

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Jurass Company ) ASBCA No. 51527  
 )  
Under Contract No. SPO600-98-D-1000 )

APPEARANCE FOR THE APPELLANT: Ms. Natalia Krantz  
Director

APPEARANCE FOR THE GOVERNMENT: Danica S. Irvine, Esq.  
Assistant Counsel  
Defense Energy Support Center  
Defense Logistics Agency  
Fort Belvoir, VA

OPINION BY ADMINISTRATIVE JUDGE REED  
ON GOVERNMENT MOTION FOR SUMMARY JUDGMENT

The government awarded a commercial items contract to Jurass Company (Jurass, contractor, appellant) for supply of winter grade diesel fuel. Following the initial delivery of fuel, quality was tested. The government alleged, at that time, that the fuel did not comply with the cloud point and distillation standards for winter grade diesel fuel set out in the contract specifications. Appellant disagreed with the test results; therefore, it was unwilling to remedy the alleged quality problem. Thereafter, the government terminated the contract for cause “based upon Jurass’s failure to meet the scheduled delivery date and failure by Jurass to supply a winter grade diesel fuel conforming to the required GOST 305-82 Z specification.” The contractor appealed from the termination decision.

The government now moves for summary judgment based on evidence related to the specifications together with quality testing results and appellant’s alleged inability or unwillingness to provide conforming diesel fuel. Appellant opposes the motion for at least two main reasons. First, appellant argues that the standard used by the government to reject the fuel was not based on the latest revision to the applicable specifications for the fuel to be supplied under the contract. Appellant posits that the test results show that the delivered fuel was compliant with the latest revision of the applicable standard.

Second, appellant seems to suggest<sup>1</sup> that the Ukrainian military, as the user of the fuel, was willing to accept it.

The Board has issued two previous motion decisions in this appeal. Those decisions addressed reinstatement of the appeal and reconsideration of that decision. *Jurass Co.*, ASBCA No. 51527, 04-1 BCA ¶ 32,631, *revised and aff'd on recons.*, 04-2 BCA ¶ 32,663.

### FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. In Request for Proposals No. SPO600-97-R-0136, dated 18 August 1997, the U.S. Department of Defense, Defense Logistics Agency, Defense Fuel Supply Center (DFSC) (now known as the Defense Energy Support Center), solicited offers to supply 3,654 metric tons of “Diesel Fuel (Winter Grade) Specifications: GOST 305-82 Z (Latest Revisions)” to Ukrainian military units (UMU). The acquisition was to be administered by Defense Fuel Region - Europe (DFRE). The DFRE points of contact in Germany, listed on the solicitation form, were Sam Bekele and Greg Winstead. Jurass submitted a proposal dated 1 September 1997, listing the country of origin of the diesel fuel as Russia. (Government’s Board Rule 4 appeal file (R4), tab 3 at 10-11, 18)

2. In a letter dated 24 October 1997, prior to award of the contract, Jurass confirmed to Messrs. Bekele and Winstead that it could begin deliveries within 7-10 days after it received tax and “duty” (customs) documents and information concerning unloading capacity at the UMU. Jurass further stated that it presently had sufficient quantity of fuel in Ukraine and more on the Russia-Ukraine border. (*Id.* at 1)

3. On 3 November 1997, DFSC awarded the contractor an estimated quantity, requirements, commercial items type supply contract, Contract No. SPO600-98-D-1000. The contract was signed for the contractor by Peter Sessions, president, and by contracting officer (CO) Samuel Bekele. The commercial items provision of the contract specified, among other things, that the “contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613) . . . in accordance with . . . FAR 52.233-1, DISPUTES” and that the “Government may terminate this contract . . . for cause in the event of any default by the Contractor . . . .” (R4, tab 1 at 11-12, ¶ 11.03-1, FAR

---

<sup>1</sup> As indicated by the appeal caption, appellant’s Natalia Krantz is appearing before the Board *pro se*. Based on telephone conferences among Ms. Krantz, government counsel, and the Board, most of the content of which requires translation to English, Ms. Krantz’ first language is not English. Appellant’s response to the motion, written in English, is further indication of the language barrier; therefore, we construe appellant’s response liberally.

52.212-4, CONTRACT TERMS AND CONDITIONS - COMMERCIAL ITEMS (OCT 1995), subparagraphs (d), (m), at 31, ¶ I84, FAR 52.216-21, REQUIREMENTS (OCT 1995); tab 4 at 1, at 2, ¶ B1.05-1, at 5, ¶ F105)

4. The contract designated three different delivery locations at three different UMU in Ukraine, including Pervomaysk, UMU 33883, each with an estimated quantity of fuel. The estimated price of the contract at award was \$822,150.00. The contract was to be administered by way of delivery orders. The ordering period began on the date of award and was to end on 30 November 1997. Based on bilateral Modification No. P00001 to the contract, signed by CO Bekele on 26 November 1997 and by Mr. Sessions on 27 November 1997, the ordering period was extended to 31 January 1998. (R4, tabs 4 at 2, ¶ B1.05-1, Line Item 0200-32, at 4, ¶ F4, at 5, ¶ F30.01; appellant's supplemental Board Rule 4 appeal file (app. supp. R4), tab A1 at 2)

5. In SPECIAL NOTES under ¶ B1.05-1 of the contract the following appears:

(a) Orders will be placed by the Ordering Officer at . . . (DFRE) . . . Contractor must notify the designated Ukrainian Military Points of Contact [UMPOC] of delivery at least three (3) working days in advance of delivery date. Contractor must notify the [UMPOC] of any changes in delivery schedule immediately. The designated [UMPOC] are [two named Ukrainian lieutenant colonels at specified locations with telephone and "fax" numbers provided]. Contractor shall provide the following information when contacting [UMPOC]: 1. Date of Delivery 2. Origin of Shipment 3. Rail car Identification Numbers 4. Quantity of Fuel Loaded into each Rail car

(b) Product to be delivered by rail car. . . . Military locomotive will move rail cars from town train station to military base. Product will be sampled by the Ukrainian Military while in contractor rail cars. After test results are received, all on-specification fuel will be accepted and off-loaded into Ukrainian Military fuel tanks. Any off-specification fuel will be handled in accordance with Clause I1.03-1 [FAR 52.212-4, CONTRACT TERMS AND CONDITIONS - COMMERCIAL ITEMS (OCT 1995); finding 1].  
. . .

(c) Title to supplies and risk of loss thereof shall pass from the contractor to the Government (Ukrainian Ministry of

Defense [UMOD]) when the supplies pass into the receiving facility (Military storage tanks and/or transport equipment). Acceptance for quality and quantity will be made at destination . . . . A representative from the contractor must be present for sampling and off loading at the military base. All product delivered must be accompanied by a certification of product specifications and quantity. A certification as to quality and quantity will be made by the [UMOD] on the contractor's delivery documents. Invoice, delivery documentation, signed DFRE-issued order document . . . and Ukrainian Military Certificate of Quality will be presented to DSWA's [DSWA is the U.S. Department of Defense, Defense Special Weapons Agency, Cooperative Threat Reduction Program operations in Ukraine] representative at Hughes Aircraft Systems International (Hughes) in Kiev, Ukraine. The contractor must provide a copy of the customs act, if required, to the receiving unit, the [UMOD] and the DSWA representative.

(d) In accordance with the agreement between the Governments of the United States and Ukraine, all products furnished under any resulting contract are exempt from all Ukrainian duties, taxes and custom fees.

(e) Contractor must inform DSWA's representatives in Ukraine as well as DFRE in Germany at least five (5) working days in advance of a pending delivery in order to make arrangements for DSWA and/or DFRE personnel to witness all deliveries performed under [the] contract . . . . DFRE personnel will also verify the net quantity received and will review the inspection and testing of samples drawn from the contractor's rail cars as performed by [UMOD] lab personnel. Failure to notify the designated representatives of delivery dates and times and any subsequent changes may result in the inability of Hughes to certify invoices for payment. . . . Notwithstanding [contract provision] G150.07-3,<sup>[2]</sup> certification and authorization will be performed by Hughes or other designated DSWA representatives.

---

<sup>2</sup> That provision, SUBMISSION OF INVOICES FOR PAYMENT (PC&S)(UKRAINE)(DFSC AUG 1995), among other things, specifies delivery to U.S. Government entities

....

(h) All three parties, [UMOD] personnel, contractor representatives and designated U.S. Government representatives, must be present for delivery of supplies under [the] contract . . . . The U.S. Government has designated that only one individual will be present in Ukraine to monitor deliveries. . . .

(i) Ukrainian Military personnel are available at the three [delivery] locations from 9:00 to 18:00 hours, Monday through Friday. . . .

Additional Notes in the contract, under SPECIAL NOTES, include:

1. This contract is in support of the agreement, dated 25 October 1993, between the USA and Ukraine for assisting Ukraine in eliminating strategic nuclear weapons [United States - Ukraine agreement].<sup>[3]</sup>

(R4, tab 4 at 2-4, tab 7 at 1, paragraph entitled BACKGROUND)

6. The contract included provision F1.32, DETERMINATION OF QUANTITY (PC&S)(UKRAINE)(DFSC FEB 1995), which provides in part:

(b) VOLUME CORRECTION: Volume correction to net metric tons will be in accordance with local [UMOD] procedures. Volume correction will be accomplished by the [UMOD] representative to the Arms Control Implementation Unit . . . .

(R4, tab 1 at 24)

7. Documents in the present record that comprise the solicitation (as amended) and the contract (as modified) do not further describe "Diesel Fuel (Winter Grade)

---

with title passing to those entities instead of to the UMOD, and allows for ordering officer certification of invoices instead of independent certification and authorization for payment by Hughes or DSWA (R4, tab 1 at 28).

<sup>3</sup> This agreement is a part of the so-called START or Nunn-Lugar program (app. supp. R4, tab 2, first paragraph, tab 6).

Specifications: GOST 305-82 Z (Latest Revisions),” the specified standard for the fuel to be supplied (R4, tabs 1-2, 4-6; app. supp. R4, tab A1).

8. The government submitted for the record a copy of the following regarding the standard specifications for diesel fuel:

THE STATE STANDARD OF THE USSR

DIESEL FUEL

SPECIFICATIONS

GOST 305-82

....

UDK 621.436-632	Group B13
-----------------	-----------

....

DIESEL FUEL Specifications OKP 02 5131 0000	GOST 305-82* In lieu of GOST 305-73 and GOST 4749- 73
---	---

[Footnote within GOST 305-82] \*Second edition (August 1983) with Amendment 1 approved in April 1983 (IUS 7-83)

By the Resolution of the State Committee of the USSR on Standards, of March 31, 1982, No. 1836, the time of validity shall be fixed from January 01, 1983 [until] January 01, 1988.

....

It is allowed to produce the fuel with additives permitted for use in accordance with the established procedure.

1. GRADES

1.1 Depending on the conditions of use, three grades of the diesel fuels shall be established:

L (summer) - for operation at the ambient temperatures of

0 degr. C[elsius] and above;

Z (winter) - for operation at the ambient temperatures of minus 20 degree[s] C and above (the solidification point of the fuel shall be no more than minus 35 degr. C) and minus 30 degr. C and above (the solidification point of the fuel shall be no more than minus 45 degr. C);

A (arctic) - for operation at the ambient temperatures of minus 50 degr. C and above.

1.2 Based on the content of sulfur, the diesel fuels are classified in two kinds:

I - the mass portion of sulfur does not exceed .2%.

II - the mass portion of sulfur does not exceed .5% (for Grade A - no more than .4%).

1.3 The OKP codes of the diesel fuel are shown in Table 1.

Table 1

Fuel	The OKP code
L - 0.2	02 5131 0103
L - 0.5	02 5131 0102
Z - 0.2	02 5132 0102
Z - 0.5	02 5132 0101
A - 0.2	02 5134 0102
A - 0.4	02 5134 0101

1.4 The designation of the fuel . . . Grade Z [shall include] the mass fraction of sulfur and the solidification point . . . .

Examples of the designation

.....

The winter fuel with the mass fraction of sulfur of up to .2% and the solidification point of minus 35 degree[s] C:

*The diesel fuel Z-0.2 minus 35 GOST 305-82*

....

## 2. Technical requirements2 [sic]

....

2.2 As to the physicochemical factors, the fuel should meet the requirements and the norms indicated in Table 2.

Table 2

Factor	Norm for the Grade			Test method
	L	Z	A	
....				
3. Fraction Contents: 50 % is distilled at the temperature of, C degrees, not higher 96 % is distilled at the temperature of (end of distillation), C degrees, not higher	...	280  340	...	By GOST 2177-82
....				
6. Cloud point degr. C, not higher, for the climatic zone: - moderate - cold	... ...	-25 -35	... ...	By GOST 6356-75
....				

[Table 2] Notes:

....

3. As a matter of agreement with the user, the cloud point of no higher than minus 11 degr. C at the solidification point of no higher than minus 35 degr. C is permitted for the diesel fuel Grade Z obtained from the summer fuel by application of the carbamide deparaffination.

.... [end table 2 notes]

....

#### 4. RULES FOR ACCEPTANCE

4.1. ....

4.2. ....

4.3 Should there be obtained negative results of testing on at least one of the factors, a repeated test on this factor shall be performed on the new sample from a duplicate selection. The results of the repeated test shall be spread to the whole lot.

(R4, tab 9) No copy or other description of the cited test methods and standards, *i.e.*, GOST 2177-82 or 6356-75, under GOST 305-82 is included in the present record. Neither the pertinent terms (“fraction contents,” “cloud point,” or “carbamide deparaffination”) nor the processes relevant to the parties’ assertions (distillation and cloud point) are defined or further explained in the present record.<sup>4</sup>

9. Appellant submitted for the record a copy of the following regarding specifications for diesel fuel:

MINISTRY OF FUELS AND ENERGY  
OF THE RUSSIAN FEDERATION

....

OKP CODE 02 132 0000

Group B 13

Registered . . . September 26, 1996

APPROVED . . . September 27, 1996

AMENDMENT NO. 10  
SPECIFICATIONS 38.101889-81<sup>[5]</sup>

---

<sup>4</sup> The government motion at 2, n.2, purports to explain distillation and the meaning of the norms for distillation set out in GOST 305-82, quoted above. In the motion text at 10 and in n.3, counsel asserts that distillation failures and non-conforming cloud point indicate certain fuel contamination and the potential harm to be expected from use of the fuel. However, no record evidence is cited in support of counsel’s representations.

<sup>5</sup> The translation from Russian to English renders this numeral as 36.101889-81; however, on our close examination of the copy of the original language document provided for the record and by comparison with the entry in ¶ 4 of the document,

WINTER DIESEL FUEL DZp  
WITH DEPRESSOR ADDITIVE

Effective as of September 27, 1996

. . . .

AGREED:  
JSC Mazeikiu Nafta

. . . .

Introduction

Paragraph 1. “*JSC Mazeikiu Nafta*” shall be added after the words “*Novopolotskoye Production Association ‘Naftan’*.”

Paragraph 2 shall read:

*“By content of sulfur in fraction of total mass the fuel is divided into three grades:*

*DZp-0.- with a sulfur content by mass not in excess of 0.1%- OKP Code 02 5132 0109;*

*DZp-0.2- with a sulfur content by mass not in excess of 0.2-OKP 02 5132 0105; and*

*DZp-0.5- with a sulfur content by mass not in excess of 0.5-OKP 02 5132 0106.”*

Paragraph 4. The examples of designations are to be supplemented with:

*“Diesel fuel DZp-0.1 - TU 38.101889-81.”*

Section 1. The table shall be supplemented with a new grade - DZp-0.1 - and shall read as follows:

“Table

Indicator	Value for DZp-0.1 grade	Test method
-----------	-------------------------	-------------

---

below, it is clear that the numeral begins with 38, not 36. It is a typographical error.

....

- |  |     |           |
|--|-----|-----------|
| 2. Fractional composition:   |     | GOST 2177 |
| 50% to be distilled at temperature, ° C, not higher than                       | 280 |           |
| 96% to be distilled (end of distillation) at temperature, ° C, not higher than | 360 |           |

....

- |                                      |         |  |
|--------------------------------------|---------|--|
| 5. Cloud point, ° C, not higher than | minus 5 | GOST 5066,<br>Method B as amended by<br>Item 3.3.4 |
|--------------------------------------|---------|--|

....

Section 4 is hereby supplemented with Item 4.5 reading:

*“4.5. ‘Whenever a disagreement arises on matters of quality assessment . . . .’”*

(App. supp. R4, tab A9)

10. Specifications 38.101889-81, Amendment No. 10 (finding 9; hereafter referenced as “889-81”) does not state whether it supplements or revises Specifications GOST 305-82, Amendment 1 (finding 8; hereafter referenced as “305-82”). However, in some respects, the content of each is arranged in a comparable manner and similar terms are used. The government has not yet established that a reasonable bidder might not understand 889-81 as specifying an acceptable supplement to 305-82 for winter diesel fuel with the most moderate temperature requirements for distillation and cloud point.

11. In a letter “To Whom It May Concern” dated 5 December 1997, the Cooperative Threat Reduction Support Office at the United States Embassy in Ukraine indicated, pursuant to a United States - Ukraine agreement, that Jurass had been awarded a contract, the performance of which exempted it from the assessment of customs fees, taxes, and similar charges in Ukraine. The letter provided that the contract was “to

purchase and deliver fuel to the [UMOD]. The . . . contract directly supports the [UMOD] in the implementation of U.S. assistance to Ukraine in the elimination of strategic nuclear weapons . . . .” (App. supp. R4, tab A2)

12. In a memorandum dated 11 February 1998, later prepared in support of the termination action, successor CO Lula Manley stated, with reference to the tax-free provision of fuel for the DSWA mission in Ukraine, that the UMOD was responsible for providing authentication documentation for tax and customs exemptions for fuel brought into Ukraine for purposes of the contract and for processing the necessary customs and tax clearance documents (R4, tab 7).

13. Internal Ukrainian military correspondence dated 18 December 1997, from Major-General P. Kovbasa, Deputy Commander for Logistics, 43<sup>rd</sup> Rocket Army (43<sup>rd</sup> RA), to Colonel Lomov, START Implementation Center, UMOD, apparently related to logistical matters in connection with receipt of fuel from Jurass, provides in part: “According to your letter of 11 December 1997 and Mr. Gregory Winstead’s letter of 12 December 1997 to you[,] attached to which is certificate on winter diesel fuel (TU-38.101889-81), it is clear that the fuel meets requirements of the state standard GOST-305-82.” The referenced letters and certificate are not included in the record. (App. supp. R4, tab A6) The successor CO, in her memorandum dated 11 February 1998, states that the internal UMOD correspondence concerns “information submitted in the customs process. This letter was not coordinated among the users and was not issued to Jurass as a waiver under the contract.” (R4, tab 7 at 2-3, bottom paragraph at 2)

14. The DFRE Ordering Officer, Gregory Winstead, issued delivery orders dated 31 December 1997 for delivery of fuel under the contract on 5 January 1998 through 4 February 1998 (R4, tab 16).

15. Appellant has provided for the record an analysis from the producer, Mazeikiu Nafta, of the diesel fuel supplied. The producer record indicates a production location in Lithuania and records the following, in part:

Production: WINTER DIESEL FUEL DZp-0.1, HAVING  
0.0413% DEPRESSANT

TU 38.101889-81

....

Manufacturing date: 97.12.31      Sampling date: 97.12.31

Property	Norm	In fact
...	...	...
2. Distillation, °C		
50% recovered, max	280	258
96% recovered, max	360	355
...	...	...
5. Cloud point, °C,	minus 5	- 11
max		

A stamped box appears below the chart quoted in part above. Among other entries in the stamped box appear the words: “According to standard.” (App. supp. R4, tab A12)

16. Certain of the deliveries of fuel, contained in at least five rail tank cars, were made to Pervomaysk and then moved to the fuel storage area of UMU 33883, a subordinate unit of 43<sup>rd</sup> RA. On or about 23 January 1998, the DFRE representative, Sgt. Scott Marcinkowski, personnel from UMU 33883, and Jurass representatives were present for sampling of fuel. Jurass personnel took a sample or samples under the direction of Sgt. Marcinkowski’s interpreter. Jurass objected to the sampling procedure. (R4, tabs 12-13; app. supp. R4, tab A5, tab A13, unsworn statement of Nikolay Andreyevich Sheremet dated February 1998, tab A14, unsworn, undated statement of witness Sheremet) The sample from at least one rail car was tested at UMU 33883’s laboratory (R4, tab 10). Witness Sheremet asserts that there were “violations of the GOST standard procedure in the taking of samples and the measurement of the fuel quantity (a sample was taken from only one tank car instead of all five; and instead of the prescribed three measurements for each tank only one was taken . . .” (app. supp. A13, ¶ 3b).

17. The UMU 33883 laboratory issued Certificate # 10 showing test results, in relevant part, as follows:

[Factor]	[Norm for the grade]	[Result]
...	...	...
(50%) refined up to C degrees	not more than 280 °C	249 °C
...	...	...
96 (96^97.5%) refined up to C degree[s]	not more than 340 °C	89%-280

...	...	...
Cloud point °C	not more than - 25 °C	- 5 °C

CONCLUSION: Does not correspond to GOST 305-82 by cloud point and fractional composition.<sup>[6]</sup>

(R4, tab 10) Based on the test results, the government notified the contractor, by memorandum dated 24 January 1998 “that the fuel delivered to Pervomaysk does not meet the contract specification. Jurass is . . . requested to identify its suggestions for correcting the problem” (R4, tab 12).

18. Jurass objected to the test results from MU 33883 (R4, tab 13 at 1, last paragraph, tab 14). A later internal UMOD report dated 8 March 1998, over the name of Colonel-General G. Mikhailichenko, stated, in part, that “one can come to the conclusion that the analysis done by the 43<sup>rd</sup> RA fuel laboratory [was] not done competently” (app. supp. R4, tab 5 at 1, third paragraph). In response, the government agreed to take additional fuel samples for testing (app. supp. R4, tab 3). With Sgt. Marcinkowski, Jurass personnel, and Ukrainian military personnel present, at least one sample was taken from each of six different rail cars on 30 January 1998 and tested by the 10<sup>th</sup> Chemical Center, a UMU, on 3 February 1998. Three test reports (“Passports”) were produced. The first was for samples from three rail cars. The second was for samples from the other three rail cars. The third was for a sample from one rail car. (App. supp. R4, tab A3, tab A11, Passport Nos. 9-11, respectively, tab A14). The government produced “Certificate N 9, 10, 11” that lists all six rail cars and shows the same test results for distillation and cloud point as are indicated on Passport No. 9 (R4, tab 11). The Board’s composite rendering (not an exact quote of any one document) of pertinent information shown on Passport or Certificate Nos. 9, 10, and 11, issued by the 10<sup>th</sup> Chemical Center indicates the following:

For fuel (DZp), supplied by . . Jurass  
 Sample[s] . . . taken 30.01.1998

.....

Plant producer       Mazeikiu - Nafta  
 Date of . . . analysis 03.02.1998  
 Certificate is issued 04.02.1998

---

<sup>6</sup> Based on our limited understanding of fractional composition and distillation (finding 8, n.4, finding 18, n.7 below), the 50% value appears to be compliant. The 96% test appears incomplete at 89%.

. . . .

[Item No.] Name	Norm of GOST	Results
2. Fraction contents,		
. . . .		
c) 50% is distilled at the temperature of	280	256 to 258
e) 96% is distilled at the temperature of	340	347 to 349
. . . .		
10. Cloud point degree C	-25	-11

Each of Passport Nos. 9-11 includes the same laboratory opinion, quoted below:

CONCLUSION: corresponds to GOST 305-82, as Z-0,2 minus 35 [taking] into consideration [¶] 3 of Notes and permissible deviation (in accordance with order 131 from “Direction to quality control of fuel by the armed forces of Ukraine”)<sup>[7]</sup>

19. By letter dated 6 February 1998, Jurass wrote the government explaining that it believed that the quality of the fuel was within standards TU-38.101889-81 and GOST 305-82 Z based on documentation from the producer and from 10<sup>th</sup> Chemical Center. The letter also recounted supplies of fuel that were available at and before the award date but that could not be delivered because documentation had not been finalized. Jurass asserted that the previously available fuel, produced under TU-38.101889-81 standards, had been “accepted by US-contractor” as confirmed in the internal UMOD correspondence dated 18 December 1997. Based on those events, the contractor claims that it ordered more fuel to be produced to the same standards and that the fuel subsequently produced was delivered to Pervomaysk. It requested acceptance of the six

---

<sup>7</sup> The successor CO, in her memorandum supporting termination, stated that distillation did not meet specification (R4, tab 7 at 2, third paragraph, at 4, first paragraph). The 96% test results are for higher temperatures than the norm would seem to allow. However, appellant asserts, in its opposition to the motion at 7, that order 131, entitled “Instructions on the Control of Quality in the Armed Forces of Ukraine,” Appendix 23, at 157 provides for a deviation of +/- 10 degrees for the fractional composition parameter. If true, this would explain the conclusion of the 10<sup>th</sup> Chemical Center laboratory. Order 131 is not in the record.

rail cars at Pervomaysk and informed the government that ten more rail cars were waiting at the Ukraine border. (Findings 2, 13; app. supp. R4, tab A13)

20. The internal UMOD report dated 8 March 1998 (finding 18) complained of a lack of coordination by DFSC/DFRE acquisition personnel with the UMOD and the UMOD's inability to participate in the acquisition of fuel in implementation of the "Treaty on US Assistance to Ukraine in Elimination of Strategic Nuclear Weapons." The report agrees with appellant to the extent that the report states in part: "Diesel fuel is badly needed for the Ukraine Armed Forces and in our opinion as far as its quality is concerned it can be suitable for supply."

21. By letter dated 12 February 1998, effective that date, the successor CO terminated the contractor's right to proceed further with performance of the contract. A unilateral contract modification issued 3 March 1998, effective 12 February 1998, provided that the termination was for cause. The termination decision letter stated that Jurass failed to supply diesel fuel that conformed to the required GOST 305-82 Z specification. CO Manley took the position that the contractually specified cloud point was not higher than minus 25° C. She agreed that note 3 within GOST 305-82 Z allowed, as a matter of agreement with the user, a cloud point not higher than minus 11° C, but that appellant never requested a waiver to deliver fuel that relied on note 3 and that DFRE never modified the contract to that effect. We understand her view to be that the U.S. Government is the "user" because "U.S. Government officials have sole decision making authority concerning the contract, its implementation and related issues (including quality). No other organizations have the authority to change the contract."<sup>8</sup> The CO further opined, without elaboration, that "the fuel again was off-specification for distillation as well as the cloud point." Being aware of no method by which the fuel could be corrected and having no guarantee that other fuel being held by Jurass would meet the cloud point specification, she terminated the contract. (R4, tabs 6, 8)

22. The contractor timely appealed to the Board from the termination decision. 04-1 BCA at 161,450.

---

<sup>8</sup> Concerning acceptance of the fuel delivered by Jurass, the CO memorandum also noted that "DSWA has concurred with the rejection of the fuel" and that "Bechtel, the main DSWA fuel-consuming contractor in Ukraine, has [had concerns about] diesel fuel with insufficient winter properties . . ." (R4, tab 7 at 2, fourth paragraph). We have no affidavits or correspondence to that effect in the record. We also are not informed of the qualitative nature of the fuel about which Bechtel complained or how such parameters compare with the fuel delivered by the contractor.

## DECISION

The government argues that there are no genuinely disputed issues of material fact, that the government is entitled to judgment as a matter of law, and that summary judgment should follow. According to the government, taking the facts in the light most favorable to appellant shows that diesel fuel conforming to the required standard, 305-82, was not delivered because the fuel did not meet the specification requirements for “cloud point” and “distillation.” Therefore, contends the government, the termination for cause was justified.

Appellant suggests that the required standard for 305-82 also encompasses “(Latest Revisions).” According to appellant, the “Latest Revisions” include winter diesel fuel 889-81 as described in Amendment No. 10 to that specification. Appellant claims that the fuel delivered to the government complied with that standard, as a later revision to 305-82 or that the fuel it delivered complied with 305-82, Table 2, note 3, as agreed by UMOD.

The government is correct that a party may obtain summary judgment if no material facts are genuinely disputed and that party is entitled to judgment as a matter of law. To determine whether a material fact is disputed, the evidence of the non-movant is to be believed and we are to construe all reasonable inferences in favor of the non-moving party. In examining the record for summary judgment purposes, we neither weigh evidence to determine the truth of a matter nor resolve factual differences in deciding whether a material fact dispute genuinely exists. A fact is material if it may affect the outcome of the case. A genuine factual dispute is indicated if the evidence is such that a reasonable fact finder would be obliged to resolve the factual dispute at trial and could return a verdict for the non-moving party. Termination for cause is a government claim. Where the movant has the ultimate burden of proof at trial, that party must show that no reasonable trier of fact could find other than for the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49, 255 (1986); *Abbott Laboratories v. Novopharm Ltd.*, 323 F.3d 1324, 1329 (Fed. Cir. 2003); *Madey v. Duke University*, 307 F.3d 1351, 1358 (Fed. Cir. 2002), *cert. denied*, 539 U.S. 958 (2003); *OddzOn Products, Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1401 (Fed. Cir. 1997); *Jay v. Secretary of DHHS*, 998 F.2d 979, 982 (Fed. Cir. 1993); *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *South Carolina Public Service Authority*, ASBCA No. 53701, 04-2 BCA ¶ 32,651 at 161,600-01; *Precision Standard, Inc.*, ASBCA No. 54027, 03-2 BCA ¶ 32,265 at 159,600; *Double B Enterprises, Inc.*, ASBCA Nos. 52010, 52192, 01-1 BCA ¶ 31,396 at 155,110.

The standard specifications supplied by the government, 305-82, specify validity dates from 1 January 1983 to 1 January 1988. The contract was awarded in 1997. The

contract provides for use of “Latest Revisions” of the standard specifications, at least implying the possibility of revisions after 1988. Multiple types of winter diesel fuel are indicated within 305-82. There are a number of similarities and consistencies between 305-82 and 889-81. Based on the record compiled to date, we cannot say that no reasonable trier of fact could find that 889-81 would indicate to a reasonable bidder a supplemental type of winter diesel fuel for the most moderate conditions. (Findings 1, 7-10) The government has not presented evidence in support of the motion such that a genuinely disputed material fact as to the applicability of 889-81 to the acceptability of the fuel offered by appellant is foreclosed.<sup>9</sup> If Specifications 889-81 were fully applicable, then every test (producer, UMU 33883, and 10<sup>th</sup> Chemical Center) appears to show compliance with cloud point and distillation parameters (findings 9, 15, 17-18).

The government alleges that appellant did not suggest that 889-81 was fully applicable but instead ordered fuel that was compliant with 889-81 and 305-82, Table 2, note 3. Appellant represents that such fuel had been found acceptable by the user, UMOD. We will address matters related to the user below. However, there is evidence that the delivered fuel complied with the cloud point parameter set out in 305-82, Table 2, note 3, if applicable. Evidence also exists that the fuel met the distillation requirements of 305-82. (Findings 8, 18)

Whether 305-82, Table 2, note 3, is applicable brings into question the identity of the “user” and whether that entity agreed to allow a cloud point parameter of no higher than minus 11° C. The government contends that authorized DFSC/DFRE contracting personnel represent the user (the United States government) because they are the only persons authorized to change the contract’s terms by relaxing requirements related to fuel quality. The situation is less clear, on the record compiled to date, than the government suggests.

Based on our reading of 305-82, Table 2, note 3, an authorized user, which may or may not be an authorized contracting official (neither the contract nor note 3 address that point), can agree to accept minus 11° C cloud point fuel. Such acceptance would not be a change to the contract’s terms. Further, there is contract language that places UMOD personnel in a position of coordinating and accepting delivery, sampling, testing and certifying quality and quantity, off-loading, taking title to, storing, transporting, and possibly using the fuel (findings 1, 4-6, 11-12, 18). This evidence places before us the

---

<sup>9</sup> Attached as ex. A to the government’s reply to appellant’s response in opposition to the motion (gov’t mot. reply) is a printout of material from the website of the International Fuel Quality Center (IFQC; [www.ifqc.org](http://www.ifqc.org)). This material is unauthenticated and not supported by an explanatory affidavit or other evidence. We do not consider it further.

factual question whether UMOD is the user. Other evidence places before us the factual question whether UMOD agreed to accept the fuel (findings 13, 19-20).

In addition to the genuinely disputed, material fact issues arising from the specific points in the government's motion related to cloud point and distillation parameters, the record compiled to date is overall unclear. Technical requirements, terms, and processes related to fuel quality specified under the contract are not explained or are not included in the record (findings 7-10, 16-18). Relationships and responsibilities between and among the various U.S., Ukrainian military, and contractor (Hughes and Bechtel) entities under the international agreements in support of which the contract was let are mentioned but not developed in the record (findings 1-2, 4-6, 11-13, 20-21). Those relationships and responsibilities may bear on the issue of the "user" as that term is to be construed under 305-82, Table 2, note 3.

The government opines that the CO has broad discretion whether to terminate a contract for default and such discretion should not be overturned unless it is arbitrary, capricious or constitutes an abuse of discretion. The cases cited by the government involve situations where the objective predicate for the termination was not in question (*Consolidated Industries, Inc. v. United States*, 195 F.3d 1341, 1343-44 (Fed. Cir. 1999) (specific failure of the contractor to meet contractual delivery dates)) or it was unsuccessfully argued that the termination was pretextual or unrelated to contractor performance (*McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999)).

In this case, at this stage of the proceedings and development of the record, the more pertinent rule of law is that "a default termination is a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence." *J.D. Hedin Construction Co. v. United States*, 187 Ct.Cl. 45, 57, 408 F.2d 424, 431 (1969) (internal citation omitted); *Plum Run, Inc.*, ASBCA Nos. 46091, 49203, 05-2 BCA ¶ 32,977 at 163,364. Absent additional development of the record, we are not satisfied that the government's motion position is grounded upon solid evidence. Accordingly, summary judgment is inappropriate and the government's motion must be denied.

Dated: 31 January 2006

---

STEVEN L. REED  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

I concur

I concur

---

MARK N. STEMLER

Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

---

EUNICE W. THOMAS

Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

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. 51527, Appeal of Jurass Company, rendered in conformance with the Board's Charter.

Dated:

---

CATHERINE A. STANTON

Recorder, Armed Services  
Board of Contract Appeals