

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
 ANHAM FZCO, LLC ) ASBCA No. 58999  
 )  
 Under Contract No. SPM300-10-D-3373 )

APPEARANCE FOR THE APPELLANT: Eric J. Marcotte, Esq.  
Vedder Price  
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.  
DLA Chief Trial Attorney  
Michael D. McPeak, Esq.  
Corinne M. Foley-Petersen, Esq.  
Trial Attorneys  
DLA Troop Support  
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE WOODROW

This appeal involves an indefinite-delivery, indefinite-quantity contract for the supply and delivery of food and non-food items to military customers within Kuwait, Iraq and Jordan. ANHAM FZCO, LLC (ANHAM) seeks costs originating from the government's direction to alter its delivery operations from Kuwait to Iraq utilizing a commercial entry point.

This decision addresses entitlement only for ASBCA No. 58999. We hold that the government changed the terms of the contract by directing ANHAM to enter Iraq through the commercial entry point instead of the contractually-required U.S. military controlled crossing.

The government's modification of the contract to pay the costs of private security escorts once in Iraq did not compensate appellant for the new and additional costs of switching appellant's operations to the commercial crossing location. Finally, we conclude that ANHAM did not assume the risk that the delivery method would change under the terms of its fixed-price contract. We sustain the appeal.

## FINDINGS OF FACT

### **I. Solicitation and Contract**

1. On May 5, 2008, Defense Logistics Agency – Troop Support (DLA or government) issued Solicitation No. SPM300-08-R-0061 (solicitation) seeking proposals for a contractor to provide subsistence (food and non-food items) to the U.S. military and other authorized customers in Kuwait, Iraq and Jordan (R4, tab 1).<sup>1</sup>

2. The solicitation sought to establish an indefinite-quantity contract (C. Sol. at 47).<sup>2</sup>

3. The pricing terms under the solicitation were “firm fixed price/fixed price with economic price adjustment” (C. Sol. at 179).

4. The solicitation’s Statement of Work stated that the work to be performed involved the “support of customers who are currently within a war zone” (C. Sol. at 47). The zone of contract performance was designated as a contingency operation in accordance with FAR 2.101 (*id.*).

5. ANHAM submitted a proposal in response to the solicitation. ANHAM’s proposal took no exceptions to the terms and conditions of the solicitation. (R4, tab 55; supp. R4, tab 2)

6. On April 14, 2010, DLA awarded Contract No. SPM300-10-D-3373 (contract) to appellant in the amount of \$2,156,364,275.88, following a competition conducted under the solicitation (R4, tab 58). The contract incorporated the solicitation, all 25 amendments, and ANHAM’s proposal (*id.* at 2).

7. The contract was an indefinite-quantity contract (C. Sol. at 47). It had a base period of 18 months, followed by 4 option periods (R4, tab 58). Option periods 1, 2, and 3 were one-year periods, and the 4th (and final) option period was for 18 months (*id.* at 52). The maximum contract dollar value was \$6,469,092,827.64 (*id.*).

8. The contract included Federal Acquisition Regulation (FAR) 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAR 2009) (C. Sol. at 8). Several sections of the standard clause were modified as follows: Paragraph (c)

---

<sup>1</sup> Rule 4 cites are to the Rule 4 filed in ASBCA No. 58999, unless otherwise noted.

<sup>2</sup> The conformed solicitation incorporates the text of all 25 amendments into a complete version of the Solicitation (R4, tab 58 at 2). A copy of the conformed solicitation, which was used at the hearing, was attached to appellant’s post-hearing brief. It is incorporated into the record and for ease of reference, will be cited to as C. Sol.

“Changes” was modified to add a provision providing the government with the right to unilaterally order changes.

(c) Changes.

(1) The Contracting Officer, at his/her discretion, may unilaterally invoke any of the contingency options set forth in this contract.

(2) The Contracting Officer may at any time, by unilateral written order, make changes within the general scope of this contract in any one or more of the following:

- (i) method of shipment or packing;
- (ii) place, manner, or time of delivery.

(3) If such change causes an increase or decrease in the cost of, or time required for, performance for any part of the work under this contract, the Contracting Officer shall make equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(4) The Contractor must assert its right to an adjustment under this clause within thirty (30) days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(C. Sol. at 12)

9. The contract further stated:

In addition to the changes otherwise authorized by the Changes clause of this contract, the Contracting Officer may, at any time, by written order identified as a change order, make changes in the place of performance or Government-furnished facilities, equipment, material, services, or site. Any change order issued in accordance with this paragraph (p) shall be subject to the provisions of the Changes clause of this contract.

(C. Sol. at 24)

10. The solicitation, and the resultant contract, called for product to be delivered from ANHAM's Kuwait warehouses into Iraq via overland shipments under military supervision:

The Prime Vendor [ANHAM] *will need to transport full and empty containers/trucks to and from Iraq under the supervision of a U.S. Army convoy. Private security is presently prohibited* (see page 60). The vendor is responsible to honor the provisions of clause 252.225-7043 Antiterrorism/Force Protection for Defense Contractors Outside The United States (Mar 2006), and all clauses which may supplement or supersede it. Iraq convoy routes are established via Kuwait. A vendor(s) needs to have, at a minimum, operations in Kuwait to include a physical warehouse location and a distribution network.

(C. Sol. at 48 (emphasis added))

11. In the Statement of Work (SOW) section titled "Work to be Performed," "Iraq Vehicle Transportation," the estimated service volumes were counted "Per vehicle, purchase order, & entry into convoy" (C. Sol. at 52). In the SOW section titled "Work to be Performed: Iraq Command, Control, and Support Programs," the solicitation explained that performance included placing trucks into U.S. military convoys:

The Prime Vendor will be required to: provide customer service within the SPV program; maintain regular communications with all concerned parties to ensure information flows to the right people in a timely manner; *facilitate placement of contractor vehicles within the military convoy system*; maintain organization and discipline of drivers; promote smooth throughput of contractor vehicles; minimize round-trip transit times; adhere to driver safety and security policies of the base and surrounding area; provide 24x7 on-site points of contact for transport operations; expedite response to breakdowns and incidents; and facilitate rapid recovery of assets and personnel.

(C. Sol. at 53 (emphasis added)) The solicitation further provided, "Delivery trucks/drivers fall under the military convoy system and must follow Government priorities of movement and adhere to all force protection requirements" (*id.* at 102). With

regard to security, the solicitation also contained the following provision:

The Prime Vendor is currently prohibited from using private security within Iraq. However, if private security is allowed in the future, and the government determines that the Prime Vendor may use private security, the vendor will be given notice of the requirement and the vendor's proposal for private security would be negotiated and evaluated at that time.

(C. Sol. at 60)

12. The procuring contracting officer (CO), Linda Ford, confirmed that offerors must perform deliveries by joining a military convoy and performing under military supervision (R4, tab 217 at 16-17). Moreover, both parties understood that, at the time the contract was awarded, no other means existed for delivering products to the military in Iraq (tr. 3/64).

13. A contemporaneous Army memorandum, dated August 3, 2010, confirmed that all goods in Kuwait bound for U.S. personnel in Iraq had to move through the Khabari Crossing (K-Crossing):

As per Kuwait Customs there is no commercial transit of U.S. Forces land shipments through Kuwait to Iraq. All shipments are imported into Kuwait and then exported from Kuwait via Camp Virginia and Khabari Crossing. All U.S. Forces shipments arriving in Kuwait with a final destination to Iraq are required to be transported by military convoy thru Camp Virgin[i]a.

(ASBCA No. 59000, R4, tab 179 at 2)

14. CO Timothy Dlugokecki, confirmed that the restriction on military shipments through Safwan had been in effect since at least the start of the predecessor contract (tr. 3/66).

## **II. ANHAM's Proposal and Concept of Operations**

15. In the portion of its proposal titled "Transportation Flow and Standard Operating Procedures," ANHAM described its method of moving subsistence supplies from Kuwait into Iraq, which ANHAM refers to as its concept of operations. ANHAM's concept of operations, and supporting pricing, was based on the solicitation's mandated use of U.S. military escorts to enter and return from deliveries in Iraq. (R4, tab 55 at 8-11)

16. Describing the movement of its trucks between its own warehouse and the Iraqi border, ANHAM proposed that once its trucks were loaded, they would “proceed to the border where they group and assemble at the US Military staging yard awaiting instructions on military convoy escort” (R4, tab 55 at 8). After that, “Border Facilitator / Border Clearing Agents will facilitate entry of trucks into US Military convoys by communicating and coordinating with the Logistic and Movement Control Center (LMCC) Liaison” (*id.* at 9). “Upon completion of formalities, the drivers with their trucks are staged at the US Military assembly yard where they are briefed before they depart” (*id.*). Once across the border, ANHAM proposed that its “trucks continue with the US Military escort convoy on all the routes until the convoy reaches final destination, at no time will our trucks separate from the escort unless handed over to another US military escort team during grid changes” (*id.* at 10). In Iraq, ANHAM promised that “[d]eliveries to sites are performed as requested by the US Military and flexibly accommodate and comply with all security requirements at delivery points” (*id.* at 11).

17. ANHAM did not propose to use the Safwan commercial border crossing (tr. 1/140-41, 3/106-07). ANHAM’s proposal did not specify any particular point at which its trucks would join with the U.S. military convoys, or where its trucks would cross the border (tr. 1/137).

18. ANHAM’s proposal was based on using its Kuwaiti trucking fleet and Kuwaiti drivers to perform missions into Iraq, and it priced its proposal in accordance with that assumption (tr. 1/136-37).

19. CO Dlugokecki, also understood that ANHAM proposed to use the same trucks for all missions (R4, tab 216 at 270).

20. Regarding ANHAM’s proposal, the solicitation provided that “[t]he Prime Vendor’s [PV] technical proposal will be incorporated by reference into the contract” and further provided that, “[i]f there is any conflict between the solicitation language and the [PV’s] technical proposal, the solicitation language governs” (C. Sol. at 110).

21. The contract incorporated the solicitation, amendments, and ANHAM’s proposal “including all enhancements and revisions, and the final proposal revision dated 13 March 2010” (R4, tab 58 at 2).

22. ANHAM’s proposal recognized the possibility that U.S. Troops could be withdrawn from Iraq during contract performance, and that it recognized the risks associated with such a withdrawal:

One of the main political risks to the Prime Vendor project lies not in Iraq, but in the US. A major withdrawal of

US troops beyond the planned draw downs during the initial contract period could jeopardize adequate cost recovery for a prime vendor who has invested heavily specifically on the Prime Vendor contract. ANHAM recognized this risk early in the process and developed a comprehensive plan incorporating the Prime Vendor project with other projects ANHAM is performing in Iraq food supply. These other projects, which are of a more commercial nature, are not dependent on a US presence, and major assets such as warehouses and trucks can easily be repurposed for commercial supply use.

(App. supp. R4, tab 2 at 5)

23. The conformed solicitation states that the estimated sales volume for the contract “was developed using current contract data adjusted by troop strength projections as a result of the [Status of Forces Agreement] SOFA” and that the estimated sales volume “may be increased or decreased based on the actual conditions on the ground” (C. Sol. at 48).

24. The contract contained similar provisions linking troop strength projections under the SOFA to estimates of storage required for government-furnished material (C. Sol. at 51), the number of trucks necessary (*id.* at 52), and the estimated requirements for customer service (*id.* at 53).

25. The contract price was based on the formula of “Contract Unit Price = Product Price + Distribution Price (Normal and/or Premium)” (C. Sol. at 71).

26. The Product Price is the price that the vendor has paid for an item. It does not include any of the costs that are covered by either the normal or premium distribution price. (C. Sol. at 71) Under the term of the fixed-price contract, the Product Price was the only element of contract price that could be adjusted during contract performance (*id.* at 73).

27. The Distribution Price, including both the normal and premium aspects of the Distribution Price, is defined as “the firm fixed price portion of the Contract Unit Price, offered as a dollar amount per unit of issue, rounded up or down to the nearest cent,” which is the “only method for the Contractor to bill the Government for all costs of contract performance other than Product Price” (C. Sol. at 32).

28. Several Premium Distribution categories were also included in contract pricing. These categories were designed to compensate the Prime Vendor for costs beyond those covered by the Normal Distribution Price (C. Sol. at 72).

29. The Premium Distribution Price was defined as “a firm fixed price offered as a dollar amount” (C. Sol. at 72). One of the Premium Distribution categories was for Iraq Vehicle Transportation:

d. Iraq Vehicle Transportation (Limited to risk, elevated insurance, in-transit visibility, recovery, demurrage, and other reasonable and allowable costs that the prime vendor finds necessary to include that are unique to the expense of operating a vehicle in Iraq (see page 52).

(*Id.*)

30. ANHAM’s Premium Distribution Price included cost of Iraq Vehicle Transportation (C. Sol. at 72; tr. 3/30).

### **III. ANHAM’s Performance under the Contract**

31. ANHAM followed the concept of operations set forth in its proposal, with a few minor differences. Initially, ANHAM staged its trucks at its logistical warehouse. Later, ANHAM moved its staging area to a larger facility in the Doha region, closer to the K-Crossing. And from there, its trucks were call-forwarded to the military staging area. (Tr. 1/48) ANHAM’s Kuwait-based trucks and drivers met with U.S. military convoys at Camp Virginia, crossed the border into Iraq under U.S. military supervision by way of the K-Crossing, made their deliveries in Iraq, and then returned under U.S. military supervision across the border at the K-Crossing (tr. 1/48-49, 153-57).

### **IV. The Closing of the K-Crossing**

32. The United States and Iraq entered into a SOFA on November 17, 2008, that became effective January 1, 2009. The SOFA, which contained 30 Articles, was titled “Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq.” (Supp. R4, tab 1) Article 1 stated that the agreement determined the requirements “that regulate the temporary presence, activities, and withdrawal of the United States Forces from Iraq.” The SOFA included provisions dealing with “United States Contractors” (such as ANHAM) which were defined in Article 2. (*Id.* at 1-2)

33. Article 9 of the SOFA concerned movement of vehicles, vessels, and aircraft. Paragraph 1 of Article 9 noted that “vehicles operated by or at the time exclusively for the United States Forces may enter, exit, and move within the territory of Iraq for the purposes of implementing this Agreement.” (Supp. R4, tab 1 at 7)

34. Article 15 of the SOFA concerned “Import and Export” and provided that:

For the exclusive purposes of implementing this Agreement, the United States Forces and United States contractors may import, export (items bought in Iraq), re-export, transport, and use in Iraq any equipment, supplies, materials, and technology, provided that the materials imported or brought in by them are not banned in Iraq as of the date this Agreement enters into force. The importation, re-exportation, transportation, and use of such items shall not be subject to any inspections, licenses, or other restrictions, taxes, customs duties, or any other charges imposed in Iraq, as defined in Article 2, paragraph 10.

(Supp. R4, tab 1 at 13)

35. Article 24 of the SOFA provided that “[a]ll the United States Forces Shall withdraw from all Iraqi territory no later than December 31, 2011” (supp. R4, tab 1 at 20). Article 30 of the SOFA provided that the duration of the SOFA would be three years, beginning January 1, 2009 (*id.* at 24). Three years from January 1, 2009, would be December 31, 2011, the same date that Article 24 required all U.S. forces to be out of Iraq. The SOFA was a public document and was repeatedly mentioned in the solicitation. (C. Sol. at 48, 51-53, 57-59, 64-65, 70)

36. Consistent with the SOFA provisions, in June or July of 2011, the Army informed DLA and CO Dlugokecki that it intended to transition out of Iraq. This withdrawal of U.S. Troops would lead to the end of military or “Green” security and a closure of the military K-Crossing. (Tr. 3/47-48)

**A. DLA Directed ANHAM to Alter its Operations to Utilize the Safwan Commercial Crossing**

37. On August 19, 2011, the CO directed ANHAM to develop a point paper describing how the transition to using a commercial crossing would affect its operations. The CO stated:

I need a point paper on how the transition to Safwan will affect ANHAM’s operations. Please include elements of driver requirements, customs processing, truck coordination,

45 day dipnote order processing, truck numbers, LMR and FF&V etc. Please produce as soon as possible.

(R4, tab 126 at 42, tab 138 at 2)

38. At the time when the government informed ANHAM that it would no longer be able to use the military supervised crossing, the Safwan commercial crossing was the only commercial crossing border available (tr. 3/64).

39. In order to use the Safwan commercial crossing, ANHAM explained that it would need to establish an entirely new trucking operation in Iraq, including new trucks, new drivers, and a new staging yard in Kuwait. The most significant operational change was that Kuwaiti trucks would no longer be able to enter Iraq. (Tr. 1/50)

40. The new operational procedures required Kuwaiti trucks to transload their contents into Iraqi trucks. Specifically, all Kuwaiti trucks would drop their cargo in Safwan Custom's yard and transload their cargo into an Iraqi truck. (R4, tab 178 at 4) Transloading is the process of unloading the contents of a trailer (reefer or refrigerated container) and moving them into another reefer, which requires two tractors (bobtails) and two reefers (tr. 1/51).

41. The government recognized that the new procedures were "quite different from the concept of operations that ANHAM was currently performing" (tr. 3/67).

42. Both the government and ANHAM agreed that transloading perishable food cargo was not a viable option, given the need to preserve the integrity and temperature of perishable foods (tr. 1/52, 168-69). Moreover, transloading would also require the presence of U.S. Army Veterinary Command personnel at the time and place the reefers were opened (tr. 1/169).

43. ANHAM proposed a solution that involved swapping the Kuwaiti-registered bobtail with an Iraqi-registered bobtail at the Safwan commercial crossing (R4, tab 178 at 4-6). An Iraqi driver could then complete the delivery without the need to fully unload and reload the cargo at the Safwan customs yard (*id.*; tr. 1/51-52). Empty reefers brought to the border by the Iraqi trucks would be returned to Kuwait by the Kuwaiti bobtails. This process was known as a "bobtail swap." (Tr. 1/163)

44. To support the Iraqi trucks and drivers, ANHAM would also have to set up a secure staging yard in Iraq (R4, tab 61 at 5).

45. The U.S. Embassy in Baghdad later confirmed that a bobtail swap was necessary to move perishable goods across the Kuwait-Iraq border. The U.S. Embassy

also confirmed that the ban on Kuwaiti drivers in Iraq was, and had been, in place. (R4, tab 198)

### **B. ANHAM and DLA Negotiate to Modify Contract to Accommodate the New Delivery Method**

46. ANHAM and DLA continued to communicate regarding the procedures necessary to accommodate the new border crossing location (tr. 1/52-53, 3/68). ANHAM submitted revised versions of its proposal on August 23, August 25, and August 31, 2011 (R4, tabs 61, 179-80). Each version provided new information that DLA requested (*id.*; tr. 1/49-54).

47. The government recognized that the cost would be affected by changing to a commercial crossing (R4, tab 61). The CO distributed ANHAM's proposal to DLA senior officials with a note: "Gentlemen, Please see attached. Huge cost to do this; \$1M to \$2.5M per month." (R4, tab 141 at 2)

48. The government also prepared its own internal assessment of the new border crossing procedures. The government's summary page, entitled BLUF, an acronym for "bottom line up front" (tr. 3/74), indicates that continuing to use the K-Crossing was the "[l]owest cost solution" "to pitfalls of commercial traffic congestion/frustration at Safwan Border" (R4, tab 62 at 5). DLA recognized that using the Safwan crossing would require more than a dozen unique new processes, including Iraqi trucks and drivers (*id.* at 9), initiating the bobtail swap process (*id.* at 13, 16), and the need for an additional staging yard in Iraq (*id.* at 15).

49. The government was involved in approving the operational changes associated with using the commercial crossing (tr. 1/59-64).

50. DLA recognized the likely cost impacts associated with the change in its own internal assessment (R4, tab 62 at 22). Those costs included an increase in fleet size, a secure staging yard, an increase in labor costs at the border, private security for the new facility, and life support for employees at the staging yard (*id.*). The CO testified that he believed the costs identified in DLA's internal analysis represented "an accurate representation of what the situation was at the time" (tr. 3/75).

51. In summarizing the parties' meeting discussing the operational changes, the CO addressed modifying the contract: "bilateral modification—if any—will be developed based on a mutually agreed-to CONOPS [concept of operations], F&R Pricing, and schedule for implementation" (R4, tab 63 at 1). At the hearing, the CO testified that he believed that it was premature to promise that a modification would be forthcoming and, for that reason, added the three above-quoted caveats (tr. 3/82).

52. On October 4, 2011, ANHAM representatives met with the CO to discuss the transition to the Safwan crossing (R4, tab 186; tr. 1/59). DLA produced an internal “Fact Sheet” describing the purpose of the meeting to be discussions concerning the “transition from the current [military Class] 1 support of Contingency Operations to an Overseas Commercial model in Iraq” (R4, tab 187 at 1).

53. The fact sheet stated: “Upon approval DLA Troop Support will initiate and complete the necessary contract modifications to support the new requirements” (R4, tab 187 at 2).

54. ANHAM took contemporaneous notes of the October 4, 2011 meeting (R4, tab 186; tr. 1/60, 3/80-81). During the meeting, the parties discussed the January 1, 2012 deadline for the transition, as well as test runs and test diplomatic notes (R4, tab 186; tr. 1/59-60). The parties also discussed ANHAM’s new trucking operations in Iraq, the new facilities that would be required to support the Iraqi trucks, and the bobtail swap that ANHAM had described in previous submissions. The parties also discussed a contract modification to cover the change in requirements. (R4, tab 186; tr. 1/60)

55. The government participated in extensive negotiations with ANHAM on the terms and conditions of a contract modification to support the use of the commercial crossing (tr. 1/63-64).

56. On October 13, 2011, CAPT Hansen scheduled a meeting for the following month and requested the attendance of more than two dozen people from DLA, Department of State, DLA counsel, and other commands within the military (R4, tab 144 at 2). In the invitation, CAPT Hansen described the purpose of the meeting:

*The objective of this event will be working level approval that will support higher level approval, and expedite any contract modification necessary to support plan implementation/operations.*

(*Id.* (emphasis added))

57. At the hearing, the CO confirmed that the purpose of the meeting was to obtain “working-level approval that will support higher-level approval, and expedite any contract modification necessary to support planned implementation and operations” (tr. 3/84-85).

58. On November 9, 2011, DLA held a meeting of the stakeholders to discuss ANHAM’s new operational plans. Mr. Beau Lendman, ANHAM’s senior vice president, presented the operational plan that it developed in collaboration with DLA. (R4, tab 147; tr. 1/63)

59. After the November 9, 2011 meeting, DLA requested that ANHAM provide “rough order of magnitude” cost proposals describing the costs associated with changing to a commercial method of delivery (tr. 1/66). DLA requested rough cost estimates, instead of more refined cost proposals, due to the shortness of time (R4, tab 211 at 161).

60. Over the following weeks, ANHAM provided DLA with three cost proposals, addressing the costs of establishing new facilities near the Safwan crossing (R4, tab 70), the costs of operating the facilities (R4, tab 149), and the costs related to Iraqi transportation of equipment and drivers (R4, tab 150).

61. In response to ANHAM’s cost proposals, CAPT Hansen sent an email to Ray Miller, DLA deputy director of subsistence, and Thomas Daley, DLA director of subsistence supplier operations, forwarding the cost proposals and explaining how ANHAM would be compensated for its additional costs:

ANHAM wishes to be compensated for the additional operating cost due to the loss of the military border crossing, and the need to hire Iraqi’s [sic] to support Iraq operations due to the loss of the MTA. Attached is a one-time cost for the Safwan transfer yard. *The[re] will be an adjusted distribution fee once those costs are precisely calculated, negotiated, and agreed to.*

We need to discuss early Monday, there is some trepidation on their part because of the unknowns. If there is a way to mitigate those concerns we need to facilitate.

(R4, tab 71 at 1 (emphasis added), tab 211 at 165)

### **C. ANHAM Complies with the Government’s Direction and Begins Using the Safwan Commercial Crossing**

62. On November 22, 2011, the CO approved ANHAM’s proposed concept of operations for the new commercial method of delivery, but stated that DLA would need more time to review ANHAM’s cost proposal (R4, tab 151 at 2; tr. 3/54). The CO explained that DLA had approved ANHAM’s operational proposal, but would still need for ANHAM to support its request for costs with a formal proposal (R4, tab 216 at 255-56; tr. 3/94).

63. On December 19, 2011, the CO and CAPT Hansen met ANHAM’s Mr. Lendman in ANHAM’s offices to assess the status of the transition to the Safwan crossing (R4, tab 156). Topics of the meeting included the status of the K-Crossing and the Safwan crossing, customs paperwork, driver visas, ANHAM’s new Safwan facilities,

and convoy security (tr. 1/72). Mr. Lendman and the CO both recall discussing a contract modification and accounting for costs (tr. 1/72, 3/95).

64. ANHAM began using the Safwan commercial crossing on December 24, 2011. ANHAM established a facility near the Safwan crossing. (R4, tab 197)

65. By mid-January 2012, ANHAM was running regular missions into Iraq through the commercial border crossing (tr. 3/96).

66. Once ANHAM's trucks began using the Safwan commercial crossing, ANHAM's trucks had no security escort from the time the trucks left ANHAM's Kuwaiti warehouses until they reached ANHAM's Safwan, Iraq, staging yard (tr. 1/164).

67. Mr. Lendman testified that ANHAM incurred significant costs setting up a new transfer facility at the Safwan border crossing location, including the rental of a temporary yard, setting up temporary housing facilities, and civil constructions costs (tr. 3/81-83).

68. Using a summary exhibit, Mr. Lendman explained each element of the direct costs set forth in ANHAM's transportation claim and explained the documentary basis for each (R4, tab 99 at 208). Mr. Lendman explained the documentation supporting these costs, including vendor contracts, vendor invoices, and proofs of payment (tr. 1/83). Mr. Lendman also testified about the costs of providing security at the Safwan location and the cost of leasing Iraqi trucks that were used on the Iraq side of the border for food deliveries (tr. 1/91-92).

69. Mr. Lendman testified that ANHAM's claim for additional costs was based on the difference between its previous use of Kuwaiti trucks and the new costs associated with the Iraqi transportation subcontracts (tr. 3/23-25).

#### **D. Negotiations over Contract Modification Break Down over Pricing**

70. Although the parties continued to discuss a modification, the discussions were unproductive (tr. 3/97).

71. Negotiations over the contract modification ultimately broke down over price. The CO admitted that pricing was the only barrier to agreeing to a modification and that, had the parties agreed on price, the government would have issued a modification. At his deposition, CO Dlugokecki stated:

Q. Assuming adequate documentation was provided to support the cost that was verifiable and thought to be

authentic and the price was fair and reasonable, then DLA would be prepared to negotiate a modification?

A. Yes.

(R4, tab 200 at 274-75)

72. At the hearing, Mr. Dlugokecki similarly testified:

Q. If ANHAM provided a cost proposal that was viewed as fair reasonable by DLA and DCAA, and it provided adequate documentation to support the costs that were claimed, then DLA was prepared to try to negotiate a modification, correct?

A. That is correct.

(Tr. 3/110)

73. The CO also testified at the hearing that he did not intend to issue a contract modification for ANHAM's use of the Safwan border crossing:

Q. As the contracting officer, did you intend on issuing a contract modification for ANHAM's use of the Safwan border crossing?

A. No.

Q. Why not?

A. Because it was part of their technical proposal.

(Tr. 3/55-56)

74. The CO further testified that "technical proposal" refers to ANHAM's "concept of operations" (tr. 3/56). Earlier in his testimony, he stated that he had asked ANHAM to submit a plan because he "just needed to know how their concept of operation would work" (tr. 3/53). He continued, acknowledging that he would need this information, because:

Well, there's a lot of moving pieces. It's a different crossing. They have to do a customs documentation that they did not do before.... They had to do the Kuwait side piece. They had to

do the Iraq side piece. They had to do an AK-302 to get their equipment and merchandise out of the country, and they had to line up their drivers.

(Tr. 3/53-54)

**E. The Government and ANHAM Modify the Contract to Pay for Private Security for Convoys within Iraq**

75. On April 12, 2012, David Braus, ANHAM's managing director, and CO Dlugokecki, signed Modification No. 28. Modification No. 28 briefly suspended U.S. Army-contracted security to permit ANHAM to conduct a test on ANHAM-contracted private security for supply convoys within the borders of Iraq. (R4, tab 29)

76. On May 9, 2012, the CO issued contract Modification No. 30 which requested that ANHAM submit a proposal for private security for convoys "within the sovereign borders of Iraq" (R4, tab 31 at 2). Modification No. 30 provided in part that "US Government-provided armed security escort will cease effective 6/30/2012. In order to have uninterrupted Class 1 service to our customers in Iraq, ANHAM is tasked to provide its own private armed security services." (*Id.* at 2)

77. On May 11, 2012, the Agency CO, Virginia E. Barnwell, signed Modification No. 31, which revised Modification No. 30. As in Modification No. 30, Modification No. 31 states that "US Government-provided armed security escort will cease effective 6/30/2012. In order to have uninterrupted Class 1 service to our customers in Iraq, ANHAM is tasked to provide its own private armed security services." (R4, tab 32 at 2) Modification No. 31 requested that ANHAM submit a price proposal within seven calendar days of the modification (*id.*).

78. On June 14, 2012, DLA and ANHAM entered into bilateral Modification No. 33 to allow ANHAM to provide its own private security under the contract (R4, tab 33). Pursuant to this modification, DLA compensated ANHAM for costs related to maintaining this private security for supply convoys within the borders of Iraq (tr. 3/50). On June 30, 2012, ANHAM began providing its own security under Modification No. 33 (R4, tab 33).

79. By its terms, Modification No. 33 compensated appellant only for the provision of security "within the borders of Iraq." It did not include payment for any of ANHAM's costs associated with having to change the location of the border crossing. (R4, tab 33 at 5)

80. CO Dlugokecki testified that DLA ultimately modified ANHAM's contract to require the use of private security in Iraq:

Q. And did DLA enter into a modification with ANHAM to provide for private security?

A. Yes.

Q. And what modification was that?

A. P00033.

Q. I'm going to direct your attention to Modification 33 at Government Rule 4, Tab 33. And Mr. Dlugokecki, did you sign this modification?

A. Yes. I did.

(Tr. 3/49-50)

81. That modification did not include any costs that are included in ANHAM's claim:

Q. And did this modification include any of the new costs associated with ANHAM's claim for transportation, for using the Safwan border crossing?

A. No.

(Tr. 3/51)

#### **V. DLA Denies ANHAM's Request for Equitable Adjustment**

82. On July 10, 2012, during a meeting between DLA and ANHAM, ANHAM made an oral request for equitable adjustment regarding the "Safwan Border Crossing" (59283, R4, tab 57 at 1; tr. 1/76). Although this oral conversation did not constitute an official request for an equitable adjustment to the contract, the CO stated that he "would issue a position on all of these issues NLT COB 07/31/2012" (59283, R4, tab 1 at 46, tab 57 at 1).

83. On July 26, 2012, DLA issued an "Official Response to [ANHAM's] Seven Individual Requests for Equitable Adjustments" (R4, tab 124). One of the topics covered in this letter was the move to the Safwan border crossing.

84. With regard to the Safwan border crossing, DLA denied the request stating:

DLA Troop Support denies the request as [ANHAM's] September 1, 2009 proposal clearly provides for use of the Safwan/Kuwait-Iraq Border Crossing to deliver material from Kuwait into Iraq. [ANHAM] voluntarily chose this course of action in response to the solicitation requirements. As such, costs associated with using this route are, or should have been, incorporated into ANHAM's proposal. The fact that [ANHAM] had been using the Khabari Crossing Route ("K Crossing"), at no cost to them, in lieu of its proposed Safwan Route underscores the appropriateness of the Agency's instant position.

(R4, tab 124 at 4)

85. DLA cited as support "Pages D-7 through D-10 of [ANHAM's] proposal [which] discuss use of the Safwan/Kuwait-Iraq Border Crossing Route in performance of the contract" (R4, tab 124 at 5). CO Dlugokecki reiterated this position during the hearing (R4, tab 55; tr. 3/56).

86. In addition, DLA rejected a related request for an increase in the premium transportation allowance, stating:

DLA Troop Support denies the request as this issue is intertwined with the Safwan Border Crossing issue above. The requirements of an Iraqi-citizen and Iraqi-owned truck to ensure passage through the Safwan Border Crossing into Iraq have not changed since the contract's inception. Therefore, as [ANHAM] proposed use of the Safwan Border Crossing in its proposal, so too should the costs associated with these requirements been incorporated in said proposal. Failure to have done so falls on [ANHAM], not the Government.

(R4, tab 124 at 5)

87. The record reflects that ANHAM's proposal stated that border crossing will be done as part of a military convoy (R4, tab 55; tr. 3/104; C. Sol. at 48, ¶ F).

## **VI. ANHAM's Certified Claim and Subsequent Appeal**

88. On December 12, 2012, ANHAM submitted a certified claim seeking to recover the additional costs of transporting subsistence goods through the Safwan border crossing (R4, tab 126).

89. On February 12, 2013, DLA notified ANHAM that it was requesting a Defense Contract Audit Agency (DCAA) audit to assist with the CO's final determination and therefore expected to "issue a final decision on your claim on or before Friday, July 25, 2013" (R4, tab 127 at 1).

90. On July 25, 2013, DLA notified ANHAM that because of the ongoing DCAA audit, DLA was unable to issue a final decision, but expected to issue a decision on October 15, 2013 (R4, tab 132).

91. On September 12, 2013, DCAA provided DLA its audit report regarding ANHAM's "Equitable Adjustment Claim for Added Costs of Iraq Premium Transportation Costs Related to Safwan Crossing for Contract No. SPM300-10-D-3373," Audit Report No. 2131-2013F17200001 (hereafter DCAA Safwan Audit) (R4, tab 133).

92. DCAA's Safwan Audit found that "examination of the price adjustment claim disclosed a significant amount of questioned costs" such that "the claim [was] not acceptable as a basis for settlement" due to three significant issues (R4, tab 133 at 4).

93. DCAA first noted that the Safwan Audit "was limited due to the contractor's failure to: a) Provide adequate supporting documentation to substantiate its claimed cost savings [and] b) Provide explanations for its claimed facilities, security and vehicles costs that describe the connection between the costs claimed and the increased costs incurred under the contract as direct result of the alleged changed condition" (R4, tab 133 at 4).

94. Second, DCAA found that:

Claimed "additional" costs [were] overstated as follows:

- a. Leased trucks and trucks fuel are unallowable duplications of the incremental transportation costs the contractor computed in its cost savings calculation.
- b. Labor and driver lease costs do not represent increased costs on the contract.
- c. Transportation costs are not allowable per the terms of the contract.

d. A portion of the security and vehicle costs were incurred prior to the award of the PV Contract.

e. A portion of the facilities costs were incurred after the claim period.

(R4, tab 133 at 4)

95. Third, DCAA questioned “Indirect costs associated with the questioned base costs” (R4, tab 133 at 4).

96. On October 15, 2013, DLA issued a CO’s final decision (COFD) denying the claim (R4, tab 134). DLA based its denial on the premise that ANHAM had proposed to use the Safwan commercial crossing:

ANHAM’s proposal, dated September 1, 2009, which was submitted in response to Solicitation SPM300-08-R-0061, stated that ANHAM would use the Safwan commercial border crossing route in making deliveries of subsistence items from Kuwait into Iraq. By voluntarily selecting this location from the outset, any costs associated with using this route are, or should have been, anticipated and incorporated into ANHAM’s original proposal. Therefore, the claimed costs associated with ANHAM’s Safwan facility and Iraq trucking operations are not “new,” as ANHAM should have been and/or was aware of those costs at the time it proposed on the Contract. Thus, the costs associated with using the Safwan border crossing were built into the firm fixed price of the contract.

(R4, tab 134 at 2-3; second amended answer ¶ 50)

97. In his final decision, the CO first determined that ANHAM proposed to “use the Safwan commercial border crossing route in making deliveries of subsistence items from Kuwait into Iraq” in response to the solicitation (R4, tab 134 at 2, tab 55 at 8-10). Because ANHAM “select[ed] this location from the outset,” the CO determined that “any costs associated with using this route [were], or should have been anticipated and incorporated into ANHAM’s original proposal” and therefore “were built into the firm fixed price of the contract” (R4, tab 134 at 2-3).

98. Second, the CO determined ANHAM’s claim “confused the concepts of escort support with location of a supply route” and that based on “decisions made by the

U.S. Government regarding the status and operation of the military...[the] U.S. military escort was no longer available once the U.S. Government determined that it would withdrawal [sic] its troops from Iraq in December 2011.” The CO determined that decisions, such as withdrawing troops and eliminating military escorts, represented Sovereign Acts of the United States Government for which DLA cannot be held liable. (R4, tab 134 at 3) The CO also found that ANHAM’s “use of the [K-Crossing,] at little or no cost to [ANHAM], in lieu of its proposed Safwan route” indicated that “ANHAM was making an additional, unanticipated profit under its firm-fixed price Contract” and that “[t]he fact that ANHAM [was] no longer making that additional unanticipated profit is not compensable” (*id.*).

99. Third, the CO determined that “even if [he] were inclined to find any liability for the additional claimed costs on the part of the Agency, which [he did] not, ANHAM’s claim must be denied in its entirety as the DCAA [Safwan Audit] concluded that none of ANHAM’s cost elements are supportable.” Further, the CO found that “[f]rom the time [ANHAM] submitted its REA, to date, ANHAM has consistently been unable and/or refused to provide evidentiary support to justify any portion of the millions of dollars in claimed costs.” (R4, tab 134 at 3)

100. On August 2, 2013, prior to the issuance of the October 15, 2013 COFD, ANHAM filed a notice of appeal on the basis that the claim had been deemed denied by DLA’s failure to issue a decision. The appeal was docketed as ASBCA No. 58807. DLA filed a motion to dismiss for lack of jurisdiction on the basis that it had not yet issued a final decision. When DLA issued its COFD on October 15, 2013, the Board found the motion to be moot. On November 15, 2013, ANHAM filed two notices of appeal<sup>3</sup>, and the matter that is the subject of this decision was docketed as ASBCA No. 58999.

101. Beginning on November 12, 2015, the Board held a four-day hearing at its offices in Falls Church, Virginia, on entitlement and quantum. At the close of the hearing, the parties jointly proposed that the decision only cover entitlement and the Board agreed (tr. 4/4).

---

<sup>3</sup> ANHAM also filed a notice of appeal from an October 30, 2015 COFD, which was docketed as ASBCA No. 59000 and consolidated with the subject appeal. The parties subsequently resolved ASBCA No. 59000, and it was dismissed on January 11, 2016. (Bd. corr. file)

## DISCUSSION

### **I. DLA's Direction to Discontinue Military Supervised Border Crossing Constituted a Constructive Change to the Contract**

To recover for a constructive change, a contractor must prove (1) that it performed work beyond the contract requirements; and (2) that the additional work was ordered, expressly or impliedly, by the government. *Bell/Heery, a Joint Venture v. United States*, 739 F.3d 1324, 1335 (Fed. Cir. 2014); *AMEC Environment & Infrastructure, Inc.*, ASBCA No. 58948, 15-1 BCA ¶ 35,924 at 175,593.

As we discuss below, we conclude that the government's direction to discontinue military supervised crossings and transition to the use of the Safwan commercial crossing constituted a constructive change to the contract.

#### **A. The Contract Expressly Required ANHAM to Transport Goods to and From Iraq under Military Supervision**

The contract contains several express requirements that dictate how ANHAM was to accomplish the delivery of perishable food items to locations in Iraq. For example, the contract required ANHAM to "transport full and empty containers/trucks to and from Iraq under the supervision of a U.S. Army convoy" (finding 10). In addition, the contract required ANHAM to "facilitate placement of contractor vehicles within the military convoy system" (finding 11). The contract further required that "[d]elivery trucks/drivers fall under the military convoy system and must follow Government priorities of movement and adhere to all force protection requirements" (*id.*). Each of these provisions pertain to the method of delivery under the contract and constrain how ANHAM was to accomplish the provision of food to locations within Iraq.

The contract's express language was confirmed by the procuring CO, Ms. Ford, who testified that offerors (including ANHAM) only could perform such missions by joining a military convoy and performing under military supervision. Moreover, both parties understood that, at the time the contract was awarded, no other means existed of delivering products to the military in Iraq. (Finding 12) This understanding further was confirmed in a contemporaneous Army memorandum (finding 13), as well as by the CO, Timothy Dlugokecki (finding 14).

ANHAM's proposal, which was incorporated into the contract, described procedures that complied with the contract's requirements (findings 15-16). Specifically, the proposal stated that ANHAM would load trucks at its warehouse in Kuwait, drive to a U.S. military staging area in Kuwait near the Iraqi border, and cross the border under military supervision into Iraq. The trucks would continue with the U.S. military convoy, deliver their product, and return to Kuwait under military escort. (Finding 16)

Significantly, ANHAM proposed using the same trucks and drivers for the entire mission (*id.*), and priced its proposal accordingly (finding 18).

Contrary to the CO's final decision denying ANHAM's claim, ANHAM's proposal did *not* state that ANHAM would use the Safwan commercial border crossing route when making deliveries (finding 17). Indeed, using the commercial crossing would have been inconsistent with the terms of the solicitation (findings 11-12). This is because the contract required military supervision (finding 11), and, at the time of the solicitation, the only border crossing available was the K-Crossing (findings 12-13). This is corroborated by the Army's August 3, 2010 memorandum, which confirmed that all goods in Kuwait bound for U.S. personnel in Iraq had to move through the K-Crossing (finding 13).

DLA makes much of the fact that the solicitation did not identify the location of the border crossing (gov't br. at 9, 34). However, this argument misses the mark. Indeed, ANHAM does not dispute the fact (app. br. at 21). The contract unequivocally required deliveries to be made into and out of Iraq only under the supervision of a U.S. Army escort (finding 11). When the government eliminated military supervised crossings, ANHAM was forced to develop a new – and more expensive – means of transporting goods into Iraq. The dispute here is about the costs associated with the change in the method of delivery of goods into Iraq; not about the specific location of the border crossing point.

#### **B. DLA's Direction to Discontinue Military Supervised Crossings and Transition to the Safwan Commercial Crossing Constituted a Change to the Contract**

In June or July 2011, the Army informed DLA that the Army would be withdrawing U.S. Troops from Iraq and would, as a result, close the military K-Crossing (finding 36). Shortly thereafter, in August 2011, DLA directed ANHAM to “produce as soon as possible” a “point paper on how the transition to Safwan [border crossing] will affect ANHAM's operations” (finding 37). ANHAM complied, and worked extensively with the CO to develop a plan to implement the changes necessary to accommodate the new commercial crossing location (findings 46-52). These operational changes included: (1) establishing transportation network in Iraq; (2) building a new secure facility supporting Iraq operations; and (3) implementing a bobtail swap operation in order to preserve perishable food when switching from a Kuwaiti-registered vehicle to an Iraqi-registered vehicle at the Safwan crossing (findings 48-52).

This direction, when juxtaposed against the contract's requirements, is a material change to the scope of work under the contract. Not only did DLA's direction change the location of the border crossing, it changed ANHAM's entire method of fulfilling the terms of the contract. The contract expressly is for the *delivery* of perishable goods by a

certain method, i.e., into and out of Iraq under military escort (finding 11). Directing that goods be delivered by a different method – in the context of a delivery contract – is necessarily a change to the contract requirements.

The government contends that the change only affected *how* ANHAM would perform the contract and did not change the contract's requirements (gov't br. at 37). This argument would require us to accept that the contract required nothing more than the provision of food items at particular locations in Iraq and was completely silent about how the contractor would accomplish the delivery. That is not what the contract requires.

We conclude that a change in *how* ANHAM would meet its contract requirements constitutes a "change" pursuant to the Changes clause and, therefore, would require the government to make an equitable adjustment to account for the extra costs resulting from the change. Indeed, DLA acknowledges in its post-hearing brief that ANHAM's changes "were, of course, a change in how ANHAM would meet contract requirements" (gov't br. at 36). Pursuant to the Changes clause, the government may unilaterally make changes to the "method of shipment or packing," including changes to the "place, manner, or time of delivery" of goods into Iraq (finding 8). That is precisely what the government did here. In addition, "[i]f [the] change causes an increase or decrease in the cost of, or time required for, performance for any part of the work under this contract, the Contracting Officer *shall* make equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract." (*Id.* (emphasis added)); *Info. Sys. & Networks Corp.*, ASBCA No. 46119, 02-2 BCA ¶ 31,952 at 157,873 (holding that contract price must be equitably adjusted when a change under the Changes clause results in an increase or decrease in the cost of performance of work). This language in the Changes clause is unambiguous and unequivocal.

This appeal is similar to *Alley-Cassetty Coal Co.*, which involved a contract that mandated the delivery of coal via barge and truck to the Rock Island Arsenal in Illinois. ASBCA No. 33315, 89-3 BCA ¶ 21,964 at 110,484. When severe cold weather made barge delivery impossible, the contractor sought an equitable adjustment for the extra cost of delivering the coal by truck. Although the government agreed to additional time, it refused to pay for the additional costs of overland delivery. Instead, the government ordered the contractor to complete the delivery under threat of a termination for default. *Id.* at 110,489. On appeal, we held that requiring delivery via a different method was a change pursuant to the Changes clause and required an equitable adjustment. We specifically held that the contractor's extra costs were not caused by the weather, but from the insistence that contractor proceed with delivery by a different method than that set forth in the contract. *Id.* at 110,490.

In this appeal, the contract mandates a particular method of delivery of goods into Iraq. By changing the method of delivery, the government instituted a change pursuant to

the contract's Changes clause and triggered a mandatory obligation to make an equitable adjustment for any increase or decrease in the contract price.

### **1. Government's Reliance on *Zafer Taahhut* and *Advanced Engineering* is Unavailing**

The government cites *Zafer Taahhut* and *Advanced Engineering* to support its argument that ANHAM is not entitled to an equitable adjustment for acts not caused by the government (gov't br. at 31, 38). In *Zafer Taahhut Insaat ve Ticaret, A.S. v. United States*, 120 Fed. Cl. 604 (2015), which involved a firm-fixed-price construction contract, the government of Pakistan closed the border between Pakistan and Afghanistan, causing Zafer to incur additional costs to transport construction materials to its work site in Afghanistan. The United States Court of Federal Claims held that the government was not responsible for transportation delays occasioned by the Pakistani government's closure of the border route, when Zafer had entered into a fixed-price contract including an agreement to transport construction materials to its work site "FOB: Destination."<sup>4</sup> 120 Fed. Cl. at 610.

The government's reliance on these cases is unavailing. *Zafer* is distinct from this appeal in that *Zafer* involved a firm-fixed-price construction contract and an FOB clause, which explicitly required the contractor to deliver the materials and supplies to the specified project site at no charge to the government. In contrast, the contract in this appeal is a delivery contract and contains specific requirements for how the deliveries must be made.

This appeal also differs significantly from *Zafer* in that the CO in *Zafer* did not direct the contractor to change its method of delivery or otherwise alter any of its contractual obligations. 120 Fed. Cl. at 608. In this appeal, the CO directed ANHAM to change its entire method of fulfilling the terms of the contract.

*Advanced Engineering & Planning Corp.*, ASBCA No. 53366, 05-1 BCA ¶ 32,806, which DLA also cites in support of its position, is equally unhelpful to the government (gov't br. at 38). *Advanced Engineering* involved a contract to overhaul a Navy ship. The Navy initially made available a staging area alongside the vessel, but the area became unavailable when the Navy used the area for piling snow. 05-1 BCA ¶ 32,806 at 162,291. Appellant sought an equitable adjustment for the loss of the staging area. We held that the loss of the staging area was not a constructive change to the contract, because the Navy was not contractually required to provide the staging area in the first place. *Id.* Because the contractor did not perform "beyond the requirements of

---

<sup>4</sup> "FOB: Destination" is explained in FAR 47.303-6 and requires the contractor to deliver the materials and supplies to the specified project site at no charge to the government.

the pertinent specifications or drawings” when it performed work without a staging area, it was not entitled to an equitable adjustment. *Id.* (quoting *Ets-Hokin Corp. v. United States*, 420 F.2d 716, 720 (Ct. Cl. 1970)).

This appeal, in contrast, involves a change to an express contractual requirement. The contract unequivocally required deliveries to be made into and out of Iraq only under the supervision of a U.S. Army escort (finding 10). As the parties discussed from the outset, changing the border crossing procedures would involve a contract modification (finding 53). This conclusion was consistent with the language of the contract.

## **2. Modification No. 33 Does Not Compensate ANHAM for Change in Border Crossing**

The government states, incorrectly, that Modification No. 33 “provides for and compensates Appellant for the elimination of military supervised convoys into and out of Iraq” (gov’t br. at 34). Modification No. 33 does not compensate ANHAM for changes in the delivery method (finding 79). Modification No. 33 is limited in scope, in that it compensates appellant only for the provision of private security within the borders of Iraq (findings 78-79). In fact, Modification No. 33 expressly provides only for private security within the borders of Iraq, not “into and out of Iraq.” It does not compensate appellant for the change of the location of the border crossing or for any other costs associated with the change in delivery method. (Finding 79) In fact, the CO testified that the modification did not include any of the new costs associated with ANHAM’s claim (finding 81). We take the CO at his word.

In our view, the issue of private security somewhat obfuscates the issue. The question is not whether the solicitation contemplated a switch to private security, but whether the contract contemplated the changes associated with changing the delivery method. ANHAM does not dispute that the contract might allow for private security and that the parties would negotiate the details (app. br. at 33). However, the delivery method or concept of operations transporting the supplies under the supervision of a U.S. Army convoy, was expressly stated in the contract (finding 10). The change in operations was dramatic and “quite different” from what ANHAM had previously done (findings 39-40, 67-68). Once the government changed the method of delivery, it equated to a constructive change under the contract. Thus, ANHAM’s distribution system was impacted, not just the need for private security.

## **3. DLA, Not the Iraqi Government, Directed the Change in Delivery Method**

Finally, the government contends that there was no constructive change, because the new delivery procedures were “not required by the government,” but, were instead caused by the government of Iraq (gov’t br. at 31). This is just a variation of

the government's third-party act defense (*see* section III, below). The relevant change in this case is the government's unilateral direction to change the method of delivery, including the location of the border crossing and the discontinuance of military-supervised convoys. The Iraqi government's commercial shipping requirements pre-dated the closure of the K-Crossing and were applicable to all commercial shipments, not just ANHAM. (Findings 45, 74)

## **II. The Sovereign Act Defense does Not Insulate the Government from Liability**

The government contends that it acted in its sovereign capacity when it withdrew troops from Iraq in 2011. It further contends that the closing of the K-Crossing was a sovereign act that applied universally to all contractors and was not directed solely towards ANHAM. Finally, the government contends that its decision to end military convoy security in Iraq constituted a sovereign act. (Gov't br. at 42-50) In the government's view, these three actions were sovereign acts and did not constitute constructive changes under the contract.

For its part, ANHAM concedes that the decision to withdraw troops from Iraq and the closure of the K-Crossing were sovereign acts, but argues that the government's decision to impose new and additional contractual requirements prevents the government from relying on the sovereign act defense to insulate it from liability for the costs of complying with the new requirements (app. br. at 25).

### **A. The Sovereign Act Defense**

The sovereign acts defense is simply that the government, when sued as a contractor, cannot be held liable for its general and public acts as a sovereign. *Horowitz v. United States*, 267 U.S. 458, 461 (1925); *Conner Bros. Construction Co. v. Geren*, 550 F.3d 1368 (Fed. Cir. 2008). A sovereign act is one taken in the national interest and is public and general in application. *Altanmia Commercial Marketing Company*, ASBCA No. 55393, 09-1 BCA ¶ 34,095. The "sovereign act" defense is an affirmative defense, *see Orlando Helicopter Airways, Inc. v. Widnall*, 51 F.3d 258, 261 (Fed. Cir. 1995), for which the defending party bears the burden of proof. *DynCorp*, ASBCA No. 49714, 97-2 BCA ¶ 29,233 at 145,430.

#### **1. The Closing of the Khabari Border Crossing was a Sovereign Act**

In this appeal, both parties agree that the withdrawal of troops pursuant to the SOFA and the concomitant closing of the Khabari border crossing (K-Crossing) was a sovereign act (gov't br. at 42-46; app. br. at 23-25). The withdrawal of troops and closing of the K-Crossing addressed the broad social need of protecting convoy movements and protecting national security and was not for the purpose to specifically and intentionally nullify government contractor rights.

## 2. Exceptions to the Sovereign Acts Defense

The Board has recognized two key limitations to the sovereign act defense preventing the government from avoiding liability when: (1) the CO issues instructions or orders to implement the sovereign act which exceed contract requirements, e.g., which constitute a constructive change; or (2) the government expressly or impliedly agrees to pay the contractor's losses due to the sovereign acts. Under the first of these two limitations, an act ceases to be a sovereign act when it takes the form of a direction for implementation under the contract and when it requires a constructive change to the contract. *Nero and Assocs., Inc.*, ASBCA No. 30369, 86-1 BCA ¶ 18,579 at 93,297; *see also Home Entertainment, Inc.*, ASBCA No. 50791, 99-2 BCA ¶ 30,550 at 150,860; *Empire Gas Engineering Co.*, ASBCA No. 7190, 1962 BCA ¶ 3323 at 17,128 (holding that CO's order caused a compensable suspension).

The Board's decision in *Altanmia Commercial*, 09-1 BCA ¶ 34,095, is an example of the latter limitation to the sovereign acts defense. In *Altanmia*, appellant contended that the government constructively changed the contract when it destroyed vehicles that became disabled during transport and deprived appellant of the use of the vehicles to perform the contract. The Board held that the military's order to destroy the disabled vehicles was a sovereign act. However, the Board also held that the contractual requirement to "provide security escort to [contractor] convoys" extended to convoys sent to recover abandoned vehicles and that this contractual language "included the implied promise that [the government] DESC would pay for any increased costs resulting from a breach of its obligation to provide security escorts for Altanmia's recovery convoys." 09-1 BCA ¶ 34,095 at 168,582. The Board's conclusion in *Altanmia* is consistent with the settled exception to the sovereign acts defense that the government may contractually agree to compensate contractors for losses due to its sovereign acts, either by an implied or an express agreement. *Id.* (citing *D&L Construction Co. & Associates v. United States*, 402 F.2d 990, 999 (Ct. Cl. 1968)); *also International Oil Trade Center*, ASBCA No. 55377, 08-2 BCA ¶ 33,916 at 167,832.<sup>5</sup>

We conclude that both of these exceptions to the sovereign act defense apply in this appeal. First, as we previously concluded, the CO's orders to ANHAM to develop a transition plan to accommodate the new delivery method were constructive contractual changes made in response to the government's sovereign act. Second, we conclude that

---

<sup>5</sup> Oddly, the government relies on *Altanmia* for the opposite conclusion (gov't br. at 32). In fact, in that appeal, appellant did not prevail on a constructive change argument, but rather on the fact that the government's order to destroy vehicles violated the implied promise that the government would pay for any increased costs due to its sovereign acts. 09-1 BCA ¶ 34,095 at 168,582.

the government expressly agreed to compensate ANHAM for the additional costs associated with the change in delivery method.

**B. The Government Acknowledged that Changing the Border Crossing Location Would Require a Contract Modification**

The facts demonstrate that the government was aware of the costs associated with changing the border crossing location and was willing to both modify the contract and pay some portion of the additional costs associated with the new procedures.

On August 19, 2011, CO Dlugokecki directed ANHAM to develop a point paper describing how the transition to using a commercial crossing would affect its operations (finding 37). The government recognized that the new procedures were “quite different from the concept of operations that ANHAM was currently performing” (finding 41). In so doing, the government also recognized that ANHAM’s costs would be affected by changing to a commercial crossing. Indeed, in the CO’s communications with his superiors, the CO made note of the fact that the new border crossing procedures would significantly increase ANHAM’s costs, in the range of \$1 million to \$2.5 million per month. (Finding 47)

In light of the increased costs of changing to commercial delivery methods, the CO expressly agreed that the parties would negotiate a modification to support the new requirement associated with using the commercial crossing (finding 51). This acknowledgement is memorialized in a contemporaneous fact sheet produced by the government in support of a meeting with ANHAM on October 4, 2011 (finding 52). The fact sheet stated: “Upon approval DLA Troop Support will initiate and complete the necessary contract modifications to support the new requirements” (finding 53).

These facts demonstrate that the CO was aware at the time that the new border crossing location would significantly change ANHAM’s concept of operations and would require the contract to be modified. CO Dlugokecki’s subsequent testimony at the hearing—that he did not intend to modify the contract because the new procedures were part of the concept of operations in ANHAM’s original proposal—is inconsistent with this contemporaneous awareness and is not credible. (Finding 51)

After directing ANHAM to develop new procedures for shipments through the commercial crossing, the government continued to be involved directly in approving the operational changes associated with using the commercial crossing. The government participated in extensive negotiations with ANHAM on the terms and conditions of a contract modification to support the use of commercial crossing. (Finding 55) These negotiations ultimately broke down over price (finding 71). The CO admitted that pricing was the only barrier to agreeing to a modification and that, had the parties agreed on price, the government would have issued a modification (findings 71-72).

We draw two conclusions from the government's efforts to reach agreement with ANHAM on a bilateral modification to accommodate the new border crossing. First, we conclude that the government contemporaneously concluded that a contract modification was necessary to accommodate the new border crossing method. Second, we conclude that the government was aware that changing the border crossing would cost the contractor additional money and that the government was willing to pay *some amount* for those additional costs. Accordingly, the government's arguments to the contrary must fail.

### **C. The Government Expressly Agreed to Compensate ANHAM for Additional Costs Associated with New Border Crossing**

The facts further demonstrate that the government was aware that changing the border crossing would cost the contractor additional money and that the government was willing to pay *some amount* for those additional costs. Indeed, both parties anticipated a bilateral modification and spent months negotiating the terms of such a modification. (Findings 43–61)

Although the parties were able to reach agreement on a new concept of operations to accommodate the new delivery method, they were unable to agree on pricing. The CO admitted that pricing was the only barrier to agreeing to a modification and that, had the parties agreed on price, the government would have issued a modification. (Findings 60-61)

That the government and ANHAM ultimately were unable to agree on price does not change the fact that the government contemporaneously acknowledged that the new border crossing was a compensable change to the contract and that it was willing to compensate ANHAM for the additional costs ANHAM incurred. These facts satisfy the second exception to the sovereign acts defense, whereby the government expressly or impliedly agrees to pay the contractor's losses due to the sovereign acts. *Altanmia*, 09-1 BCA ¶ 34,095 at 168,582.

We conclude that the sovereign acts defense does not insulate the government from liability in this situation.

### **III. DLA Has Waived Third-Party Affirmative Defense**

In its post-trial brief, the government contends for the first time that the switch to the Safwan border crossing was not a contractual change, but was "necessitated by Iraqi requirements and/or the expiration of the SOFA" (gov't br. at 38). In particular, DLA contends that the requirements imposed by the Iraqi government following the expiration of the SOFA were acts by a third party, not the acts of the United States, and therefore DLA is not contractually liable for those actions (*id.* at 50). According to the

government, the “expiration of the SOFA was both a sovereign act of the United States and an act of a third party (Iraq)” (*id.* at 52).

In response, ANHAM contends, *inter alia*, that DLA has waived the right to raise the affirmative defense of third-party action, because DLA did not raise the defense in its answer or at the hearing (app. reply br. at 28). By failing to plead the affirmative defense in its answer, and further by failing to raise it during the hearing, the government failed to put ANHAM on notice that the government intended to argue that the costs incurred by ANHAM were primarily caused by the actions of Iraq.

Board Rule 6(b), requires that affirmative defenses must be set forth in the pleadings. The defense of third-party action is similar to other avoidance defenses, such as the sovereign acts doctrine or the political question doctrine, and should be pleaded as an affirmative defense. *See Girardeau Contractors, Inc.*, ENG BCA No. 5034, 88-1 BCA ¶ 20,391 (holding that defenses of acts of third parties, sovereign acts, and acts of natural forces are all affirmative defenses to breach of warranty claim). The failure to timely raise an affirmative defense may waive it. *Eagle Contracting, Inc.*, AGBCA No. 88-225-1, 92-3 BCA ¶ 25,018, *recon. denied*, 93-1 BCA ¶ 25,320; *Michael, Inc.*, ASBCA No. 35653, 92-1 BCA ¶ 24,412 (holding that government waived affirmative defense of lack of notice by failing to raise it until its post-hearing brief).

In this appeal, DLA failed to plead the defense of third-party causation in its answer, although DLA specifically included the affirmative defenses of the sovereign acts doctrine and the political question doctrine (second amended answer at 75-77). Moreover, the parties’ arguments and evidence adduced at the hearing were directed at the government’s sovereign acts defense, not at the actions of the Iraqi government. According to ANHAM, it was prepared for and did defend against the government’s sovereign act defense, but it did not take discovery or elicit testimony concerning the actions of the Iraqi government (app. reply br. at 28).

Even if the government had not waived its third-party defense, we conclude that the extra costs incurred by ANHAM were not primarily or solely caused by the actions of Iraq, but were caused by the government’s direction to change the border crossing location.

The government relies on *TEKKON Engineering Co.*, ASBCA No. 56831, 11-2 BCA ¶ 34,872, to support its argument that the extra costs incurred by ANHAM were primarily or solely caused by the actions of Iraq, not by the United States. *TEKKON*, unlike this appeal, involved a firm-fixed-price contract requiring delivery on an f.o.b. destination basis pursuant to FAR clause 52.247-34, F.O.B. DESTINATION (NOV 1991), which expressly shifted the risk of delivery costs onto the contractor. Moreover, the excess costs in *TEKKON* involved a unilateral embargo on incoming

shipments imposed by Iraq, not the routine regulations governing commercial shipments at issue in this appeal.

As we have found, the contract in this case expressly required ANHAM's vehicles to become part of the military convoy system (finding 10). As a result, ANHAM was not subject to the rules for commercial travel into and within Iraq. ANHAM only became subject to these rules as a result of DLA's decision to discontinue military supervised crossings (findings 38-39). In our view, the root cause of ANHAM's additional costs was DLA's change to the express requirements of the contract, not the rules applicable to commercial shipments within Iraq. Indeed, the Iraqi rules regarding commercial shipments, such as the prohibition on Kuwaiti trucks and drivers from entering Iraq, were in place before the SOFA and before DLA instructed ANHAM to change its method of delivery (finding 45).

#### **IV. ANHAM did Not Assume the Risk that Border Crossing Procedures would Change under the Terms of its Fixed-Price Contract**

DLA next contends that ANHAM assumed the risk of unexpected costs when it entered into a firm-fixed-price contract (gov't br. at 53). The contract price was based on the formula of "Contract Unit Price = Product Price + Distribution Price (Normal and/or Premium)" (finding 25). According to DLA, pricing under the contract included an economic price adjustment mechanism that pertained only to the product price, not to the distribution price, which was defined as a firm-fixed-price element in the solicitation (gov't br. at 54). DLA contends that ANHAM was aware of the risks it was assuming when it submitted its pricing proposal, and knew it would be responsible for unexpected costs related to changes to the procedures for transporting food between Iraq and Kuwait (*id.* at 55).

In response, ANHAM contends that a firm-fixed-price contract does not immunize the government from liability for constructive changes (app. reply br. at 31). ANHAM argues that it had no reason to assume the risk of using the Safwan border crossing when it submitted its proposal, because the solicitation prohibited using the commercial crossing and it was against Army policy and Kuwaiti law (*id.* at 32).

DLA's assumption of the risk defense fails for the same reasons as its sovereign act defense. We previously concluded that DLA's direction to ANHAM to begin using the commercial border crossing was a constructive change to the contract. We agree with ANHAM that a firm-fixed-price contract does not relieve the government of liability for constructive changes. *Precision Dynamics, Inc.*, ASBCA No. 50519, 05-2 BCA ¶ 33,071 (compensating contractor under firm-fixed-price contract for constructive change requiring additional work beyond contract requirements). Indeed, if a firm-fixed-price contract precluded making equitable adjustments to compensate for constructive changes, there would be no reason for equitable adjustment and Changes clauses in the contract.

*See AAA Eng'g & Drafting Co.*, ASBCA No. 21326, 77-1 BCA ¶ 12,454 (holding that Changes clause requires equitable adjustment even in a fixed-price contract).

The government's assumption of the risk defense also fails because it incorrectly describes the risk that ANHAM assumed in its pricing structure. The government asserts that ANHAM's proposal recognized the risk of troop withdrawal and that ANHAM "was accepting the risks associated with such a withdraw[al]" (gov't br. at 14). It is true that ANHAM knew and accepted the risk of troop withdrawal—and its concomitant effect on the quantities of food to be stored, transported, and delivered. However, in this appeal, the relevant risk is that DLA would require ANHAM to adopt an entirely different method of delivering food into Iraq—not that the government would withdraw its troops. *See, e.g., ANHAM FZCO, LLC*, ASBCA No. 59283, 17-1 BCA ¶ 36,817 (holding that acceptance of risk of major troop withdrawal is distinct from acceptance of risk of government misinformation).

Under the contract's pricing structure, ANHAM's Premium Distribution Price included cost of Iraq Vehicle Transportation. By its terms, Premium Distribution Price was limited to "allowable costs that the prime vendor finds necessary to include that are unique to the expense of operating a vehicle *in Iraq*." (Findings 28-29) Contrary to DLA's contention, this did not "price in" the risk of changing border crossing locations or converting to commercial delivery operations. In our view, this language demonstrates that changing border crossing locations and transitioning to a commercial mode of operation was *not* part of the original pricing structure which would include Premium Distribution Price. Based on the anticipated concept of operations, ANHAM would be entering into and traveling within Iraq inside the "bubble" of a military convoy. This mode of operating is inherently non-commercial.

It is true that the contract contained language putting ANHAM on notice that troops could be withdrawn from Iraq (findings 23-28). A risk that ANHAM acknowledged in its proposal (finding 22). This risk is distinct, however, from the possibility that DLA would order ANHAM to change its method of delivering goods into Iraq.

The fact that ANHAM was aware of the SOFA and considered it in developing the concept of operations does not mean that ANHAM assumed the risk of costs associated with changing the crossing location and complying with commercial shipping requirements. Indeed, ANHAM's statement in its proposal about the SOFA speaks to the business risk associated with a reduction in business volume resulting from "[a] major withdrawal of US troops beyond the planned draw downs during the initial contract period," not the risks associated with a change in the concept of operations (finding 22).

We conclude that ANHAM did not assume the risk of the unexpected costs of a new method of delivering goods into Iraq when it entered into the contract.

## V. ANHAM Proved Governmental Liabilities

DLA contends that “ANHAM is not entitled to an equitable adjustment because ANHAM has not shown that any change resulted in an increase in the cost of performance of work” (gov’t br. at 40). Specifically, DLA argues that, although the parties mutually agreed to remand the quantum portion of this appeal back to the CO, ANHAM has not yet submitted a quantum claim for DLA’s review (*id.* at 41). According to the government, ANHAM’s failure to prove some increase in costs is fatal to its constructive change theory (*id.*).

In response, ANHAM contends that, in a hearing on entitlement only, the contractor must only put on *some* evidence of damage to support a finding of liability (app. reply br. at 21). ANHAM argues that it presented extensive testimony during the hearing concerning additional costs it incurred as a result of the changes to the delivery method, including increases in Safwan security costs and Iraqi truck costs. ANHAM further contends that the Rule 4 file contains extensive documentation of additional costs, including a preliminary DCAA audit report that itemized specific costs ANHAM incurred as a result of the change. (*Id.*)

In an entitlement hearing, it is necessary to prove the fact of injury resulting from the constructive change. *See Scott Timber Co. v. United States*, 692 F.3d 1365, 1376 (Fed. Cir. 2012) (citing *Cosmo Constr. Co. v. United States*, 451 F.2d 602, 605-06 (Ct. Cl. 1971) (“[T]here must be some evidence of damage...sufficient to demonstrate that the issue of liability is not purely academic; that some damage has been incurred.”)); *see also Puritan Assocs. v. United States*, 566 F.2d 1191 (Ct. Cl. 1977) (table) (“Even if...the assessment of damages is reserved for the quantum phase of the case, the plaintiff as part of its proof of entitlement, must show it was damaged to some extent, by defendant’s derelictions.”). Proving that damage has been incurred, however, does not require the same precision as necessary to support a judgment in a precise sum. *Cosmo*, 451 F.2d at 606. Indeed, un rebutted evidence of damages is sufficient to prove that injury occurred.

In this appeal, there is sufficient testimonial and record evidence to demonstrate that the constructive change to the contract caused ANHAM to incur significant additional costs. For example, ANHAM’s senior vice president, Mr. Lendman, testified regarding the types of costs ANHAM incurred in setting up a new transfer facility at the Safwan border crossing location, including the rental of a temporary yard, setting up temporary housing facilities, and civil constructions costs (finding 67). In his testimony, Mr. Lendman used a summary exhibit to discuss each element of the direct costs set forth in ANHAM’s transportation claim (docketed as ASBCA No. 58999), and explained the documentary basis for each. Mr. Lendman testified that these costs were supported by documentation, including vendor contracts, vendor invoices, and proofs of payment.

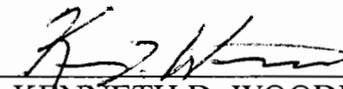
(Finding 68) Mr. Lendman also testified about the costs of providing security at the Safwan location and the cost of leasing Iraqi trucks that were used on the Iraq side of the border for food deliveries (*id.*). Although government counsel questioned Mr. Lendman about ANHAM's decision to lease trucks from Iraqi subcontractors, Mr. Lendman explained that its Iraqi subcontracts included the cost of trucks, drivers, insurance, and fuel. Mr. Lendman further explained that ANHAM's claim for additional costs was based on the difference between its previous use of Kuwaiti trucks and the new costs associated with the Iraqi transportation subcontracts. (Finding 69) The government did not question Mr. Lendman about any of the other costs in ANHAM's claim. This unrebutted testimony of ANHAM's additional costs is sufficient to prove that an injury occurred as a result of the constructive change to the contract. *CATH-dr/Balti Joint Venture*, ASBCA Nos. 53581, 54239, 05-2 BCA ¶ 33,046 (unrebutted testimony of individual costs sufficient to demonstrate injury resulting from constructive change).

Finally, the parties agreed to bifurcate the hearing, having the Board "consider the entitlement portion of the case which has been now fully submitted" (tr. 4/4). The Board's normal practice is to decide entitlement first, then, if applicable, return the quantum determination back to the parties for resolution. In the event that the parties are unable to reach or agree on quantum, they may come back to the Board for a separate hearing and ruling. At the hearing, the parties had prepared to present both entitlement and quantum, but subsequently agreed to request a decision on entitlement only (finding 101).

### CONCLUSION

Based upon the foregoing the appeal is sustained and is returned to the parties to resolve quantum.

Dated: November 13, 2018



---

KENNETH D. WOODROW  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

I concur



---

RICHARD SHACKLEFORD

Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



---

OWEN C. WILSON

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. 58999, Appeal of ANHAM FZCO, LLC rendered in conformance with the Board's Charter.

Dated:

---

JEFFREY D. GARDIN

Recorder, Armed Services  
Board of Contract Appeals