ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
International Oil Trade Center	)	ASBCA No. 55377
	)	
Under Contract No. SPO600-04-D-0506	)	

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OPINION BY ADMINISTRATIVE JUDGE DELMAN ON MOTION FOR SUMMARY JUDGMENT

The Defense Energy Support Center (DESC or government) has filed a motion for summary judgment and contends it is entitled to judgment on this appeal as a matter of law. The appeal involves a claim by International Oil Trade Center (IOTC or appellant) under the subject contract with DESC for recovery of truck and fuel product losses in the amount of $3,819,486 incident to the transporting and delivery of fuel over land routes from the nation of Jordan into the nation of Iraq. IOTC has filed in opposition to summary judgment. The Board heard oral argument on 2 May 2008[1]. We have jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 601-613.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF MOTION

1. From 8 April 2004 to 30 June 2004, immediately prior to the subject contract, Trigeant, Ltd. (Trigeant), an entity sharing common management and owners with appellant, performed as a reprocurement contractor under Contract No. SPO600-04-D-0490. This contract was similar to the subject contract insofar as both contracts provided for the delivery of fuel via land routes from Jordan to Iraq under similar contract provisions. Under both contracts fuel was loaded onto tanker trucks at Aqaba, Jordan and trucked via convoy to the Jordanian – Iraqi border, at which

[1] The transcript references herein refer to the transcript of the oral argument.

time the truck convoy was met and escorted by the U.S. military or its representatives to delivery locations within the same general area in Iraq. The truck convoy then returned to Jordan to repeat the process. Under the Trigeant contract, the fuel was provided for the Iraqi populace in support of a humanitarian effort (tr. 71). Under the subject contract, appellant was to deliver turbine aviation jet fuel, JP8, to military bases for the use of the U.S. military to support the war effort. (Government's Statement of Uncontroverted Facts (GSUF) ¶¶ 2, 3, 4)

2. Under the reprocurement contract, Trigeant delivered 3,500 truck loads of fuel (approximately 28,000,000 U.S. gallons) to Iraq. According to appellant, Trigeant did not experience any truck or product losses due to hostile or enemy action. (R4, tab 29; app. supp. R4, tab 136, Sargeant decl. ¶¶ 10, 11) The U.S. military escort provided Trigeant with the opportunity to make certain repairs to its vehicles when they broke down while in convoy (*id.* ¶ 21). The military escort did not order the destruction or abandonment of any of Trigeant's vehicles (tr. 71).

3. During the spring of 2004, the U.S. Army provided security escort for fuel convoys in southern Iraq under a different contract with a different contractor. Under that contract there were occasions when the U.S. military escort ordered the destruction or abandonment of the contractor's disabled vehicles for military or security reasons. (GSUF ¶ 7) During the negotiation of the subject contract, DESC did not advise IOTC of these occurrences, nor did DESC warn IOTC, in writing or otherwise, that such actions could occur under the subject contract. IOTC did not have actual knowledge of these events in southern Iraq and contends it had no reason to know of them. (App. supp. R4, tab 136, Sargeant decl. ¶ 16; tr. 74)

4. When IOTC prepared its proposal for the subject contract and during negotiations with DESC in May/June 2004, IOTC was aware of the absence of hostile action under Trigeant's contract. IOTC expected the absence of hostile action to continue. IOTC did not anticipate losing any trucks and trailers due to hostile action or by order of the U.S. military escort. (App. supp. R4, tab 136, Sargeant decl. ¶ 15) Based upon the Trigeant experience, IOTC assumed that it would be provided a reasonable opportunity by the U.S. military to repair disabled trucks while in convoy (*id*. ¶ 19).

5. During the negotiation of this contract, appellant supported its proposed per gallon price of fuel by contending, *inter alia*, that its insurance costs for delivery of fuel to the U.S. military under the subject contract would be higher than the insurance costs for delivery of fuel to the civilian population under the Trigeant contract "because the risk of attack is higher" (R4, tab 60 at 3). According to the government, appellant advised the government on 15 June 2004 that it included $0.018 per U.S. gallon as part of its proposed price to represent appellant's insurance costs under the Risk of Loss clause (see below). It appears that some insurance cost for equipment was also included in

appellant's proposed price as part of the transportation cost of $0.45 per U.S. gallon (see appellant's claim dated 11/4/04 at 2, ¶ 5). Appellant advised the government that its "driver" costs would also be higher under the subject contract than under the Trigeant contract because "delivering to a military base represents a greater personal safety risk to the drivers. The drivers demand higher salaries for deliveries to the military bases as they feel these locations are military targets…" (R4, tab 60 at 5).

6. DESC awarded this contract to IOTC on 23 June 2004. The contract was a fixed-priced per gallon, requirements-type contract for delivery of jet fuel into Iraq with economic price adjustment. The original performance period was through 15 December 2004 plus a 30-day carryover for deliveries (R4, tab 21), but it was extended a number of times by contract modification to 7 July 2005 (R4, tab 42). The contract contained the terms and conditions of the Trigeant contract, as amended (R4, tab 21 at 2). It also included a Changes clause, FAR 52.243-1 (AUG 1987) (R4, tab 1 ¶ 14).

7. The contract, as amended, contained a Risk of Loss clause that provided as follows:

> **15**. **RISK OF LOSS**
>
> **a. FOB destination contract provision:**
>
> (1) DESC will assume title and risk of loss for the product when trucks are dispatched from the loading point. The Contractor is also responsible for transporting the product to the destination points. After title passes to the Government, and during transportation of the product, the Contractor shall be liable for loss or damage to the product which results from negligence, or bad faith, or willful misconduct of the Contractor, its employees, or agents for [sic] subcontractors. This includes, but is not limited to, short deliveries, theft by employees or agent, losses stemming from tampering with the trucks or altering measurement devices, or adulteration of fuel, etc. The Government assumes the risk of loss or non delivery [sic] of product due to circumstances beyond the control of the Contractor.
>
> *(2) However, the Contractor bears all risk and responsibility* for personal injury or death of its employees or agents or subcontractor employees or *for any damage to or loss of equipment during transportation of the fuel. These*

types of claims will not be separately reimbursed under this contract.

(R4, tab 18 at 5) (Emphasis added)

8. IOTC was willing to accept the Risk of Loss clause in light of its knowledge of Trigeant's experience under the earlier contract. IOTC believed the Risk of Loss clause would not expose IOTC to substantial risk. According to IOTC, it would not have accepted the clause if IOTC thought that there was a risk of substantial hostile action against convoys. (App. supp. R4, tab 136, Sargeant decl. ¶ 17)

9. The contract as amended stated that "All FOB Destination deliveries of JP8 [fuel] to be made to Al-Assad and Al-Taquddem, Iraq must meet the U.S. Military at the Jordanian Border in order to be escorted as a convoy into Iraq" (R4, tab 17 at 2, A.2, ¶ 19). The United States Military, Central Command (CENTCOM) provided the escorts. CENTCOM is a unified combatant command overseeing combat operations in Iraq and is not under the control of DESC or the Defense Logistics Agency (DLA). (GSUF ¶ 5)

10. The contract as amended also contained the following pertinent provisions:

b. **Security Requirements-**

(1) *Contractor drivers shall take written or verbal direction from Convoy Commander [a contractor representative] and authorized U.S. Military Representative. Contractor drivers shall follow the security guidance from the authorized U.S. Military Representative, Coalition Force provided escort.* [Emphasis added]

(2) The U.S. Military or Coalition [F]orces will provide security escort to convoys.

. . . .

d. Convoy Requirements-

(1) No unauthorized stops will be made with any tanker, unless authorized by the authorized U.S. Military Representative, or escort elements

assigned by the U.S. Military. (Vehicle breakdowns are an exception.)

(2) Contractor shall provide minimum of one bobtail [2] with each convoy. Requirement is subject to change as per direction of the U.S. Military escorts.

(3) Contractor will be responsible for recovery of tractors and tankers. Contractors are responsible for safeguarding of any and all products (situation dependent on the military escorts), and reporting any loss of product to the authorized U.S. Military Representative upon submission of delivery ticket.

. . . .

(5) The U.S. Military Representative reserves the right to remove any convoy commander not following directions. . . .

. . . .

f. Equipment Requirements-

(1) Any authorized U.S. Military Representative has the right to refuse any equipment if deemed unsafe or not road worthy. Contractor will replace this vehicle, if identified in a convoy line up, to include the convoy commander's vehicle.

(2) Maintenance for vehicles shall include repair and replacement of mechanically defective equipment or accident damaged equipment. Contractor shall provide replacement of defective truck and trailer parts.

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[2] A bobtail was a truck without a trailer (the front end or "cab" of the vehicle) that was used, *inter alia*, to tow other vehicles (tr. 70, 103).

> (3) Contractor shall provide trucks that are fully operable, and supply qualified maintenance personal [sic] (tractor, trailer, and fuel tanker) to perform maintenance 7 days a week 24 hours a day. All repairs will be completed within 24 hours. Tankers that need maintenance or are down for ANY reason shall be replaced at no extra cost to the U.S. Military. [Emphasis in original]

(R4, tab 18 at 3-4)

11. On 28 June and 29 June 2004, DESC conducted a post-award conference. IOTC representatives and DESC representatives discussed, *inter alia*, quality control issues, transport safety, and security and convoy requirements. (R4, tab 61) According to IOTC, Mr. Bill Hendricks, the government's quality assurance representative, advised IOTC that it could expect to have two to three hours to repair damaged or disabled equipment in convoy. Mr. Hendricks' statement was generally consistent with appellant's understanding of its contract rights. (App. supp. R4, tab 136, Sargeant decl. ¶ 24)[3] However, there was no contract clause that expressly provided for any such repair time.

12. IOTC began transporting fuel into Iraq under the subject contract in July, 2004. It appears that around this time the military and security situation deteriorated on the land routes used by the convoys to make these fuel deliveries to the U.S. military.[4] IOTC lost a number of tanker trucks while in convoy in Iraq due to direct hostile action, *i.e.*, attacks by enemy forces, land mines and improvised explosive devices.

13. There were also occasions when a contractor's truck broke down while in convoy and needed repair, from a very simple repair (*i.e.*, a flat tire) to the more complex. Pursuant to military guidelines and with due consideration given to the military and security situation, the U.S. military escort generally did not permit repairs during convoy. Rather, it ordered appellant to abandon the disabled vehicle in place to keep the convoy

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[3] Appellant's complaint averred that Mr. Hendricks' statement was made at a pre-award meeting (compl. ¶ 9), but Mr. Sargeant's Declaration indicates it was made at a post-award meeting, which is also consistent with the government's evidence.

[4] The "Defense Department Regular Briefing" on 17 June 2004 referred to media reports of a surge in violence in Iraq (R4, tab 54). The Coalition Provisional Authority handed sovereignty over to an Iraqi government on or about 30 June 2004 (R4, tab 55).

moving. On at least one occasion, it ordered the destruction of a disabled tanker vehicle and ordered the spillage of the fuel so that neither the vehicle nor the fuel would fall into enemy hands. Once vehicles were abandoned, they were subsequently taken or destroyed by third parties and appellant was unable to recover them.

14. On 13 September 2004, IOTC met with DESC at Fort Belvoir, VA to discuss the increased hostilities in Iraq, the lack of time allowed by the U.S. military escorts for repairs and the need to change the Risk of Loss clause in the contract. (R4, tabs 67, 68; app. supp. R4, tab 136, Sargeant decl. ¶ 27) It appears that the government was willing to consider the modification of the Risk of Loss clause at this time.

15. On 28 October 2004, DESC and IOTC met again at Fort Belvoir, VA, discussing IOTC truck losses under the contract (app. supp. R4, tab 108). On 30 October 2004, IOTC's Mr. Bustami sent an email to DESC's Lt. Saleem Tafish stating that "we are trully [sic] suffering big losses on our trucks due to the current unstable situation in Iraq, where the military escort do not provide our convoys even five minutes to repair trucks" (*id.* tab 110). Lt. Tafish replied:

> I agree with you that five minutes is not enough time to fix a truck. Last time I talked to them, they told me that they would allow 15 minutes or more, *if there is [sic] no security problems*.

(App. supp. R4, tab 111) (Emphasis added)

16. On 4 November 2004, IOTC submitted a certified claim to DESC for truck and product losses, in the amount of $2,342,947. As part of the claim, appellant also sought to recover truck losses resulting from a traffic accident in Iraq during transportation of the fuel. Appellant sought a change to the Risk of Loss clause whereby IOTC would be "held harmless for all war losses" and DESC would agree "to indemnify IOTC for all losses and claims arising from war related incidents related to the transportation of the product into Iraq." Alternatively, appellant sought a price increase of $0.30 per U.S. gallon to pay for the cost of "proper insurance." (R4, tab 29 at 2, ¶ 6) IOTC stated that its contract price was based upon the experience encountered under the earlier Trigeant contract:

> As discussed in our September 13 and October 28, 2004 meetings, our performance has been severely affected by increased hostilities and other events related to the war in Iraq beyond our control and without our fault or negligence. These increased hostilities and working conditions were not foreseen at the time we submitted our offer which was based

> under the assumption the deliveries will be under risk conditions similar to the ones we experienced in our previous contract SPO600-04-D-0490 for supplying Diesel and Benzene to the location of Ramadi in Iraq.

(*Id.* at 1, ¶ 1)

17. COL Dave Rohrer, DESC Director of Bulk Fuels, acted as a program manager for DESC on this contract and participated in a number of the meetings and conversations with appellant's personnel concerning the above referenced issues. COL Rohrer was not a contracting officer (CO), nor does the record contain evidence that he otherwise had the authority to modify the IOTC contract, but it appears that he generally kept the CO advised of his conversations with IOTC.

18. On 11 November 2004, COL Rohrer asked DESC counsel, Mr. Howard Kaufer, if there was agreement at DLA to amend the Risk of Loss clause (app. supp. R4, tab 113). On 12 November 2004, the CO sent an email to IOTC explaining that the risk of loss issue was being coordinated with DLA headquarters, and the issue would be further discussed at the DESC-IOTC meeting scheduled for 19 November 2004 in Aqaba, Jordan (app. supp. R4, tab 114).

19. On 18 November 2004, COL Rohrer requested a status report on a revised Risk of Loss clause. Mr. Kaufer replied that the latest version of the clause (with comments) was being sent to headquarters. (App. supp. R4, tab 119)

20. On 19 November 2004, IOTC and DESC representatives, including the CO, met in Aqaba, Jordan to discuss performance issues, including truck losses. After the meeting, COL Rohrer sent the following email to Mr. Kaufer:

> Discussed the basic concept that we are pursuing with IOTC today while on-site in Aqaba. They asked that we relook the shared position when they are forced to abandon equipment. They state, and one of the Dominican Republic drivers confirmed (in a very animated fashion), that they are not given any time to attempt repairs. IOTC felt that under these conditions (zero recovery time) that the 50/50 share was an extremely high cost for them to bear for something as simple as a flat tire or broken fan belt which could have been easily repaired given 30-45 minutes.
>
> I asked point blank if they would add trucks to their fleet if the loss issue was solved. They stated that they would

> which allows us to increase throughput to Al Asad via Jordan thereby reducing 2nd and 3rd destination deliveries from the other two GLOCS.
>
> We need to press forward as quickly as possible in order to set the stage for improved performance.

(App. supp. R4, tabs 120, 136, Sargeant decl. ¶ 32)

21. On 24 November 2004, COL Rohrer and Mr. Harry Sargeant, president of IOTC, had a telephone conversation during which they addressed IOTC's truck losses. According to Mr. Sargeant, COL Rohrer agreed during this call that DESC would compensate IOTC for its claimed truck losses under this contract and would modify the Risk of Loss clause for this purpose to provide that: (a) DESC would compensate IOTC for 100% of the value of each truck destroyed by hostile action and (b) DESC would compensate IOTC for 70% of the value of each truck lost due to abandonment ordered by the U.S. military. According to Mr. Sargeant, COL Rohrer agreed that DESC would provide a contract modification to appellant to implement changes to the Risk of Loss clause. (App. supp. R4, tab 136, Sargeant decl. ¶ 33) According to Mr. Sargeant: "Because of Col. Rohrer's agreement that the Risk of Loss clause would be revised, I directed my operations people to continue to send convoys into Iraq" (*id*. ¶ 34; compl. ¶ 72). COL Rohrer reported this conversation to the CO (R4, tab 75).

22. On 1 December 2004, Mr. Mauco of IOTC sent an email to the CO asking when IOTC would see a draft of the "Contract Risk clause modification" (R4, tab 76). The government had prepared a number of different versions of a revised Risk of Loss clause (app. supp. R4, tabs 116, 123). These drafts were circulated internally within the government, but were not sent to appellant. On 14 December 2004, DESC's counsel put a hold on the processing of a revised Risk of Loss clause due to a potential conflict with the Federal Acquisition Regulation (FAR) (app. supp. R4, tab 124).

23. On 14 December 2004, COL Rohrer expressed frustration with the delay in the government's approval of a revised Risk of Loss clause, stating in an email: "When are we going to have an answer on this? My frustration level continues to grow in that we've been working on this for well over two months" (app. supp. R4, tab 125).

24. On 18 December 2004, IOTC sent an email to the CO stating in part that:

> On november [sic] 4th, we formally submitted a request for a Contract Amendment and a claim for losses (see attachments) and we are still waiting for the compensation associated to those losses and the contract amendment according to our

> meeting at Aqaba and further discussions [sic] COL Rohrer/ H. Sargeant Jr.
>
> We will be submitting shortly a modified and updated claim for losses of product and equipment in Iraq, with the assumption DESC will reimburse 100% of product losses, 100% of equipment lost in direct war actions and 70% of the value of trucks losts [sic] for Abandonment. We hope to receive a formal response and to receive a compensation for our losses on a short basis, in order to be able to sustain our financial efforts and therefore increase our contract performance.

(App. supp. R4, tab 126)

25. By email on 4 January 2005, the CO responded to IOTC's 18 December 2004 email, stating that IOTC may not be entitled to compensation for its destroyed or abandoned trucks:

> Under the terms of the contract as written, the only provision of the contract that shifts risk under the contract from IOTC to the Government deals with product losses due to circumstances beyond the control of the contractor. This same provision specifically states the contractor bears all risk and responsibility for injury or death of its employees and for any damage to or loss of equipment during the transportation of the fuel, indicating claims for which will not be separately reimbursed under the contract. Generally, in this type of situation with these contract terms, a contractor would need to show an actual lack of profitability under the contract in support of a claim.

(*Id.* tab 129)

26. In an internal IOTC email dated 4 January 2005, Mr. Sargeant commented on the above email, stating that "this seems not to be in agreement with what the Col [sic] and I agreed!!" (app. supp. R4, tab 129).

27. On 6 January 2005, IOTC and DESC met again to discuss the subject issues. Mr. Mauco of IOTC summarized that meeting in an internal email, insofar as pertinent, as follows:

> After more than two months of submitting our claim, last week we were told in the meeting with DESC that according to the contract they are only responsible for product losses from the loading point and we are responsible for the equipment even in the event they are lost by a direct war action. This is a new position basically sustained by their General Counsel and even though COL Rohrer and John Walker are trying to help, it seems to be impossible for them to honor the agreement Rohrer/H. Sargeant Jr., unless we go to a Mediation Process or ADR (Alternate Dispute resolution). Harry told them our understanding is we already had a negotiation process and an agreement was already made.

(App. supp. R4, tab 131)

28. On 23 February 2005, IOTC revised its claim amount to $3,819,486. The claim as revised sought recovery for 43 truck losses and related product losses in Iraq and Jordan, including those involving traffic accidents during the transportation of the fuel. The revised claim also sought recovery for the theft of several disabled trucks stolen from the U.S. base where they had been towed. These theft-related losses were in excess of $100,000 and were not part of the earlier claim. Appellant did not file a claim certification. (R4, tab 34)

29. Based upon the government's position as stated in the CO's email dated 4 January 2005, DESC did not revise the Risk of Loss clause during the performance of this contract and did not modify the contract for this purpose. DESC did, however, revise the Risk of Loss clause for the follow-on contract with IOTC for transporting fuel into Iraq, Contract No. SPO600-05-D-0497. (App. supp. R4, tabs 133, 136, Sargeant decl. ¶¶ 39, 40)

30. On 18 May 2005 the parties settled IOTC's claim for product losses experienced on certain convoys in accordance with the Risk of Loss clause in the amount of $477,849.44 plus interest. The settlement agreement was in writing and was incorporated into unilateral contract Modification No. P00012. (R4, tab 39)

31. By decision dated 9 January 2006, the CO denied the balance of appellant's claim. In brief, the CO denied recovery of all truck losses in Iraq and Jordan based upon the Risk of Loss clause, which provided that appellant was to bear all risk and responsibility for any damage to or loss of equipment during transportation of the fuel. The CO also denied IOTC's claim for 11,357 U.S. gallons of product lost on Convoy A, in the amount of $26,462, contending that the government had no responsibility for the

product under the Risk of Loss clause because the loss was attributable to appellant's delays and breach of contract. The CO also denied appellant's claim for 44,477 gallons of product lost in traffic accidents in Jordan, in the amount of $114,725, contending that these accidents were presumably attributable to appellant's negligence. The CO did not specifically address appellant's claim related to the theft of a number of its vehicles from the U.S. military base to which they had been towed. (R4, tab 43) This appeal followed.

THE CONTENTIONS OF THE PARTIES

The government's motion for summary judgment contends that the material facts are undisputed and based upon the contract terms and the governing law appellant is not entitled to recover under any of its proposed legal theories as a matter of law. Appellant does not agree, and contends that at a minimum there are disputed material facts which require the denial of the motion for summary judgment. We briefly describe appellant's contentions below.

Appellant does not challenge the propriety or reasonableness of the decisions of the U.S. military to order the abandonment or destruction of appellant's vehicles based upon its assessment of the military or security situation (supp. opp'n at 3), nor does it dispute that such military decision-making constituted public and sovereign acts. Rather, appellant contends that a government contract may, expressly or impliedly, compensate a government contractor impacted by sovereign acts, and this contract provides for such compensation. According to appellant, this contract provided for a reasonable opportunity for the repair, tow or recovery of its disabled vehicles, and the government's elimination of this right, by sovereign act or otherwise, caused losses to appellant for which it must be compensated. (Tr. 131-34)

Alternatively, appellant seeks recovery of its truck losses on the grounds of mutual mistake of fact, contending that when the parties entered the subject contract they both understood that the risks of loss under the contract would be similar to those under the Trigeant contract; that appellant would have a reasonable opportunity to repair, tow or recover its disabled vehicles under the contract, that appellant would be able to maintain insurance at commercially reasonable costs during the performance period, and that neither party anticipated that the military escorts would order the abandonment or destruction of disabled vehicles. According to appellant, the failure of these mutual understandings to materialize during contract performance caused appellant the loss of its vehicles for which it is entitled to be reimbursed.

Appellant also contends that the government breached its implied duty to disclose superior knowledge to appellant.[5] According to appellant, the government failed to disclose to appellant pre-award the following: that appellant would not be given a reasonable opportunity to repair, tow or recover its vehicles; and that U.S. military escorts had ordered the abandonment or destruction of contractor vehicles under fuel delivery contracts in southern Iraq based upon military necessity, and the U.S. military would do the same under the subject contract.

Finally, appellant contends that the government breached an oral settlement agreement by refusing to acknowledge the cost-sharing formula agreed to by Mr. Sargeant and COL Rohrer, and by refusing to pay appellant's claim based thereon. The government contends that COL Rohrer was not authorized to make such an agreement. Alternatively, appellant contends that the government breached an "agreement to agree" to such a settlement by failing to negotiate and ultimately consummate such a settlement.[6]

DECISION

General Principles

Summary judgment is properly granted where there are no material facts in dispute 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). A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A moving party may discharge its burden by showing that there is an absence of evidence to support the other party's case. The nonmoving party's failure to show an element essential to its case on which it has the burden of proof renders all other facts immaterial and entitles the moving party to summary judgment. *Dairyland Power Cooperative v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994).

Whether IOTC and the Government Reached a Legally Enforceable Agreement on Truck Losses

We conclude as a matter of law that there was no binding, enforceable settlement agreement regarding truck losses for a number of reasons.

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[5] In its complaint, ¶ 65, appellant asserted that DESC failed to disclose knowledge regarding the risk of loss due to war conditions in Iraq. Appellant now represents that its superior knowledge claim "applies only to the equipment lost due to forced destruction or abandonment" (opp'n at 43).

[6] In its complaint, appellant also asserted relief on the grounds of unilateral mistake and unconscionability. Appellant has withdrawn these contentions (tr. 98).

First, it is undisputed that COL Rohrer was not a contracting officer. The subject matter of the Rohrer-Sargeant discussions required a modification to the Risk of Loss clause in the contract. Only the contracting officer had the express authority to enter into such a contract modification on behalf of DESC. *See Trauma Service Group v. United States,* 104 F.3d 1321, 1325 (Fed. Cir. 1997). Appellant also failed to provide evidence that COL Rohrer had any implied actual authority to enter into such a contract modification.

Second, assuming, *arguendo,* that the contracting officer was aware of, and did not object to the Rohrer-Sargeant understanding, this understanding nevertheless required a modification to the contract's Risk of Loss clause and such a contract modification, like a government contract in the first instance, needed to include all the ingredients necessary to support contract enforceability: offer, acceptance and consideration. *Trauma Service Group, supra,* 104 F.3d at 1325. The parties' understanding here was not supported by consideration. Appellant provided no consideration to the government for the benefit it sought under the new risk-sharing formula. Mr. Sargeant's direction to his personnel — to continue contract performance (SOF ¶ 21) — was a pre-existing legal duty. A party's promise to perform a pre-existing legal duty is not consideration for this purpose. *Gardiner, Kamya & Associates, P.C. v. Jackson,* 369 F.3d 1318, 1322 (Fed. Cir. 2004); *Allen v. United States,* 100 F.3d 133, 134 (Fed. Cir. 1996). Because this purported contract modification was not supported by consideration, we conclude it was not legally enforceable.

Third, the risk-sharing formula to be contained in a revised Risk of Loss clause was but one element in a new clause that had yet to be drafted and approved by the parties. The government's draft of the new clause was circulated internally and underwent a number of revisions, but a draft clause was never submitted to the appellant for review and approval (SOF ¶ 22). Indeed, after the purported agreement in the telephone call of 24 November, COL Rohrer expressed frustration over the government's delay in furnishing the modified clause, presumably because things could not move forward without a modified clause approved by the parties. Since the parties' understanding was integrally related to and dependent upon an approved Risk of Loss clause, the failure of the parties to reach agreement on the language of a revised clause precluded a legally binding settlement.

Fourth, we note that a contract modification of the sort contemplated here needed to be in writing. See FAR 2.101, Definitions. See also FAR 43.103(a)(3), 43.301. Indeed, appellant acknowledged that it needed to review a written version of the revised Risk of Loss clause (SOF ¶ 22). The parties also used a writing to memorialize their agreement to settle appellant's claim for product losses even when no revision of the Risk of Loss clause was necessary (SOF ¶ 30).

It is undisputed that neither party signed a contract modification document or any writing with respect to a revised Risk of Loss clause. Hence, there arose no legally binding settlement. *Mil-Spec Contractors, Inc. v. United States*, 835 F.2d 865 (Fed. Cir. 1987) (oral modification of a written contract is ineffective when bilateral writing is required); *Kato Corp*., ASBCA No. 51462, 06-2 BCA ¶ 33,293. This is not a case where the omitted writing was a mere formality or ministerial act. *See Johnson Management Group CFC Inc. v Martinez*, 308 F.3d 1245, 1258 (Fed. Cir. 2002). The government's draft of the revised clause changed over time, and none of the drafts was shared with or approved by appellant. Under these circumstances it was essential to have a writing to reflect the agreed-upon language of the revised Risk of Loss clause. No such writing has been shown.

Based upon the foregoing, we conclude there was no binding, legally enforceable agreement, and we grant summary judgment to the government on this aspect of the claim.

Agreement to Agree

We also find for the government on appellant's allegation that the government breached an obligation to negotiate and to agree to a settlement. In *North Star Steel Co. v. United States*, 477 F.3d 1324, 1332 (Fed. Cir. 2007), the Court stated as follows:

> This court has recognized that *a provision which calls upon the parties to a contract* to agree in the future on a specified point or contract term, often referred to as an "agreement to agree," *imposes an obligation on the parties to negotiate in good faith.* (Citations omitted) (Emphasis added)

Appellant has failed to adduce any evidence to support its *prima facie* case on this claim. First, it has failed to show a provision in a contract calling upon the parties to negotiate the matter of truck losses. Second, it has failed to adduce any evidence that the government failed to negotiate in good faith. Rather, the record shows that the government declined to approve the proposed settlement terms as they were vetted up the DLA chain. We must conclude, absent evidence from appellant to the contrary, that the government's reluctance to change the Risk of Loss clause in the midst of contract performance and to materially alter the risks between the parties upon which the contract was awarded was based upon legitimate legal and policy considerations.

Based upon the foregoing, we grant summary judgment to the government on this aspect of appellant's claim.

Truck Losses Due To Enemy Action

Mutual Mistake of Fact

As was stated by the Court in *Dairyland Power, supra,* 16 F.3d at 1202-03:

> To establish a mutual mistake of fact [a party] must show that:
>
> (1) the parties to the contract were mistaken in their belief regarding a fact;
>
> (2) that mistaken belief constituted a basic assumption underlying the contract;
>
> (3) the mistake had a material effect on the bargain; and
>
> (4) the contract did not put the risk of the mistake on the party seeking reformation. . . .
>
> . . . To establish a mutual mistake of fact, however, the party seeking reformation must show that the parties to the contract held an erroneous belief as to an *existing* fact. [Citation omitted, emphasis in original]. . . . "A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined [under the doctrine of mutual mistake of fact]." Restatement (Second) of Contracts § 151 cmt. a (1981); . . . . Indeed, there is uniformity among the circuit courts of appeals and the commentators that mutual mistake of fact cannot lie against a future event.

The Court affirmed the lower court's grant of summary judgment to the government because the contractor, which had purchased a nuclear reactor plant, was unable to show that the expectation that commercial reprocessing of spent nuclear fuel would be available during the contract term was an erroneous belief of an existing fact shared by the parties at the time the contract was signed. Rather, the demise of commercial reprocessing of spent nuclear fuel was a future event to which the doctrine of mutual mistake did not apply.

We believe the same result is compelled here. Appellant has not adduced evidence showing that at the time the contract was signed the parties shared an erroneous

belief of an existing fact. At best, we deal here with predictions or judgments of the parties as to events to occur in the future, *i.e.,* that future levels of violence would hopefully remain low as they were under the Trigeant contract. To the extent such judgments proved improvident or erroneous, they do not constitute mutual mistakes of fact.[7]

Assuming, *arguendo*, that appellant is able to show evidence of an erroneous belief of an existing fact, it must also show as part of its *prima facie* case that the contract did not put the risk of the mistake on the party seeking reformation. Here, the contract plainly placed the risk of increased violence and the loss of appellant's vehicles on appellant. The Risk of Loss clause clearly states that appellant bears all risk and responsibility for loss of its equipment during transportation of the fuel (SOF ¶ 7). Accordingly, we believe that the doctrine of mutual mistake of fact does not apply under these circumstances.

With respect to the relatively sanguine conditions under the earlier Trigeant contract, neither the government nor the subject contract represented that those conditions would continue into the period of this contract. It is common knowledge that field conditions in a war zone may change at a moment's notice, as apparently they did here. The Risk of Loss clause clearly placed the risk of these equipment losses on appellant.
Moreover, appellant's proposal recognized that this contract contained greater risks of this type than the Trigeant contract (SOF ¶ 5).

For reasons stated, we conclude that appellant may not recover its truck losses caused by enemy fire or hostile action, and we grant the government's motion for summary judgment on this claim.

Truck Losses Resulting From Directions of the U.S. Military

Superior Knowledge

In *Grumman Aerospace Corp. v. Wynne*, 497 F.3d 1350, 1357 (Fed. Cir. 2007), the Court recited the familiar law that in order for a contractor to show a government breach of its implied duty to disclose superior knowledge, it must satisfy the four-part test enunciated in *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000):

[7] A party may seek relief based upon the occurrence of future events beyond the control of the parties, such as discharge by supervening impracticability or supervening frustration, RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 265 (1981), but appellant does not seek relief on these grounds.

> (1) a contractor undertook to perform without vital knowledge of a fact that affects performance costs or duration; (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information; (3) any contract specification supplied misled the contractor or did not put it on notice to inquire; and (4) the government failed to provide the relevant information.

Accord JWK Korea Ltd., ASBCA No. 54198, 06-2 BCA ¶ 33,297 at 165,122.

Appellant has failed to adduce evidence under the four prongs of the *Giesler* test to support recovery of these losses under the superior knowledge doctrine. First, assuming for purposes of this motion that the CO possessed information not shared with appellant regarding the judgments made by the U.S. military in southern Iraq under other contracts to abandon or destroy disabled contractor convoy vehicles, we believe that such judgments – uniquely dictated by military and security considerations at that time and place – did not constitute knowledge that was "vital" to appellant's bid or performance under this contract. Rather, it is undisputed that appellant's bid and performance expectations here were largely colored by the preceding Trigeant contract in which it encountered no truck and equipment losses (SOF ¶¶ 4, 16).

Appellant also has failed to provide evidence under the third prong of the *Giesler* test. This contract specification, reasonably construed, did not mislead appellant regarding the nature of U.S. military direction and vehicle repair. The contract provided that appellant's drivers were required to take direction from, and to follow the "security guidance" of the U.S. military while in convoy, and the number of bobtails in a convoy was subject to the direction of the U.S. military (SOF ¶ 10). Security guidance in a war zone must be construed broadly to include any decision by the U.S. military reasonably related to keeping the convoy moving, including denying repair of disabled vehicles and abandoning property, which is deemed necessary to preserve life, the success of the convoy mission or the war effort in general.

The risks to appellant's vehicles under such circumstances were self-evident. These risks were also underscored by the Risk of Loss clause, which clearly provided that appellant "bears all risk and responsibility" for any equipment damage and loss during the transportation of the fuel (SOF ¶ 7).

In short, appellant did not have the unfettered contract right to repair its disabled vehicles while in convoy. Rather, the ability to repair its vehicles was subject to the assessment of the military and security situation by the U.S. military escort. The contract specification did not mislead appellant in this regard.

For the foregoing reasons, appellant may not recover truck losses resulting from the directions of the U.S. military based upon the doctrine of superior knowledge.

The Changes Clause

Appellant contends that the government constructively changed the contract under the Changes clause by precluding appellant from the opportunity to repair its vehicles while in convoy. Implicit in appellant's position is that the government promised appellant under this contract, expressly or impliedly, that it would have a reasonable opportunity to make repairs to its disabled vehicles while in convoy in Iraq. We find no such clause, nor do we believe such a promise can be reasonably implied from a reading of the contract as a whole. Nor did the statement of the government's quality assurance representative after award regarding "repair time" serve to modify these contract provisions. As we stated above, we read the contract to provide appellant with an opportunity to make repairs subject to the direction of the U.S. military escort and its assessment of the military and security situation.

Because appellant did not have the unfettered contract right to make repairs while in convoy, the government did not expressly or constructively change the contract under the Changes clause through the limitation of these repairs. Nor may appellant recover these losses based upon a claim of "mutual mistake of fact" for reasons stated above. The Risk of Loss clause clearly placed upon appellant the risk of equipment losses during transportation of the fuel.

Compensation for Sovereign Acts

Appellant does not dispute, and we conclude that the decisions of the U.S. military relating to the destruction, or the ordered abandonment of appellant's vehicles for military and security purposes constituted public, sovereign acts. Appellant also does not challenge the reasonableness of these acts. The general rule is that the United States as a contractor cannot be held liable for the public acts of the United States acting in its sovereign capacity. *Horowitz v. United States*, 267 U.S. 458 (1925); *Jones v. United States*, 1 Ct. Cl. 383 (1865).

This general rule is subject to a well settled exception, that is, that the government may contractually agree, expressly or impliedly, to compensate contractors for losses due to sovereign acts. *D & L Construction Co. v. United States*, 185 Ct. Cl. 736 (1968); *Gerhardt F. Meyne Company v. United States*, 110 Ct. Cl. 527 (1948). However, we find no contract provision here that expressly or impliedly promises reimbursement to the contractor for losses directly or indirectly caused by the U.S. military, or through other sovereign acts. The Risk of Loss clause provides otherwise, *i.e.*, stating that the

contractor "bears all risk and responsibility" for any and all equipment losses during the transportation of the fuel.

For reasons stated, we conclude that the government is entitled to judgment as matter of law on appellant's claim for truck losses caused directly or indirectly by the directions of the U.S. military. We have duly considered all of appellant's other arguments, but they have not persuaded us otherwise.

Loss of Product due to Traffic Accidents; Loss of Product in Convoy A

IOTC seeks payment for loss of fuel product in Convoy A and in vehicular accidents. Under the Risk of Loss clause, ¶ 15a.(1), the government is responsible for the nondelivery of product due to circumstances beyond appellant's control and without the negligence or misconduct of appellant or its representatives during transportation of the fuel, as defined by the clause (SOF ¶ 7). However, appellant adduces no evidence on this record showing that these product losses were beyond its control. Appellant has failed to furnish evidence to support its *prima facie* case. Accordingly, we grant the government's motion for summary judgment with respect to these claims.

Theft of Appellant's Vehicles

The government has not persuaded us at this time that it is entitled to judgment with respect to appellant's claim that the government was responsible for the theft of a number of appellant's disabled vehicles from the U.S. military base to which they had been towed. This theft claim raises jurisdictional issues that the parties have not briefed, *i.e.*, whether the claim sounds in tort and is beyond our jurisdiction, *Qatar International Trading Co.*, ASBCA No. 55553, 08-1 BCA ¶ 33,829, or if not, whether it constitutes a new claim in excess of $100,000 that needed to be certified to the CO, 41 U.S.C. § 605(c)(1). The Board believes that additional briefing will help clarify these matters.

CONCLUSION

We have duly considered all the arguments and contentions of the parties. Those matters we have not discussed are not necessary to our determination and to the conclusions we have reached. For reasons stated, the government's motion for summary judgment is granted in part and denied in part consistent with this decision.

Dated: 16 July 2008

JACK DELMAN
Administrative Judge

Armed Services Board
of Contract Appeals

(Signatures continued)
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 No. 55377, Appeal of International Oil Trade Center, rendered in conformance with the Board's Charter.

Dated:

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