ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
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Honeywell International, Inc.	)	ASBCA No. 57779
	)	
Under Contract No. W911S1-08-F-0131	)	

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OPINION BY ADMINISTRATIVE JUDGE MELNICK ON THE GOVERNMENT'S MOTION FOR PARTIAL DISMISSAL AND THE PARTIES' CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Appellant Honeywell International, Inc. (Honeywell) entered into a delivery order with the United States Army to install various energy savings measures in facilities at Fort Dix, New Jersey. After the Army transferred administration of the contract to the United States Air Force, Honeywell pursued a claim for breach, claiming the government had failed to inspect and accept a solar array installed under the agreement, and failed to make payments. The government issued a final decision asserting that the provisions for the solar array were voidable. This appeal followed.

The government moves to partially dismiss the appeal for lack of jurisdiction, or for failure to state a claim, seeking a ruling that the solar array provisions are invalid. Honeywell cross-moves for partial summary judgment, arguing that they are valid. We conclude that the Board has jurisdiction over the appeal, and grant partial summary judgment for the government, finding certain terms of the delivery order invalid.

BACKGROUND AND STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

Honeywell's Mid-Atlantic Region Energy Savings Performance Contract

1. Section 8287 of Title 42 of the United States Code authorizes federal agencies to enter into Energy Savings Performance Contracts (ESPCs). Under these agreements,

contractors incur the costs of providing various energy conservation measures (ECMs) to agencies in exchange for receiving a share of the energy savings the agencies experience. 42 U.S.C. § 8287(a)(1).

2. On 25 February 1999, the Department of Energy (DOE) awarded Contract No. DE-AM01-99EE73683 to Honeywell (ex. B-1, tab 10) (the Super ESPC).[1] This Super ESPC is an indefinite-delivery/indefinite-quantity contract through which federal agencies can issue delivery orders to Honeywell for services and equipment to reduce energy and water consumption in facilities in six Mid-Atlantic states, including New Jersey (*id.* at 2, 4, 6). The delivery orders may include a variety of energy savings measures, including the installation of renewable energy systems, such as solar arrays (*id.* at 7).

New Jersey Solar Renewable Energy Certificates

3. New Jersey has adopted renewable energy portfolio standards. N.J. STAT. ANN. § 48:3-87(d). The statute mandates that a percentage of the electricity sold by New Jersey's power utilities be from renewable energy sources (*id.*). The utilities are to satisfy these requirements by acquiring either Renewable Energy Certificates (RECs) or Solar Renewable Energy Certificates (SRECs). N.J. STAT. ANN. § 14:8-2.8. An REC is a certificate issued by the state representing the environmental benefits or attributes of one megawatt-hour of electricity from a facility that produces renewable energy. N.J. STAT. ANN. §§ 14:8-2.2, 48:3-51; *In re Ownership of Renewable Energy Certificates,* 913 A.2d 825, 827 (N.J. Super. Ct. App. Div. 2007). An SREC is a certificate representing one megawatt-hour of solar energy produced from a facility connected to New Jersey's electricity distribution system. N.J. STAT. ANN. §§ 14:8-2.2, 48:3-51. Qualified generating facilities are issued RECs or SRECs upon their production of electricity. N.J. STAT. ANN. §§ 14:8-2.4, 14:8-2.9.

4. Rather than generate the clean electricity necessary to meet New Jersey's renewable energy portfolio standards themselves, New Jersey utilities may acquire RECs and SRECs from the marketplace. *Ownership of Renewable Energy Certificates,* 913 A.2d at 827-29. New Jersey's creation and recognition of RECs and SRECs essentially permits any qualified generators of renewable electricity to sever the clean energy attributes and benefits of their electricity for separate sale. New Jersey's

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[1] On 6 February 2013, Honeywell provided a 12-tab file containing the Super ESPC and its modifications, after the Board requested those materials from the government. The Board designates the entire file as Exhibit B-1. Modification No. (Mod. No.) M003 to the contract changed the number to DE-AM36-99EE73683 (ex. B-1, tab 11; tr. 1/67-69).

establishment of the renewable energy portfolio standards for its utilities creates a market for those sales by positioning the utilities as potential buyers of RECs and SRECs.

Honeywell's Fort Dix Delivery Order

5. On 9 July 2008, the Department of the Army awarded Delivery Order (DO) W911S1-08-F-0131 to Honeywell under the Super ESPC for ECM services at Fort Dix, New Jersey (compl. ¶ 17, answer ¶ 17a; R4, tab 1). Consistent with the terms of the Super ESPC, the government was to fund its payments for the services from utility savings generated by the installed ECMs (R4, tab 1 at 80-112). The services to be provided included the installation of a solar array for the production of renewable electricity (R4, tab 1 at 21). After Mod. No. P00001 was executed on 18 September 2008, the DO assumed for the purpose of calculating savings "that the renewable energy credits produced by the [solar] system [would] have value for at least five years at a value of $0.3825/kwh." It characterized these credits as "Savings." (R4, tab 4 at 1, 82) The parties agreed that the government's energy savings resulting from the solar array included the value of the electricity it produced plus the value of the SRECs (R4, tab 4 at 82-83, tab 33; gov't mot. at 2; app. resp. at 6). Based on the DO's assumptions, Honeywell guaranteed certain annual savings from the ECMs that included the value of SRECs, and the DO scheduled annual payments to Honeywell based upon those savings (R4, tab 4 at 6, 83, 109). As modified, the DO also "granted Honeywell transfer rights to manage the SREC transaction (including associated environmental benefits) for 10% of achieved SREC value" (R4, tab 4 at 4). We refer to the initial set of ECMs under the DO, including its solar array facility, as Phase I.

6. In a letter to Honeywell dated 23 March 2009, the contracting officer addressed the SRECs generated by the solar array. The contracting officer requested Honeywell to "facilitate the sale of these certificates," permitting Honeywell to "manage and market" them. Honeywell was to forward the proceeds of its SREC sales to the government, minus a ten percent management fee. (R4, tab 35 at 2)

7. Mod. No. P00004 of the DO, effective 29 May 2009, added additional solar arrays to the project. It contemplated expected savings from SRECs valued at $0.405/kWh for the first five years, and $0.2025/kWh for years six through ten. (R4, tab 16) We refer to it as Phase II.

8. Both the contracting officer who awarded the DO, and the one who signed the modifications, possessed unlimited contracting warrants. After consulting counsel, both contracting officers believed that they had authority to authorize the sale of SRECs. However, neither now believes they had or were granted specific authorization to sell personal property. (R4, tab 1 at 1, tab 4 at 1, 3; gov't mot., Edler decl., Edgar decl.)

9. All Phase I work, including the solar array, was completed and accepted by the government sometime between 8 June and 25 September 2009, and payments have been made toward it. In April of 2010, the Phase II solar array was supplied by Honeywell as designed, completed on time, and installed as required. However, the government has not connected it to the base electrical grid, tested it, or accepted it. (Compl. ¶¶ 30-37, answer ¶¶ 30-37)

10. On 1 October 2009, the Army transferred administrative authority for the DO to the Department of the Air Force after Fort Dix became a joint base with McGuire Air Force Base (R4, tab 18; compl. ¶ 5, answer ¶ 5b).

11. On 22 March 2011, Honeywell submitted a certified claim to the Air Force contracting officer, contending the government had breached the DO by refusing to inspect and accept the Phase II work, failing to pay interest owed for late payments, and failing to pay an invoice for $2,741,963.06 (R4, tab 50). In a 21 June 2011 final decision, the Air Force contracting officer declared the DO "voidable as related to the solar arrays because of a failure of consideration; the payment stream required by the task order violates federal property disposition and miscellaneous receipt statutes." Therefore, the contracting officer purported to cancel "the voidable portions of the task order." The contracting officer offered to lease to Honeywell the facilities and land upon which the arrays were located and to purchase from Honeywell the power generated by the arrays. She also sought to revise the DO's payment schedule to reflect the exclusion of the arrays from its scope, and to pay any outstanding amounts due that would be in accordance with that modified schedule. (R4, tab 53)

12. Honeywell filed this appeal on 16 September 2011. Its complaint seeks a ruling that it is entitled to payments for its Phase I and II work, and that its Phase II work must be accepted by the government. Alternatively, it seeks a ruling that Honeywell is entitled to compensation for the value of the benefits it has provided to the government.

13. The government moves to partially dismiss the appeal on the ground that the portions of the DO providing for solar arrays are *void ab initio*, and therefore no contract exists to support our jurisdiction. Alternatively, it seeks partial dismissal for failure to state a claim upon which relief may be granted, or partial summary judgment, for the same reasons. Honeywell cross-moves for partial summary judgment, seeking a ruling that the DO is valid and enforceable.

DECISION

I. Jurisdiction

We need not dwell long over our jurisdiction. The claim and complaint are premised upon allegations that the DO imposes valid contractual obligations upon the parties. A claimant need only make a non-frivolous assertion as to the existence of a contract to trigger our jurisdiction. Whether a contract was legally formed and breached goes to the merits. *Engage Learning, Inc. v. Salazar,* 660 F.3d 1346, 1353-55 (Fed. Cir. 2011); *Tele-Consultants, Inc.,* ASBCA No. 58129, 13 BCA ¶ 35,234. Also, the government does not deny that a contract was formed. It simply asserts that the portions of the DO relating to solar arrays are invalid. Thus, even under the government's theory, we must determine the extent of the enforceability of an existing contract. Finally, we also note that DOs issued by Department of Defense components under a DOE Super ESPC are discrete contracts. Disputes over the terms of such DOs are within our jurisdiction. *AmerescoSolutions, Inc.,* ASBCA Nos. 56824, 56867, 11-1 BCA ¶ 34,705. Accordingly, the Board has jurisdiction over this appeal.

II. Summary Judgment

The government's alternative motion to partially dismiss for failure to state a claim relies upon materials outside the pleadings and therefore we treat it as a motion for partial summary judgment that we consider with Honeywell's cross-motion for partial summary judgment. FED. R. CIV. P. 56(d). Summary judgment is appropriate when there is no genuine issue of material fact and a movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Both parties agree that the DO's validity is ripe for ruling through summary judgment.

The government observes that the DO's guaranteed savings upon which Honeywell's payments are premised include the sale of the SRECs generated by the solar arrays. However, according to the government, SRECs are government-owned personal property. The government has provided declarations by the Army contracting officers who executed the DO stating they were not granted authority to sell personal property (SOF ¶ 8). The government also contends that, even if the contracting officers were authorized to sell personal property, the DO's terms are inconsistent with governing regulations. Separately, the government argues that the proceeds of the sale of personal property must be deposited in the Treasury. Thus, the DO's provisions for the solar arrays are invalid.

Honeywell's cross-motion for partial summary judgment argues that the ESPC statute and contractual scheme authorizes the inclusion of SREC sales toward the savings realized from a solar facility acquired under an ESPC, and can be added to the payments made to the contractor. Honeywell claims the contracting officers were authorized to

commit the government to such an arrangement. Honeywell also contends that such sales are exempt from any requirement to deposit the proceeds in the Treasury.

A contract with the government must be executed by an agent with actual authority to bind the government. *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380 (1947); *Trauma Service Group v. United States,* 104 F.3d 1321, 1325 (Fed. Cir. 1997). A contracting party bears the risk of accurately ascertaining the limits of a government agent's contractual authority even when the agent is unaware of those limitations himself. *Merrill,* 332 U.S. at 383-84; *City of El Centro v. United States,* 922 F.2d 816, 820 (Fed. Cir. 1990). Additionally, the government is not bound to contractual terms that are inconsistent with law. *Johnson Mgmt. Group CFC, Inc. v. Martinez,* 308 F.3d 1245, 1255-57 (Fed. Cir. 2002); *Alabama Rural Fire Ins. Co. v. United States,* 572 F.2d 727, 736 (Ct. Cl. 1978). The burden is on Honeywell to prove the relevant provisions of the DO providing for the solar arrays are authorized and lawful. *Harbert/Lummus Agrifuels Projects v. United States,* 142 F.3d 1429, 1432 (Fed. Cir. 1998).

The DO procures supplies and services for the government, including the installation of solar arrays. However, its terms are different from the typical fixed-price procurement contract. Consistent with the ESPC statutory scheme, the DO bases Honeywell's payments upon the savings Honeywell guaranteed, including in those savings the value of the SRECs the facility is expected to generate, and grants Honeywell authority to sell the SRECs to generate those funds. (SOF ¶¶ 5-7) Thus, the parties agree that the DO commits the government to finance part of Honeywell's payments for the solar array from the proceeds of Honeywell's sale of the SRECs (gov't mot. at 5 ("the sale of SRECs was the primary consideration for performance"); app. resp. at 9 ("the ESPC DO authorizes Honeywell to finance the DO in part by selling the SRECs generated by the solar arrays")). It is this arrangement that the government claims is invalid. We must decide whether the ESPC statute permits the inclusion of SREC sales among the energy savings generated by an ESPC, and upon which contract payments are calculated. We also must determine whether the contracting officers were authorized to commit the government to permit Honeywell to sell the government's SRECs and include those proceeds in Honeywell's payments.

A. *The ESPC Statute's Definition of Energy Savings*

In support of the DO's validity, Honeywell stresses that the ESPC statute authorizes the agency's procurement of energy savings measures "in exchange for a share of any energy savings directly resulting from implementation of such measures during the term of the contract" (app. resp. at 11 (quoting 42 U.S.C. § 8287(a)(1)). It notes that the Super ESPC requires Honeywell to identify financial incentives offered by the state, apply for them, and incorporate them into the project (app. resp. at 13 (citing Section C.12 of Mod. No. M006 of the Super ESPC, ex. B-1, tab 12 at 12)). It contends that SRECs are just such financial incentives offered by New Jersey relating to the generation

of renewable energy, and therefore constitute energy savings. Honeywell also argues that there are no limits on the sources of the energy savings recognized by an ESPC. In the absence of a prohibition on the use of SREC sales, they should be permitted to fund a contractor's ESPC performance. (App. resp. at 11-14)

The ESPC statute defines what constitutes cognizable "energy savings." Section 8287c(2) of Title 42 defines the term to mean:

> (A) a reduction in the cost of energy, water, or wastewater treatment, from a base cost established through a methodology set forth in the contract, used in an existing federally owned building or buildings or other federally owned facility as a result of-
>
> (i) the lease or purchase of operating equipment, improvements, altered operation and maintenance, or technical services;
>
> (ii) the increased efficient use of existing energy sources by cogeneration or heat recovery, excluding any cogeneration process for other than a federally owned building or buildings or other federally owned facilities; or
>
> (iii) the increased efficient use of existing water sources in either interior or exterior applications;
>
> (B) the increased efficient use of an existing energy source by cogeneration or heat recovery;
>
> (C) if otherwise authorized by Federal or State law (including regulations), the sale or transfer of electrical or thermal energy generated on-site from renewable energy sources or cogeneration, but in excess of Federal needs, to utilities or non-Federal energy users; and
>
> (D) the increased efficient use of existing water sources in interior or exterior applications.

In short, under section 8287c(2)(A), (B), and (D), "energy savings" are reductions in the cost of energy, water, or wastewater treatment from a base cost, or increased efficient use of existing energy or water sources, resulting from a contractor's performance. Under

section 8287c(2)(C), energy savings can also include the sale of excess electricity from a renewable energy source if otherwise authorized by law.

Considering first section 8287c(2)(A), (B), and (D), Honeywell has not shown that SREC sales fall within any of these definitions. SRECs simply reflect the clean, renewable aspect of electricity produced by a solar facility. Although the electricity produced by a solar array reduces the amount of energy the agency must purchase, lowering its costs, the certificates themselves (the SRECs) provide nothing that reduces those costs any further. Honeywell suggests that SREC sales meet the requirements of section 8287c(2)(A) because they provide "benefits derived from [measures] installed under an ESPC that result in avoided expenditures from appropriated energy and O&M funds" (app. reply at 6-9). However, the statute's definitions focus upon whether the measure reduces energy costs, not whether it generates revenue that could be used to pay those costs in lieu of appropriated funds. SRECs do not reduce the agency's energy costs. Nor do SRECs increase the efficiency of existing energy or water sources. Accordingly, SREC sales do not meet the test of section 8287c(2)(A), (B), or (D).

The closest candidate for Honeywell's purposes among the ESPC statute's definitions of "energy savings" might be section 8287c(2)(C). That section recognizes that, when "otherwise authorized by Federal or State law (including regulations)," energy savings include "the sale or transfer of electrical or thermal energy generated on-site from renewable energy sources...but in excess of Federal needs, to utilities or non-Federal energy users." Added in 2007, this provision expands the definition of energy savings beyond reductions in cost to include the sale of excess electricity generated by solar facilities when it is otherwise authorized by law. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 515, 121 Stat. 1492, 1659. This provision is not included in the Super ESPC's definition of energy savings (SOF ¶ 2). However, even if we conclude it should have been, it would not assist Honeywell. SRECs are not electrical energy. They are marketable certificates, representing the clean, renewable nature of a solar facility's electrical production that has been severed from the electricity for the very purpose of being sold separately (SOF ¶¶ 3-4). Thus, they do not meet the test of section 8287c(2)(C).[2]

B. *Chevron Deference*

Honeywell argues that DOE interprets the ESPC statute to recognize SREC sales as valid energy savings, and contends the Board must defer to that interpretation. In

[2] The addition of section 8287c(2)(C) is another reason that the sales revenues from a solar facility's production, like SREC sales, do not constitute reduced energy costs under section 8287c(2)(A). Such a reading would render section 8287c(2)(C) superfluous. *See Sprietsma v. Mercury Marine,* 537 U.S. 51, 63 (2002).

support, Honeywell cites excerpts from what seems to be another Super ESPC that is not applicable here. (App. resp. at 14 (citing ex. 5 at 19)) That document appears to require the contractor to consider the benefits of REC sales from renewable energy projects and to prepare "documentation...to effectively address...implementing and leveraging the REC sales revenue financial benefits for the project." This expectation is repeated in another document relied upon by Honeywell, entitled "ENERGY SAVINGS PERFORMANCE CONTRACT (ESPC) INDEFINITE DELIVERY INDEFINITE QUANTITY (IDIQ) FREQUENTLY ASKED QUESTIONS (FAQS)," which Honeywell represents is from DOE's Federal Energy Management Program (FEMP) (app. resp. at 14-15 (citing ex. 7 at 4)). Honeywell also quotes from the part of FEMP's website that describes the incentive programs offered by New Jersey. There, DOE opines that "[f]ederal facilities can sell SRECs from their New Jersey solar installation[s]...thereby augmenting the financing" (app. resp. at 14 (citing ex. 6)).

Honeywell's deference argument is derived from the doctrine articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Under *Chevron,* when Congress has left ambiguity in a statute, it will "be resolved, first and foremost, by the agency." *City of Arlington, Texas v. FCC,* No. 11-1545, slip op. at 5 (U.S. May 20, 2013) (quoting *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735, 740-41 (1996)). However, substantial deference to agency statutory interpretations may only be given under *Chevron* when Congress has delegated the agency rulemaking authority meant to carry the force of law, and the agency interpretation is an exercise of that authority. *Gonzales v. Oregon,* 546 U.S. 243, 255-56 (2006) (quoting *United States v. Mead Corp.,* 533 U.S. 218, 226-27 (2001)); *see also Long v. Soc. Sec. Admin.,* 635 F.3d 526, 534 (Fed. Cir. 2011). Otherwise, agency interpretations are simply entitled to respect to the extent they are persuasive. *Gonzales,* 546 U.S. at 256 (citing *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)); *see also Stephenson v. Office of Pers. Mgmt.,* 705 F.3d 1323, 1330-31 (Fed. Cir. 2013).

If the ESPC statute lacked a definition of the term "energy savings," then *Chevron* deference to an agency interpretation might be appropriate. *See Abrams v. Soc. Sec. Admin.,* 703 F.3d 538, 543 (Fed. Cir. 2012) (applying *Chevron* deference to an agency construction of a statute lacking a definition of the relevant term). However, Honeywell does not identify a relevant ambiguity in the ESPC statute's definition of the term, and when the intent of Congress is clear, that is the end of the matter. *City of Arlington,* slip op. at 4; *PSC VSMPO-Avisma Corp. v. United States,* 688 F.3d 751, 763-64 (Fed. Cir. 2012).

Indeed, none of the DOE statements relied upon by Honeywell suggest that they are the product of an exercise of rulemaking meant to interpret the ESPC statute's definition of energy savings. *See New England Tank Indus. of N.H., Inc. v. United States,* 861 F.2d 685, 694 (Fed. Cir. 1988) (noting that not every piece of paper issued by an agency is a mandatory regulation). The purported Super ESPC contract language

Honeywell relies upon requires those contractors subject to it to consider whether REC sales can benefit a project in some way. It does not say that they could constitute energy savings under an ESPC contract. That is also the case for the FEMP frequently asked questions. The additional FEMP website language stating that New Jersey SRECs can be sold does not indicate that it is intended to apply to ESPCs. There is no basis for giving these materials any deference under *Chevron.* Nor is there any reason to find that these vague, superficial statements persuasively show that SREC sales are includable as energy savings under ESPCs, given that they do not purport to engage in any legal analysis to that effect.[3]

C. *Property Disposal Regulations*

Even if SREC sales could otherwise constitute energy savings for purposes of an ESPC contract, the Army contracting officers could not lawfully commit to their sale to finance payments to Honeywell. We agree with the government's suggestion, not challenged by Honeywell, that SRECs are personal property, given their exclusive nature and transferability. *See Members of the Peanut Quota Holders Ass'n, Inc. v. United States,* 421 F.3d 1323, 1330-34 (Fed. Cir. 2005). New Jersey case law is consistent with that conclusion, characterizing SRECs as commodities subject to ownership. *Ownership of Renewable Energy Certificates,* 913 A.2d at 827.

General Services Administration (GSA) property disposal regulations contained at 41 C.F.R. Parts 102-35 through 102-42 generally govern the disposition of personal property under the custody and control of executive agencies in the United States. 41 C.F.R. § 102-35.5 (2008). These regulations ensure the government does not sell excess property without first determining if it can use the property elsewhere. 41 C.F.R. §§ 102-35.15, 102-36.45(a), 102-36.65, 102-36.210. Under the process established by these rules, when an agency determines that personal property is not needed, the agency "declares the property excess and reports it to GSA for possible transfer to eligible recipients," including other agencies. 41 C.F.R. § 102-36.35(a). If GSA determines that the property has no uses, it becomes surplus property and available for donation. 41 C.F.R. § 102-36.35(b). Only if it is not selected for donation under established procedures does it become eligible for competitive sales under specific procedures. 41 C.F.R. §§ 102-36.35(c), 102-38.5-.370. Additionally, only a designated Sales Center may sell the government's personal property, and only a duly authorized agency official may execute the sale award documents and bind the government to a sale. 41 C.F.R. § 102-38.40. Generally, all personal property sales are subject to these rules. 41 C.F.R. § 102-38.20.

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[3] DOE has engaged in formal rulemaking regarding ESPC contracts. However, those regulations predate the current version of section 8287c(2) and contain a definition of "energy cost savings" even more narrow than the statute. *See* 10 C.F.R. § 436.31 (2013).

Honeywell suggests the relevant provision of the property disposal regulations is 41 C.F.R. § 102-35.30(d), which says that "Government-owned personal property may only be used as authorized by [the] agency." Honeywell argues that the DO's inclusion of SREC sales as energy savings was authorized by the Army. Because the Army considered the SRECs' purpose was that they be sold to finance payments to Honeywell, they were neither excess nor surplus property and therefore exempt from the requirements of the property disposal regulations. Honeywell also contends that, because the Army contracting officers possessed unlimited warrants, and were advised that they could commit to the DO's SREC terms, they were authorized to do so. (App. resp. at 6-7, 15-19; app. reply br. at 13-14)

The question is not how SRECs could be used, but whether they could be sold as contemplated by the DO. The very next sentence of section 102-35.30(d), after the one relied upon by Honeywell, states that "[t]itle to Government-owned personal property cannot be transferred to a non-Federal entity unless through official procedures specifically authorized by law." Although the DO does not purport to directly sell SRECs to Honeywell, it would permit Honeywell to sell them in the marketplace to generate revenues to be paid to Honeywell. Thus, the DO would obligate the government to sell its SRECs and allow Honeywell to do it. Regardless of whether the Army contracting officers were authorized to sell personal property themselves, Honeywell has not presented any evidence showing that the contracting officers could authorize Honeywell to sell the government's personal property for the government. Moreover, the arrangement disregards the procedures dictated by the property disposal regulations for the disposition of virtually all personal property held by the government. Contrary to Honeywell's contention, the property disposal regulations do not simply restrict the sale of excess or surplus personal property, they apply to nearly all personal property, and only permit its sale after it has been declared excess and surplus. 41 C.F.R. § 102-36.35. Honeywell cites no support for the suggestion that an agency can circumvent those requirements by simply declaring that a piece of property's purpose is that it be sold.

Honeywell also maintains that the SRECs are government-furnished property provided to Honeywell for its performance of the contract, and therefore governed by the provisions of FAR Part 45 (app. reply br. at 14-15). It argues that, after receiving the SRECs from the government, it would "consume" them under the DO, which it says is an action exempted from the requirements of the property disposal regulations by FAR 45.503.

FAR Part 45 applies to property being furnished "for performance of a contract." FAR 45.101 (defining *Government-furnished property*). The DO does not provide the SRECs to Honeywell for contract performance. Contrary to Honeywell's contention, it would not be "consuming" the SRECs to perform the DO. It would be selling them for use by others. Nothing in FAR 45.503 exempts such transactions from the control of the

property disposal regulations. Indeed, even if FAR Part 45 applied here in some way, it provides that the government "retains title to Government-furnished property until properly disposed of, as authorized by law or regulation." FAR 45.401. Honeywell has not shown that the DO would lawfully dispose of the SRECs.

D. *Invalid Contract Terms*

Finally, Honeywell claims that, even if the DO's SREC terms are inconsistent with applicable law, they are still valid because the Army contracting officers did not knowingly violate the law (app. resp. at 23-24). Honeywell contends that only contract terms that are plain or palpable violations of the law are invalid, and if contracting officials were unaware that particular terms were invalid then that invalidity cannot be plain or palpable. Honeywell cites *John Reiner & Co. v. United States,* 325 F.2d 438 (Ct. Cl. 1963), and subsequent precedent relying upon it, in support of its position. *See Trilon Educational Corp. v. United States,* 578 F.2d 1356 (Ct. Cl. 1978); *EROS Div. of Resource Recycling Int'l, Inc.*, ASBCA Nos. 48355, 48773, 99-1 BCA ¶ 30,207.

In *Reiner,* the former General Accounting Office (GAO) sustained an unsuccessful bidder's protest of a contract award as improper. Accordingly, the government cancelled the contract, prompting the awardee to sue for breach. The government defended on the ground that the contract was void and therefore not subject to a breach claim. The court concluded that it was not bound by GAO's ruling, and held that "[i]n testing the enforceability of an award...where a problem of the validity of the invitation or the responsiveness of the accepted bid arises...the court should ordinarily impose the binding stamp of nullity only when the illegality is plain." *Reiner,* 325 F.2d at 440. In *Trilon,* the government also cancelled an award after concluding that the contractor was nonresponsible, and denied liability for costs on the basis that the award was improper and illegal. Citing *Reiner,* the court held that when an award does not egregiously deviate from applicable statutes and regulations, the bidder may recover because the contract was "not palpably illegal to the bidder's eyes." *Trilon,* 578 F.2d at 1359-60. Similarly, in *EROS,* this Board found that violation of pre-award procedural requirements were not sufficiently plain to render the contract illegal. *EROS,* 99-1 BCA ¶ 30,207 at 149,461.

This appeal does not involve an irregular contract award. Here, the contract contains operative terms that are illegal and unauthorized. This contrasts with *EROS,* where the Board expressly found that the contract's "terms and conditions did not violate or exceed any statutory or regulatory limits." *Id.* Honeywell does not cite any precedent holding that illegal contract terms can be enforced as long as the parties agreeing to them believed the contracting officer possessed authority to commit to them and that they were lawful. Indeed, the contention is inconsistent with the entrenched principle that contractors assume the risk that the agency may enter a contract, regardless of what the contracting officer believed, and that we must strike down illegal contract terms. *United*

States v. Amdahl Corp., 786 F.2d 387, 392-93 (Fed. Cir. 1986). Unlike *Reiner*, this situation is governed by precedent such as *Yosemite Park and Curry Co. v. United States*, 582 F.2d 552 (Ct. Cl. 1978), where the court found that operative payment terms permitting recovery of federal income taxes, and a 12.5 percent operating fee, were illegal regardless of the parties' genuine belief to the contrary. *See also Johnson Mgmt. Grp.*, 308 F.3d at 1255-57 (invalidating a liquidation provision inconsistent with the FAR, despite detrimental reliance by the contractor); *Urban Data Sys., Inc. v. United States*, 699 F.2d 1147 (Fed. Cir. 1983) (invalidating illegal price terms); *McDonnell Douglas Corp. v. United States*, 670 F.2d 156, 159 (Ct. Cl. 1982) (invalidating a patent rights exemption clause inconsistent with mandatory regulations); *W. Pa. Horological Inst., Inc. v. United States*, 146 Ct. Cl. 540 (1959) (invalidating illegal price terms).

We conclude that the provisions of the DO including the sales value of SRECs among the government's energy savings, and the associated payment calculations premised upon those sales, are invalid. We also find invalid the DO's provision permitting Honeywell to sell the SRECs.[4] Honeywell has argued that such a finding does not bar its recovery, claiming that it is still entitled to payment under the doctrine of reformation. We recognize that a finding that these portions of the DO are invalid may not bar recovery. *See Barrett Refining Corp. v. United States*, 242 F.3d 1055 (Fed. Cir. 2001) (recognizing that *quantum valebant* relief is awardable to compensate for goods delivered under a contract with an invalid price escalation clause); *Amdahl*, 786 F.2d at 395; *Urban Data Sys.*, 699 F.2d at 1154-55; *Yosemite Park*, 582 F.2d at 560-61. Consideration of any such entitlement must await further proceedings.

CONCLUSION

The government's motion to partially dismiss for lack of jurisdiction is denied. The government's motion for partial summary judgment is granted to the extent consistent with this opinion. Honeywell's motion for partial summary judgment is denied.

Dated: 7 August 2013

MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

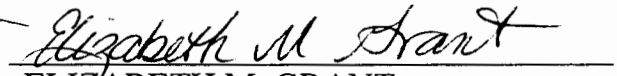
(Signatures continued)

[4] Given this conclusion, we do not consider the government's additional argument that that the proceeds of SREC sales must be deposited in the Treasury.

I concur

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

I concur



ELIZABETH M. GRANT
Administrative Judge
Acting 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. 57779, Appeal of Honeywell International, Inc., rendered in conformance with the Board's Charter.

Dated:

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