ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Free & Ben, Inc.	)	ASBCA No. 56129
	)	
Under Contract No. W91GY0-07-C-0056	)	

APPEARANCE FOR THE APPELLANT: Mr. Ben Emosivbe
President

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
CPT Robert T. Wu, JA
Trial Attorney

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

Appellant, Free & Ben, Inc., entered into a firm fixed-price contract with Joint Contracting Command-Iraq/Afghanistan (JCC-I/A or the government) to provide 126 medium 5-ton cargo trucks for delivery to Taji Warehouse, Baghdad, Iraq. The trucks were intended to be transferred to the Iraqi government. Appellant requested the government to issue an End Use Certificate (EUC) because its supplier needed one as a condition to exporting the trucks from Japan. The government refused to provide an EUC contending that the contract says nothing about issuing one. When appellant made known that it could not fulfill its contract without an EUC, the government terminated the contract for cause pursuant to Federal Acquisition Regulation (FAR) 52.212-4(m). Appellant appealed the termination contending that its failure to perform was excusable and the termination should therefore be converted to one for the convenience of the government. The parties have filed cross-motions for summary judgment.[1] In addition,

[1] Numerous motion papers have been filed in connection with the parties' cross-motions for summary judgment. For ease of reference, citation to the parties' motion papers in each motion shall be as follows: In connection with the government's motion for summary judgment, the Board has before it the following submissions from the parties: (1) Government's Motion for Summary Judgment filed 27 March 2008 (motion papers No. 1), (2) Appellant's Response to Respondent's Motion for Summary Judgment filed 2 July 2008 (motion papers No. 2), (3) Government's Reply to Appellant's Opposition to the Government's Motion for Summary Judgment filed 3 September 2008 (motion papers No. 3), (4) Appellant's Response to Respondent's Opposition filed 14 October 2008 (motion

the government has filed a motion for partial dismissal of appellant's certified claim pending resolution of whether the termination for cause was valid.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 18 April 2007, JCC-I/A, Multi-National Security Transition Command-Iraq (MNSTC-I) Support Division, issued a request for proposal (RFP) to procure 126 "Medium Cargo Truck[s]" including shipping. The procurement was structured as a firm fixed-price buy for commercial items under FAR Part 12. (R4, tab 2) Offers were required to be submitted by electronic e-mail not-later-than 2 May 2007, 2000 local time, Baghdad, Iraq (*id.*).

2. MNSTC-I is a subordinate command to Multi-National Forces-Iraq whose stated mission is "to assist the Iraqi Government in the development, organization, training, equipping, and sustainment of Iraqi Security Forces (ISF) and ministries capable of defeating terrorism and providing a stable environment…which, in time, will contribute to Iraq's external security and the security of the Gulf Region" (motion papers No. 1 at 1 n.1).

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papers No. 4), and (5) Addendum to Appellant's Opposition to the Government's Motion for Summary Judgment filed 27 December 2008 (motion papers No. 5). In connection with appellant's cross-motion for summary judgment, the Board has before it the following submissions from the parties: (1) Appellant Separate Statement of Material Facts As To Which There Is No Genuine Issue and Appellant's Memorandum of Law In Support of Appellant's Cross Motion for Summary Judgment and Opposition to Respondent's Motion for Summary Judgment filed 2 July 2008 (cross-mot. papers No. 1), (2) Government's Opposition to Appellant's Cross-Motion for Summary Judgment filed 9 October 2008 (cross-mot. papers No. 2), and (3) Appellant's Response To Respondent's Opposition to Appellant's Cross Motion For Summary Judgment filed 27 October 2008 (cross-mot. papers No. 3). On 17 March 2009, the Board authorized appellant to provide DoD Directive 2060.1 (9 January 2001) on its representation that the directive may be pertinent to the issues before the Board. Appellant provided the DoD directive by letter dated 28 March 2009; it also provided an eight-page addendum to its opposition to the government's motion for summary judgment (motion papers No. 2 above) and to its response to the government's opposition to its cross-motion for summary judgment (cross-mot. papers No. 3 above). Except with respect to DoD Directive No. 2060.1, appellant essentially repeats the same argument it made previously. The government was given the opportunity to respond to appellant's latest submission.

3. FAR 2.101, DEFINITIONS (JUL 2007) defines the term "Commercial item" to mean:

> (1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and –
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> (i) Has been sold, leased, or licensed to the general public; or
>
> (ii) Has been offered for sale, lease, or license to the general public;
>
> ….
>
> (3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for –
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> (i) Modifications of a type customarily available in the commercial marketplace; or
>
> (ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor….

4. The RFP included FAR 52.212-2, EVALUATION COMMERCIAL ITEMS (JAN 1999) which told offerors that offers would be evaluated on four factors: (1) Technical Capacity, (2) Past Performance, (3) Iraqi Socio Economic Program, and (4) Price. This clause also stated "Initially all proposals will be reviewed and evaluated to determine if the proposed vehicles meet the minimum requirements of the specifications as described in the attached specifications for each vehicle." (R4, tab 2 at 13)

5. With respect to "Technical Capability," the RFP stated that "[t]his acquisition will utilize the Technical Capability of the items offered to meet the Government

requirement. A decision on the technical capability of each offeror's proposal will be made. Each will be evaluated to determine if the offeror provides a sound, compliant approach to meeting the government's requirements as described in the attached Specifications for each vehicle." Offeror's delivery schedule was stated as a Technical Capability evaluation subfactor:

> *Technical Capability Subfactor*: ***Delivery schedule –*** As this item is necessary for the continuous build-up of forces in Iraq, the time frame in which the entire quantity of items can be delivered is of high importance. Offerors shall provide the best possible delivery schedule within the shortest period of time. In addition to this schedule, offerors shall provide evidence of ability to meet the proposed schedule. This may include such items as commitments from dealers or evidence of availability of the number of vehicles they propose. Contractor must affirmatively demonstrate that it is able to take possession of the completed vehicles, effect transportation, and clear all processing through Iraq to ensure delivery by the proposed time. Contractor may initiate partial deliveries immediately upon award.

(R4, tab 2 at 11)

6. The five-page specification for the vehicles required, among other things, removable "TROOP SEATING" for "a minimum of 20 personnel with gear, in the cargo body." It also required "soft cover and support structure" that would not "impede or interfere with the transporting of personnel and gear or the use of a machine gun on the weapon mount." (R4, tab 21 at 5)

7. JCC-I/A received various proposals, including that of appellant. Appellant's proposal made no mention of a requirement for an EUC (R4, tab 4). Department of Defense (DoD) Directive No. 2040.3 dated 14 November 1991 pertains to "End Use Certificates (EUCs)." The directive "[e]stablishes policies, assigns responsibilities, and prescribes procedures for signing EUCs on foreign defense items" (¶ 1.2). DoD Directive No. 2040.3 defines an EUC as "a written agreement in connection with the transfer of military equipment or technical data to the United States that restricts the use or transfer of that item by the United States" (¶ 3.1).

8. According to appellant, it solicited ZAYANI MOTORS W.W.L (Kingdom of Bahrain)/MITSUBISHI (Mitsubishi), Tata Motors, Ltd. (India) (TATA), Kamaz Group of Companies (Russia) (Kamaz), Leyland Trucks Ltd. (U.K.) (Leyland) and Daylight

Engineering Ltd. (Daylight Engineering)[2] for quotes to meet the delivery schedule. It chose Mitsubishi and Daylight Engineering based on their competitive prices, and both indicated availability and delivery to meet the contract delivery schedule. (Motion papers No. 4 at 20)

9. On 23 June 2007, JCC-I/A and appellant executed Contract No. W91GY0-07-C-0056 (Contract 0056). The contract—effective 21 June 2007—was for delivery of 126 Mitsubishi Fuso 5-ton long cargo trucks, including shipping, for $6,161,400. Delivery was required to be completed "no later than **90 Days ARO**" to Taji Warehouse, Baghdad, Iraq. Partial delivery and partial payment were authorized. The "Shipping Instructions" part of the contract told appellant that "[t]he items being acquired are for Iraqi Reconstruction." The specification sheet for the Mitsubishi Fuso 5-ton long cargo truck was attached. (R4, tab 1)

10. Contract 0056 incorporated by reference FAR 52.212-4, CONTRACT TERMS AND CONDITIONS–COMMERCIAL ITEMS (SEP 2005) (R4, tab 1). Paragraph (m) of this clause provides:

> (m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

11. On 23 June 2007, First Lieutenant Robert S. Lady (1LT Lady) sent an e-mail to appellant providing instructions for delivery of the vehicles (motion papers No. 1 at 2, ¶ 5).

12. Appellant states in its notice of appeal that "it was first notified of the need for an End User Certificate by its supplier's [sic] on June 25, 2007" (notice of appeal at 4 of

[2] Documentary evidence provided by appellant shows that on 23 June 2007 it awarded a $763,000 contract to Daylight Engineering to provide custom fitted vehicular covers and removable troop seating for the trucks (*see* motion papers No. 2, tab 12 at 41).

39). On 2 July 2007, appellant sent an e-mail to 1LT Lady requesting issuance of a signed EUC, citing the military application of the vehicles as the reason for the request (R4, tab 5). According to the government, "[t]his was the first mention of an EUC by either party, either prior to award or post award" (motion papers No. 1 at 3, ¶ 6). Appellant disputes the government's assertion that the 2 July 2007 e-mail was the first mention of EUC by either party. Referring to a telephone log (motion papers No. 2, tab 12 at 38), appellant contends that "[p]rior to signing the contract on 21 [sic] June, 2007, Appellant called on Respondent, raising the issue of EUC, to which 1Lt Robert Lady, responded, 'that would be taken care of'" (motion papers No. 4 at 11).

13. On 4 July 2007, 1LT Lady advised appellant by e-mail that "[t]his requirement does not require an EUC and it isn't just a matter of issuing one. It is a very lengthy process. Please let me know if this will be an issue." (R4, tab 5) In reply to 1LT Lady's 4 July e-mail, appellant's 5 July 2007 e-mail advised that an EUC was required for delivery of the Mitsubishi trucks into Iraq. In lieu of Mitsubishi trucks, appellant offered to deliver TATA trucks, stating that the manufacturer of the TATA trucks "did not request an EUC for the export of their troop carrier, instead they relied solely on the purchase order issued by your department to us." (R4, tab 5)

14. On 6 July 2007, appellant sent 1LT Lady an e-mail addressed to CO Riddle. The e-mail acknowledged receipt of the 21 June 2007 order and stated "the delivery of these trucks [Mitsubishi Fuso] cannot be fulfilled without the inclusion of an End User [sic] Certificate (EUC), which states that the end user could neither re-export the vehicles or hand them over to another entity within the country of Iraq." Appellant's e-mail stated that "[t]his is strictly the policy of the country and the company manufacturing these trucks." Appellant requested that the government "either provide us with an EUC…or approve the TATA trucks," stating that "[t]he manufacturer of the TATA trucks did not require an End User [sic] Certificate for this order." (R4, tab 6)

15. 1LT Lady's 7 July 2007 e-mail reply referred to an internet link and said that "[i]n accordance with the Department of State regulation that we follow concerning End User [sic] Certifications [sic]…the vehicles on contract W91GY0-07-C-0056 do not require an EUC."[3] According to the e-mail, the contract was "for standard commercial

[3] In its motion for summary judgment, the government identified 22 C.F.R. § 121.1 to be the pertinent regulation (motion papers No. 1 at 4 n.3). 22 C.F.R. Subchapter M pertains to "INTERNATIONAL TRAFFIC IN ARMS REGULATIONS." 22 C.F.R. Part 121.1 (2007), THE UNITED STATES MUNITIONS LIST, designated Category VII – Tanks and Military Vehicles to include:

> (a) Military type armed or armored vehicles, military railway trains, and vehicles specifically designed or modified

vehicles with very minor modifications and they do not fall under Category VII for Tanks and Military Vehicles." 1LT Lady's e-mail went on to say:

> We will not issue an EUC for this requirement, because none is required. Since you have indicated that you will not be able to fulfill the terms of our contract, I am forced to consider terminating the contract for cause. Please advise me as to whether or not you will be able to deliver the required trucks.

1LT Lady's e-mail said that the government had reviewed appellant's offer to provide similar TATA trucks but "accepting a product other than what has already been evaluated and contracted for is not an option." (R4, tab 6)

16. On 7 July 2007, Lieutenant Commander Jadon Lincoln (LCDR Lincoln), Commodities Team Chief, MNSTC-I Support Division, sent an e-mail to 1LT Lady instructing him to draft a Commander's Critical Information Requirements (CCIR)[4] to "T4C (cause) the current 5Ton truck contract with [appellant]." The e-mail stated that he received legal advice that in order to award to the next contractor in line, "we cannot T4C (convenience)…we would have to terminate for cause." The e-mail went on to say that a show cause notice can be issued 48 hours after a CCIR has been completed, and once appellant was given the opportunity to respond, termination of the contract could follow. LCDR Lincoln mistakenly included appellant as a recipient of the e-mail and unsuccessfully attempted to recall the e-mail from appellant. (R4, tabs 7, 8; motion papers No. 1 at 4, ¶ 11)

17. On 9 July 2007, appellant transmitted an e-mail message to 1LT Lady urging him to "review the cure we have provided the government, and make your best decision as to whether we should continue with the contract or not" (R4, tab 8).

18. On 10 July 2007, appellant sent an e-mail to LCDR Lincoln stating that appellant was "working out a deal with Japan to ensure that the trucks are enrouted via Kuwait or Jordan." The e-mail mentioned that appellant had "your verbal approval that these trucks are destined for the Iraqi troops and will not be re-exported." On the same day, LCDR Lincoln responded to the above e-mail stating he had no knowledge of the conversation referenced by appellant and inquired whether appellant intended to provide

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> to accommodate mountings for arms or other specialized military equipment or fitted with such items.

[4] A CCIR is "a situation report used by the Contracting Officer…to inform the Commanding General, JCC-I/A, of the impending termination for cause" (motion papers No. 3 at 10 n.3).

the Mitsubishi Fuso trucks. Appellant was told "As stated before, there are no plans to issue an EUC for these vehicles." (R4, tab 9)

19. Also on 10 July 2007, appellant advised LCDR Lincoln by e-mail that while Mitsubishi agreed to configure the trucks as specified, "they are unwilling to ship the trucks via Kuwait or Jordan into Iraq without an EUC issued by your department." This e-mail and a subsequent e-mail on the same day offered to provide instead TATA, Leyland or Kamaz trucks at no additional cost to the government "if the government does not want to issue an EUC for the delivering of the Mitsubishi we are proposing." (R4, tabs 9, 10)

20. Appellant notified LCDR Lincoln later on 10 July 2007 by e-mail that:

> Sadly, Mitsubishi has just call [sic] off the deal, because of the government unwillingness to certify that those trucks will not be re exported by the Iraqi troops, once they are in Iraq. We deeply regret this situation as we are trying to do our best to ensure that the government gets the goods in a timely fashion. Thanks.

(Notice of appeal, encl. 22)

21. LCDR Lincoln's 10 July 2007 CCIR to the Commanding General reported that a show cause notice leading to termination for cause would be issued on 12 July 2007. The CCIR gave the following reasons for the action:

> Contractor has requested an End Use Certificate, which is not required for this contract. Contractor has not provided any proof that an EUC is being requested by country providing vehicles. Since contractor is not receiving an EUC, he has shown that he will not be able to deliver in accordance with the terms and conditions of this contract.

(Motion papers No. 2, tab 13 at 15)

22. By letter dated 12 July 2007, 1LT Lady, erroneously signing as CO, advised appellant:

> Since you have shown that you will be unable to perform on Contract Number W91GY0-07-C-0056 within the time required by its terms" [sic] and "[sic] cure the conditions endangering performance under Contract No W91GY0-07-C-0056 the Government is considering terminating the contract

> under the provisions for cause of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to Robert Lady, MNSTC-I-JCCI, APO, AE 09348 (robert.lady@pco-iraq.net), within 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and the Government and the liabilities that may be invoked if a decision is made to terminate for cause.

(R4, tab 11) This letter was sent to appellant as an attachment to an e-mail sent on 12 July 2007 (R4, tab 13, encl. 23). Appellant acknowledged receipt of the letter on 13 July 2007 (*id*., encl. 24).

23. The record shows that on 12 July 2007, appellant received the following e-mail from the Embassy of Japan:

> Dear Mr. Emosivbe:
>
> My name is Hironori Saito, in charge of economic affairs at the Embassy of Japan.
>
> According to the Foreign Exchange and Foreign Trade Act in Japan, one who is going to export/transfer arms and dual-use items (including military trucks or vehicles) is required to obtain an appropriate license from the Ministry of Economy Trade and Industry (METI).
>
> Exporters are required by METI to obtain documents from the intended end-users (e.g. letter of assurance from the end-user, a copy of the contract). In detail, please find the following website (available in English);
>
> http://www.meti.go.jp/policy/anpo/index.html
>
> http://www.mofa.go.jp/policy/un/disarmament/policy/annex1/.html
>
> If you have further technical questions, please contact METI directry [sic]:

Security Export Control Licensing Division
Ministry of Economy, Trade and Industry
TEL: +81-3-3501-2801

Best Regards,

Hironori Saito
First Secretary
Embassy of Japan

(Notice of appeal, 3 August 2007, encl. 26) There is no evidence that Mitsubishi attempted to obtain an export license from METI. Nor is there evidence that METI evaluated the particular procurement and determined that an EUC was required for the Mitsubishi Fuso trucks.

24. Apparently at the urging of appellant, the e-mail from the First Secretary of the Embassy of Japan was also sent directly to 1LT Lady, LCDR Lincoln, and Maj Mark A. Micchio, USAF, Deputy Command Judge Advocate, JCC-I/A (motion papers No. 2, tab 17, encl. 10; gov't 18 June 2008 letter). Because of this communication from the Embassy of Japan, appellant contends that the government "acted in bad faith" and "deception" when it proceeded to terminate the contract stating in the 10 July 2007 CCIR briefing to the Commanding General that "[c]ontractor has not provided any proof that an EUC is being requested by country providing vehicles" (motion papers No. 2 at 6-7; SOF ¶ 21).

25. The government does not dispute that Mitsubishi requested an EUC. It disputes that the request was "in line with international law concerning the shipment of Military vehicles." The government admits that the end user of the contracted for vehicles was the Iraqi government[5] (cross-mot. papers No. 2, Statement of Genuine Issues of Material Fact (Statement of Fact) at 3, ¶ 12).

26. On 18 July 2007, appellant sent the CO an 18-page response to 1LT Lady's 12 July 2007 letter (R4, tab 13). The letter disagreed with the government's assertion that the procurement was for "standard commercial vehicles with very minor modifications" (*id.* at 3 of 18) and contended that since the trucks were to be used as "troop carriers," the procurement would fall under the Wessenaar Arrangement[6] to which

[5] In response to the Board's 30 May 2008 inquiry, the government represented that it was not the end user of the contracted for trucks, and that the trucks were to be provided to "the Ministry of Defense, specifically to the 4th Division/4th Brigade of the Iraqi Forces" (motion papers No. 3 at 14 n.7).

[6] The Wessenaar Arrangement is an export control regime agreed upon by the member states and is based on individual and discretionary determinations by each

both the United States and Japan were signatories. Since the Wessenaar Arrangement "allows each Participating State to determine at domestic level its own definition of the term 'military end-user,'" appellant contended that its inability to effect delivery of the trucks was excusable (*id.*). Appellant contended that the CO was forewarned by DoD FAR Supplement (DFARS) 225.802-71 (2007) of a possible request for signing an EUC when purchasing an item from a foreign source (*id.*). Appellant also contended that "where one party knows the true facts and the other does not…[and] where both parties may be unaware of the truth," it should be permitted to offer the government "another brand name for the 5-tons cargo trucks" as a "cure for the government's refusal to issue an End User [sic] Certificate" (*id.* at 4 of 18).

27. On 25 July 2007, LCDR Lincoln, as CO, terminated Contract 0056 for cause in accordance with FAR 12.403, Termination, and FAR 52.212-4, Termination for cause. The notice told appellant that Contract 0056 was terminated effective immediately upon receipt of the notice, and the notice constituted a final decision of the contracting officer and appellant had the right to appeal under the Disputes clause, FAR 52.233-1, of the contract. The specific reason for the termination was stated as follows:

> (2) Reason for Termination: A request for an End User [sic] Certificate (EUC) was received on 6 July 2007. As this Contract does not require an EUC, the request was rejected. In addition, your response to a "Show Cause Notice" dated 18 July 2007 detailed your company's inability to perform in accordance with the terms and conditions of this contract. It is in the Government's best interest to exercise its right to terminate this contract for default in the interest of procuring the required material from an alternate source.

(R4, tab 14) The termination letter was attached to 1LT Lady's e-mail he sent on 25 July 2007 (R4, tab 16).

28. On 27 July 2007, appellant sent 1LT Lady a certified claim in the amount of $787,760. This amount was calculated as follows:

> member state as to what military and dual-use items to control. Enforcement of the Wessenaar Arrangement is done in accordance "with member countries' national legislation and policies and [is] implemented on the basis of national discretion" (motion papers No. 3 at 11 and encl. 1, *citing* as source http://www.wassenaar.org/publicdocuments/docs/Basic_documents_2008.pdf. Encl. 1 can be found within this site at Background Documents: What is the Wassenaar Arrangement? at page 1). According to the U.S. Department of State fact sheet, there are 33 Wassenaar Arrangement members including Japan, Russia, United Kingdom and United States (http://www.state.gov/t/isn/rls/fs/2001/5285.htm).

Settlement with Subcontractor:	$763,000.00
General and Administrative Expenses	$15,700.00
Settlement Expenses	$9,060.00
NET PAYMENT REQUESTED	$787,760.00

(App. supp. R4, encl. 5)

29. Subsequent to this filing, appellant was directed by a colonel to discuss the claim with 1LT Lady. Appellant was misdirected because 1LT Lady was not the CO on Contract 0056. (App. supp. R4, encls. 6, 7)

30. On 1 August 2007, CO Lincoln issued Modification No. P00002 confirming the 25 July 2007 termination (R4, tab 17).

31. Appellant timely appealed CO Lincoln's 25 July 2007 termination for cause decision by notice dated 3 August 2007. Appellant's notice asked the Board to "reverse the CO's termination decision and award Free&Ben the sum of $763,000 in cost and anticipatory profit" (notice of appeal at 10 of 39). The Board docketed the appeal on 10 August 2007 as ASBCA No. 56129.

32. In connection with appellant's $787,760 certified claim, Maj Micchio advised appellant by e-mail on 15 August 2007:

> Sir,
>
> Please be patient. We are evaluating your position. Your appeal will likely be elevated to Lt Lady's supervisor, LCDR Lincoln. Either LCDR Lincoln or I will contact you regarding this matter in the near future.

(App. supp. R4, encl. 9) According to appellant, LCDR Lincoln departed Iraq on 1 September 2007, without addressing its claim (app. opp'n to mot. to dismiss ¶ 15). The record does not indicate any succeeding CO addressed the claim.

33. The 60 days within which the CO was required to issue a decision or indicate when a CO decision would be issued on appellant's 27 July 2007 certified claim ($787,760) has long since passed. *See* 41 U.S.C. § 605(c)(2) We consider appellant to have appealed the CO's failure to issue a decision in its 3 August 2007 notice of appeal, even though, technically, it would have been premature at the time. Appellant's 27 July 2007 certified claim is accordingly separately docketed as ASBCA No. 56788.

DECISION

I. The Government's Motion for Summary Judgment

Contract 0056 was terminated for cause because of appellant's alleged inability to perform in accordance with its terms and conditions. More precisely, the contract called for appellant to deliver 126 Mitsubishi Fuso 5-ton long cargo trucks to Iraq. The contract was silent about the government providing an EUC. After execution of the contract, appellant notified the government by e-mail that in order for its supplier, Mitsubishi, to export the trucks, an EUC, limiting the end user's ability to re-export or hand over the trucks to another entity within Iraq would be required. This requirement was based on appellant's contention that the trucks procured qualified as military or dual-use items, and thus were controlled by the laws and regulations of the exporting country.

A default termination is a drastic sanction which should be imposed only for good grounds and on solid evidence. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). The government bears the burden of proof with respect to whether the default termination was justified (*id.* at 764). Once the government has established a *prima facie* case, the burden shifts to appellant to prove that the termination for default (or cause in this case) was excusable. *Double B Enterprises, Inc.*, ASBCA Nos. 52010, 52192, 01-1 BCA ¶ 31,396 at 155,110 (holding the burden of proof relating to default termination applies to commercial item contracts terminated for cause).

In moving for summary judgment, the government contends that its termination for cause was justified because the contract did not require an EUC and it had no obligation to issue one. The government asserts that appellant's 2 July 2007 e-mail to 1LT Lady requesting issuance of a signed EUC citing military application of the vehicles "was the first mention of an EUC by either party, either prior to award or post award" (motion papers No. 1 at 3, ¶ 6). Appellant disputes this fact (motion papers No. 2 at 6). Referring to a telephone log, appellant contends that "[p]rior to signing the contract on 21 June, 2007, Appellant called on Respondent, raising the issue of EUC, to which 1LT Robert Lady, responded, 'that would be taken care of'" (motion papers No. 4 at 11; SOF ¶ 12). The government has not contradicted appellant's assertion; it represented that "[w]hile it is understood that Appellant had telephone conversations with Government personnel regarding EUC issuance, the first written reference to Appellant's request was an email sent by Mr. Ben Emosivbe to 1LT Robert Lady on 2 July 2007" (motion papers No. 3 at 12). We note that appellant has inconsistently stated in its 3 August 2007 notice of appeal that "it was first notified of the need for an End User [sic] Certificate by its supplier's [sic] on 25 June 2007" (notice of appeal at 4 of 39, SOF ¶ 12). That would be after both parties had executed Contract 0056.

Implicit in every contract are the duties of good faith and fair dealing between the parties. *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). Generally,

a failure to cooperate with the other party in the performance of a contract serves as a breach of that contract because a failure to cooperate violates the duty of good faith. *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988). As we stated in *Coastal Government Services, Inc.*, ASBCA No. 50283, 99-1 BCA ¶ 30,348 at 150,088:

> "[T]he gravamen of the…inquiry in cases involving a breach of the duty of cooperation is the reasonableness of the Government's action considering all of the circumstances." *PBI Electric Corp. v. United States*, [35 CCF ¶ 75,669] 17 Cl. Ct. 128, 135 (1989). However, [i]ssues that require 'the determination of the reasonableness of the acts of the parties under all the facts and circumstances of the case, cannot ordinarily be disposed of by summary judgment.'"

When appellant's request for a signed EUC became an issue on 4 July 2007, appellant offered to deliver TATA trucks because the manufacturer of the TATA trucks "did not request an EUC" (SOF ¶ 13). 1LT Lady advised appellant by e-mail on 7 July 2007 that the government had reviewed appellant's offer to provide similar TATA trucks but "accepting a product other than what has already been evaluated and contracted for is not an option" (SOF ¶ 15). When Mitsubishi finally declined to provide the trucks without an EUC on 10 July 2007, appellant offered to provide three other trucks that did not require an EUC at no additional cost to the government (SOF ¶ 19). Notwithstanding these offers to perform without condition and additional costs, the CO terminated Contract 0056 for cause on 25 July 2007 (SOF ¶ 27). In opposing the government's motion for summary judgment, appellant contends that the government's refusal to accept its offer to perform without an EUC was a breach of its implied duty of cooperation (motion papers. No. 2 at 11, 17, 19). With appellant's repeated offer to remove the impediment of its inability to perform – the requirement for an EUC – the only justification in the record explaining the government decision to proceed with termination for cause was "accepting a product other than what has already been evaluated and contracted for is not an option" (SOF ¶ 15).

Summary judgment is appropriate where no material facts are genuinely 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 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to determine whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851.

As articulated above, there are genuine issues of material fact with respect to (1) whether appellant was told that the issue of EUC "would be taken care of" before it signed Contract 0056, and (2) whether the government acted reasonably under all the facts and circumstances in rejecting appellant's offers to perform without condition and at no additional costs to the government.

Accordingly, the government motion for summary judgment is denied.

II. Appellant's Cross-Motion for Summary Judgment

The 126 trucks procured were to be provided to the Iraqi Ministry of Defense (SOF ¶ 25, n.5). Thus, it is now clear that the Iraqi forces and not the U.S. government were the end users of the trucks. In moving for summary judgment in its favor, appellant contends that it "made several futile attempts" to reach 1LT Lady to "seek his advise [sic] pertaining to the issuance of an EUC by the Iraqi Government" (cross-mot. papers No. 1 at 31, ¶ 13), and that 1LT lady's "slow reaction" to its phone calls and e-mails reflected an intent to "derail" its contract from the beginning (*id.* at 32, ¶ 14). Appellant also contends that the government failed to disclose information about the end user and was responsible for its failure to perform (*id.*). The government disputes that appellant sought advice from 1LT Lady pertaining to the issuance of an EUC by the Iraqi government (cross mot. papers No. 2, Statement of Facts at 4, ¶ 13), and that 1LT Lady was slow in responding to appellant and failed to provide information about the end user (*id.* at 4, ¶ 14). The government takes the position that appellant "knew or should have known that the trucks were destined for delivery to the Iraqi forces" from the RFP and publicly available documents and to ascertain with its supplier whether an EUC would be necessary to export the trucks (mot. papers No. 3 at 16). The government contends that not only did the CO not contemplate the issuance of an EUC but issuance of an EUC would have frustrated the very purpose of the contract (*id.* at 15).

The principles applied to a motion for summary judgment also apply to a cross-motion for summary judgment. *Town of Port Deposit v. United States*, 21 Cl. Ct. 204, 208 (1990). Where there are cross-motions for summary judgment, each must be evaluated on its own merits. *Alameda Reuse Redevelopment Authority*, ASBCA No. 54684, 06-2 BCA ¶ 33,443 at 165,767.

There are genuine issues of material fact with respect to whether appellant should have known that Iraqi forces were the end users of the trucks being procured, and, from the viewpoint of the government's implied duty to cooperate, whether the government was cooperative. These issues of material fact as well as those we discussed earlier in connection with the government's motion for summary judgment preclude us from granting summary judgment in favor of appellant.

Accordingly, appellant's cross-motion for summary judgment is denied.

III. The Government's Motion for Partial Dismissal

For reasons stated earlier, we consider appellant to have appealed the CO's failure to issue a decision in its 3 August 2007 notice of appeal (SOF ¶ 33). At this juncture, it is unclear whether appellant's certified claim was intended as a termination for convenience claim prepared in accordance with FAR 52.212-4(l) or whether it was intended as a breach of contract damages claim. Weighing the arguments of the parties, the Board believes that appellant's termination for convenience/damages claim should be deferred until the termination for cause case (ASBCA No. 56129) is resolved.

Accordingly, the government's motion for partial dismissal is denied. ASBCA No. 56788 is hereby assigned to appellant's certified claim and proceedings in that case are suspended pending resolution of ASBCA No. 56129.

CONCLUSION

The government's motion for summary judgment is denied. The appellant's cross-motion for summary judgment is denied. ASBCA No. 56788 is suspended pending resolution of ASBCA No. 56129.

Dated: 14 April 2009

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman

Armed Services Board
of Contract Appeals

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. 56129, Appeal of Free & Ben, Inc., rendered in conformance with the Board's Charter.

Dated:

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