?

In *Danzig v. AEC Corp.*, 224 F.3d 1333, 1337 (Fed. Cir. 2000), *cert denied*, 532 U.S. 995 (2001), the Federal Circuit said that “[t]he law applicable to a contractor’s failure to provide assurances of timely completion is a branch of the law of anticipatory repudiation.” Thus, in the law of government contracts, the contractor is required to give reasonable assurances of performance in response to a validly issued cure notice. *Id.* at 1338. While the promisor’s renunciation of a “contractual duty *before* the time fixed in the contract for . . . performance” is a repudiation, such a repudiation “ripens into a breach prior to the time for performance . . . if the promisee ‘elects to treat it as such.’” *Franconia Associates v. United States*, 536 U.S. 129, 143 (2002). *FFR-Bauelemente + Bausanierung GmbH*, ASBCA No. 52152 *et al.*, 07-2 BCA ¶ 33,627 at 166,557 (“in order for a default termination to be sustained, the CO need only be found to have been ‘justifiably insecure about the contract’s timely completion.’”).

A refusal to perform in the future without a change to the contract has been held to be anticipatory repudiation: *DK’s Precision Machining & Mfg.*, ASBCA No. 39616, 90-2 BCA ¶ 22,830 (holding the contractor’s refusal to proceed unless the government met its demands for a price increase constituted an anticipatory breach); *Precision Cable Mfg. Co.*, ASBCA No. 39030, 90-2 BCA ¶ 22,833 (holding contractor’s refusal to perform in a fixed price contract except at an increased price constituted an anticipatory breach); *Sunox, Inc.*, ASBCA No. 30025, 85-2 BCA ¶ 18,077 (holding contractor’s statement that he could not deliver a domestic end product, after bidding a 100% foreign-made product, at the contract price was an anticipatory breach); *Smith Faison Military Sales Co.*, ASBCA No. 24229, 82-1 BCA ¶ 15,512 (holding contractor’s notice that it would not perform without a price increase due to its subcontractor going out of business was an anticipatory repudiation of the contract); *Elliot Constr. Co.*, ASBCA No. 23483 *et al.*, 81-2 BCA ¶ 15,222, *aff’d on recon.*, 82-1 BCA ¶ 15,625 (holding the CO properly issued a partial termination for default when contractor conveyed its determination to complete work only if the contract were renegotiated).

The appeal before us closely parallels the facts in *Mission Valve and Pump Co.*, ASBCA Nos. 13552, 13821, 69-2 BCA ¶ 8010. In that case, the Navy issued a RFP to

procure 3 bronze check valves in accordance with certain specified drawings. The valves, subsequently increased to 13, were urgently needed for repairs of the USS Enterprise. Because appellant's unit price quotes was substantially below those of other offerors, the Navy requested appellant to confirm its offer. Upon confirmation, the contract was awarded to appellant. Subsequent to award, appellant advised the Navy that it discovered the valves specified were not the valves of appellant's design. Since appellant did not have the drawings referenced in the RFP, it had actually submitted its offer based on "previous experience with Mil Spec valves" (*id.* at 37,239). Thereafter, appellant notified the Navy:

We regret that we will be unable to furnish the valves on subject Contract. We failed to obtain the drawing referenced in the Contract prior to making our bid and find the requested valves are not our design.

We do believe our valve fully meets the requirements of this requirement but are unable to comply with the face to face length etc. of the drawing....

(*Id.* at 37,240) Based on this letter the CO terminated appellant's contract for default, and awarded a re-procurement contract to one of the two offerors who had also submitted offers.

With respect to the default termination prior to the time specified for delivery, we said:

Nevertheless, we have often held that whenever there is a positive, definite, unconditional, and unequivocal manifestation of intent, by words or conduct, on the part of a contractor of his intent not to render the promised performance when the time fixed therefor by the contract shall arrive, the contracting officer is not required to go through the useless motions of issuing a preliminary "10-day cure" notice even though the time for performance has not yet arrived, but may terminate the contract forthwith on the ground of anticipatory breach....

Although appellant's letter of 24 July 1968 is expressed in the form of regret as to appellant's inability to perform, there can be no doubt that it was appellant's intent by that letter to convey to the contracting officer its definite repudiation of the contract. Accordingly, appellant's appeal from the default termination of the subject contract is denied.

(*Id.* at 37,243)

Much like the contractor in *Mission Valve and Pump Co.* who submitted an offer, confirmed its price, and signed a contract with the Navy without checking the pertinent valve drawings, F&B confirmed its 90-day delivery schedule and signed Contract 0056 without first checking with, and receiving confirmation from, Mitsubishi Japan – its “ultimate supplier” – as to its willingness to export Fuso trucks to Iraq (findings 21, 22). Before he signed the contract, Emosivbe also failed to seek a determination from METI, the appropriate export control authority of the Japanese government, on whether an EUC would be required for the Fuso trucks it contracted to deliver to the U.S. Government in Iraq (finding 30). Emosivbe called Mitsubishi Japan for the first time on 25 June 2007, two days after he signed Contract 0056. Based on his verbal description that “this is a military truck” that would be sent to the U.S. Army in Iraq, he was told by a Mitsubishi representative that a license – which Emosivbe interpreted to be an EUC – would be required (finding 31).

Faced with the belated discovery of this reality, Emosivbe e-mailed 1Lt Lady on 2 July 2007 to ask for an EUC (finding 33). When he was told that an EUC was not required (finding 34), Emosivbe proposed a different truck from a different source that did not need an EUC (finding 35). On 6 July 2007, Emosivbe took up the issue with the CO. His e-mail said “the delivery of these trucks cannot be fulfilled without the inclusion of an End User Certificate (EUC).” The e-mail went on to say “We are requesting that you either provide us with an EUC for your order or approve the TATA trucks,” and to “please comply with this request as soon as possible” (finding 36). This demand did not offer to perform the contract as written. We interpret F&B’s letter as Emosivbe’s positive, definite, unconditional and unequivocal expression of intent that unless the government signed an EUC or accepted a different truck, F&B would not be able to deliver the Fuso trucks as provided in Contract 0056. Moreover, in response to the government’s 12 July 2007 show cause/cure letter, F&B’s 18 July 2007 response placed the blame for its inability to perform entirely on the government, and provided no assurance, short of receiving an EUC, that it would be able to deliver the Fuso trucks in accordance with the contract terms (finding 53). We conclude that F&B repudiated Contract 0056 and the government’s termination for cause was proper.

Has F&B Proved that It Entered into Contract 0056 as a Result of a Pre-Award Agreement that the EUC would be “Taken Care of”?

Emosivbe contends that on 21 June 2007, two days before he signed Contract 0056, he called 1Lt Lady about signing an EUC and 1Lt Lady allegedly said “that would be taken care of” (app. resp. to gov’t opp’n filed 14 October 2008 (motion papers No. 4 at 11)). In other words, F&B contends that its inability to deliver was excusable

because it entered into Contract 0056 in reliance on the government's promise that an EUC would be provided.

1Lt Lady denied he spoke to anyone from F&B prior to award of Contract 0056. He testified he "did not tell Free & Ben that an EUC would be taken care of." Since 1Lt Lady knew that issuing an EUC would significantly impact the trucks' delivery schedule, and since he knew signing an EUC would restrict the government's ability to transfer the trucks to the Iraqis, we believe it was unlikely that 1Lt Lady would have made the alleged promise. (Finding 26)

If 1Lt Lady's alleged promise was what led Emosivbe to sign Contract 0056 on 23 June 2007, it was too important an event not to have been confirmed in writing at the time or brought up when the possibility of termination loomed. Emosivbe acknowledged that apart from his telephone log, he has no follow-up e-mail, no follow-up letter and no other written record in support of the alleged promise. Moreover, at various times after award when providing an EUC became an issue, and when the government proceeded to consider termination of F&B's contract, Emosivbe never once mentioned the promise 1Lt Lady allegedly made to him. Nor did Emosivbe mention this alleged promise after he appealed the CO's termination and filed F&B's complaint. The first time this alleged promise surfaced was on 14 October 2008, over a year into litigation, when F&B filed its last response to the government's motion for summary judgment. (Finding 27)

Weighing the evidence, we believe 1Lt Lady's version of what occurred. If he called, we do not believe Emosivbe reached 1Lt Lady by telephone on 21 June 2007, and consequently, no promise that an EUC would be "taken care of" was, or could have been, made (finding 27).

Was F&B's Inability to Perform Excusable?

The only proof F&B has offered in support of its contention that an EUC was required in order to export the Fuso trucks to Iraq are: First, on 25 June 2007, two days after he signed Contract 0056, Emosivbe called Mitsubishi Japan, and based on his oral description that "this is a military truck" that would be sent to the U.S. Army in Iraq, Mr. Suzuki of Mitsubishi Japan was said to have advised that a license, which Emosivbe interpreted to be an EUC, would be required (finding 31). Second, a 12 July 2007 e-mail from the First Secretary, Embassy of Japan, advising under Japanese law, one who was going to export arms and dual-use items (including military trucks or vehicles) was required to obtain an appropriate license from METI (finding 50). Third, a 20 April 2010 e-mail, from an individual, provided in rebuttal to the government's translated statement by two METI officials, stating it was Mitsubishi Japan's "company policy" not to "export vehicles which will be used in a military environment" without an EUC (finding 65).

In support of its contention that an EUC was required, F&B also relies on the Wassenaar Arrangement (app. br. at 33). The Wassenaar Arrangement is an export control regime agreed upon by the member states and is based on individual and discretionary determination by each member state as to what military and dual-use items to control. Enforcement of the Wassenaar Arrangement is done in accordance “with member countries’ national legislation and policies and [is] implemented on the basis of national discretion.”¹⁰

There is no proof that Japan, the exporting country of the Fuso trucks, required an EUC as a matter of its national legislation and policy. METI is the government entity that controls export from that country (finding 51). The only proof F&B offered in support of its contention that an EUC was required to export the Fuso trucks was the after-award 12 July 2007 e-mail that Emosivbe solicited from the Embassy of Japan. The Embassy e-mail advised generally that under Japanese law “one who is going to export/transfer arms and dual-use items (including military trucks or vehicles) is required to obtain an appropriate license from the Ministry of Economy Trade and Industry (METI),” and “Exporters are required by METI to obtain documents from the intended end-user.” The Embassy e-mail referred Emosivbe to two websites and told him to contact METI’s Security Export Control Licensing Division directly for further technical questions. (Finding 50) There is no evidence that F&B contacted METI. There is also no evidence that METI reviewed the cargo truck procurement and concluded that, under Japanese law, an EUC is required. (Finding 51)

As told to do so by the solicitation, F&B should have ascertained its supplier’s willingness and METI’s policy to “effect transportation, and clear all processing through Iraq to ensure delivery by the proposed time” on the Fuso trucks before it submitted its offer (finding 11), before it confirmed its offer (finding 22), and before it signed the contract (finding 30). We conclude that F&B’s failure to do so renders its professed inability to perform inexcusable.

Did the Government Breach Its Implied Duty of Cooperation in Rejecting F&B’s Offer to Perform with Other Trucks?

F&B contends that the government did not act reasonably in rejecting its offer to “perform without condition and at no additional costs to the Government” (app. br. at 11). It contends that the government’s rejection of the Tata trucks and its subsequent failure to respond to its offer to provide Leyland (from U.K.) and Kamaz (from Russia) trucks was a breach of the government’s implied duty of cooperation (*id.* at 12). F&B

¹⁰ See *Free & Ben, Inc.*, ASBCA No. 56129, 09-1 BCA ¶ 34,127 at 168,744 n.6, referring to Government’s Reply to Appellant’s Opposition to the Government’s Motion for Summary Judgment (motion papers no. 3) citing http://www.wassenaar.org/publicdocument/docs/Basic_documents_2008.pdf.

charges that the government “made up its mind to terminate the contract long before Appellant had the opportunity to present its offer of alternative trucks” (*id.* at 11-12).

The covenant of good faith and fair dealing is an implied duty that each party to a contract owes to its contracting partner. The covenant imposes obligations on both contracting parties that include the duty not to interfere with the other party’s performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract. *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). A party’s duty to cooperate is a part of its implied obligation of good faith and fair dealing. *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988), *modified*, 857 F.2d 787 (Fed. Cir. 1988) (holding that failure to cooperate in the other party’s performance violated the implied obligation of good faith and fair dealing).

Before it submitted its offer, F&B contacted Tata, Leyland and Kamaz as well (finding 13). Although it was encouraged to submit multiple offers, F&B offered only the Mitsubishi Fuso trucks (finding 20). Consequently, only the Fuso truck was evaluated in accordance with the published evaluation criteria. Thus, notwithstanding its offer to provide the Tata, Leyland and Kamaz trucks at no additional costs and without an EUC, these trucks were not eligible to replace the Mitsubishi trucks. As we said in *Mission Valve and Pump*, 69-2 BCA ¶ 8010 at 37,243, “the Government is entitled to demand strict compliance with contract plans and specifications simply as a usual contractual right.”

Of the thirteen offers received, only two, those from F&B and Nour USA were found to be technically acceptable (finding 21). Inasmuch as the time frame for delivery was of “high importance” (finding 11), when F&B made clear it was unable to perform Contract 0056 without receiving an EUC, the government acted reasonably in awarding a contract to the only other technically acceptable offeror.

There is no support for F&B’s claim that the government “made up its mind to terminate the contract long before Appellant had the opportunity to present its offer of alternative trucks” (app. br. at 11-12). The government was forced to consider terminating the contract for cause after F&B’s 6 July 2007 e-mail told the CO “the delivery of these trucks cannot be fulfilled without the inclusion of an End User Certificate (EUC)” (finding 36). Providing an EUC and accepting alternate trucks which had not been evaluated were not obligations contemplated in Contract 0056. We conclude that F&B has failed to prove that the government breached its implied duty of cooperation.

F&B raised numerous other complaints attacking virtually every aspect of the cargo truck procurement. We have considered all of the complaints and found them to be without merit.

CONCLUSION

Because F&B repudiated the contract and failed to provide adequate assurance of future performance, and because its inability to perform the contract without an EUC stemmed from its failure to ensure clearance of all processing through the cargo trucks' destination before it signed the contract, we hold that the government properly terminated the contract for cause.

Accordingly, this appeal is denied.

Dated: 22 March 2011



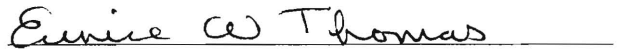
PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



EUNICE W. THOMAS
Administrative Judge
Vice 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. 56129, Appeal of Free & Ben, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals