

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Raytheon Missile Systems) ASBCA No. 57594
)
Under Contract No. N00019-04-C-0569)

APPEARANCES FOR THE APPELLANT: Robert M. Moore, Esq.
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APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
Navy Chief Trial Attorney
James T. DeLanoy, III, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE CLARKE ON THE GOVERNMENT'S
MOTION FOR SUMMARY JUDGMENT

The Navy filed a motion for summary judgment contending that it is entitled to judgment as a matter of law because Raytheon assumed the risk of fuel price fluctuation in its fixed-price contract. Raytheon Missile Systems (Raytheon) opposes the Navy's motion contending, among other things, that the Naval Air Systems Command (NAVAIR), the Navy's contracting party, and the Defense Logistics Agency Energy (DLA-Energy) caused the increase in fuel price and thereby constructively changed the contract and breached the implied duty of non-interference. We have jurisdiction under the Contracts Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. Because Raytheon has raised issues of disputed material fact, we deny the Navy's motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 5 October 2009, Raytheon submitted a claim in the amount of \$3,909,544 arising from increases in costs of JP-10 fuel under the captioned contract (R4, tab 12). The Navy contracting officer issued a final decision on 4 February 2011 denying the claim (R4, tab 21). Raytheon appealed the final decision by letter dated 14 April 2011 and the appeal was docketed as ASBCA No. 57594 on 15 April 2011 (R4, tab 22).

2. The Navy filed a motion for summary judgment on 5 July 2011 (gov't mot.). The Navy's motion is based on the following four "Undisputed Material Facts:"

1. Raytheon Company was awarded contract N00019-04-C-0569 effective 18 August 2004, Rule 4 (a), Tab 4, P.1.

2. Contract N00019-04-C-0569 was firm fixed price, Rule 4 (a), Tab 4, Complaint paragraph 9.

3. Contract N00019-04-C-0569 did not contain an economic price adjustment clause. Rule 4(a), Tabs 4 and 21.

4. After contract N00019-04-C-0569 award, Raytheon Company experienced a JP-10 fuel price of \$ 13.09 per gallon for JP-10 fuel delivered to it from its supplier in FY 2006 and of \$25 per gallon for JP-10 fuel delivered to it from its supplier in FY 2007 – FY 2010.

(Gov't mot. at 1-2)

2. In "APPELLANT RAYTHEON COMPANY'S RESPONSE TO THE GOVERNMENT'S STATEMENT OF UNDISPUTED MATERIAL FACTS" Raytheon did not dispute the first three of the Navy's undisputed facts (app. resp. at 1).¹ Raytheon responded to the Navy's fourth undisputed fact as follows:

Paragraph 4 of the Government's Statement of Undisputed Material Facts is disputed as far as there is any suggestion on the part of the Government that Raytheon's JP-10 fuel supplier is a private entity or that Raytheon negotiated with and/or choose [sic] its supplier. The Defense Logistics Agency ("DLA") is the sole source of supply for JP-10 fuel available to Raytheon. (Government's Rule 4 Appeal File ("Rule 4") at Tabs 1, 6, 9 p. 1; Appellant's Supplement to Government's Rule 4 Appeal File ("App. Rule 4") at Tabs 7-11, 13).

(*Id.* at 1, 2) Raytheon went on to set out 32 paragraphs of additional undisputed facts (*id.* at 2-6).

¹ Raytheon also filed separately "APPELLANT RAYTHEON COMPANY'S OPPOSITION TO THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT" ("app. opp'n").

3. In its opposition to the government's motion, Raytheon set out a two paragraph "STATEMENT OF FACTS" (app. opp'n at 2-3). In these facts Raytheon states that it was required to use JP-10 fuel in its performance of Contract No. N00019-04-C-0569, it was obligated to purchase JP-10 from the "sole supplier" of JP-10, DLA-Energy, and that in FYs 2007 through 2010 it experienced a "nearly 80%" price increase for JP-10 (*id.*). Raytheon stated, "[t]his unilateral price increase, unrelated to any economic or market conditions, increased Raytheon's cost of performance by over \$3,360,000" (*id.* at 3). Raytheon explains that the price increase was the result of a "corporate decision" made by DLA-Energy to construct a Defense Fuels Support Point (DFSP) specifically for JP-10 financed by an increase in the price of JP-10, and that construction of the DFSP supported NAVAIR's programs (app. resp. at 4, ¶¶ 19, 28).

5. The Navy did not file a reply to Raytheon's Response to the Government's Statement of Undisputed Material Facts or a paragraph-by-paragraph reply admitting or disputing Raytheon's 32 paragraphs of additional undisputed facts contained therein.

DECISION

It is well settled that summary judgment may be granted when the moving party can show that there are no genuine, disputed material facts 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). We draw all justifiable inferences in favor of the party opposing the motion. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010). Raytheon raises legitimate issues of law and material disputed fact that require denial of the Navy's motion.

The primary thrust of the Navy's argument is that since the firm-fixed-price contract did not include an economic price adjustment clause, the risk of JP-10 price fluctuation was allocated by the contract to Raytheon (gov't mot. at 2-3). Raytheon responds that while it assumed some risk of fuel price fluctuation, it "did not assume the risk that the Government would take advantage of Raytheon's contractual obligations, forcing Raytheon to finance capital improvement projects for NAVAIR" (app. opp'n at 5).

Raytheon argues "[t]here are genuine issues of material fact surrounding the relationship between NAVAIR and DLA-Energy, the bond that existed between those entities, and the actions they took as a result of the relationship or bond between them" (app. opp'n at 9-10). Citing *Weaver Construction Co.*, DOT BCA No. 2034, 91-2 BCA ¶ 23,800, Raytheon argues that when there exists a "significant bond" between government agencies the actions/knowledge of one may be imputed to the other (*id.* at 10-11). Raytheon argues that there are disputed material facts relating to DLA's basis for increasing the price of JP-10 (*id.* at 10).

The Navy dismisses Raytheon's argument that the fact DLA-Energy was the supplier of JP-10 makes a difference—"[h]owever, Raytheon cites no authority for distinguishing between the source or a supplier on the basis of being Government or non-Government" (gov't reply at 1). Contrary to the Navy's contention, Raytheon did cite authority for the proposition that the fact a supplier is another government entity may make a difference in the allocation of risk. In *Weaver Construction*, the case cited by Raytheon, the actions of the Forest Service were imputed to the Federal Highway Administration:

That the acts were committed by personnel of the Forest Service rather than by Federal Highway Administration personnel is irrelevant. Where there is a "significant bond" between two agencies and their projects, the Government will be held liable for a breach, even though it is committed by the non-contracting agency. *See, J. A. Jones Construction Co. v. United States*, 182 Ct. Cl. at 626 [390 F.2d at 892]. *Accord, L. W. Foster Sportswear Co. v. United States*, 186 Ct. Cl. 499, 510 (1969).

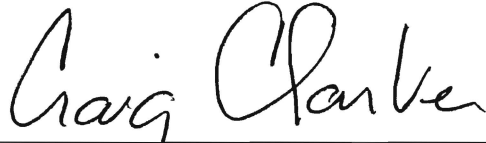
Weaver Construction, 91-2 BCA ¶ 23,800 at 119,184. In *Jones Construction Co. v. United States*, 390 F.2d 886 (Ct. Cl. 1968), the court noted that the Air Force and Army Corps of Engineers (COE) were part of the Department of Defense (DOD) and that the COE was the "construction agency" for the Air Force (*id.* at 892-893). Based on this relationship, the court held that the Air Force, though not the contracting party, had a duty to disclose to Jones certain construction plans that would increase Jones' labor costs. Drawing all reasonable inferences in favor of Raytheon as the non-movant, the relationship between the Navy and DLA-Energy was similar to that between the Air Force and COE. The implication from these cases is that under the right circumstances DLA-Energy's price increase for JP-10 may be imputed to the Navy. The Navy failed to deal with this line of cases in its reply, cases that go to the heart of the Navy's argument.

Raytheon argues that the relationship between DLA-Energy and the Navy (the "significant bond" question) involves material disputed facts. (app. opp'n at 9-11). Raytheon argues that the Navy and DLA-Energy were obligated to coordinate so as to avoid interfering with Raytheon's performance of the contract and that genuine issues of material fact exist concerning this obligation (app. opp'n at 12-13). We agree with Raytheon that disputed material facts exist in this case, particularly in view of the fact that the Navy failed to address the cases cited by Raytheon.

CONCLUSION

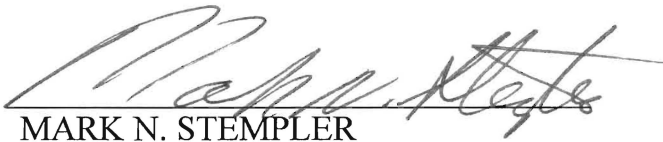
The motion is denied.

Dated: 11 October 2011



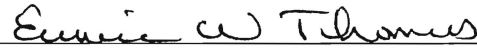
CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 57594, Appeal of Raytheon Missile Systems, rendered in conformance with the Board's Charter.

Dated:

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