

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -)
)
General Logistics Group, Ltd. d/b/a) ASBCA No. 60838
GLC Group)
)
Under Contract No. W56KJD-13-A-0004)

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MAJ Stephen P. Smith, JA
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OPINION BY ADMINISTRATIVE JUDGE MCNULTY

This appeal involves a claim arising under call orders issued pursuant to a Blanket Purchase Agreement (BPA) for the delivery of different types of fuel to various locations within Afghanistan. The fuel was intended to be purchased from outside Afghanistan and imported. Pursuant to a Status of Forces Agreement, between the United States and The Islamic Republic of Afghanistan, the fuel was to be exempt from importation taxes. Appellant, General Logistics Group, Ltd. (GLC) asserts the government failed to provide the assistance required to obtain the tax exemption, which caused its cost of performance to increase. GLC seeks to recover the alleged increased cost of performance. We decide entitlement only. Also pending before the Board is GLC's motion for summary judgment. This decision moots the motion.

FINDINGS OF FACT

1. BPA W56KJD-13-A-0004 was issued November 6, 2012. The original performance period was just seven weeks, November 6, 2012 to December 31, 2012¹ (R4, tab 1 at 1-2). The BPA, by amendment, extended the performance period several times, ending finally on August 31, 2013 (R4 tabs 2-3, 5). The BPA was for the

¹ Although the record includes no copy of the BPA signed by GLC signifying its acceptance, there is no dispute GLC accepted and performed delivery orders issued under the BPA.

supply of petroleum, oil and lubricants (POL) to support the mission of the Afghanistan National Security Forces (ANSF). The POL was a mission critical material. (Tr.1/146, 2/57) The POL was requested through call orders issued by the contracting officer or the authorized representative of the contracting officer (R4, tab 1 at 4; tr. 2/21). The BPA stated that calls would be placed with the vendor who could offer the lowest pricing and meet the delivery requirements (R4, tab 1 at 3). The BPA stated that invoicing for the delivered POL was to be submitted at least monthly (*id.* at 4).

2. The BPA provided that either party could terminate the agreement upon 30 days' notice (*id.* at 4). The BPA included lists setting forth the estimated quantities of the different types of POL that would be required throughout the Islamic Republic of Afghanistan and also stated that for planning purposes the vendors should anticipate delivery being required within 48 hours of a call being issued (*id.* at 5-9, 15). Deliveries were often required within 24 to 72 hours of the call being issued (tr. 1/ 35-36, 138-39, 2/171).

3. The BPA required the vendors to submit firm fixed per liter pricing lists to be updated at least monthly (R4, tab 1 at 3-4; tr. 1/56, 2/170). Additionally, the government was entitled to a 10% discount, whenever more than 2,000,000 liters of diesel fuel was delivered in a month and to a 13% discount, whenever more than 5,000,000 liters of diesel fuel was delivered in a month (R4, tab 1 at 17).

4. The BPA stated that because the fuel was being purchased for the benefit of the government of the Islamic Republic of Afghanistan (GIRoA) the fuel deliveries were exempt from taxes and customs duties. The vendors were instructed to exclude taxes and duties from their pricing calculations. (*Id.* at 18; tr. 1/27-29)

5. The BPA incorporated by reference FEDERAL ACQUISITION REGULATION (FAR) 52.229-6, TAXES—FOREIGN FIXED PRICE CONTRACTS (JUN 2003), which states in part:

(d)(1) Except as provided in subparagraph (d)(2) of this clause, the contract price shall be increased by the amount of any after-imposed tax *or of any tax or duty specifically excluded from the contract price by a provision of this contract that the Contractor is required to pay or bear*, including any interest or penalty, if the Contractor states in writing that the contract price does not include any contingency for such tax and if liability for such tax, interest, or penalty was not incurred through the Contractor's fault, negligence, or failure to follow

instructions of the Contracting Officer or to comply with the provisions of paragraph (i) of this clause.

....

(i) The Contractor shall take all reasonable action to obtain exemption from or refund of any taxes or duties, including interest or penalty, from which the United States Government, the Contractor, any subcontractor, or the transactions or property covered by this contract are exempt under the laws of the country concerned or its political subdivisions or which the government of the United States and of the country concerned have agreed shall not be applicable to expenditures in such country by or on behalf of the United States.

(R4, tab 1 at 25) (emphasis added)

6. The BPA also incorporated by reference DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT (DFARS) 252.229-7000, INVOICES EXCLUSIVE OF TAXES OR DUTIES (JUN 1997), which states:

Invoices submitted in accordance with the terms and conditions of this contract shall be exclusive of all taxes or duties for which relief is available.

(*Id.* at 25)

7. The BPA included C³ CLAUSE 952.225-0019, COMMODITY SHIPPING INSTRUCTIONS (AFGHANISTAN) (AUG 2011), which required that all shipments into the Combined Joint Operations Area-Afghanistan (CJOA-A) be coordinated through the Defense Transportation system (DTS) to expedite the customs clearance process. This clause included the following documentation required for imports:

- a. An original Customs Clearance Request (CCR) prepared by the COR in accordance with Afghanistan customs guidance referenced in paragraph 4 below.
- b. Bills of Lading (for shipments by sea), Airway Bills (for shipment by air) or Commodity Movement Request (CMRs) (for overland shipments).

....

f. A Diplomatic Note, prepared by DoD Customs, to the Ministry of Foreign Affairs requesting the initiation of customs formalities with the Ministry of Finance, Department of Customs and Exemptions.

The clause also included a provision listing a point of contact in the United States, with telephone number, for customs issues (C³ CLAUSE 952.225-0019(d)(2); *id.* at 36-38).

8. This clause adopts procedures set forth in a document dated March 31, 2010, issued by the United States Embassy in Kabul entitled “SOP For Customs Clearance Request (Import/Export) Operations” (R4, tab 19). The SOP indicates that DOS (Department of State) is responsible for issuing Diplomatic Notes requesting exemptions from customs duties and that DOD (Department of Defense) appoints an officer to be responsible to oversee the DOD portion of the process (*id.* at 2). Each request is entered into a database maintained by DOS by a DOS Liaison Officer (LNO). The SOP also indicates that only DOD CORs are authorized to send CCRs to the LNO office and that no CCR will be accepted and processed until a DD 577 appointment memo has been received from the COR. (*Id.* at 2, 6) The SOP makes it clear the Diplomatic Note requesting the exemption will not be issued by the LNO until the other documents required have been received by the LNO because the note will include the Bill of Lading/CMR number or other information specific to the shipment in it. (*Id.* at 3, 7) A flow chart included in the documents annexed to the SOP indicates the very first step in the customs duty exemption process, before any other documentation is prepared, is the COR sending the CCR to DOS (*id.* at 23; tr. 1/ 32-34). Without the CCR, fuel could not be imported into Afghanistan (tr. 1/42). Captain ██████², the contracting officer during the initial period of contract performance when the vast majority of GLC’s performance, measured by quantity of fuel delivered occurred, testified he was not familiar with the SOP, nor with the CCR (tr. 2/19-20, 59-60, 71-74).

9. GLC was one of several companies who were selected by the government as vendors (tr. 2/169). Although GLC had several years of past performance experience supplying fuel to the government in Afghanistan, exemption from taxes and customs duties was a new development for both GLC and the government personnel responsible for administering the contract. GLC’s previous fuel delivery contracts had not been tax or customs duties exempt. It was also the first time the U. S. government personnel involved in administering the BPA and the call orders issued pursuant to it dealt with a tax exempt fuel delivery contract. (Tr. 2/44, 64-66, 3/20-22, 34, 39) Major ██████ testified that because this was the first BPA that was to be exempt from GIRoA taxes the Army had no formal procedures in place for helping the contractors

² By the time of the hearing Captain ██████ had been promoted to the rank of Major.

receive the exemptions. (Tr. 2/66) His supervisor, LCDR [REDACTED], similarly testified he could not recall there being any established processes in place for assisting the contractors in obtaining the customs duty exemption (tr. 2/201, 210-11).

10. GLC received notification via email dated November 6, 2012, that it was a successful offeror followed by a more formal notification dated November 8, 2012 (app. supp. R4, tab 344 at 5-6, 342; tr. 1/58). The first call to GLC was issued December 15, 2012, for delivery on December 31, 2012. (R4, tab 31; tr. 1/43-44) The record includes 105 calls issued to GLC between December 15, 2012 and August 2, 2013 (app. supp. R4, tabs 31-135). The record does not include the calls' delivery schedules, which presumably would set forth fuel types, quantities, and delivery locations. Of the 105 total calls GLC received, 48 were issued in December 2012, 38 in January 2013, and the remaining 19 were issued mostly after May 2013³. (*Id.*) Not only did the largest number of calls occur early in the performance of the contract, but the quantity of the fuel ordered was greater in the early calls than it was in the later calls (tr. 1/50-51).

11. Immediately thereafter, although the government sought to assist the awardees, including GLC in obtaining the applicable exemptions from taxes, the effort was at best only partly successful (tr. 3/41-43, 87-88). In a series of emails beginning with a date of November 17, 2012, and extending to December 1, 2012, the record indicates the government had contacted both the U.S. Embassy in Kabul and the GIRoA on behalf of the awardees, but that the awardees were having trouble obtaining all of the applicable exemptions and some awardees were declining to accept orders because they could not receive exemptions (R4, tab 21; tr. 2/83-84). In a message dated December 1, 2012, the contracting officer advised the awardees who were accepting orders were losing 20 cents "give or take" for each dollar of fuel delivered without the exemptions (R4, tab 21 at 1).

³ GLC's [REDACTED] testified the call documents at tabs 31-135 were generated after the fuel had been delivered and GLC had invoiced the government for it, which it did at the end of each month. The orders that initiated the fuel deliveries were sent via email. GLC was required to wait until the end of the month to invoice, to see if the government had ordered a large enough quantity of fuel to qualify for the discounts provided for in the pricing provisions of the BPA. (Tr. 1/43-47, 107-13; app. supp. R4, tabs 105, 216; finding 3) This testimony was confirmed by the contracting officer and his supervisor (tr. 2/24, 167, 186). The initial calls via email are not in the record. Based on this testimony it appears the vast majority of the fuel delivered by GLC was delivered before January 31, 2013, during Captain [REDACTED] tenure as contracting officer. [REDACTED] also testified that a large portion of GLC's performance under the BPA occurred between December 2012 and January 2013. (Tr. 3/88)

12. In late December 2012, GLC thanked the contracting officer for his assistance in helping GLC receive exemptions from taxation on salaries and business receipts and requested that the Army issue a tax exemption letter for the importation of 8,000 metric tons of diesel fuel and 2,000 metric tons of Mogas. Major [REDACTED] testified he had no recollection of GLC ever requesting that a CCR be issued. He also testified he could not recall whether the DD 577 forms referred to in the SOP and necessary for the CCR had ever been issued. The contracting officer also testified that despite having legal advisors and senior contracting officials available to him, no one ever advised him that following the procedures set forth in the BPA's Commodities Shipping Instructions clause might solve the problem. (Tr. /99-101) Additionally, the COR, initially Lieutenant, later Captain [REDACTED], did not seek any tax exemption on behalf of GLC (app. supp. R4, tab 376; tr. 2/126, 132). The government never issued any CCRs necessary for the importation of fuel (R4, tab 7 at 71; app. supp. R4, tabs 28, 28A; tr. 1/155-59, 2 /35-36, 40, 3/81-83). The record includes no documentary evidence that GLC requested exemption from customs duties or CCRs for other fuel importations except for a single instance set forth in an email chain that occurred in late May to June 2013, but GLC's CEO, [REDACTED] testified GLC had requested custom clearance documents several times, including orally (R4, tab 7 at 86-89; tr. 3/44).

13. The record includes no evidence that any Diplomatic Note as set forth in subsection f of the Commodities Shipping Instructions clause of the BPA and the SOP was ever prepared by the Army and submitted on its behalf by DOS to the GIRoA Ministry of Foreign Affairs.

14. The contracting officer wrote a letter to the GIRoA Ministry of Finance in mid-January 2013, on behalf of all eight awardees seeking exemptions from taxes and customs duties (R4, tab 7 at 79-80). A week later, in an email dated January 22, 2013, the contracting officer advised GLC that a process had been established with the GIRoA Ministry of Finance to begin processing GLC's exemptions from taxes and customs duties for fuel delivered under the BPA.⁴ The contracting officer also advised that he would be redeploying and that the new contracting officer would be LCDR [REDACTED] with SSgt [REDACTED] having responsibility for day to day contracting operations. (*Id.* at 74)

15. When GLC was unable to obtain the exemption from customs duties it was not able to import fuel and purchased fuel inside Afghanistan rather than importing fuel as it had planned to do. The fuel purchased within Afghanistan had been subject to customs duties and in order to comply with the BPA requirement that the offerors' fuel prices include no taxes or customs duties for which exemptions existed, GLC subtracted from the prices it charged the government, the customs duty component it

⁴ GLC had already completed the lion's share of its performance at this point (finding 10).

had to pay its suppliers⁵. (Tr. 1/83-99, 118-23, 140-41, 170-72, 3/51-53, 122; app. supp. R4, tab 29 at 82, tab 216 at 2, tab 255)

16. GLC attempted to obtain a refund for the customs duties it had paid indirectly through the prices it had paid its suppliers for the fuel it purchased inside Afghanistan, both with the help of the contracting office personnel and directly from the government of Afghanistan, but these efforts were unsuccessful (tr. 1/166-69, 2/89-92, 3/117-18; R4, tab 7 at 82-83, 121-22, tab 23).

17. GLC subsequently raised its prices on its monthly price lists, when it realized the government would not issue the CCRs and assist it in obtaining the exemption from the custom duties (tr. 3/62-63).

18. In an audit report released several months after performance of the contract began, the Special Inspector General for Afghanistan Reconstruction (SIGAR) reported that contractors performing work that should have been exempt from Afghan taxes and customs duties were often being assessed the same⁶ (app. supp. R4, tab 26). In a section of the report entitled “Contracting Agencies Erroneously Reimbursed Contractors For Afghan Taxes And Have Not Taken Sufficient Steps To Help Contractors Obtain Tax Exemption Certificates” SIGAR stated in pertinent part:

CENTCOM Joint Theater Support Contracting Command (CJTSCC) also operates as a contracting command for DOD in Afghanistan. Like USACE, CJTSCC’s operations fall under the protections delineated in the SOFA.⁷ Unlike USACE CJTSCC has not developed any procedures to ensure its contractors receive tax exemption. CJTSCC contracting officers we spoke with stated that they were unaware of how the taxation provisions in the SOFA and

⁵ The record includes price quotes from six different fuel suppliers. Each supplier’s quote sets forth as a separately identified component of the total price quoted, customs duty. (App. supp. R4, tabs 250-55; tr. 3/58-59, 173)

⁶ The report was dated May 2013, but the actual audit work occurred between June 2012 and January 2013 (app. supp. R4, tab 26 at 25). The report indicates it was focused on business income taxes, which does not include customs duties (*id.* at 8-9). However the report is peppered with references to customs duties, which we understand as being included in the problems discussed more specifically in the report with respect to business taxes (*e.g., id.* at 17, 19).

⁷ Status of Forces Agreement. The SOFA, which went into effect in May 2003, states that acquisition of articles and services by or on behalf of the United States in implementing the SOFA shall not be subject to any taxes, customs duties or similar charges in Afghanistan (R4, tab 18 at 2).

the Afghan tax code affect their contracts. They stated they have refused to sign letters of introduction or assist contractors in the tax exemption process because they believe tax issues are beyond the contracting officer's responsibility.

....

CJTSCC maintains an Acquisition Instruction meant to provide guidance to its contracting personnel for the appropriate handling of common contracting issues in Iraq and Afghanistan. However, this Acquisition Instruction does not include any explanation of contracting personnel responsibilities or requirements for assisting in contractor taxation issues or tax-exempt status.

(*Id.* at 18-20)

SIGAR made the following recommendation to the government's contracting activities to help ensure that contractors gain tax-exempt status:

Develop procedures to help contractors obtain appropriate documentation of tax-exempt status with the Afghan government.

(*Id.* at 21)

The report includes a response, dated April 17, 2013, from CJTSCC to this recommendation indicating that a bulletin was published on January 21, 2013, summarizing the tax exemptions Department of Defense (DOD) contractors were entitled to. The response also indicates that letter templates had been included with the bulletin to be signed by senior DOD contracting officials to allow contractors to seek the appropriate exemptions from taxes. The response further states the CJTSCC Acquisition Instruction *will* be revised to include guidance that advises contracting officers of their responsibilities and the command's procedures in this area. (Emphasis added) (*Id.* at 26) The templates were not issued until January 21, 2013 and the guidance was not issued until December 13, 2013 (app. supp. R4, tabs 360, 362).

19. GLC submitted a claim certified by [REDACTED] to the contracting officer under date of January 21, 2016, demanding payment for taxes it had incurred under the BPA (R4, tab 7). GLC claimed it had incurred additional costs in the amount of

\$9,584,327.19 for taxes, which it asserted it was entitled to reimbursement for under the contract and the FAR (*id.*).

20. In a decision dated July 8, 2016, the contracting officer denied the claim (R4, tab 16).

21. GLC filed its notice of appeal on October 5, 2016. The Board docketed this appeal as ASBCA No. 60838 on October 6, 2016. (Bd. corr. ltr. dtd. October 6, 2016)

POSITIONS OF THE PARTIES

GLC asserts the Army has breached the contract by failing to follow the procedures set forth in BPA for obtaining the exemption from customs duties including failing to issue the CCR's (compl. ¶¶ 41, 51-55, 66-69). GLC asserts the Army breached the implied duties of good faith and fair dealing and to cooperate by directing GLC to comply with a tax exemption procedure that was not in accordance with the procedure set forth in the BPA (*id.* ¶¶ 73-78). GLC also asserts it is entitled to an equitable adjustment pursuant to FAR 52.229-6 (*id.* ¶¶ 44-48). GLC asserts the government should be estopped from denying payment (*id.* ¶¶ 81-89). Finally, GLC asserts the Army's actions rendered the contract commercially impracticable to perform (*id.* ¶¶ 91-93).

These assertions, other than the assertion GLC was entitled to an equitable adjustment pursuant to FAR 52.229-6, were fully briefed in its motion for summary judgment.⁸ The motion also included a new legal argument, that the government constructively changed the contract. (App. mot. at 16-18) GLC incorporated its briefing relating to its motion into its post-hearing brief by reference (app. br. at 1).

The government argues GLC has failed to establish a breach has occurred because it cannot establish, a duty owed to GLC the government failed to fulfill, or that the damages alleged were foreseeable, caused by the government or reasonable. Although neither clearly argued, nor supported by citation to applicable case law, we understand the government also argues GLC failed to mitigate damages. The

⁸ The Board in an order dated June 20, 2018, advised the parties it was unlikely to be able to rule on the motion before the hearing of the appeal occurred, because the briefing of the motion would not be completed until shortly before the hearing. The Board requested the parties to advise the Board whether they preferred to reschedule the hearing to give the Board the opportunity to decide the motion. The parties elected to proceed with the hearing. Accordingly, the decision on the motion was deferred.

government also argues that GLC abandoned a number of its theories of recovery. (Gov't br. at 7, 12-14, 17-19, 28-40⁹)

DECISION

We hold that GLC is entitled to an equitable adjustment to the contract price pursuant to the Taxes—Foreign Fixed Price Contracts clause of the BPA agreement and thus need not discuss the alternate theories of recovery and defenses thereto asserted. This provision states the contract price *shall* be increased for any taxes a contractor is required to bear, which are specifically excluded from the contract price. (Finding 5)

We begin by noting that although neither GLC, nor the government expressly and directly addressed GLC's argument that it is entitled to an equitable adjustment under FAR 52.229-6, TAXES—FOREIGN FIXED PRICE CONTRACTS (FEB 2013) in their briefing, we do not consider this theory of recovery to have been abandoned and find the record to be sufficiently developed for us to decide this issue. We have held on multiple occasions that failure, to provide evidence relating to a claim or theory of recovery, or to discuss the claim or recovery theory in post-hearing briefing may constitute abandonment and excuse us from having to discuss the issue in our decision. *E.g., Sci. & Mgmt. Res., Inc.*, ASBCA No. 60412, 19-1 BCA ¶ 37,236 at 181,243 (failure to enter evidence of claim constituted abandonment), *United Launch Servs., LLC*, ASBCA Nos. 56850 *et al.*, 16-1 BCA ¶ 36,483 at 177,765 (failure to address release of claims contentions in post-hearing briefing equated to abandonment of the issue); *Hanley Indus., Inc.*, ASBCA Nos. 54315, 56383, 08-2 BCA ¶ 33,932 at 167,922 (failure to present evidence constituted abandonment of issue). However, in this appeal the evidence and the arguments relating to GLC's claim it is entitled to an equitable adjustment, both with respect to advocating for and defending against the claim significantly overlap with that of the other theories of recovery GLC asserted and expressly briefed. Accordingly, there is plenty of evidence in the record relating to this issue and both parties have adequately briefed the issue. We do not consider the claim for an equitable adjustment to have been abandoned by GLC despite its failure in its post-hearing briefing to have expressly identified the arguments it made as relating to this claim.

In order to prevail under an equitable adjustment theory, the contractor must establish liability, causation, and resultant injury. *CATH-dr/Balti Joint Venture*,

⁹ The government argues GLC abandoned the following claims: (1) constructive change; (2) breach of implied duty of good faith and fair dealing; (3) detrimental change in position; and (4) commercial impracticability, by failing to put on evidence relating to these claims. Despite arguing they were abandoned, the government addressed these claims in its post-hearing briefing.

ASBCA Nos. 53581, 54239, 05-2 BCA ¶ 33,046, at 163,782, citing *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991); *Wunderlich Contracting Co. v. United States*, 351 F.2d 956,968 (Ct. Cl. 1965).

There is no dispute the contract specifically excluded customs duties from the price of the fuel GLC was to provide to the government. The government argues that GLC paid no customs duties because it purchased fuel within Afghanistan rather than importing the fuel itself. This argument ignores the unrebutted testimony of GLC's witnesses that all fuel is imported into Afghanistan and is subject to customs duties. This testimony was partially supported by the evidentiary record; *i.e.*, the price quotes GLC received from its vendors, which included a separate component for the customs duties the vendors had paid when the fuel was imported, which GLC's witnesses testified were deducted from the price it charged to the government. The government also argues there is no evidence the vendors actually paid any customs duties. This argument is unpersuasive in the absence of any evidence that the vendors were able to avoid having to pay the customs duties that GLC's witnesses testified are required by Afghanistan law. To the extent the government is arguing the clause is inapplicable to contractors who do not incur taxes directly themselves and instead experience taxes only indirectly as costs passed through to them from vendors and suppliers who are the parties who actually paid the taxes, we disagree with this argument. There is nothing in the language of the clause that would limit it only to directly incurred taxes and exclude taxes incurred as pass through costs from vendors or subcontractors, who were subjected to taxes the contract would otherwise exclude. Taxes incurred as pass through costs included in the pricing from vendors or subcontractors who paid the taxes could raise quantum issues when they have not been expressly identified, which could lead to a failure to prove any injury, but in this appeal the record before us is that GLC paid its vendors a per liter cost that included an expressly identified component for the customs duty its vendor had incurred when the fuel was imported. GLC subtracted this custom duty cost from the price it quoted and was paid by the government. This evidence was unrebutted by the government. This unrebutted testimony and documentary evidence of GLC's additional costs is sufficient to prove that an injury occurred. *Anham FZCO, LLC*, ASBCA No. 58999, 2018 WL 6588212 (Nov. 13, 2018)¹⁰ (unrebutted testimony of additional costs sufficient to demonstrate injury). Both parties introduced expert testimony and reports, which we have considered. We find the expert evidence to pertain more to quantum and to be of little assistance with respect to deciding the issue of entitlement, which is the only issue before us at this time.

The government argues it did not cause GLC's damages, and that it was unreasonable for GLC to have incurred the additional costs it claims because GLC was

¹⁰ For reasons unknown to the Board, this decision has not been published in the official reporter.

performing pursuant to a blanket purchase agreement and had no obligation to accept the delivery orders and perform at a loss. In the circumstances we find this argument unpersuasive. The government's argument ignores that the lion's share of the damages claimed were incurred during the first two months, or less, of the performance period. Both parties' personnel had no experience with a tax exempt contract and were not familiar with the various documents and steps required to actually obtain the exemption. Although the government attempted to assist GLC in obtaining the exemptions to which it was entitled, the assistance was only partially successful; successful with respect to the exemptions for business taxes and completely ineffectual with respect to customs duties. Although the contracting officer never made any express promise that GLC would be reimbursed for the customs duties it had incurred, in the circumstances, particularly given the short time frame involved when the alleged damages occurred, we conclude it was not unreasonable for GLC to continue to perform and deliver the mission critical fuel because it was reasonable for it to believe that the paperwork would eventually catch up with its performance. The record includes evidence that GLC did mitigate its damages by increasing its prices after it realized that it would not be receiving relief from the customs duties included in the prices it was paying to its suppliers and that it would not be able to obtain the documentation necessary to import the fuel free of customs duties into Afghanistan.

The clause further requires that the contractor be without fault or negligence and not to have failed to follow the direction of the contracting officer. The evidence in the record establishes that GLC followed the contracting officer's directions, which were erroneous. The record also establishes that although GLC could have done a better job of using the terminology used in the contract to request the documents from the government necessary to start the exemption process, that GLC did request the contracting officer issue the documents necessary to import fuel into Afghanistan and avoid the customs duties it would otherwise have to pay. On the evidence before us we do not conclude that GLC was negligent or responsible for not being able to obtain the documents necessary to avoid having to pay customs duties on the fuel it delivered in performance of the contract.

CONCLUSION

For the reasons set forth above the appeal is sustained and returned to the parties for a determination of quantum

Dated: March 16, 2021



CHRISTOPHER M. MCNULTY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



OWEN C. WILSON
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 60838, Appeal of General Logistics Group, Ltd. d/b/a GLC Group, rendered in conformance with the Board's Charter.

Dated: March 16, 2021



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals