ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
International Oil Trading Company	)	ASBCA Nos. 57491, 57492
	)	
Under Contract Nos. SPO600-07-D-0483	)	
SPO600-09-D-0515	)	

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGEMENT

International Oil Trading Company (IOTC) has appealed the denial of its claims totaling $74.7 million for fuel delivered to the government under the captioned contracts (hereinafter "Contract 0483" and "Contract 0515"). It now moves for partial summary judgment on two contract interpretation issues regarding Clause F1.09.100(a)(2)(iv)(A) (hereinafter "the Quantity Determination clause") of Contract 0483. The government opposes the motion on both issues. We grant the motion to the extent indicated below.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 3 May 2007, the government awarded IOTC Contract 0483 for delivery of fuel to four military installations in Iraq on an as-ordered (indefinite delivery) basis. The base period of the contract ran from 1 July 2007 through 30 April 2008. The contract specified fixed prices for gallons of fuel delivered to and accepted by the government. The total estimated contract value at award was $456,802,652.89. (R4, tab 2 at 1, 3) The subsequent exercise of options and contract amendments extended the contract performance period to 31 August 2009 and the contract value to $1,068,435,275.91 (*id.* at 13-14, 24, 32, 44).

2. The Quantity Determination clause of Contract 0483 stated in relevant part:

> iv. **DELIVERIES BY TANK TRUCK/TRUCK AND TRAILER/TANK WAGON.**
>
> (A) On items requiring delivery on a f.o.b. destination basis by tank truck, truck and trailer, or tank wagon, the quantity shall be determined on the basis of temperature compensating meters on the receiving system – (or if the receiving system meters are inoperative) on the basis of
>
> (i) Calibrated meter on the conveyance; or
>
> (ii) Gauging the delivery conveyance...; or
>
> (iii) Providing the receiving activity with the net quantity determined at the loading point by a calibrated loading rack meter or calibrated scales. This quantity must be mechanically imprinted on the loading rack meter ticket that is generated by the loading rack meter or scale.)

(R4, tab 1 at A-29, tab 2 at 1-2)[1]

3. The fuel destined for Iraq under Contract 0483 was loaded into IOTC tank trucks in a duty-free zone at the port of Aqaba, Kingdom of Jordan (hereinafter Jordan). The weight of the fuel loaded in each tank truck was determined by Jordan customs officials weighing the truck before and after loading on a calibrated "weighbridge" scale. The "weighbridge" scale mechanically printed a ticket recording the weights and the difference in the weights as the weight of the loaded fuel for each tank truck.

4. For each tank truck load of fuel, IOTC prepared by computer a "Fuel Delivery and Acceptance Form." This form included an identification of the truck and driver, the convoy date, the type of fuel loaded, the fuel weight taken from the Jordan customs weighbridge ticket at Aqaba, and a conversion of that fuel weight to U.S. gallons. The bottom of the form was to be completed by the U.S. government representative at the discharge site acknowledging receipt of the fuel.

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[1] Hereinafter, we will refer to subsections (a)(2)(iv)(A)(i), (ii) and (iii) of the Quantity Determination clause as "alternatives" (i), (ii) and (iii).

5. The procuring agency[2] Quality Representative (QR) at the Aqaba loading site reviewed IOTC's preparation of the Fuel Delivery and Acceptance Forms (app. mot., ex. 3 at 6). After loading and weighing, the tank trucks moved to an assembly area for convoy to the Jordan/Iraq border (app. mot., ex. 3). At the Karama border post on the Jordan/Iraq border, the tank trucks were again weighed by Jordan customs to assure that none of the duty-free fuel in the tanks had been diverted to the Jordan economy while en route to the border. After crossing the border into Iraq, the tank trucks proceeded under U.S. military escort to their respective discharge sites.

6. There were four discharge sites in Iraq for the Contract 0483 fuel. These were Al Asad (AA), Al Taqaddum (TQ), Korean Village (KV) and Trebil. These discharge sites were managed by, and the discharge of the fuel from the tank trucks was performed by, U.S. military personnel or U.S. Army contractor employees. Apart from the truck drivers, no IOTC personnel were allowed into Iraq to observe the discharge process at the sites. It is not disputed that none of the discharge sites had temperature compensating meters on their fuel receiving systems. Three of the discharge sites had meters, but the temperature compensation had to be computed manually. One site (Trebil) had no meter or any other device for measuring received fuel and the government accepted the Aqaba weighbridge measurements at that site. It is not disputed that the government never directed IOTC to provide calibrated dispensing meters or calibrated tank gauging devices on the tank trucks. (Compl. and answer ¶¶ 47, 48, 49; 51, 52; app. mot., ex. 4 at 3; gov't opp'n, statement of undisputed material facts at 7 n.1).

7. Shortly after the start of deliveries under Contract 0483 in July 2007, it became apparent that the gallons reported by the receiving personnel at the discharge sites were less than the loaded gallons indicated on the Fuel Delivery and Acceptance Forms and invoiced by IOTC (R4, tab 5). The contracting officer instructed IOTC to invoice on the basis of the government receiving reports. On 10 August 2007, IOTC responded to this instruction by citing the Quantity Determination clause and further stating:

> It is IOTC's opinion that the conditions on the ground at the discharge points neither meet the metering/gauging requirements of the clause nor allows us to certify the validity of the procedures and the accuracy of the measurements. As you know we are still unable to send our personnel to the bases as required by the Contract and in addition to our presence at the locations we consider necessary (as per normal international procedures on fuel contracts) to use the services of a qualified and reputable independent inspector

[2] The procuring agency at award was the Defense Energy Support Center (DESC). The current name of that agency is the Defense Logistics Agency-Energy (DLA-Energy).

(contracted 50%/50% by both parties) to certify the quality and quantity of the fuel delivered.

Additionally, we have informed DESC that some of our trucks have returned to the border with high quantities of fuel which have given IOTC problems with Customs.

We believe the use of the Government controlled weigh bridge at Aqaba (which generates a printed ticket per truck) and the additional verification of the quantities of the trucks at the weigh bridge at the border (fines are imposed to the trucks if the discrepancy between the two measures is greater than 500 Kgs) represents a more accurate option under the actual conditions to determine our contractual quantities.

However, as a temporary solution to this issue, IOTC has agreed to change our invoices to reflect the discharged figures indicated by the bases in order to be able to receive initial payment necessary to guarantee the continuation of our operations....

(R4, tab 7 at 1)

8. On 21 December 2007, IOTC by counsel requested an interim partial payment of $15,000,000 to compensate IOTC for the difference between the loaded quantities at Aqaba and the government reports of the quantities received at the four discharge sites (R4, tab 13). Discussions of the quantities and payment issues continued between the parties without resolution over the following year, but the requested interim payment was not made. There is no evidence in the record on the motion that the government considered, at any time over the remaining 20 months of contract performance, resolving the dispute by providing the specified temperature compensating meters on the receiving systems at the discharge sites.

9. In June 2008, an internal DESC investigation team was directed to determine, among other things, whether the U.S. government and IOTC were compliant with the Quantity Determination clause of Contract 0483. In a report dated 1 September 2008, the team stated its findings on the contract compliance question as follows:

> Finding 1A: The US Government failed to ensure Temperature Compensating Meters (TCM) were in use at the receiving locations in accordance with (IAW) SPO600-07-D-0483, Quantity Determination Clause F1.09.100, paragraph (A).

Finding 1B: Our investigation found no evidence that the U.S. Government notified IOTC that TCMs were not available.

Finding 1C: Our investigation found no evidence the U.S. Government requested IOTC [to] equip IOTC Tank T[r]ucks with calibrated metering devices IAW default option (i).

Finding 1D: Our investigation found no evidence that the U.S. Government requested IOTC [to] provide calibrated capacity tables to permit gauging of conveyance upon receipt IAW default option (ii).

Finding 1E: Our investigation found that IOTC was not compliant with default option (iii). IOTC provided the receiving activity with a net quantity determined at the loading point by calibrated scale. However, the loading documents presented upon receipt at all four delivery locations are handwritten and not mechanically imprinted. Calibration certifications of the weight scales at the Aqaba Refinery and the Jordanian Customs border post at Karama provided by IOTC to the investigation team were in order and therefore are compliant with default option iii(c).

(App. mot., ex. 4 at 2-4)

10. The finding in the DESC investigation team report that "the [IOTC] loading documents presented upon receipt at all four delivery locations are handwritten and not mechanically imprinted" is contradicted by the 302 Fuel Delivery and Acceptance Forms submitted by IOTC as a sample of the 30,000 deliveries over the 26-month term of the contract. All of the data provided by IOTC on these forms, including the loaded fuel weight at the terminal, is computer printed, not handwritten. The handwritten entries are in the acceptance section of the forms that is completed by the government representative accepting the delivery. Moreover, the computer-printed loaded weight on these forms is exactly the same as the machine-printed loaded weight on the loading terminal weighbridge ticket for the same vehicle on the same loading date. (App. supp. R4, tabs 1, 2; app. mot., ex. 3 at 6-7) On this record, there is no genuine issue of material fact that the net fuel quantity determined at the loading point by calibrated scales was transcribed from the machine-imprinted weighbridge tickets to the Fuel Delivery and Acceptance Forms that were provided to the receiving activity at the discharge site.

11. By letter to IOTC dated 13 January 2009, the contracting officer effectively ended settlement discussions with the following statement:

> This responds to the many discussions between DESC and IOTC regarding IOTC's allegations of quantity discrepancies resulting in underpayments under subject contract.
>
> The quantity determination clause in the contract states that quantity will be determined using temperature-compensating calibrated meters (TCCMs). DESC acknowledges that there are no TCCMs at the destinations to which IOTC is delivering. Quantity is instead determined by calibrated meter with manual temperature correction. This inconsistency between the method described in the contract and the method used does not by itself entitle IOTC to compensation unless it resulted in underpayments. After a review by a dedicated team of inventory management specialists, DESC finds no evidence of underpayment and cannot justify additional compensation to IOTC at this time.

(R4, tab 31)

12. On 5 March 2010, IOTC submitted a certified claim in the amount of $20,032,140.72 under Contract 0483 for the difference between the quantity of fuel measured at Aqaba pursuant to alternative (iii) of the Quantity Determination clause of the contract, and the quantity measured by the government at the discharge sites for the period July 2007 through February 2008 (R4, tab 33).

13. On 20 August 2010, IOTC submitted a supplemental certified claim in the amount of $48,783,478 under Contract 0483 for the difference between the quantity of fuel measured at Aqaba pursuant to alternative (iii) of the Quantity Determination clause of the contract and the quantity measured by the government at the discharge sites for the period 1 March 2008 to 31 August 2009 (R4, tabs 40, 41).[3]

14. By final decision dated 17 November 2010, the contracting officer denied the IOTC claims of 5 March and 20 August 2010 entirely (R4, tab 42). The captioned

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[3] IOTC's claim letter of 20 August 2010 also included a claim in the amount of $5,917,482 under Contract 0515 on grounds similar to the Contract 0483 claims. However, the Quantity Determination clause in Contract 0515 is not identical to the clause in Contract 0483 and the Contract 0515 claim is not at issue in appellant's present motion for partial summary judgment.

appeals followed. The 5 March 2010 claim under Contract 0483 is docketed as ASBCA No. 57491. The 20 August 2010 supplemental claim under Contract 0483 is docketed as ASBCA No. 57492. The 20 August 2010 claim under Contract 0515 is docketed as ASBCA No. 57493.

DECISION

IOTC moves for partial summary judgment on Count I of its complaint. Count I is for judgment in the amounts of $20,032,141 (ASBCA No. 57491) and $48,783,478 (ASBCA No. 57492) for the difference in dollars between the determination of delivered quantity at the Aqaba loading sites pursuant to alternative (iii) of the Quantity Determination clause in Contract 0483 and the determination of delivered quantity using non-temperature compensating meters on the receiving systems at three of the discharge sites with manual computation of temperature compensation.[4] Summary judgment is requested on two issues. The first issue is whether alternative (iii) of the Quantity Determination clause is the applicable measure of delivered quantity. The second issue is whether IOTC complied with alternative (iii). (App. mot. at 3) Summary judgment may be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

On the first issue, the Quantity Determination clause of Contract 0483 stated that the delivered quantity of fuel "shall be determined on the basis of temperature compensating meters on the receiving system – (or if the receiving system meters are inoperative) on the basis of (i) Calibrated meter on the conveyance; or (ii) Gauging the delivery conveyance...or (iii)...the net quantity determined at the loading point by a calibrated loading rack meter or calibrated scales...." The contract did not specify the use of non-temperature compensating meters on the receiving systems with manual computation of temperature compensation as an alternative method of determining delivered quantity. (SOF ¶ 2)

The government argues that the phrase "or if the receiving system meters are inoperative" means that all meters on the receiving systems, whether or not they are temperature compensating meters, must be inoperative before the specified alternatives apply. We disagree. The cited phrase appears in the same sentence and immediately following the specification of "temperature compensating meters on the receiving system." In this context, the words "receiving system meters" in the cited phrase refer to the immediately preceding "temperature compensating meters on the receiving system." The government's interpretation to the contrary is not within the zone of reasonableness and we find no ambiguity in the clause. The government cites a Declaration of the contracting officer dated 20 August 2011 as evidence that the government's intention

[4] The fourth site, Trebil, is not separately addressed in the complaint (*see* SOF ¶ 6).

when it awarded the contract on 3 May 3007 was to use meters to determine quantity and "not IOTC's weight scales" (gov't opp'n at 6). This extrinsic evidence of the contracting officer's unilateral intent cannot be used to vary the unambiguous terms of the written contract. *See Sundt Construction, Inc.*, ASBCA No. 57358, 11-1 BCA ¶ 34,772 at 171,120, *aff'd*, No. 2011-1603, 2012 U.S. App. LEXIS 11614 (Fed. Cir. 2012).

The government argues that manual calculation of the temperature compensation substantially complied with the contractual requirement to use temperature compensating meters (gov't opp'n at 8-12). We do not agree. Manual calculation is inherently more prone to error than machine calculation. Moreover, the government's substitute inspection method is irrelevant where, as here, the contract specified agreed alternatives to the specified primary method and the proffered method was not one of the agreed alternatives in the contract.

The second issue on the motion is also one of contract interpretation. The only non-compliance alleged by the government is that IOTC did not submit the loading-site machine-imprinted weighbridge ticket with each Fuel Delivery and Acceptance Form at the discharge site (gov't opp'n at 12-16). IOTC admits that it did not submit the weighbridge tickets with the Fuel Delivery and Acceptance forms, but denies that the contract required it to do so. We agree. We find nothing in the contract requiring the weighbridge tickets to be submitted with the Fuel Delivery and Acceptance Forms. The contract required that the loaded weight mechanically-imprinted on the weighbridge ticket be provided to the receiving activity, but not the ticket itself. We have found above that there is no genuine issue of material fact that the Fuel Delivery and Acceptance Forms provided the receiving activity with the relevant loading point weighbridge data. (SOF ¶ 10)

The government contends that there are genuine issues of material fact with respect to weight scale calibration and inconsistent IOTC loading data records at the Aqaba loading point (gov't opp'n at 16-17). The cited issues are relevant to the determination of the amount of fuel actually loaded at Aqaba, but are not relevant to the contract interpretation issues on the present motion.

The government argues that events after loading render the loaded amounts "inappropriate" for determining the quantity chargeable to the government. The events referred to are for the most part evidence of pilferage by the truck drivers, leaking tanks, and failure to completely empty the tanks at the discharge sites. (Gov't opp'n at 17-19) The specified primary method and alternatives (i) and (ii) of the Quantity Determination clause clearly placed the risk of fuel losses en route from Aqaba to the discharge sites on IOTC. However, alternative (iii) of the same clause equally as clearly placed the risk of en route fuel losses on the government. If the government thought this risk was unacceptable, it should not have agreed to alternative (iii) before award. Moreover, at any time after award, the government could have avoided entirely any possible risk of

IOTC using alternative (iii) by simply providing the discharge sites with the temperature compensating meters for their receiving systems as was specified in the contract. The government has only itself to blame for failing to do so. (SOF ¶ 8)

The government argues that the motion for partial summary judgment should be denied because Contract 0483 is void for taint of bribery.[5] There is some evidence in exhibits 9-12 of the government's surreply that at sometime after award of Contract 0483, in connection with an award protest and the exercise of the first option year, a $9,000,000 bribe was paid by persons acting for IOTC to a Jordan official to assure that permits required to transport the fuel across Jordan from Aqaba to the Iraq border would be limited to IOTC and two other companies. (Gov't opp'n at 19-20; gov't surreply at 9-12) We will not consider this allegation in deciding the present motion that is limited to the interpretation of the Quantity Determination clause of Contract 0483. However, since further proceedings on these appeals will be necessary, the government may assert its bribery/void contract allegation by appropriate motion. *See Schuepferling GmbH & Co., KG,* ASBCA No. 45564, 98-1 BCA ¶ 29,659.

Finally, the government argues that the motion for partial summary judgment should be denied because IOTC has not provided the information requested by the government on discovery "about interpretation of [the Quantity Determination clause], theft, incomplete loadings, problems with IOTC trucks, and the private actions against IOTC and its president..." (gov't opp'n at 21). We have determined above that the plain language of the Quantity Determination clause was unambiguous. Therefore, discovery of information about the interpretation of the clause is discovery of extrinsic evidence that is irrelevant. *See Sundt Construction,* 11-1 BCA ¶ 34,772 at 171,120. The other information requested by the government may be relevant to other aspects of the appeal, such as the validity of the contract and the quantum claimed, but it is not relevant to the two contract interpretation issues posed by appellant's motion for partial summary judgment.

We have found no genuine issues of material fact on the two contract interpretation issues presented and IOTC is entitled to judgment on those issues as a matter of law. On the first issue, since the government failed to provide the specified temperature compensating meters and failed to implement either of the first two specified alternatives, alternative (iii) was by default the contractually specified method for determining quantity of fuel delivered. On the second issue, the requirement in alternative (iii) was for the load data on the weighbridge ticket. That requirement was met when the Delivery and Acceptance Form with the transcribed weighbridge ticket load data was submitted to the receiving activity at the fuel discharge site.

[5] We note that this was not asserted as an affirmative defense in the Answer.

The motion for partial summary judgment is granted on the first issue. The motion is granted on the second issue to the extent of our determination that the delivery documentation was in compliance with alternative (iii).

Dated: 22 June 2012

MONROE E. FREEMAN, JR.
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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 57491, 57492, 57493, Appeals of International Oil Trading Company, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals