

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
DG<sup>21</sup>, LLC ) ASBCA No. 56386  
 )  
Under Contract No. N62742-06-D-4501 )

APPEARANCES FOR THE APPELLANT: John C. Dulske, Esq.  
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San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.  
Navy Chief Trial Attorney  
Mark R. Wiener, Esq.  
Senior Trial Attorney  
Lori W. Chang, Esq.  
Associate Counsel  
Naval Facilities Engineering  
Command Pacific

OPINION BY ADMINISTRATIVE JUDGE THOMAS

The captioned contract requires DG<sup>21</sup>, LLC (DG<sup>21</sup>) to reimburse the Navy for electricity used in government-furnished facilities. DG<sup>21</sup> estimated that it would use 17 kilowatt hours (kWh) per square foot. Its actual usage during the first 12½ months of the contract was 31.16 kWh per square foot.<sup>1</sup> DG<sup>21</sup> demands repayment of \$1,391,109, representing the difference in cost. DG<sup>21</sup> argues that the Navy is responsible for the underestimate under theories of negligent misrepresentation, superior knowledge, mutual mistake and breach of the duty of good faith and fair dealing. It asserts that it was misled by, and relied upon, Amendment Nos. 0004 and 0006 to the solicitation, which stated that historical usage information for electricity was unavailable. The parties elected to have the Board decide the appeal on the record pursuant to Board Rule 11. We deny the appeal.

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<sup>1</sup> All figures are on an annualized basis unless otherwise indicated.

## FINDINGS OF FACT

### Predecessor and Captioned Contracts

1. In 1999, the Navy's Naval Facilities Engineering Command Pacific (NAVFAC Pacific), Pearl Harbor, Hawaii, awarded DG<sup>21</sup> Contract No. N62742-98-D-4500 (Contract 4500) for Base Operating Support (BOS) Services, Navy Support Facility (NSF), Diego Garcia, British Indian Ocean Territory. This contract was the predecessor contract to the captioned contract. (Supp. R4, tab G-4 at 34; app. supp. R4, tab A-1 at 7504)

2. Under Contract 4500, the Navy provided electricity to the contractor free of charge. DG<sup>21</sup> was required to file monthly Electrical Meter Readings reports in accordance with the Contract Data Requirements Lists (CDRLs) with the Diego Garcia Public Works Office (PWO). These reports provided electrical usage information. (Supp. R4, tab G-4 at 34; app. supp. R4, tab A-1 at 7495, 7505-06, 7544)

3. On 6 July 2006, NAVFAC Pacific awarded DG<sup>21</sup> Contract No. N62742-06-D-4501 (Contract 4501) for continued BOS Services, NSF, Diego Garcia. Contract award was for a base period and phase-in/mobilization from 1 August 2006 to 31 July 2007 with multiple option periods. The total estimated price for all potential periods of performance, not to exceed 120 months, was \$455,292,490. (R4, tab 9 at 289, 291)

### Solicitation No. N62742-05-R-4501 and Amendment No. 0001

4. On 2 September 2005, NAVFAC Pacific issued Solicitation No. N62742-05-R-4501, which led to the award of Contract 4501. The solicitation called for a best value selection procurement resulting in a combination firm fixed-price/indefinite quantity contract. The closing date for initial proposals, as amended, was 4 January 2006. Final proposal revisions were received on 28 April 2006. (R4, tab 3 at 9, 58, 122, tab 5 at 134, tab 15 at 1025)

5. The solicitation included annexes 3 through 18 describing the services to be provided. Annex 2 of the solicitation included project overhead costs and administrative requirements which benefited two or more annexes. The solicitation instructed that the price to perform annex 2 should be spread to the unit prices and amounts for annexes 3 through 18. (R4, tab 3 at 10)

6. The solicitation stated that the government would make available the Government-Furnished Facilities (GFF) described in Attachment J-0200000-03 (Attachment J). Attachment J listed the GFF by facility number, facility name, facility description, area in square feet, and year built. The largest facility was the "AIMD" building, containing shops and offices. The AIMD building was built in 2003 and

consisted of 26,059 square feet. By DG<sup>21</sup>'s calculation, the facilities totaled 353,400 square feet. (R4, tab 1 at 87, tab 15 at 1041; app. supp. R4, tab A-19)

7. The solicitation also stated that electricity for the GFF would be made available on a cost reimbursable basis at the prevailing electricity rate. This represented a change from the predecessor contract. Annex 2, Spec Item 2.4.2 gave electricity rates for the last three years. Amendment No. 0001 to the solicitation dated 4 November 2005 stated that the rate for the most recent fiscal year (FY 05) was .3029 per kWh. (R4, tab 1 at 88; app. supp. R4, tab A-20 at 8179)

Appellant's Pricing for Electricity Prior to the Issuance of Amendment Nos. 0004 and 0006

8. DG<sup>21</sup> is a joint venture. The members of the joint venture at time of bid were First Support Services, Inc. (FSSI), which was the managing member, Defense Support Services LLC, and W.S. Atkins International Limited. Mr. Robert W. Unger was the Chairman of the Managing Member Committee. (R4, tab 15 at 1025; supp. R4, tab G-4 at 42)

9. DG<sup>21</sup> prepared its proposal at its principal offices in Dallas, Texas. DG<sup>21</sup>'s proposal manager was Mr. Calvin Hicks, an outside consultant. Mr. George Bernard was the lead estimator and pricer, reporting to Mr. Hicks. Mr. Harold Higa was another pricer working on the proposal. Mr. Unger and his counterparts at the other joint venture members were the decision makers on the final estimates to be used in the proposal. (Supp. R4, tabs G-6 at 62, 65, 90, 110, tab G-7 at 237-38, tab G-8 at 254)

10. Based on the contemporaneous record, DG<sup>21</sup>'s initial approach to the electricity estimate was to determine what actual historical usage of electricity was. Various individuals including Ms. Edie Samonte and Mr. Norman Pounder gathered information from DG<sup>21</sup> personnel on Diego Garcia (sometimes referred to as "the island") relating to the potential cost for electricity and forwarded it variously to Messrs. Hicks, Bernard and Higa. (See, e.g., supp. R4, tab G-1 at 1-5, tab G-7 at 242)

11. On 2 November 2005, Ms. Samonte emailed to Mr. Higa, with copies to Messrs. Hicks, Bernard and Pounder, a spreadsheet which showed that the average monthly cost for electricity of the GFF facilities included in Attachment J over a two month period was \$287,047. Mr. Jun Aquino prepared the spreadsheet based on the Electrical Meter Readings reports which were deliverables to the Navy under Contract 4500. The spreadsheet included an average monthly amount of 22,137 kWh for the AIMD building, which had not been fully occupied at that time. Ms. Samonte stated that the calculations were a "first pass" and that she was still checking the rationale or basis for the electricity costs with the island. (Supp. R4, tab G-1 at 1-5, tab G-7 at 242, 244-45)

12. Mr. Lynn Thompson, DG<sup>21</sup>'s Deputy Director of Utilities on Diego Garcia, also sent Mr. Pounder some information about electricity prices. The prices seemed too high to Mr. Pounder. He asked, via email to Mr. Leon Herndon, that Mr. Thompson review those numbers. (Supp. R4, tab G-7 at 242)

13. In response, Mr. Thompson prepared a spreadsheet which showed electricity consumption for nine transformers for the 12-month period from November 2004 through October 2005. His results were close to those of Mr. Aquino. On 6 November 2005, Mr. Thompson reported to Mr. Herndon:

Leon, attached is my verification of Jun's figures.

Mine are slightly higher due to averaging a full year vice Jun's selective 2 months. This shows the full annual weather impact but the bottom line is that 9 randomly selected transformers match to within \$3,000 so Jun's figures are a good basis for costing the RFP. Only difference is that the AIMD facility in Jun's figures is way low and should be estimated about 90,000 KWH per month....

(Supp. R4, tab G-7 at 244) Mr. Thompson's attachment stated explicitly that his and Mr. Aquino's figures were based on "the Meter Reading Reports (Deliverable) for 12 months" (*id.* at 245).

14. On 7 November 2005, Mr. Herndon sent Mr. Thompson's analysis to Mr. Pounder, stating that "Lynn...went back and checked and still thinks the numbers are right actually he thinks they may be low now, since the AIMD building was figured with it only being occupied by the cal lab people right now. So once we fully occupy it the power usage will go up dramatically [sic]." Mr. Pounder in turn forwarded Mr. Thompson's information to Messrs. Hicks and Bernard and Ms. Samonte on 7 November 2005, stating: "All, More verification [f]rom the island of electricity prices." (Supp. R4, tab G-7 at 242)

15. On 9 November 2005, Mr. Thompson provided additional information about electrical consumption including data for two seahuts (living quarters) and further calculations relating to the AIMD building. Mr. Herndon forwarded the additional information to Messrs. Hicks and Pounder, and Ms. Samonte, with a note: "Hope this helps." Mr. Herndon's email did not show a copy to Mr. Bernard. (Supp. R4, tab G-7 at 239-41)

16. The government has calculated, and we find, that based on Mr. Thompson's 6 November 2005 "verification," the weighted average of consumption for the GFF would be 33.6 kWh per square foot (supp. R4, tab G-5 at 54).<sup>2</sup>

17. On 11 November 2005, Ms. Susan W. Colchin of FSSI transmitted questions about the solicitation to NAVFAC Pacific. One of the questions was as follows:

[The solicitation] makes the contractor responsible for reimbursing the Government for electricity, sewage, and water at Government Furnished Facilities. Historical rates have been provided for each of these. However, there is no historical usage information. Will the Government please provide historical usage? Also, does the requirement extend to areas outside the facilities (such as street lamps for electricity)?

(Supp. R4, tab G-10; app. supp. R4, tab 39 at 7487) The government answered this question among others through Amendment No. 0004 to the solicitation, *infra*.

18. On 15 November 2005, Mr. Unger notified the other members of the joint venture, with copies to Messrs. Hicks and Bernard, that the pricing review for the proposal would take place on 16 November 2005 (supp. R4, tab G-7 at 238).

19. On 16 November 2005, Mr. Hicks distributed an email to Messrs. Unger, Bernard, Higa and others confirming the results of that review. He stated in relevant part:

The pricing review was conducted on 16 November attended by representatives of each JV member company (including Bob Unger...) and the following changes from the pricing were agreed on.

....

George [Bernard] will make the following changes in the pricing proposal.

....

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<sup>2</sup> Appellant does not dispute this calculation. It states the 33.6 kWh per square foot calculation "is consistent with the 31.16 Kwh/sq.ft. rate DG21 is now experiencing.... Accordingly, the historical usage data was relevant because it tracks DG21's current GFF electrical usage." (App. reply br. at 16)

The electrical pricing will be \$2.1 million for all option years based on the square footage of the facilities and the FY 05 unit cost of \$0.3029/KWH for electricity.

(Supp. R4, tab G-7 at 237-38) Mr. Unger confirmed that Mr. Hicks's record was complete in relevant respect (*id.*). We do not have a copy of the pricing proposal discussed at the pricing review, so we do not know from the contemporaneous record what the proposed price for electricity was before it was changed to \$2.1 million.

20. DG<sup>21</sup> included the electrical pricing of \$2.1 million agreed upon in the 16 November 2005 pricing review in its initial proposal submitted to the Navy on 4 January 2006, *infra* (app. supp. R4, tab 33 at 7440).

#### Amendment Nos. 0004 and 0006 to the Solicitation

21. On 21 November 2005, the Navy issued Amendment No. 0004 to the solicitation (R4, tab 5 at 255). Since the Navy issued the amendment after the 16 November 2005 pricing review, it did not affect that review.<sup>3</sup> Attachment JL-11 listed industry questions and the government responses. Question No. 6 in Amendment No. 0004 was the one submitted by DG<sup>21</sup>, which asked whether the government would provide historical usage information about electricity and other utilities. The government answered that “[h]istorical usage information is unavailable.” It also confirmed that street lamps were not considered GFF. (R4, tab 5 at 255) This answer about historical usage information was not correct since, unbeknownst to the NAVFAC Pacific contracting office, the Diego Garcia PWO had available the monthly Electrical Meter Readings reports filed by DG<sup>21</sup> under Contract 4500 (app. supp. R4, tab A-2 at 7711).

22. Amendment No. 0006, issued on 12 December 2005, distributed additional questions and answers. Question No. 10 asked “[w]ould the Government offer remedies to remove the clear advantage offered the incumbent in those areas where additional information is not available?” The questioner cited as examples questions from Amendment No. 0005 which had asked for clarity on workload data essential to develop staffing. The questioner did not refer explicitly to utility costs. The Navy answered in relevant part:

The information provided in previous amendments are the best available information. Much of the information being requested is historical information based on the current

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<sup>3</sup> DG<sup>21</sup> has not alleged that it received advance information about the contents of Amendment No. 0004.

contractors [sic] method of operations. Offerors should based [sic] their proposal on their proposed concept of operations.

(R4, tab 9 at 626)

Internal Navy Communications

23. LCDR Donald George was Deputy Resident Officer in Charge of Construction at Diego Garcia, and the principal point of contact for the procurement team at NAVFAC Pacific. Upon receipt of a question from NAVFAC Pacific, LCDR George would distribute the question to the particular entity on Diego Garcia that was responsible for that portion of the performance work statement in the solicitation and later collect the response or information for forwarding to NAVFAC Pacific. (App. supp. R4, tab A-6 at 7992-95)

24. NAVFAC Pacific followed this procedure with DG<sup>21</sup>'s question identified as Question No. 6 in Amendment No. 0004. On 17 November 2005, LCDR George responded that the information was not available. (App. supp. R4, tab A-6 at 8037, column K)

25. On 18 November 2005, the NAVFAC Pacific contracting office emailed LCDR George a list of 23 questions from Amendment Nos. 0001 through 0003 that had been answered "no information available." The email stated: "Due to concerns from counsel and proposers, request you provide a justification from the SMEs [subject matter experts] as to why the 'information was not available.'" (App. supp. R4, tab A-6 at 8032)

26. On 19 November 2005, LCDR George replied:

Please advise counsel that questions

- \* contained request regarding incumbent contractor performance on current contract.
- \* contained requests for information that would require NSF [Navy Support Facility] to ask incumbent contractor for which they may not need to provide
- \* contained request for information that falls under FFP performance so why would GOVT care.
- \* contains request for information that most NSF GOVT personnel wouldn't be able to compile due to lack of continuity of assigned QAEs (ie 12 month rotations).
- \* Some were not even applicable to bidding efforts.

(App. supp. R4, tab A-6 at 8036)

27. At his deposition in this matter, LCDR George offered the following explanation for his statement “so why would GOVT care”:

The contractor was awarded or provided a fixed-price fee to do a task. So, therefore, it didn't matter to the government how he completed that task as long as the task was done. So, the information, unless it was backed by CDRL, may not have been required.

(App. supp. R4, tab A-6 at 8008)

#### Appellant's Proposals

28. Based on the red-lined final proposal, DG<sup>21</sup>'s 4 January 2006 initial proposal to the Navy set forth its assumption that usage would be 20 kWh per square foot, which resulted in an amount for electricity of \$2,140,897 (app. supp. R4, tab 33 at 7440).

29. In its revised and final 28 April 2006 proposal, DG<sup>21</sup> reduced the amount included for electricity in the proposal to \$1,819,763, based on usage of 17 kWh per square foot. It explained:

In order to price Electricity, DG<sup>21</sup> did an analysis of [Attachment J] and determined that there are 219 facilities assigned...with total square feet of 353,400. We then determine [sic] the type of usage for each facility (high use=40 kWh per SF/year, medium use=21 kWh per SF/year, and low use=12 kWh per SF/year). In our original proposal, we based our assumption on a medium-use facility at 20 kWh per square foot per year. DG<sup>21</sup> revised this estimate based on low-to-medium usage at 17 kWh per square foot per year. We believe this more accurately reflects the type of usage we will experience, on average. Therefore, on an annual basis, we determined that electricity at the FY05 rate provided in RFP Section 2.4.2, Government Furnished Utilities, would be:

$$353,400 \text{ SF} \times 17 \text{ kWh} \times \$0.3029 = \$1,819,763$$

(R4, tab 15 at 1041)

30. Other than this explanation, the contemporaneous record contains little information about why DG<sup>21</sup> decided to reduce its estimated usage from 20 to 17 kWh per



square foot. The only contemporaneous statement relating to this part of the proposal during the period from 4 January 2006 to 28 April 2006 is an email from Mr. Bernard to Mr. Unger dated 25 February 2006 in which he stated: “bob, fuel or electricity is not going to be the reason this project will not be operationally successful” (supp. R4, tab G-3 at 30).

31. Mr. Bernard testified that the fact that the Navy had not asked any questions about the electricity costs in the 4 January 2006 proposal meant to him that DG<sup>21</sup> might be high. Mr. Hicks asked him to look at the estimated electricity consumption, and he did, and he felt that “we could probably cut a little bit there. I guess the number was just so big, it seemed unrealistic.” (Supp. R4, tab G-8 at 261-62, *see also* tab G-6 at 78)

32. There is no evidence in the contemporaneous record that DG<sup>21</sup> reduced the kWh per square foot from 20 to 17 because of Amendment Nos. 0004 and 0006.

#### Actual Usage During Performance of Contract 4501

33. Over the period 1 October 2006 to 15 October 2007, DG<sup>21</sup>'s electrical usage was 31.16 kWh per square foot, nearly twice the electrical usage it had estimated in its final proposal (R4, tab 15 at 886-87).

#### Claim, Final Decision and Appeal

34. On 29 October 2007, DG<sup>21</sup> submitted its certified claim asserting that it should not be required to reimburse the Navy for electrical usage exceeding 17 kWh per square foot and demanding repayment from the Navy for all amounts paid in excess of that amount. The claim was in the amount of \$1,391,109 for the period through 15 October 2007. (R4, tab 15 at 883, 888)

35. On 24 April 2008, the contracting officer issued a final decision denying the claim and this timely appeal followed (R4, tab 20).

#### Messrs. Bernard's and Hicks' Testimony about DG<sup>21</sup>'s Pricing for Electricity

36. Appellant proposes as fact that “[b]ased upon the lack of historical electrical usage data in the Solicitation and the Government’s answers to questions confirming no additional information would be provided to offerors, DG21 decided to calculate GFF electrical usage from other sources” (app. br. at 11). It relies upon the deposition testimony of Mr. Bernard:

The electrical estimate, at the time when we asked the question [asking that the government provide historical usage

information] – when we first evaluated the RFP, we had no idea how we could come up with electrical consumption, which is why we asked the question.

When the answer came back that it was unavailable, I started to feel that that number would be very difficult to come up with. Having been an estimator in an electrical and instrumentation company, there was no hard fast estimate to come up – way to come up with an estimate.

In other words, in my seven or eight years of doing that [estimating], not once had I ever come up with an electrical consumption based on square footage.

So at that point I then went to find engineering studies that I felt were reliable for that, and those were the two studies that I found.

(App. br. at 11-12, quoting supp. R4, tab G-8 at 257) The two engineering studies to which Mr. Bernard referred were: (1) the Energy Information Administration (EIA) – Official Energy Statistics from the US Government – Electrical Consumption Tables for Public Assembly Buildings (EIA study); and (2) an engineering study on electrical usage from the State of Hawaii (R4, tab 11 at 743). These studies showed electrical consumption for various buildings. For example, the EIA study showed 15.9 kWh per square foot for a large, over 50,000 square foot facility. The Hawaii study showed electrical consumption in State facilities in Oahu at 21.1 kWh per square foot. (R4, tab 11 at 743, 752) Based on these studies, according to Mr. Bernard, he settled upon a 20 kWh per square foot figure, which was later reduced to 17 kWh per square foot.<sup>4</sup> (Supp. R4, tab G-8 at 260-61) Mr. Bernard also stated in a declaration that “[h]ad all offerors been provided...historical electrical consumption data for GFF..., DG<sup>[21]</sup> would have estimated its electrical consumption for GFF to be approximately 31 KWHs/Sq.Ft.” (App. supp. R4, tab A-7, ¶ 9, decl. dtd. 18 Dec. 2009)

37. Appellant has not pointed out in its briefs, and we have been unable to locate, any contemporaneous documents from the period prior to award of the contract confirming the use of the two studies, or how they were used. In any event, Mr. Bernard’s recollection at his deposition that the government’s answer to Question No. 6 in Amendment No. 0004 on 21 November 2005, that historical usage information

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<sup>4</sup> We have been unable to correlate the estimation approach described in the proposal, based on the type of usage for each facility, with the estimation methodologies in the cited studies.

was unavailable, triggered his use of the studies to arrive at the estimated kWh in the proposal cannot be correct since the joint venture's pricing review on 16 November 2005 had already determined that the price in the proposal would be \$2.1 million. That price, as a matter of mathematics, and as indicated in appellant's proposal, was based on 20 kWh per square foot, and that price did not change subsequent to Amendment Nos. 0004 and 0006 and prior to submission of the initial proposal on 4 January 2006. Accordingly, we decline to adopt DG<sup>21</sup>'s proposed fact, and conclude that Mr. Bernard's testimony and declaration are unpersuasive.

38. Mr. Hicks, the proposal manager, also testified by deposition about preparation of the proposal. He did not develop the electrical estimate. The electrical estimate became a concern "[a]fter the question came back saying historical data was not available." He further explained, "when the government said that the data wasn't available, that...made it sound like any data that was produced wouldn't be reliable. So then another estimate approach had to be taken." Mr. Hicks also said that if he received a spreadsheet reflecting kWh usage from the island, "it would have been of minimal use to me, because the island gave me lots of information that wasn't reliable and wasn't part of the contract." He was "very skeptical" of anything that came from Mr. Thompson. Mr. Hicks would have used the historical consumption data if it came from the government, "because I would have known with confidence that everybody was using it, and that the government perceived it as valid." (Supp. R4, tab G-6 at 62, 67, 70, 75, 95, 113, 118) We find that Mr. Hicks' testimony also is unpersuasive, since he too failed to acknowledge that the critical pricing decision to use an estimate of 20 kWh per square foot for purposes of the January 2006 proposal was made on 16 November 2005, before the government issued Amendment No. 0004 to the solicitation stating that historical usage information was unavailable (findings 19, 21). Furthermore, Mr. Hicks did not satisfactorily explain why the joint venture would ignore, if it did, data which it had itself provided to the government.

## DECISION

The core of appellant's claim is that it was misled by the Navy's issuance of Amendment Nos. 0004 and 0006 and, therefore, estimated electrical consumption at 17 kWh per square foot rather than approximately 31.16 kWh per square foot. Amendment No. 0004 dated 21 November 2005 stated that there was no available information about actual historical usage. Amendment No. 0006 stated that information provided in previous amendments was the best available information. Amendment No. 0004 was erroneous because it failed to disclose that DG<sup>21</sup> had provided monthly Electrical Meter Readings reports under Contract 4500. Amendment No. 0006 was erroneous, according to appellant, because it in effect repeated the statement in Amendment No. 0004. Appellant states that if it had received the historical GFF usage information, it would have estimated its electrical consumption for GFF to be

approximately 31 kWh per square foot (app. br. at 22). It argues that it is entitled to recover under theories of negligent misrepresentation, superior knowledge, mutual mistake and breach of the duty of good faith and fair dealing (*id.* at 1).

We are unable to reconcile appellant's claim with the facts. As the incumbent, DG<sup>21</sup> knew that historical information was available. In early November 2005, DG<sup>21</sup> sought to determine what actual historical usage of electricity was. Messrs. Aquino and Thompson, drawing upon the monthly Electrical Meter Readings reports, provided that information in emails which went, among others, to Messrs. Hicks and Bernard. We found that this information indicated historical usage of 33.6 kWh per square foot. Subsequently, on 16 November 2005, Mr. Unger convened a pricing review at which it was decided to price electricity at \$2.1 million, a price which was based, as explained in DG<sup>21</sup>'s 4 January 2006 proposal, on electrical consumption of 20 kWh per square foot. That number of 20 kWh per square foot did not change when the Navy subsequently issued Amendment Nos. 0004 and 0006. When DG<sup>21</sup> submitted its revised proposal in April 2006, it reduced the estimated electrical consumption from 20 kWh to 17 kWh. It is not clear why it made this reduction. We consider the explanation that DG<sup>21</sup> reduced the estimate from 20 kWh per square foot because the Navy had not questioned it unpersuasive. In any event, there is no evidence in the contemporaneous record that DG<sup>21</sup> decided to reduce the estimate in April 2006 because of Amendment Nos. 0004 and 0006 in November and December 2005.

In short, appellant has failed to establish either that it was misled by the erroneous statement that there was no historical information available or that it relied upon it. In view of the facts, it cannot recover under any of its legal theories. Thus, “[i]n order for a contractor to prevail on a claim of misrepresentation, the contractor must show that the Government made an erroneous representation of a material fact that the contractor honestly and reasonably relied on to the contractor’s detriment.” *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 729 (Fed. Cir. 1997). Appellant has not shown that it relied on the government’s erroneous statement, let alone that it honestly and reasonably did so. The superior knowledge doctrine requires that the “contractor undertook to perform without vital knowledge of a fact that affects performance costs or duration.” *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000). Appellant knew that there was historical information available, and its personnel had collected that information for the benefit of the proposal team, whether or not the proposal team chose to use it. In order to obtain reformation of a contract upon ground of mutual mistake, the parties to the contract must have been mistaken in their belief regarding a fact. *Bank of Guam v. United States*, 578 F.3d 1318, 1330 (Fed. Cir. 2009). Here, again, appellant was not mistaken. It knew there was historical information available. Finally, the duty of good faith and fair dealing “imposes obligations on both contracting parties that include the duty not to interfere with the other party’s performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.” *Centex*

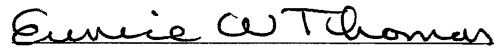
*Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). This duty deals with good faith in performance of a contract, not its formation. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (1981). Regardless, appellant has not shown that the government's error about the availability of historical information, when DG<sup>21</sup> knew the information was available, destroyed its reasonable expectations regarding the fruits of the contract.

We do not overlook the Navy's failure to get the facts right, or LCDR George's apparent attitude that it is not the Navy's problem if the facts are wrong, but neither had any proven impact on DG<sup>21</sup>'s proposal. *Cf. Robins Maintenance, Inc. v. United States*, 265 F.3d 1254, 1258 (Fed. Cir. 2001) (contractor's status as the incumbent and its ten years of service performing grounds maintenance clearly showed that it was aware of accurate acreage of the grounds and was not misled by an erroneous specification).

CONCLUSION

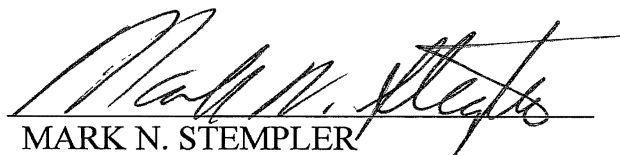
The appeal is denied.

Dated: 28 November 2011



EUNICE W. THOMAS  
Vice Chairman  
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



CAROL N. PARK-CONROY  
Administrative Judge  
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. 56386, Appeal of DG<sup>21</sup>, LLC, rendered in conformance with the Board's Charter.

Dated:

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