ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Southern Defense Systems, Inc.	)	ASBCA Nos. 54045, 54528
	)	
Under Contract No. F33657-96-D-2018	)	

APPEARANCE FOR THE APPELLANT: Mr. Thomas Jones
Vice President

APPEARANCE FOR THE GOVERNMENT: Alan R. Caramella, Esq.
Acting Air Force Chief Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAGE

The government and Southern Defense Systems, Inc. (SDS, appellant or contractor) entered into Contract No. F33657-96-D-2018 (basic contract or underlying agreement) which required SDS to furnish various aircraft support equipment (SE). ASBCA Nos. 54045 and 54528 focus upon SDS's attempt to recover the full 20% pass-through rate on purchases made under delivery order number 20 (D.O. No. 20) instead of the 6.4%[1] rate agreed to in that order. Appellant asserts in both appeals that the government violated underlying contract terms in making D.O. No. 20; it alleges in ASBCA No. 54045 that the lower rate resulted from a mistake, and alternatively charges the government in ASBCA No. 54528 with bad faith, coercion, duress and misrepresentation. Entitlement only is before us. We deny the appeals.

FINDINGS OF FACT

The Parties' Agreement

On 31 July 1996, the United States Air Force (AF), Aeronautical Systems Center (ASC) at Wright-Patterson Air Force Base (WPAFB), entered into tripartite Contract No. F33657-96-D-2018 with the Small Business Administration (SBA). SBA in turn contracted with SDS to provide various SE for C-17 aircraft pursuant to individual delivery orders placed by ASC (R4, tab 1). SDS is a small business (8a) contractor (*id.* at 24). Mr. Robert E. Kelly, SDS's president, signed the agreement on its behalf (*id.* at 2).

[1] The parties cite the lower pass-through rate variously as 6.3%, 6.4%, and the more precise 6.38227% paid to SDS in D.O. No. 20 for the "buy" items. Unless referring to the record, this decision uses 6.4% for convenience.

Among standard clauses from the Federal Acquisition Regulation (FAR) incorporated by reference into the agreement is FAR 52.233-1, DISPUTES (OCT 1995) (*id.* at 20). Also included is FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995), which provides at ¶ (a) that this is an indefinite-quantity contract for the supplies or services specified, and that the quantities provided in the schedule are estimates only. This clause provides at ¶ (b) that "The Government shall order at least the quantity of supplies or services designated in the Schedule as the 'minimum'" (*id.* at 19). However, no minimum amount or quantity was specified.[2]

With exceptions not relevant here, contract clause FAR 52.219-17, SECTION 8(a) AWARD (FEB 1990) at ¶ (a)(2) vests ASC with "the responsibility for administering the contract with complete authority to take any action on behalf of the Government under the terms and conditions of the contract" (R4, tab 1 at 24).

Delivery orders were to be issued in accordance with FAR 52.216-18, ORDERING (OCT 1995). This clause, which was incorporated by reference, provides in relevant part:

> (b) All delivery orders or task orders are subject to the terms and conditions of this contract. In the event of conflict between a delivery order or task order and this contract, the contract shall control.

(*Id.* at 19)

Contract Section H, "SPECIAL CONTRACT REQUIREMENTS," ¶ H-009 "DELIVERY ORDERS," provides in relevant part:

> (a) Upon receipt of any Order issued hereunder by the Contracting Officer (CO), the Contractor, pursuant to such Order, shall furnish to the Government supplies or services of the type and at the prices as agreed upon in accordance with ATCH NR 2, SECTION J hereof, entitled "NEGOTIATED RATES AND FACTORS FOR PROPOSED DELIVERY ORDERS". Orders may be issued at the sole option of the Government during the period set forth in the "Ordering" clause FAR 52.216-18.

(*Id.* at 12)

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[2] In a prior decision we determined that the basic contract was not a valid ID/IQ contract since it lacked a guaranteed minimum. *Southern Defense Systems, Inc.*, ASBCA Nos. 54045, 54528, 07-1 BCA ¶ 33,536 at 166,138. Subject to SDS's defenses raised in this appeal, D.O. No. 20 was definite and binding (*id.*).

Attachment 2 contained the following table:

NEGOTIATED OVERHEAD AND INDIRECT RATES FOR CY 1996

Category	
Manufacturing Overhead (Burden)	154.16%
General & Administrative (G & A)	18.92%
Profit	15.00%
Material Overhead	**2.75%**
Pass-Through Rate	20.00%

(R4, tab 1 at 43) (emphasis in original)

Paragraph H-010, "PROCEDURES FOR SUBMITTING PROPOSAL USING NEGOTIATED RATES AND FACTORS" directs the government to issue a Request for Proposal (RFP) for items sought. Following the contractor's submission of a proposal including prices, the parties are to negotiate specific terms of the order. (R4, tab 1 at 12)

Paragraph H-011, "PASS-THROUGH DEFINITION" states that the "Pass-through rate is an indirect charge applied to the price of available items purchased from the Original Equipment Manufacturer (OEM) which are merely purchased and delivered to the users of this contract." These items require no "modifications or manufacturing labor" by SDS, are to be shipped directly from the OEM to the government, and are obtained from an OEM designated by the government. (R4, tab 1 at 13) The parties referred to these as "buy" items; certain other purchases were called "make" items (*see, e.g.*, R4, tabs 36 at 6, 38 at 4; tr. 1/95-96, 2/194-95).

Paragraph H-013, "PRICED AND UNPRICED ORDERS," (d) "Form And Content of Orders" provides at subparagraph (2):

> (2) The provisions of this contract shall apply without change to any Order issued hereunder, unless the parties mutually agree to additional provisions or the modification of those set forth in this contract for application to specific Orders provided that such modifications, if any, do not constitute a deviation to the limitations imposed by the FAR.

(R4, tab 1 at 13-14)

Paragraph H-251, "NEGOTIATED OVERHEAD AND INDIRECT RATES ON A CALENDAR YEAR BASIS" states:

> The parties have agreed to negotiate on a calendar year [CY] basis overhead and indirect rates. The negotiated rates shall be applied to work authorized by Delivery Orders issued in that calendar year. The contractor shall submit a proposal for negotiations, not later than September 30th of calendar years beginning in 1996 and ending in the year 2000. This negotiation will result in a modification to the basic contract incorporating the negotiated rates.

(R4, tab 1 at 18)

Contract Delivery Orders

The government prepared a Price Negotiation Memorandum (PNM) for D.O. No. 1 (R4, tab 32), signed by the parties on 17 July 1996 (*id.* at 10). Paragraph 3 "Acquisition Situation," ¶ 3.b states that "[t]he basic contract will incorporate the following":

> (1) CY1996 thru CY2001 DCAA approved labor rates.
>
> (2) CY1996 Overhead and Indirect Rates
>
> (3) Special Provision H.251 entitled "Negotiated Overhead and Indirect Rates on a Calendar Year Bases" [sic]
>
> (4) Negotiated profit rate of 15% on the make items and 20% pass-thru [sic] on the buy items

(R4, tab 32 at 4-5)

This PNM at ¶ 3.h, "Unique Features," explains the need for periodic renegotiation of overhead and indirect rates as follows:

> The contractor could not forecast his business base and therefore could not propose overhead and indirect rates for the four year ordering period. As a result, Special Provision H.251 entitled "Negotiated Overhead and Indirect Rates on a Calendar Year Bases" will be incorporated into Section H of the basic contract. This clause allows the contractor to submit the rates for negotiations on a calendar year basis to be incorporated into the basic contract. The contractor and [Air

> Force Negotiation Team (AFNT)] are in agreement on the terms and conditions of this clause.

(*Id.* at 5)

Government memoranda for record (MFRs) dated 30 April 1998 and 30 June 1999 memorialize the parties' negotiations regarding indirect and overhead rates. The parties agreed to use the contractor's CY 1996 rates for CY 1997 (R4, tab 79) and CY 1998 (R4, tab 80). Although the MFRs for CY 1998 and CY 1999 do not specifically address a pass-through rate for either year (R4, tabs 80-81), the parties stipulated that, with the exception of D.O. No. 20, all delivery orders for "buy" items used a 20% rate (tr. 2/16).

PNMs for delivery orders for "buy" items show that, other than D.O. No. 20, SDS was paid a 20% pass-through rate as provided in the basic contract. PNMs for D.O. Nos. 3 and 5 state that the 20% pass-through rate was negotiated "for the total period of performance of the basic contract" (R4, tab 36 at 6, tab 38 at 4). PNMs for D.O. Nos. 14, 17, 18, 21, 22, 23, 24, and 25 state that the 20% pass-through rate was "negotiated under the basic contract and will be used to price all delivery orders issued under this contract" (R4, tab 58 at 3, tab 64 at 2, tab 66 at 3, tab 70 at 3, tab 72 at 4, tab 74 at 7, tab 76 at 2, tab 78 at 4). The PNMs for D.O. Nos. 7, 10, 12, and 15 state that these acquisitions used the 20% pass-through rate "negotiated under the basic contract" (R4, tab 44 at 5, tab 50 at 3, tab 54 at 2, tab 60 at 3).

Prior to D.O. No. 20, the parties had entered into two delivery orders for the same items called for in D.O. No. 20; each allowed SDS the 20% pass-through rate for these "buy" items. D.O. No. 6 dated 29 August 1997 required SDS to purchase four engine lift trailers (lift trailers) for $4,128,254 manufactured by Stanley Aviation Corp. (Stanley) (R4, tab 41 at 7, tab 42 at 1). Although the parties explored lowering the pass-through rate on this purchase, the 20% rate ultimately was used (R4, tab 42 at 4). On 31 August 1998, under D.O. No. 15 for $2,333,066, SDS purchased two Stanley lift trailers for the government. These trailers, designated as part number 230272, were the same as those called for in D.O. No. 20 (R4, tab 59 at 7, tab 60 at 1). SDS and Stanley did not enter into a teaming agreement (TA) for either D.O. No. 6 or D.O. No. 15 (R4, tabs 41-42, 59-60, *passim*), and there were no problems or concerns with these transactions (tr. 1/105).

Contract Delivery Order No. 20

From approximately January through December of 1999, Mr. Ronald F. Hill was a contracting officer (CO) for ASC in the C-17 System Program Office (C-17 SPO). The only delivery order he issued under the subject agreement is D.O. No. 20. (R4, tabs 31-78; tr. 2/133-35)

Sometime prior to 4 May 1999, CO Hill and Mr. Dwaine Young, Air Force C-17 Support Equipment Program Manager, had a telephone conversation with Mr. David Lawter, program manager for SDS. CO Hill proposed that the government would place a larger than usual order from SDS for Stanley lift trailers and engine transportation trailers (engine trailers), provided SDS and Stanley entered into a TA and SDS agreed to accept a lower pass-through rate (tr. 2/141-43). CO Hill testified that the "teaming arrangement was 100 percent my research" and "totally my idea" (tr. 2/146). It was his opinion that, with this approach, "There was no question whether there was a make or buy" item being procured (tr. 2/194). He said that Mr. Lawter resisted lowering the pass-through rate for D.O. No. 20, but eventually agreed to a TA with Stanley in anticipation of receiving an increased order. (Tr. 2/141-43, 2/194-95)

On 4 May 1999, CO Hill issued a draft RFP to SDS, advising that the government was considering the purchase of Stanley lift and engine trailers but "has not decided how it will procure" the items. He advised that the manner in which SDS planned "to achieve a teaming approach" with Stanley to "result in economies of scale for Lift and Engine Trailers will significantly form the Government's decision." A decision would be made 30-40 days after an Integrated Product Team (IPT) meeting. (R4, tab 3 at 1, 4)

At the IPT meeting held 17-19 May 1999 at Stanley's facilities in Colorado, CO Hill and Mr. Young represented the government, and Messrs. Kelly and Lawter attended for SDS (tr. 2/144-45, 3/40-41). SDS prepared the initial draft of the TA, which was revised to reflect the input of the government and Stanley (tr. 2/145-49).

On 20 May 1999, SDS and Stanley entered into a TA which, among other things, provided that:

> SDS, as the Lead Contractor (LC), will act as the program manager and will be the single focal point with the customer on the DO. Stanley will act as the Manufacturing Contractor (MC) for the portion of the work assigned to it and subject to the conditions stated in Attachment A.

The TA stated that it did not create a joint venture or formal business organization of any kind, other than a TA as set forth in FAR 9.6; the government was not a party to the agreement. (R4, tab 10 at 4, 10, 12)

CO Hill issued an RFP for D.O. No. 20 on 1 June 1999, advising SDS that the government sought a firm fixed-price agreement to purchase the subject items. The RFP stated that based on the TA, "we now anticipate the proposal will reflect economies of scale.... Therefore, the TA will afford the C-17 SPO the best combination of performance, cost, and delivery for this specific requirement." (R4, tab 4 at 1)

SDS provided a proposal dated 30 June 1999, which included executive and cost summaries as well as backup documentation and supplier data regarding the 3 lift and 13 engine trailers to be furnished (R4, tab 5). The "Contract Pricing Proposal Cover Sheet" proposed the cost of trailers and travel at $6,594,507, plus profit/fee of $494,181 (7.49382%), for a total price of $7,088,688 (*id.* at 3). The parties did not determine a final pass-through rate until after SDS submitted its proposal and the parties negotiated D.O. No. 20 (tr. 2/153, 157-65).

The government's technical and pricing analysis of 23 July 1999 evaluated SDS's proposal (R4, tab 10). Paragraph 2 notes that SDS would be responsible for overall contract administration and Stanley would manufacture all equipment end items (*id.* at 2). Paragraph 3 states that the TA between SDS and Stanley applied only to D.O. No. 20 and acknowledges: "If this Engine Handling Equipment was procured as a normal 'Buy' item, the 8A contractor would be entitled to their [sic] 20% Pass-through rate in accordance with the contract." (*Id.*)

By letter of 9 September 1999, SDS informed CO Hill that it had "completed the subcontractor cost and pricing evaluation as required by the basic contract" and compared the items sought in D.O. No. 20 to those previously provided by Stanley. SDS stated that the "current costs and pricing as presented in the June 30 proposal are reasonable for the items being procured and parallel previous pricing and cost." (R4, tab 6) On 13 September 1999, SDS provided CO Hill with a worksheet proposing $494,181 for its effort (R4, tab 7 at 2).

On or about 14 September 1999, the AFNT, including CO Hill and Mr. Young, presented clearance briefings to various officials, who approved negotiations with SDS (R4, tab 11 at 2). Negotiations were conducted by telephone 15-17 September 1999, with CO Hill and Mr. Young representing the government and Messrs. Kelly and Lawter representing SDS (R4, tab 11 at 2). On 17 September 1999, SDS informed CO Hill it accepted the total fixed-price of $6,717,361, which included $6,314,361 for Stanley and $403,000 to be paid SDS (R4, tab 8 at 1).

CO Hill on 29 October 1999 prepared a PNM for the acquisition of lift and engine trailers through D.O. No. 20 (R4, tab 11). In his negotiation summary, CO Hill stated:

> b. *This acquisition represents an exclusive and "one-time" opportunity to deviate, with contractor concurrence, from the contractual rate for Pass-Through Rates as stated in the basic contract, H-251.... The contractual Pass-Through Rate is 20%.* The Air Force will benefit substantially regarding the total cost in this special situation. The unique elements are actually interwoven and basically

> inseparable, however, there are two (2) distinct components to this unique environment which allows for this acquisition objective:
>
> (1) The first element is the Cost Factor associated with this procurement action. The contractor has a number of responsibilities under all "Buy" or "Pass-Through" acquisition actions.... In this unique case, when comparing the item costs to the contractual pass-through rate, the pass-through rate appears excessive when related to Dollars vs. Effort. While the pass-through dollars are a big number in this instance, the uniqueness must now also consider the second element;
>
> (2) The second element of uniqueness associated with this acquisition is the relationship and proven capability of [Stanley] with regard to the Engine lift Trailers.... Under a different situation where an inexperienced Source or Supplier was tasked to provide Engine Lift Trailers, the lead contractor (SDS) would have a significantly greater workload.... The existing relationship and Teaming Agreement in place between SDS and [Stanley] affords a unique opportunity to take advantage of the reduced risk in the acquisition process. The willingness and understanding of SDS and [Stanley] typifies a rare and unique opportunity between two pro-active contractors. The Air Force will realize significant savings in this acquisition....
>
> The results of (1) and (2) above summarize a unique combination of experienced and pro-active contractors, an in-place Teaming Agreement, and abnormal cost to pass-through rate driven by item cost. The unique capabilities of the companies needed to meet this important acquisition objective with minimal risk, affords [sic] the Air Force a one-time opportunity to buy the required items with significant savings.

(*Id.* at 3-4) (Emphasis added) CO Hill continued that "[a]lthough the Basic Contract calls for a Pass-Through Rate of 20% which includes profit, the Teaming Agreement...allowed for a negotiated Pass-Through Rate of 6.3% which includes profit" (*id.* at 4).

D.O. No. 20 in the amount of $6,717,361 was issued on 16 November 1999 (R4, tab 9). The order stated that it was issued "in accordance with and subject to terms and conditions" of the subject contract. In addition to a statement of work and schedule (*id.* at 3-7), the TA between SDS and Stanley was made part of D.O. No. 20 (*id.* at 2, 8-16). D.O. No. 20 did not specify whether the trailers purchased were "make" or "buy" items (*id., passim*).

SDS's Claims

By certified claim dated 17 July 2002 signed by Mr. Kelly, SDS sought to recover the full 20% pass-through rate instead of the lower rate provided for in D.O. No. 20 (R4, tab 15). Appellant asserts that the contract required use of the 20% pass-through rate for D.O. No. 20, and that this order "mistakenly uses a pass-through rate of 6.38227%" (*id.* at 4). SDS calculates the pass-through rate to be $1,262,872.20, resulting in a claim of $859,875.63. The CO issued a final decision (COFD) on 27 September 2002, denying the claim (R4, tab 23). SDS appealed the adverse COFD on 19 December 2002; this appeal was docketed as ASBCA No. 54045.

SDS submitted a second claim dated 1 October 2003 to the CO (R4, tab 82). SDS reiterated the argument from its first claim that the contract imposes a 20% pass-through rate for D.O. No. 20, sought the same amount, and charged that the government obtained SDS's consent to the lower pass-through rate by means of bad faith, coercion, duress and misrepresentation. The government's 12 December 2003 COFD denied SDS's second claim (R4, tab 84). The Board on 11 March 2004 received SDS's notice of appeal, and docketed the matter as ASBCA No. 54528.

Testimony of Messrs. Kelly and Hill

Mr. Kelly testified that he understood CO Hill's remarks to mean that unless SDS agreed to the 6.4% rate and TA, SDS would not receive further orders under the subject contract and would be denied subsequent contracts at WPAFB (tr. 2/83-84). SDS argues that while the perceived threats "would have been unjustified [to] any contractor," the potential harm to appellant was "more severe in this instance since SDS at the time" was an 8(a) contractor in need of this contract for "income and opportunity for growth and development" (app. br. at 45). Appellant asserts it agreed to the 6.4% only after "CO Hill's [threat] to 'black-list SDS' if it did not acquiesce to the lower rate" (*id.* at 14).

CO Hill denies: threatening or coercing Mr. Kelly, that he told Mr. Kelly that he would prevent SDS from obtaining other contracts at WPAFB, or that he would blacklist or blackball the company (tr. 2/155-57). There is no contemporaneous proof or corroboration of the coercive remarks supposedly made by CO Hill to Mr. Kelly. SDS sought no assistance or redress at the time, and did not notify any authorities of CO Hill's alleged conduct until approximately 4½ years after the May 1999 meeting (tr. 2/78-79,

94). Mr. Kelly testified that he told only his business partners and fellow shareholders, whom he said "made a decision to go ahead and submit to and comply with [CO Hill's] threats and demands and follow his guidance towards the objective of obtaining Task Order 20" (tr. 2/77).

We find Mr. Kelly's unsupported testimony, followed by appellant's waiting in excess of four years, unconvincing evidence that CO Hill threatened or coerced SDS into making D.O. No. 20. We find that appellant has neither proved threats or coercion or that there was government bad faith.

DECISION

SDS seeks to recover $859,875.63, the difference between the full 20% pass-through rate and the 6.4% rate it agreed to in D.O. No. 20. SDS denies in both appeals that the TA, entered into at the behest of CO Hill, supports the reduction, and asserts that: (1) a 20% pass-through rate for "buy" items is a basic contract term that cannot be changed by a delivery order; (2) the contract is ambiguous with respect to whether the pass-through rate is variable; and (3) the government violated the FAR in making D.O. No. 20. SDS alleges in ASBCA No. 54045 that the lower rate was the result of a "mistake," and in ASBCA No. 54528 that D.O. No. 20 was the product of government bad faith, coercion, duress, and misrepresentation.[3]

1. The Pass-through Rate under the Basic Contract

SDS alleges that, as a matter of contract interpretation, the 20% pass-through rate must "be used on all delivery orders [for "buy" items obtained from an OEM] under the basic contract unless properly changed by a modification to the basic contract" (app. br. at 16). SDS asserts that the pass-through rate is "not subject to the annual negotiations required by contract clause H-251 since it was not an indirect charge" (*id.* at 18). It relies upon FAR 52.216-18 Ordering, ¶ (b), which states that "All delivery orders or task orders are subject to the terms and conditions of this contract." The clause establishes an order of precedence, providing that "In the event of conflict between a delivery order or task order and this contract, the contract shall control." Appellant alleges that the unchanged 20% rate in the basic contract prevails over the conflicting 6.4% rate in D.O. No. 20 (app. br. at 48), particularly where that order did not specify whether it was for "make" or "buy" items (*id.* at 26).

SDS fails to give proper weight to other, relevant portions of the underlying agreement that allow the parties mutually to modify the contract and anticipate that

[3] The government argues that the basic contract is an enforceable ID/IQ contract, contrary to our decision cited in note 1 above. We are not persuaded by the government's argument.

indirect charges such as the pass-through rate could be renegotiated. "We construe a contract 'to effectuate its spirit and purpose giving reasonable meaning to all parts of the contract.'" *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009), *citing Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002). Properly read together, the following contract clauses show that the underlying agreement allowed for a changeable pass-through rate and do not limit the parties' ability to amend the rate in a particular contracting instrument. As noted in the findings, ¶ H-009 "DELIVERY ORDERS" obligates SDS by ¶ (a) to furnish supplies or services ordered by the government "in accordance with ATCH NR 2, SECTION J." This attachment, captioned "NEGOTIATED OVERHEAD AND INDIRECT RATES FOR CY 1996," indicates a 20% pass-through rate for that year. Paragraph H-011 "PASS-THROUGH DEFINITION" states that the "[P]ass-through rate is an *indirect charge* applied to the price of available items" purchased from the OEM and "delivered to the users of this contract," (*i.e.*, "buy" items). As an "*indirect charge*," the pass-through rate for "buy" items is susceptible to annual renegotiation pursuant to ¶ H-251 "NEGOTIATED OVERHEAD AND INDIRECT RATES ON A CALENDAR YEAR BASIS," which provides that the "parties have agreed to negotiate on a calendar year basis overhead and *indirect rates*." We find the basic contract defines the pass-through rate as an indirect charge amenable to revision, and identifies 20% as the rate for CY 1996; SDS should have anticipated that the rate could change.

Despite contract provisions subjecting the pass-through rate to periodic renegotiation, SDS is correct that the parties generally treated the 20% rate as fixed and did not modify this part of the basic contract. Nonetheless, the underlying agreement also allows the parties mutually to modify individual orders, subject to limitations of the FAR. Paragraph H-013(d)(2) is sufficiently broad to allow the parties mutually to amend the pass-through rate by means of either the underlying agreement (*see* ¶ H-251) or a delivery order. Accordingly, reading the contract as a whole, the parties were free to modify the pass-through rate for D.O. No. 20 subject to the requirements of the FAR, which we discuss below in section 3.

2. Alleged Contract Ambiguity with Respect to the Pass-Through Rate

SDS argues that "[t]he government caused confusion and an ambiguity in the contract as to whether the pass-through and profit rate was negotiated for the life of the contract and to be used on each delivery order or it could be re-negotiated on an annual basis" (app. br. at 18). "Ambiguity exists when contract language can reasonably be interpreted in more than one way." *LAI Services*, 573 F.3d at 1314 *citing Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999). SDS "admit[s] it is confused by the government's frequent use [in these clauses] of different terms such as 'rates', 'factors', 'indirect charge', and 'indirect rate'" (app. br. at 19). Appellant does not advise whether it regards the contract's use of these terms to be a patent or latent ambiguity.

A "patent ambiguity is present when the contract contains *facially inconsistent* provisions." *LAI Services*, 573 F.3d at 1314 n.6 *citing M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1207 (Fed. Cir. 2004) (internal quotation marks omitted, emphasis added). The presence of a patent ambiguity triggers a contractor's duty to inquire prior to submitting its proposal. *Dick Pacific/GHEMM, JV*, ASBCA Nos. 54743, 55255, 09-2 BCA ¶ 34,178 at 168,965 *citing Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997); *Newsom v. United States*, 676 F.2d 647, 649 (Ct. Cl. 1982). SDS did not show how the terms complained of are "facially inconsistent" or that it timely raised the issue prior to award, and has not established a patent ambiguity.

A contractor seeking to prove a less-obvious, latent ambiguity must show that it relied upon a reasonable interpretation of the controverted terms prior to award. *See, e.g.*, *LAI Services*, 573 F.3d at 1317 *citing Metric Constructors*, 169 F.3d at 751; *P.R. Burke Co. v. United States*, 277 F.3d 1346, 1355-56 n.3 (Fed. Cir. 2002). As SDS furnished no evidence in this regard, it failed to prove a latent contract ambiguity with respect to the pass-through rate.

3. Alleged Government Violations of the FAR in Making D.O. No. 20

SDS asserts that the government did not comply with multiple provisions of the FAR in making D.O. No. 20 (*see, e.g.*, app. br. at 15-24). Violations could jeopardize the validity of D.O. No. 20, as ¶ H-013(d)(2) permits only modifications that "do not constitute a deviation to the limitations imposed by the FAR."

Appellant contends, among other things, that ASC did not comply with FAR Part 7 Acquisition Planning and the acquisition plan for the subject contract (app. br. at 15-17, 24). It asserts that the government "deviat[ed] from the terms and conditions of the basic contract to reduce the pass-through rate in violation of the provisions of FAR subpart 1.4 [Deviations from the FAR]" in lowering the pass-through rate (*id.* at 22). This argument is unpersuasive, as SDS did not establish that the government was required to comport with the initial procurement strategy in modifying the pass-through rate in D.O. No. 20.

Next, SDS argues that ASC did not obtain the necessary approval of the SBA to D.O. No. 20 (app. br. at 49-51). The contractor asserts that "the government failed to recognize the basic contract was a tripartite contract with three parties, ASC, the Small Business Administration and SDS" (*id.* at 49 *citing* R4, tab 1 at 3). Appellant reasons that, "if the SBA is responsible for approving the terms and conditions of the contract prior to award[,] then they are also responsible for approving any change to the terms and conditions of the contract after award that modifies the profit and pass-through rate established in the basic contract." Appellant relies upon FAR 52.219-7, Section 8(a) Award, asserting that the "pre-negotiated fixed 20% pass-through rate was set by

Attachment 2 in the basic contract and never changed by contract modification." It contends that ASC is authorized only to "take any action on behalf of the Government under the terms and conditions of the contract." *(Id.* at 50)

SDS errs with respect to SBA's continuing responsibilities for contract administration. With exceptions not relevant here, contract clause FAR 52.219-17, SECTION 8(a) AWARD (FEB 1990) at ¶ (a)(2) specifically delegates to ASC "the responsibility for administering the contract with complete authority to take any action on behalf of the Government under the terms and conditions of the contract." After entering into a contract, the parties (here, ASC and SDS and not the SBA) "may modify not only prescribed contract procedures, but substantive provisions of their contract." *Information Systems & Networks Corp.*, ASBCA No. 46119, 02-2 BCA ¶ 31,952 at 157,873, *citing, e.g., Pinewood Realty Ltd. v. United States*, 671 F.2d 211, 215 (Ct. Cl. 1980); *General Dynamics Corp. v. United States*, 558 F.2d 985, 990 (Ct. Cl. 1977). ASC had unilateral authority to enter into D.O. No. 20, and the lack of SBA approval does not vitiate the order's modification of the pass-through rate.

4. ASBCA No. 54045: Alleged Mistake

SDS asserts in ASBCA No. 54045 that "in preparing task order no. 20 the Government *mistakenly* included a 6.38227% charge" instead of the 20% pass-through rate (R4, tab 15 at 3) (emphasis added). However, other than describing insertion of the lower rate as a "mistake" and asking that the 20% rate be substituted, appellant furnishes no evidence in support of this theory. The record compels a contrary conclusion; Mr. Kelly, who signed D.O. No. 20 for SDS, responded at the hearing to questioning by government counsel that use of the lower rate did not result from a "mistake":

> Q All right. And, in fact, Mr. Kelly, it's fair to say that you don't agree that the lower pass-through rate was a mistake between the parties; correct?
>
> A I'd say that's correct.
>
> Q All right. Now, your testimony is it was intentionally put in the proposal based under duress and coercion from the government, and not as a mistake, correct?
>
> A And a misrepresentation or misuse of contract terms and conditions, yes, sir.

(Tr. 2/93) Both parties were knowledgeable and deliberate in substituting the 6.4% pass-through rate in D.O. No. 20 for the 20% used elsewhere for "buy" items, and there is no proof a "mistake" occurred. We deny ASBCA No. 54045.

5. ASBCA No. 54528: Alleged Bad Faith, Coercion, Duress, and Misrepresentation

Appellant changed its legal theory for recovery in ASBCA No. 54528, charging the government, particularly CO Hill, with bad faith, coercion, duress, and misrepresentation in obtaining SDS's assent to D.O. No. 20 and the TA between SDS and Stanley used by the CO to justify the lower rate (*see, e.g*, app. br. at 38-52). SDS contends that Mr. Kelly "signed the TA because he was coerced and material facts were misrepresented so he signed the agreement under duress" (app. br. at 45). It alleges that CO Hill exerted economic pressure, telling SDS that if it did not agree to the TA and lowered rate, the government had other sources it could use (*id. citing* tr. 2/136).

a. Alleged Government Bad Faith, Coercion and Duress

In proving government bad faith, coercion, and duress, SDS must provide "clear and convincing proof" sufficient to overcome the presumption that the contracting officer acted properly and in good faith. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1243 (Fed. Cir. 2002). As we found above, it has not proved government bad faith. To prevail on the basis of economic duress or coercion, it must prove that "(1) the party alleging duress involuntarily accepted another party's terms, (2) the circumstances permitted no other alternative, and (3) such circumstances were the result of another party's coercive actions." *North Star Steel Co. v. United States,* 477 F.3d 1324, 1330-31 (Fed. Cir. 2007) *citing Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1329 (Fed. Cir. 2003). The "pressure, even the threat of considerable financial loss, is not the equivalent of duress." *PNL*, 04-1 BCA ¶ 32,414 at 160,457-58 *citing International Telephone & Telegraph Corp. v. United States*, 509 F.2d 541, 549 n.11 (Ct. Cl. 1975). SDS has not met its burden for any of the required elements. Appellant has not established "the lack of a reasonable alternative" or that such circumstances were the result of the government's coercive action. *PNL Commercial Corp.*, ASBCA No. 53816, 04-1 BCA ¶ 32,414 at 160,457 *citing Systems Technology Associates, Inc. v. United States*, 699 F.2d 1383, 1387 (Fed. Cir. 1983). SDS could have declined, but made a reasoned business determination to accept D.O. No. 20.

As to CO Hill's purported threats to withhold work from SDS, it is important to note that the government had no obligation to award D.O. No. 20 to SDS. Nor did SDS prove that it reasonably believed that CO Hill was empowered to prevent it from receiving any other work at WPAFB.

b. Misrepresentation

SDS accuses the government of "entic[ing] SDS to consider lowering the contractual pre-negotiated fixed 20% pass-through rate" by misrepresenting to the contractor that D.O. No. 20 "was going to be [a] larger than normal dollar value" (app. br. at 25). It also charges the government with devising "a scheme to misrepresent the

items procured under DO 20 as other than 'normal' buy items and the acquisition environment on DO 20 was 'special' and 'unique' by a Teaming Agreement to reduce the contractual pre-negotiated fixed 20% pass-through rate to the 6.3% pass-through rate on DO 20" (*id.* at 21). SDS cites prior delivery orders in which it received the basic contract's 20% pass-through rate for the same Stanley lift and engine trailers as "buy" items. SDS denies that it qualifies as an OEM that could produce "make" items warranting the lower rate, and that the TA imposed by the government and used to justify the lower rate, actually reduced or mitigated procurement risk (*id.* at 23-40).

To prevail in 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. 1998). There is no proof SDS was misled by the government's representations during the meeting with Stanley, in entering the TA, or in making D.O. No. 20.

We are not persuaded that CO Hill's comment that the order could be of a larger than normal amount (*id.* at 38) rises to the level of misrepresentation. SDS knew at the time D.O. No. 20 was made that the order was for $6,717,361 (R4, tab 9). Appellant has not shown that CO Hill intended anything other than driving a hard bargain.

We deny ASBCA No. 54528.

CONCLUSION

We have considered carefully all contentions and arguments advanced by appellant and find these to be without merit. The appeals are denied.

Dated: 16 February 2012

REBA PAGE
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 Nos. 54045, 54528, Appeals of Southern Defense Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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