

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
DG21, LLC) ASBCA No. 57980
)
Under Contract No. N62742-06-D-4501)

APPEARANCES FOR THE APPELLANT: John C. Dulske, Esq.
Joan Kelley Fowler Gluys, Esq.
Bryan L. Kost, Esq.
The Law Offices of Dulske & Gluys, P.C.
San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
Navy Chief Trial Attorney
Russell A. Shultis, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE THRASHER

DG21, LLC (DG21) contracted to provide the Navy with Base Operating Support services at Navy Support Facility/Diego Garcia (NSF/DG), British Indian Ocean Territory. Because NSF/DG is such a remote location, the government was effectively DG21's sole source for obtaining fuel to perform the contract. The contract provided DG21 could purchase fuel from the government and reimburse the government for the fuel at the prevailing DoD rate at time of purchase. The prevailing DoD rate for fuel substantially increased during contract performance and DG21 now seeks an equitable adjustment for increased cost of purchasing the fuel. We have jurisdiction of the appeal under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. The parties have elected to submit the appeal on the record pursuant to Board Rule 11.¹ We deny the appeal.

¹ Although the parties have elected to submit this appeal on the record pursuant to Board Rule 11, the government's post-hearing brief asserts our standard of review is that of a motion for summary judgment i.e., that there is no genuine issue of material fact and the government is entitled to a judgment as a matter of law (gov't br. at 1, 11). Likewise, appellant's response to the government's motion states that the government has failed to show it is entitled to judgment as a matter of law (app. resp. at 2). The standards of review and burdens of proof of a motion for summary judgment and a decision on the merits under Board Rule 11 vary substantially. We decide this appeal on the merits pursuant to Board Rule 11.

FINDINGS OF FACTS

Solicitation

1. The Department of the Navy, Naval Facilities Engineering Command, NAVFAC Pacific Acquisition Department (government) issued a solicitation on 2 September 2005 for Base Operating Support (BOS) services at NSF/DG. The government's acquisition strategy was to award a fixed-price/indefinite quantity contract through the use of a competitive best value source selection. (R4, tab 2)

2. NSF/DG is located on a remote island in the Indian Ocean (R4, tab 21 at GOVF0007224 (7224)).² Access to NSF/DG is restricted to military personnel of the United States and the United Kingdom who are on business or are assigned there, contractors to the United States or United Kingdom, and other personnel of the governments of the United States and United Kingdom who have authorized business on the island. Given its remote location, there is no commercial or civilian infrastructure on NSF/DG. Pertinent to this appeal, the government is the only source of fuel on the island. (*Id.* at 7215)

Government vs. Contractor-Provided Fuel Requirements

3. The solicitation included a Performance Work Statement (PWS) organized into 18 annexes (R4, tab 21 at 7205). Annex 2 discussed how fuel would be furnished under the contract, distinguishing between government-provided (free) and contractor-provided (at contractor's expense). Spec Item 2.4.5, Government Furnished Fuel, provided:

The Government will provide fuel required by the Contractor in the performance of the contract, except for Contractor-Furnished Fuel specified in Spec Item 2.5.1.1.

The Government will make available fuel for items listed in Spec Item 2.5.1.1 on a cost reimbursable basis at the prevailing DoD rate at the time of purchase. This is to ensure the fuel conservation program achieves its full impact throughout the life of the contract. The Government will not provide fuel storage facilities and will not be liable for damages due to use of fuel purchased from the Government.

² Citations of the Rule 4 are to the Bates-stamped numbers.

The Contractor will implement a fuel conservation plan to reduce fuel consumption by 10% each year over the life of the contract with the Base Year as the baseline.

(R4, tab 21 at 7240) The contractor-furnished fuel was to be used to fuel the contractor's base support vehicles and equipment (BSVE) used to perform the contract. Spec Item 2.5.1.1, Contractor-Furnished Fuel, provided:

The contractor will provide fuel for all Contractor-operated BSVE.

The Contractor may purchase fuel from the Government on a cost reimbursable basis. The Contractor shall reimburse the Government at the prevailing DoD rate at the time of purchase. See Spec Item 2.4.5.

(*Id.* at 7244) The offerors were provided historical data from the incumbent's total fuel consumption and the June 2005 fuel rates for diesel and mogas³ to prepare their proposals (*id.*). DG21 does not allege the information provided was inaccurate or incomplete.

Fuel Conservation Program

4. The solicitation emphasized the requirement for a fuel conservation program. Annex 17 of the contract required the contractor to:

[E]stablish a fuel conservation program for this annex for all vehicles and equipment used in this contract (Government and Contractor) ensuring a 10% reduction is achieved per year for the life of the contract. The fuel conservation program shall be approved by the ACO or COR prior to contract start-up. NAVFAC P-300 provides guidance and using Industry Best Practice to develop an effective fuel conservation program. Any deviation from the fuel conservation program will be submitted in writing to the ACO or COR for approval.

(R4, tab 21 at 10927)

³ The term "mogas" refers to gasoline or petrol to distinguish it from other types of fuels such as diesel or aviation fuel.

DG21' Initial Proposal

5. DG21 submitted its initial proposal on 4 January 2006 (R4, tab 6 at 167). The proposal addressed fuel costs as one category of DG21's Other Direct Costs (ODC) (*id.* at 188). Pertinent to this appeal, DG21 identified contractor-furnished fuel as an important cost driver in the ODC area and, accordingly, conducted a detailed analysis of the fuel consumption and cost information. DG21's proposal provided the government with the conclusions from its analysis, stating:

Contractor-furnished fuel is defined in Annex 2 Management and Administration, RFP Paragraph 2.5.1.1 Contractor-Furnished Fuel. We understand from Paragraph 2.5.1.1 that we are required to provide fuel for all Contractor-operated BSVE *only* and may purchase fuel from the Government. All other fuel is Government-furnished as defined by Annex 2, Management and Administration, RFP paragraph 2.4.5 Government Furnished Fuel.

....

We determined our cost for fuel first by considering the table provided by Annex 2, RFP Paragraph 2.5.1.1 Contractor-Furnished Fuel showing the total consumption by the BOS contractor for transportation (BSVE ONLY). We evaluated the quantities reported in the table and determined they were overstated, that the BSVE operating miles and hours do not support that level of consumption. We then made independent calculations of the gallons of fuel required to support our BSVE operations defined by Annex 17 by reviewing the NSF-Owned-Government Operated-Government Replaced-Contractor Maintained BSVE and the Tenant-Owned-Tenant Operated-Tenant Replaced-Contractor Maintained BSVE lists in the RFP (Attachments J-1700000-10 and J-1700000-12)....

....

To calculate the price per gallon, we did use the information provided in RFP Section 2.5.1.1. DG²¹ used the weighted average of the June 2005 DoD rate for diesel of \$1.73; and the June 2005 DoD rate for mogas of \$1.79 to calculate the cost of fuel. *If these rates for fuel vary by plus or minus 10% we will request an equitable adjustment to address the unanticipated reduction or increase in cost.*

....

Escalation:

There is no escalation on Other Direct Costs over the life of the contract, unless noted above for specific items.

(R4, tab 6 at 189-91)

6. DG21's technical proposal also addressed the fuel conservation program stressing its importance, stating: "[s]ince the Navy is faced with an annual energy budget that exceeds two billion dollars and with decreases in operating funds, DG²¹ realizes that we must use all available means to reduce energy costs and increase efficiency" (R4, tab 6, Disk 2, 20130315, 57980 DG21 Rule 4 Index (tab 6, Disk 2) at 852).

Discussions

7. The government responded to DG21's initial proposal on 8 February 2006 (R4, tab 6, Disk 2 at 2324). During this first round of discussions the government questioned some of DG21's estimating methodology for fuel consumption and costs. Pertinent to this appeal, government question number 15 considered the issue of escalation and stated:

The price proposal states in various places that no escalation was applied in any year of the contract however, no further explanations are provided. Please confirm and explain DG21's pricing intentions. Please explain the basis/rationale for not considering cost growth over the 10-year contract term. Provide an explanation for each significant element of direct cost, e.g. labor, material, ODC etc. Additionally, address and confirm DG21's intentions relative to the pricing of the IDIQ rates which do not include any provision for escalation. Please review and clarify/adjust as appropriate.

(R4, tab 6, Disk 2 at 2320-21) In addition, government question number 17 referenced "Contractor Furnished Fuel, Narrative REA Assumptions" that referenced possible equitable adjustments for increases in fuel prices, stating:

The historical fuel consumption and rates (RFP Section 2.5.1.1) have been provided for informational purposes only. As this is a firm fixed price contract, DG21 assumes

the full risk of consumption and/or rate changes. Please price your proposal accordingly. Please review and correct/adjust as appropriate.

(R4, tab 6, Disk 2 at 2321)

8. DG21 responded to government question number 15 concerning DG21's estimating methodology stating, in pertinent part:

OTHER DIRECT COSTS:

Several different categories of costs are included in Other Direct Costs. Although some items may, in fact, increase in cost over the life of the contract, other categories may decrease. DG21 believes that we can control cost growth in overall Other Direct Cost amounts included in price by prudent management of each category of cost.

(R4, tab 7, Disk 2 at 2335-36) DG21 responded to government question number 17, addressing the escalation provision by stating:

DG21 agrees to change the narrative. Fuel prices fluctuate dramatically from year-to-year. Fuel is priced in with Other Direct Costs and DG21 will manage to total ODCs rather than this one category. Further, DG21 believes that fuel costs overall should decrease through the Energy Efficiency Program. Therefore, DG21 does not feel that fuel costs need to be escalated, therefore, we have not changed our price in this area.

(R4, tab 7, Disk 2 at 2337)

DG21's Revised and Final Proposal

9. DG21 submitted a revised proposal on 8 March 2006. The pertinent ODC fuel section of the revised proposal was identical to the initial proposal with two exceptions: (1) The proposal no longer included the "*If these rates for fuel vary by plus or minus 10% we will request an equitable adjustment to address the unanticipated reduction or increase in cost*" language; (2) The escalation section was changed, stating:

Escalation:

There is no escalation on Other Direct Costs over the life of the contract, unless noted above for specific items. DG21 expects that, although some costs may increase, others will either stay flat or decrease.

(R4, tab 7, Disk 2 at 2367) No fuel costs were noted as subject to escalation (*id.* at 2365-67). DG21's final price proposal, dated 28 April 2006, was identical to the revised proposal (R4, tab 8, Disk 2 at 3185-87).

Contract Award

10. Contract No. N62742-06-D-4501 was awarded to DG21 on 6 July 2006. The base contract term was for a period of twelve (12) months, beginning 1 August 2006, with four (4) 12-month option periods and a potential fifth additional 12-month option period.⁴ (R4, tab 9) Section A.4 defined the documents incorporated into the contract document. It stated:

This contract document incorporates revisions made by solicitation Amendments 0001 through 0011, and the following:

- a. The DG21, LLC Technical Proposal (Volumes II and III), as submitted in the final proposal revision, 28 April 2006, is incorporated.
- b. The DG21, LLC Subcontracting Plan submitted as part of the final proposal revision, 28 April 2006, is accepted and incorporated as Attachment No. JL-2.
- c. Award Fee / Award Option Plan, approved 26 June 2006, is incorporated as Attachment No. JE-1.
- d. The Pre-Proposal Conference Minutes is incorporated as Attachment JL-7.
- e. The Questions and Answers provided by solicitation Amendments are included herein and are identified as follows:

⁴ All option periods were exercised extending contract until 31 July 2012 (R4, tab 23 at 14330-31).

ATTACHMENT NUMBER	TITLE
JL-8 to JL-14	Questions & Answers

f. Section H, add Clause H.12, SPS Consolidated Server Time Zone, which is incorporated by Full Text....

(R4, tab 9, Disk 1 at 4821)

11. The award-fee/award-option plan, incorporated as Attachment JE-1 to the contract, established that a portion of DG21's award fee would be based on implementation of the fuel conservation program. The award-fee/award-option for the fuel savings initiative was 10% of the maximum award-fee pool and would be evaluated during each rating period. (R4, tab 9, Disk 1 at 4998-5003)

12. The contract defined government furnished property as "property in the possession of, or directly acquired by, the Government and subsequently made available to the Contractor for use in the performance of work related to this contract" (R4, tab 21, Disk 1 at 7333). Contractor-furnished property was defined as "[m]aterials, supplies, and equipment provided or acquired by the Contractor and in the possession of the Contractor, to which the title remains with the Contractor" (*id.* at 7331).

13. The contract incorporated by reference Federal Acquisition Regulation (FAR) 52.233-1, DISPUTES (JUL 2002) – ALTERNATE I (DEC 1991) (R4, tab 9, Disk 2 at 4953). The contract also incorporated by reference two Changes clauses. The first was FAR 52.243-1, CHANGES – FIXED-PRICE (AUG 1987) – ALTERNATE II (APR 1984), which states in pertinent part:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

- (1) Description of services to be performed.
- (2) Time of performance (i.e., hours of the day, days of the week, etc.).
- (3) Place of performance of the services.
- (4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured

for the Government, in accordance with the drawings, designs, or specifications.

(5) Method of shipment or packing of supplies.

(6) Place of delivery.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(R4, tab 9, Disk 1 at 4953) The second was FAR 52.243-4, CHANGES (AUG 1987), which states in pertinent part:

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes—

....

(3) In the Government-furnished facilities, equipment, materials, services, or site; or

....

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; *provided*, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.

....

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing.

(*Id.*) Per the contract, FAR 52.243-4 only applied to construction projects (*id.* at 4955).⁵

14. After contract performance began, DG21 raised concerns about fuel forecasting. Following an executive partnering meeting, by letter dated 15 February 2007, DG21 proposed adjustments to the contract costs in certain areas, particularly fuel. (R4, tab 11 at 5357) DG21 described the situation as follows:

Introduction—During the procurement phase of this solicitation, DG21 had grave concerns on how to forecast/predict fuel costs over the potential ten year contract period. DG21 tried in vain to be allowed to limit the risk to plus or minus 10% of the then current rates....

Bid Assumptions—DG21 was not able to “take exception” to this bid item during the procurement phase because of the potential high risk of having our total bid “thrown out.” We also considered this a “protestable” issue and one that needed to be addressed if awarded the contract or not. DG21 takes this position due to the unpredictability of oil prices, not only over the last six–eight months, but over the last six–eight years....

Billed Fuel Usage—The average fuel consumption per the RFP was 266,370 gallons of diesel at \$1.73/gallon and 156,986 gallons of gasoline at \$1.79/gallon and the current usage charges are \$2.29 and \$2.37/gallon respectively that represents about a 32% increase at beginning of [sic] contract. It also appears that DG21 is required to pay “in advance” for fuel which means we are subsidizing the Government prior to actual usage.

⁵ FAR 52.243-4, CHANGES (AUG 1987) is designated within the list of clauses by an asterisk which denotes Applicable to Construction Projects (R4, tab 9, Disk 1 at 4953, 4955).

Monetary Shortfall—... DG21 did not/could not “predict” the fuel costs for the ten year period, so considered the RFP rates as being “as good a guess as any” and used a composite rate of \$1.75/gallon. This shortfall now projects a deficit of about \$139,775/year, based on current billing rates. It is inconceivable and unfair to assume that DG21 be required to sustain such a deficit given the impossible forecasting of the world’s oil production, usage, pricing and how it relates to the DoD Fuel Reserve pricing model/forecasting.

Proposed Resolution –

1. Cap the maximum rate charged to DG21 at the RFP rates of \$1.73/gal and \$1.79/gallon, plus or minus 10%.
2. If “advance payment” is being required, discontinue and bill based on actual usage at [sic] end of each period.

(*Id.* at 5505-06)

15. The contracting officer (CO) responded to DG21’s proposal by letter dated 15 August 2007. The letter stated, in pertinent part:

The Government’s understanding of DG21’s position is that DG21 requests to cap the maximum rate charged to DG21 at the rates of \$1.73/gallon for diesel and \$1.79/gallon for gasoline, plus or minus 10%. However, DG21 acknowledges that the contract does not contain an economic price adjustment clause, and that increases in fuel costs are borne by the contractor.

In accordance with Annex 0200000 Spec Items 2.4.5 and 2.5.1.1, the Government’s position is that DG21 may purchase fuel from the Government on a cost reimbursable basis at the prevailing DoD rate at the time of purchase. Effective April 1, 2007, the prevailing rate as set annually by the Office of the Under Secretary of Defense is \$2.13/gallon for diesel and \$2.21/gallon for gasoline. DG21 used the same rate provided in the informational note in Annex 0200000 Spec. Item 2.5.1.1 (June 2005 rates

provided “for informational purposes only”: \$1.73/gallon diesel; \$1.79/gallon mogas) and did not escalate the rate for outyears.

During source selection discussions, the Government informed DG21 that the historical fuel consumption and rates provided in the RFP, Annex 0200000 Section 2.5.1.1 were provided for informational purposes only, and that due to the contract being firm fixed price, DG21 assumes the full risk of consumption and/or rate changes. DG21 was asked to price its proposal accordingly and review/correct/adjust as appropriate.

In its response, DG21 indicated the following...

“Fuel prices fluctuate dramatically from year-to-year. Fuel is priced in with Other Direct Costs and DG21 will manage to total ODCs rather than this one category. Further, DG21 believes that fuel costs overall should decrease through the Energy Efficiency Program. Therefore, DG21 does not feel that fuel costs need to be escalated; therefore, we have not changed our price in this area.”

Additionally, per DG21’s final revised price proposal, page I-18 – I20, DG21 evaluated the quantities reported in the table of Spec. Item 2.5.1.1 and stated the following:

“We evaluated the quantities reported in the table and determined they were overstated, that the BSVE operating miles and hours do not support that level of consumption. We then made independent calculations of the gallons of fuel required to support our BSVE operations.”

....

DG21’s position is if “advance payment” is being required, discontinue and bill based on actual usage at the end of each period.

The Government does not require DG21 to make advance payments for fuel consumption. Payment is made by DG21 after actual usage is determined based on what is

reported in the Fuel Accounting System (FAS). The Base Financial Office (BFO) confirmed DG21 is billed for their monthly fuel consumption after actual usage.

(R4, tab 12 at 5524)

16. On 12 December 2008, DG21 submitted another letter to the CO describing “Potential REA” issues. The letter stated, in pertinent part:

Due to many factors over the last 24 months, DG21 has experienced losses which seriously impact the financial stability of the company. As will be [outlined] below, many of these issues are financial in nature and are directly or indirectly associated in one way or another with the high rise in fuel and items associated with these costs. These issues deal with the immediate request for funds and action from the Government....

....

Fuel Issues and Concerns

The dramatic volatility in the cost of fuel over the last 24 months is a phenomenon not seen since the late 1970s, over 30 years ago.... Currently, the reimbursable rate is \$4.06 a gallon for diesel and \$4.19 a gallon for mogas. This equates to approximately a 139% increase in diesel and mogas over a 24 month period. DG21 understands that fuel costs will fluctuate from year to year, and had determined during the proposal stage from historical data over the last 10 years, that the yearly increase in fuel cost could be absorbed by fuel management and rationing. Using historical data to develop proposed fuel costs (with or without additional escalation), is the standard for cost estimating. If DG21 had proposed an escalation factor of 70% per year in the price submission, the proposal evaluation team and/or DCAA would have questioned such an increase because there would have been no factual data in which to base such an increase....

....

FAR Part 50.103-2(a)(1) states a contracting authority can approve a contract adjustment,

“When an actual or threatened loss under a defense contract, however caused, will impair the productive ability of a contractor whose continued performance on any defense contract or whose continued operation as a source of supply is found to be essential to the national defense, the contract may be amended without consideration, but only to the extent necessary to avoid such impairment to the contractor’s productive ability.”

DG21 feels that no or protracted action by the Government on the following issues will cause DG21 to become financially unsustainable. The total potential REA adjustment when summated equates to \$4,995,072.23..., and if allowed to continue would push DG21 to an untenable position and be unable to perform the mission.

Each issue will be highlighted and discussed in detail throughout this paper and associated attachments.

I. Diesel and MoGas Rate Increases

As stated above, diesel and mogas rates have increase[d] approx 139% over the last 24 months. Roughly, this equates to over a 70% increase per annum. In a competitively procured solicitation, which has implications of price being a determining factor, no company would have anticipated or incorporated into the bid this magnitude of increase. We believe the most a company would have realistically escalated fuel rates by would be in the order of 6.9% a year, based on fuel prices for the past 10 years.... Clearly, this dramatic increase in fuel prices was not envisaged by industry, the Government, or any other appropriate/relevant financial indicator.

Since the beginning of the Contract, DG21 has experienced over \$560K in losses through October 2008, due to increased fuel costs....

During the proposal stage of this project, DG21 felt that the 6.9% increase could be off set by the 10% reduction in usage through the Energy [Conservation] Plan. However, with the

actual price of fuel at \$2.21/gallon at the commencement of the contract, DG21 was already incurring a loss at this incredible rate. The rate increase for just the first year was over 26%, far out side the normal parameters for the last past 10 years which was just 6.9% per year.

....

DG21 can in no way sustain these increases, which have not only affected fuel, but every part of the cost structure supporting the mission. With these levels of volatility and in particular [these] dramatic increases in fuel, the model used to price Diego Garcia becomes obsolete even with taking into account the 10% usage deduction, and shows no real hope of making DG21 financially sound through traditional techniques, except for the Government to assist in this incredibly volatile time.

(R4, tab 12 at 5528-30) The letter did not include a certification.

17. The parties met on 12 January 2009. Following the meeting, DG21 submitted a letter, dated 6 March 2009, addressing “revised and updated ‘Escalation REA Issues.’” (R4, tab 13 at 5548) The letter reiterated many of the same arguments of the 12 December 2008 letter and discussed the continued fluctuation of gas prices. DG21 also stated that “[t]he total potential REA adjustment when summated equates to \$2,810,953 through Option 2, or \$47,464,294 over the life of the contract if all options are exercised.” The letter did not include a certification. (R4, tab 13 at 5549-50)

18. The CO treated DG21’s revised letter as a request for equitable adjustment (REA). By letter dated 11 September 2009, with the subject “REQUEST FOR EQUITABLE ADJUSTMENT FOR ESCALATION OF FUEL AND OTHER ASSOCIATED COSTS,” the CO stated:

The Government reviewed and considered DG21’s concerns regarding the escalation of fuel and other associated costs as presented in [DG21 letter dated 6 March 2009]....

Your request does not comply with the submission requirements of FAR Part 50.103 and must be denied. DG21’s letter referred to FAR Part 50 – Extraordinary Contractual Actions], specifically FAR Part 50.103-2(a)(1), as the contract authority that would allow

the Government to approve a contract adjustment without consideration. However, FAR Part 50.101-2(a)(2) states “this authority conferred by [Public Law (PL) 85-804 Extraordinary Contractual Relief], PL 85-804, may not be relied upon when other adequate legal authority exists within the agency.” Based on your submission, we are unable to determine which avenue DG21 is electing to pursue this matter.

In conclusion, based on the information provided in your letter of 6 March 2009, the Government is not able to provide a contract adjustment under the authority in FAR Part 50 – Extraordinary Contractual Actions].

(R4, tab 15 at 5587)

19. By emails dated 8 July 2011, DG21 submitted a formal claim stating, “Please accept this e-mail and the following three additional e-mails as our submittal of our fuel claim.” The four emails contained numerous attachments, making up the legal rationale, price narrative and other supporting evidence of DG21’s claim. (R4, tab 17 at 5598-5626) The claim letter’s subject line read “REQUEST FOR CONTRACTING OFFICER’S FINAL DECISION.” The claim letter stated:

DG21, LLC (DG21) submitted at least one requests [sic] for relief from double-digit inflation on fuel rates as reflected in a Request for Equitable Adjustment (REA) dated 6 March 2009.... The request was rejected...; however, in the Government’s reply to the former request, it appeared the rejection was due to conflicting information in the REA as to the clause or law that DG21 was submitting the request under.

Therefore, DG21, LLC is submitting this claim requesting [a] Contracting Officer’s Final Decision relative to fuel rate escalation for the Firm Fixed Price portion of the contract beyond normal escalation that a prudent contractor could foresee as described in Attachment 3....

(R4, tab 17 at 5603) Attachment 3 provided DG21’s reasoning for its fuel rate claim. It provided, in pertinent part:

Since the start of the DG BOS Contract N62742-06-D-4501, starting on 1 October 2006, fuel prices charged by the Government have been quite volatile. As a result, DG21,

LLC...experienced significant cost increases from the fuel prices proposed to what has been charged to DG21 by the Navy on a per gallon basis. Further, at the start of the contract, Fuel was billed to DG21 by the Base Financial Office, apparently in advance of actual usage and later reconciled. In March 2007, the billing methodology of the Government changed and DG21 began receiving billings from DFAS-Columbus.^[6]

....

In DG21's Final Proposal Revision, Volume 1, Price Proposal, Price Narrative dated April 28, 2006...DG21 used the data provided in Annex 0200000, spec Item 2.5.1.1 reflecting usage history and the rates provided as information by the Government for diesel and mogas...to arrive at a weighted average rate per gallon of \$1.75. A fuel cost was proposed based on 258,231 gallons per year at \$1.75 per gallon, or \$451,904 per year for BSVE fuel only. This fuel was intended to be for the **Firm Fixed Price portion of the contract only.**

Since the start of the contract, fuel prices charged to DG21 by the Government have far exceeded the \$1.75 per gallon proposed, with the exception of two time periods covering February 2009 through August 2009.

....

Since the Government determines these rates and invoices DG21 for the fuel, DG21 believes this constitutes a change under the Changes clause of the contract, FAR 52.243-1 Changes-Fixed Price (Aug 1987) – Alternate II (Apr 1984), and FAR 52.243-4 Changes, which indicates that the Contracting Officer may make changes in the work within the general scope of the contract, including changes--....” (3) In the Government-furnished property or service....”. Such significant rate increases by the Government constitute a change in Government furnished property or service.

⁶ Amendment No. A00007 changed the paying office (R4, tab 22 at 11435).

The Government has never officially included via Contract Modification revised rates for invoicing by the Government to DG21 into the contract. Therefore, really, DG21 has been overpaying for fuel since inception of the contract as there has never been a formal contract modification indicating increases in fuel rates.

DG21 respectfully requests the Government's consideration of the impact of increased rates on actual fuel usage for the Firm Fixed Price portion of Contract N62742-06-D-4501... in the amount of **\$1,171,475.88** for the period August 2006 through February 2011....

....

We look forward to a favorable decision in this regard.

(R4, tab 17 at 5608-12) The claim included a CDA claim certification signed by Mr. Dave Larsen, Member, DG21, LLC (R4, tab 17 at 5605).

20. The contracting officer's final decision (COFD), dated 8 November 2011, was furnished to DG21 via email on 8 November 2011 (R4, tab 18 at 5627). The CO denied DG21's claim in its entirety stating:

The Government's position is that DG21 is not entitled to additional compensation for the fuel rate increase and this does not constitute a change under the changes clause FAR 52.243-1. The Government did not make a change to the requirements of the contract and the fuel rates were included for informational purposes only.... Additionally, if DG21 believed that an increase in the fuel rate constituted a change, it was required to assert a right to an adjustment pursuant to the changes clause, FAR 52.243-1, within 30 days. DG21 has waited several years to assert this right.

(R4, tab 18 at 5628-29)

21. DG21 appealed the COFD to the Board by letter dated 4 February 2012 (R4, tab 19).

DECISION

Preliminary Matters - Appellant's Evidentiary Objections

Appellant objects to several documents in the record, contending these documents should be excluded from the evidentiary record (removed from the Rule 4 file) and, thus, our consideration in this decision. Consequently, these documents have been constructively removed from the Rule 4 File pursuant to Board Rule 4(d) (21 July 2014 Revision). In response, the government moves to have these documents entered into evidence (gov't resp. at 1-4). The documents in question generally fall into two categories: (1) pre-award source selection documentation, proposal submittals and discussions (exchange of questions and answers about appellant's proposal) (documents 1-8 below); and (2) post-award concerns raised by appellant about the increase in fuel prices (documents 9-13 below). Specifically, appellant objects to the following documents in the record:

1. R4, Tab 6, GOVF0000189-191. DG21 Initial Proposal Volume I Price - Attachment - Vol I DG_Narrative_Att I-0;
2. R4, Tab 6, (Disk 2, 20130315, 57980 DG21 Rule 4 Index at GOVF0000214). The entire Excel Spreadsheet, including Tab "ODCs Sum," Line Q, Pol (Fuel). DG21 Initial Proposal Volume I Price - Attachment - Vol I DG_ODC_vl;
3. R4, Tab 6, GOVF0002320-2321. Initial Round of Discussion Questions Attachment B -Price;
4. R4, Tab 7, GOVF0002337. DG21 Revised Proposal Volume I Price - Attachment -Vol I Attachment (B);
5. R4, Tab 7, (Disk 2, 20130315, 57980 DG21 Rule 4 Index at GOVF0002383). The entire Excel Spreadsheet, including Tab "ODC Sum," Line Q, Pol (Fuel). DG21 Revised Proposal Volume I Price - Attachment -Vol I DG_ODC_vl;
6. R4, Tab 7, GOVF0002365-2367. DG21 Revised Proposal Volume I Price - Attachment -Vol I DG_Narrative_Att I-0_030806;
7. R4, Tab 8, GOVF0003185-3187. DG21 Final Proposal Volume I Price Vol I DG_Narrative_Att I-0_04282006;

8. R4, Tab 8, (Disk 2, 20130315, 57980 DG21 Rule 4 Index at GOVF0003203). The entire Excel Spreadsheet, including, Tab “ODCs Sum,” Line Q, Pol (Fuel). DG21 Final Proposal Volume I Price Vol I DG_ODC_vl;
9. R4, Tab 11, GOVF0005505-5506. DG21 Proposal on Issues Reported at Executive Partnering Meeting on January 18, 2007 - Electricity II.A. I - Fuel Cost Forecast;
10. R4, Tab 12, GOVF0005528-5529. DG21 Submittal Other Potential REA Issues - Cover Letter;
11. R4, Tab 14, GOVF0005574. DG21 Confirming Receipt of Their Submittal on March 6, 2009;
12. R4, Tab 14, GOVF0005579. DG21 Having Problems Sending One Large File; and
13. R4, Tab 15, GOVF0005587. DG21 POC Letter Final dated November 9, 2009.

Appellant asserts the risk of increase in fuel rates was allocated to the government by the unambiguous terms of the contract Changes clause, FAR 52.243-4. Since all these documents are extrinsic evidence offered by the government to vary, contradict, or add terms to an unambiguous contract, these documents must be excluded pursuant to the parol evidence rule. (App. objection at 3-4) In addition, appellant contends that Federal Rules of Evidence 402 states that irrelevant evidence is not admissible. Therefore, extrinsic evidence offered to contradict the clear meaning of FAR 52.243 4 is irrelevant as a matter of law under the parol evidence rule and inadmissible as an evidentiary matter under FED. R. EVID. 402 (app. reply at 6-7).

In response, the government asserts these documents are pertinent and relevant as they concern the seminal issue in this appeal and thus meet the test for relevance in Rule 401. Furthermore, the government asserts that the parol evidence rule “is a doctrine of contract construction, not evidence,” and does not require the exclusion of any documents from the record. (Gov’t resp. at 1-4) The government notes that the Board can determine whether the parol evidence rule applies after reviewing all the evidence in light of the legal arguments being made by the parties (*id.* at 4). Additionally, the government challenges appellant’s assertions that all the documents are extrinsic evidence, asserting that appellant’s final price proposal (documents 7 and 8 above) were incorporated into the contract upon the government’s acceptance of appellant’s final proposal (*id.* at 1-2).

The parol evidence rule prohibits consideration of extrinsic evidence that pre-dates a written agreement “to add to or otherwise modify the terms of a written agreement in instances where agreement has been adopted by the parties as an expression of their final understanding.” *Teg-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338-39 (Fed. Cir. 2006) (quoting *Barron Bancshares v. United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004)). We agree with the government that the parol evidence rule does not exclude these documents from the evidentiary record. Contrary to appellant’s arguments, as has often been stated, the parol evidence rule is not a rule of evidence but of substantive law. Nor is it a rule of contract interpretation; instead, it defines the parameters of the contract language to be interpreted by establishing the four corners of the parties’ agreement. See RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. a (1981). Therefore, we conclude the parol evidence rule can only be applied within the context of the particular issues and facts in question.

Likewise, we agree with the government that these documents are relevant. Although we are not bound by the FED. R. EVID. we use them as a guide (Board Rule 10(c)). We conclude these documents meet the test for relevance in FED. R. EVID. 401.

Consequently, we overrule appellant’s objection; the documents in question are entered into the record. We will address the application of the parol evidence rule and applicable rules of contract interpretation in relation to these documents, as appropriate, as we consider the contentions of the parties.

Decision on the Merits

Appellant asserts three basic contentions: (1) the changes clause, by its terms, shifted the risk of fluctuations in fuel rates to the government; consequently, any fuel rate increase charged by the government constituted a change under the contract Changes clause (FAR 52.243-4) (app. br. at 12-15); (2) in the alternative, if there was no order from the CO that appellant should be charged the new fuel rates, any fuel rate charge above the bid rate would constitute a constructive change (app. br. at 15-16); and, (3) the government’s failure to reimburse appellant for the fuel cost increases constituted a breach of the government’s duty of good faith and fair dealing because it deprived it of the benefits of the fuel conservation program (app. br. at 17-25). Each argument will be addressed in turn.

The Changes Clause Allocated the Risk of Fuel Rate Increases to the Government

Although fuel price increases due to market fluctuations are generally not recoverable under a fixed-price contract, appellant contends the facts of this case fall within an exception enunciated in our decision in *Raytheon Missile Systems Co.*, ASBCA No. 57594, 13 BCA ¶ 35,264 at 173,117, that the parties may expressly

reallocate the risk of an increase in fuel costs back to the government (app. br. at 12-13; app. resp. at 6). Appellant contends the contract allocated the risk of fuel rate increases to the government as evidenced by the express language of the Changes clause, FAR 52.243-4, which appellant asserts requires an equitable adjustment when there is a change in government-furnished materials or services that result in increased costs to the contractor (app. br. 12-15; app. resp. at 6-12). Further, appellant asserts that it did not elect to purchase fuel from the government; rather, the government was the only viable source of fuel. Accordingly, notwithstanding any pro forma labels in the contract, fuel for contractor-operated BSVE was, in fact, government-furnished fuel. (App. resp. at 10) Therefore, with each government invoice issued to appellant that reflected a fuel rate increase beyond the bid rate, the government changed government-furnished materials within the meaning of FAR 52.243-4. Consequently, appellant is entitled to an equitable adjustment representing the increased cost of performance resulting from the government's change. (App. br. at 14-15)

We reject appellant's contention. Even if the fuel at issue was government-furnished material within the meaning of FAR 52.243-4, fluctuations in the "prevailing DoD rate" would not constitute a change under the Changes clause. The plain language of the contract provided that appellant could purchase fuel at the "prevailing DoD rate"; the contract language clearly anticipates there will be market fluctuations in the fuel rates and appellant will reimburse the government at those rates if it purchases fuel (finding 3). Therefore, this process was clearly contemplated by the parties and is not a change to the contract. Reading the contract language as a whole, we conclude the Changes clause did not expressly allocate the risk of fuel price increases to the government as appellant contends.

Likewise, we find no evidence that the parties expressly reallocated the risk of an increase in fuel costs back to the government, as appellant contends, based upon our decision in *Raytheon*, 13 BCA ¶ 35,264. Appellant's reliance upon our decision in *Raytheon* in this regard is misplaced; there was no express allocation of risk to the government in *Raytheon*. As here, the contractor in *Raytheon* could only obtain fuel from the government, the government controlled the fuel price, the contractor was required to provide the fuel at its expense and there was no fuel cost escalation clause in the contract. During the source selection, the government disclosed the components of the government fuel pricing structure, some of which were not market related. The evidence established the contractor understood these pricing factors and assumed the risk of their escalation during performance. However, the contractor in *Raytheon* established that some of the government fuel price increases during performance were based upon factors that were not disclosed to the contractor during source selection and, thus, were risks that the contractor did not assume. As a result, we found that the government breached its implied duty of cooperation and noninterference by increasing the fuel price based upon factors that were not disclosed during the bidding process. *Raytheon*, 13 BCA ¶ 35,264 at 173,117-19. Therefore, the facts of this

appeal are distinguishable from those in *Raytheon*; unlike the contractor in *Raytheon*, appellant does not contend, nor does it present any evidence, that the government failed to disclose information related to how the rates were computed during the bidding process.

Finally, the government contends that appellant's proffered interpretation of the contract violates the principle that a contract should be interpreted in a manner that gives meaning to all of its provisions, makes sense, and avoids whimsical and absurd results citing *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed. Cir. 1993); *ITT Defense Communications Division*, ASBCA No. 44791, 98-1 BCA ¶ 29,590 at 146,703 (gov't resp. at 16). The government's logic is that:

DG21's proposed interpretation of the contract undermines one of the goals of the contract—to conserve fuel. In the solicitation, the Navy stated that the contractor was required to purchase contractor-furnished fuel at the prevailing DoD rate “to ensure the fuel conservation program achieves its full impact throughout the life of the contract.” (Spec. Item 2.4.5, R4, Volume 2, Tab 21, GOVF0007240). DG21's main incentive to establish an effective fuel conservation program arises from the fact that, under the contract, DG21 paid for the fuel it used. If, as DG21 suggests, the Government were required to pay even part of that cost, the primary incentive for a fuel conservation program would be eliminated.

(Gov't resp. at 16) We agree with the government; appellant's interpretation would lead to an absurd result and, therefore, we reject it.

In summary, we conclude the plain language of the contract allocated the risk of fuel price increases to appellant and such fuel price increases were not a change to the contract under the Changes clause.

Constructive Change

Appellant also contends, in the alternative, that the only contract price for fuel was the rate provided in the solicitation. Since that rate was never officially changed (by an executed change order or modification from the CO), every time the government charged appellant the higher rates it was constructively changing the contract. (App. resp. at 15-16) Appellant's logic is that since the CO is the only authority under the contract to order changes or modifications to the contract, and the CO never approved or ordered a change to the contract incorporating the increases in fuel rates, appellant should have only paid the rates reflected in the solicitation.

Accordingly, the government should reimburse appellant for the amounts associated with the increases in fuel rates. (*Id.*)

For appellant to demonstrate a constructive change, it must show (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 v. United States*, 739 F.3d 1324, 1335 (Fed. Cir. 2014). Appellant has failed to do so. The plain language of the contract contemplates the fuel rates would fluctuate during contract performance, that the solicitation rate was not a fixed contract rate, and appellant would be invoiced at the “prevailing DoD rate at the time of purchase” (finding 3). We conclude the government’s actions invoicing appellant for reimbursement at higher fuel rates was within the scope of the contract and, therefore, appellant has failed to demonstrate a constructive change.

The Implied Covenant of Good Faith and Fair Dealing

Appellant also contends that the government breached the implied covenant of good faith and fair dealing by re-appropriating a bargained for benefit derived from the express terms of the contract. Appellant’s logic is that: the goal of the fuel conservation program was to, “have a win-win situation for both the government and contractor where cost savings is [sic] achieved” (app. br. at 21); the Changes clause of the contract allocated the risk of fuel price increases to the government; the “win” or benefit for appellant under the program was an equitable adjustment for any fuel cost increases; therefore, when the government reallocated the risk of fuel cost increases to appellant it unilaterally removed a material benefit under the contract violating a covenant of good faith and fair dealing (app. br. at 17-24). We reject that contention.

The implied covenant of good faith and fair dealing is limited by the original bargain: it prevents a party’s acts or omissions that, though not expressly proscribed by the contract, are inconsistent with the contract’s purpose and deprive the other party of the contemplated value. *Metcalf Construction Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014). Contrary to appellant’s contention, we fail to find any evidence in the express terms of the contract of any expectation that the risk of fuel increases was shifted to the government in relation to the fuel conservation plan. Therefore, we conclude the express language of the contract establishes that the original bargain between the parties was that appellant would assume the risk of fuel price increases.

Contrary to appellant’s contention, we have already rejected appellant’s argument that the Changes clause, FAR 52.243-4, reallocates the risk of future fuel price increases to the government. In addition, the express language of the contract indicates the purpose of requiring appellant to reimburse for fuel costs was to achieve a successful fuel conservation program, stating in pertinent part, “[T]he Government will make available fuel for items listed in Spec Item 2.5.1.1 on a cost reimbursable

basis at the prevailing DoD rate at the time of purchase. This is to ensure the fuel conservation program achieves its full impact throughout the life of the contract.” (Finding 3) Thus, we conclude the contract squarely places the risk for the cost of fuel increases on appellant, not the government, and the purpose of doing so was to incentivize appellant to conserve fuel consumption.

In summary, appellant has failed to present any evidence to support its contention that the government’s actions in charging it for increases in fuel prices deprived appellant of its rights to retain any implied benefits under the contract. Thus, we conclude the government did not breach any implied covenant of good faith and fair dealing.

CONCLUSION

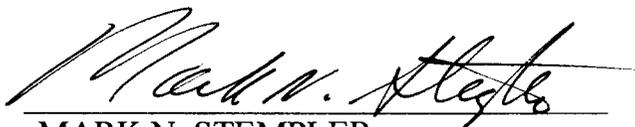
For the reasons stated, the appeal is denied.⁷

Dated: 3 March 2015



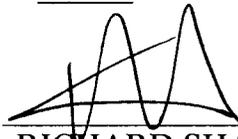
JOHN J. THRASHER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

⁷ Our decisions on appellant’s arguments were based upon a reading of the plain language of the contract, not requiring our consideration of extrinsic evidence. Consequently, we need not address the application of the parol evidence rule.

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. 57980, Appeal of DG21, LLC, rendered in conformance with the Board's Charter.

Dated:

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