

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Public Warehousing Company) ASBCA No. 57510
)
Under Contract No. SPO300-03-D-3061)

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OPINION BY ADMINISTRATIVE JUDGE TING

The Public Warehousing Company (PWC) submitted a 23.48 million dollar claim for dry and refrigerated truck services delivering subsistence items into the Iraq Operational Deployment Zone in 2003 and 2004. The contracting officer (CO) failed to issue a decision and PWC appealed. Modification No. P00002 (Mod. 2) to the underlying Prime Vendor contract specified the invoicing and payment procedures the parties were expected to follow. The parties' dispute centers on the type and adequacy of the supporting documentation PWC was required to provide for payment. PWC moves for summary judgment and partial summary judgment contending that the spreadsheets that it provided met or exceeded what Mod. 2 required. Defense Supply Center Philadelphia (DSCP)¹ opposed the motion contending that for the CO to certify the invoices for payment, Mod. 2 required PWC's supporting documentation must be verifiable and that, PWC as the movant, has failed to show the absence of genuine disputes of material facts on any of the claimed truck trips to be entitled to summary judgment of the amount claimed. We deny PWC's motion.

¹ DSCP, now known as DLA Troop Support, is a sub-agency of the Defense Logistics Agency (DLA), an agency within the Department of Defense.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On 10 May 2002, DSCP issued Solicitation No. SPO300-02-R-4003 for proposals to provide subsistence (food and non-food items) to the U.S. military and other authorized customers in the Northern Europe Zone (Zone I), the Southern Europe Zone (Zone II) and the Middle East Zone (Zone III). The solicitation contemplated separate awards for Zones I and II and two awards for Zone III: one for Kuwait and Qatar and one for Saudi Arabia. At the time, there were no U.S. forces in Iraq and purchases in Zone III were only contemplated for Kuwait, Qatar and Saudi Arabia. (R4, tab 1 at 7, 9)

The solicitation included contingency requirements allowing the government to add Operational Deployment Areas to any contract awarded. The Operational Deployment Areas for the Middle East Zone included Iraq. The solicitation provided "If and when an Operational Deployment occurs, it will be implemented by the means of a bilateral modification. Contract distribution fees will be negotiated if necessary. (R4, tab 1 at 62, 63)

On 28 May 2003, DSCP awarded PWC Contract No. SPO300-03-D-3061, known as the Prime Vendor or PV1 contract² to provide "Full Line Food and Non-Food Distribution" for authorized customers in Kuwait and Qatar. The PV1 contract incorporated the solicitation as a part of the contract. (R4, tab 9 at 1, 2)

For supplies and services delivered under the PV1 contract, PWC was to be paid a "Unit Price" which included (1) a "Delivered Price" and (2) a "Distribution Price."³ These terms are defined in the PV1 contract. The "Distribution Price" is defined as consisting of "the Prime Vendor's projected general and administrative expenses, overhead, profit, packaging costs, transportation cost from the Prime Vendor's OCONUS distribution facility(s) to the final delivery point or any other projected expenses associated with the distribution function." (R4, tab 9 at 3-4)

The PV1 contract incorporated the "FORCE MAJEURE" clause in the solicitation which provides, in part, "Neither the Government nor the Prime Vendor shall be liable for excess cost if failure to perform the contract arises out of causes beyond the control, and without the fault or negligence of the contractor" (R4, tab 1 at 65). The PV1 contract also provides, under the "FREE ON BOARD (F.O.B.) POINT" provision: "Under normal conditions F.O.B. Destination terms apply. The Government shall not be liable

² Contract No. SPO300-03-D-3061 is referred to here as the PV1 contract to distinguish it from two other contracts subsequently awarded to PWC: Contract No. SPM300-05-D-3119 (PV Bridge contract) and Contract No. SPM300-05-D-3128 (PV2 contract).

³ The pricing formula as set out in the solicitation is: Unit Price = Delivered Price + Fixed Distribution Price (or Fee) (R4, tab 1 at 11).

for any delivery, storage, demurrage, accessorial, or other charge involved before the actual delivery (or 'constructive placement' as defined in carrier tariffs) of the supplies to the final destination." (R4, tab 9 at 2)

In June 2003, the parties entered into bilateral Modification No. P00001 adding Iraq into the Operational Deployment Area and establishing "separate ordering and delivery requirements for Operation Iraqi Freedom (OIF) initiatives in the country of Iraq area of operations" (R4, tab 10 at 1, 3).

In July 2003, the parties entered into bilateral Mod. 2 which added certain transport costs to the original "Distribution Price" component of the contract's Unit Price formula. Paragraph 2 of Mod. 2 provided:

2. This Contract Modification P00002 establishes the mutually agreed upon pricing structure for 1) the Iraq Deployment Zone, to include *additional* transport costs to be paid by the Government, *above the awarded distribution category fee structure*, that will be held firm by the Prime Vendor throughout the life of the contract....Transport costs incurred by PWC, which are *specifically associated with delivery to deployment zone site(s)* and which cannot be recouped throughout the existing cataloged prices (distribution fees), may be recouped as outlined below:

(R4, tab 11 at 2) (Emphasis added)

Paragraph 4 of Mod. 2 provided that PWC would be paid \$2,050 for any trip up to three days for a refrigerated truck, and \$645 per day for each day beyond three. The transportation fee for a dry truck was \$1,600 for any trip up to three days and \$475 per day for each day beyond three. Paragraph 4 also stated that "Days will be charged based upon time of reporting of loading until truck(s) return(s) to PWC distribution facility in Kuwait." (R4, tab 11 at 2-3)

Paragraph 3 of Mod. 2 set out the invoicing procedure for truck trips:

3. PWC will submit invoices to DSCP twice a month for payment as a result of additional transportation charges (fees) for deployment zone deliveries. The first invoice of the month will be submitted on the 16th to reflect the first fifteen (15) days of the month. The second invoice will be submitted on the first day of the following month to reflect the remaining charges for the last fifteen (15) days of the prior month. These additional transportation invoices must reflect

the per truck delivery and/or per truck per day delivery fee cited below.

(R4, tab 11 at 2)

Paragraph 5 of Mod. 2 set out the payment procedure for truck trips:

5. Prior to submitting invoices to DFAS for payment, *all invoices will be verified and certified* by the DSCP Contracting Officer Representative (COR) or the Contracting Officer. Invoices must contain the proper purchase order number format and *must be accompanied by supporting documentation* showing the number of trucks used for transport, the type of truck used for transport, and their round trip time in days, according to the categories above.

(R4, tab 11 at 3) (Emphasis added)

The CO, Linda L. Ford (CO Ford), understood the term “supporting documentation” used in paragraph 5 of Mod. 2 to include “signed delivery notes, convoy reports, in-transit visibility (RF ID) archive reports or route detail archive reports, MicroTransport reports, information demonstrating the type of truck used in transport, the number of trucks used for transport, the cause for any delay in the field, the round trip time of the individual trucks in days, and any other information in PWC’s possession regarding the individual truck trips.” She understood that, under paragraph 5 of Mod. 2, “PWC was responsible for maintaining this information and providing it to me and my staff” for purposes of invoicing and payment. (Gov’t resp. to mot., ex. A (Ford decl.) at 2, ¶ 5)

Throughout the course of the PV1 contract, with the exception of the truck trips at issue in this appeal, PWC routinely sent trucking invoice packets for payment to the COR on the 16th of each month and the 1st of the following month as required by Mod. 2. The invoice packets generally included invoices for dry and refrigerated trucks and included a spreadsheet, prepared by PWC, itemizing the truck trips billed in the invoices. (Ford decl. at 2-3, ¶ 6)

Due to limited government resources, the COR would select at random truck trips from invoice packets and request PWC to provide supporting documentation. The supporting documentation PWC willingly provided included signed delivery notes, route detail activity reports, MicroTransport reports, convoy reports, in-transit visibility archive reports, and other information detailing what occurred and what caused delay on the truck trips selected. (Ford decl. at 3-4, ¶¶ 7, 9)

After discussion with PWC, the COR would make his recommendation to the CO on which invoices in the random samples should be paid and which invoices should be reduced. The reasons for reduction would include: (a) PWC caused delay; (b) cause of delay unknown; and, (c) discrepancies between PWC's spreadsheet and the dates shown on the underlying supporting documentation. According to CO Ford, PWC agreed that it should not be paid for undocumented delays or for delays it caused. Because only random samples of the truck trips were checked, the CO stated that PWC was "not intentionally paid" for delays it caused or for undocumented delays. Following PWC's downward adjustment in the affected invoices, the CO would authorize payment. (Ford decl. at 3-4, ¶ 8) A detailed spreadsheet CO Ford maintained shows, for the period November 2003 through September 2004, on average, dry trucks would be out 7 to 20 days, and refrigerated trucks would be out 10 to 24 days (*id.* at 4, ¶ 10).

In September 2004, the parties signed Modification No. P00027. Under this modification, PWC received increased minimum round trip payments for dry and refrigerated trucks but the maximum payment per trip was limited to 29 days. (App. mot., ex. 6)

On 11 November 2004, PWC submitted invoices and spreadsheets for 828 trucks in two groups, one group for 280 truck trips and the second for 548 truck trips. No supporting documentation was provided. Some of the truck trips took place as early as October 2003. A few lasted five times longer than the average truck trips. The parties have referred to this submission as Submission No. 1. (Ford decl. at 5, ¶ 12) Submission No. 1 sought payment for approximately \$19.3 million (app. mot. at 8, ¶ 25).

On 10 February 2005, PWC submitted a second set of invoices and spreadsheets for 84 truck trips. No supporting documentation was provided. Some of the truck trips took place as early as June 2004. Some of the trucks took twice and ten times longer than the average truck trips. The parties have referred to this submission as Submission No. 2. (Ford decl. at 5, ¶ 13) Submission No. 2 sought payment for \$4,368,245 (app. mot. at 8, ¶ 27).

On 4 May 2005, PWC submitted a third set of invoices and spreadsheets for 82 truck trips. No supporting documentation was provided. Twenty-two truck trips were found to be in line with the average truck trip time. A significant number of truck trips were said to take 100 to 200 days. The parties have referred to this Submission as Submission No. 3. (Ford decl. at 5-6, ¶ 14) Submission No. 3 sought payment for \$4,944,970 (app. mot. at 9, ¶ 28).

Because these three submissions were not accompanied by supporting documentation, were late, and showed high incidents of long-duration truck trips, CO Ford instructed her contract team to ask PWC to provide the type of supporting documentation it had typically provided to the COR in the past. According to the CO,

“without that supporting documentation, I will not be able to verify and certify the invoices” for payment. (Ford decl. at 6, ¶ 15)

DSCP personnel worked with PWC in attempting to resolve the disputed Mod. 2 truck trips. They decided initially to focus on Submission Nos. 2 and 3 which had the smallest number of truck trips. Among the possibilities discussed was the use of average trip times for certain trips for which supporting documentation was lacking. (Ford decl. at 6-8, ¶¶ 15-17, 19-22) In reviewing the supporting documents PWC submitted, DSCP found there was no indication that PWC delivered the items to customers on many truck trips, and it did not have a documented return date. Although PWC indicated it had been paid for the deliveries, the CO did not find this information helpful because PWC was being paid by a “fast-pay” process under which payment would be made without confirmation of deliveries from the customers. During the review process, DSCP let PWC know that in order for the CO to verify and certify the invoices for payment, PWC must demonstrate for each truck trip that the customer received the delivered items, that the delay was not caused by PWC, and the date the truck actually returned. (Ford decl. at 6-7, ¶¶ 16, 17)

On 1 March 2005, PWC’s Matthew Paice provided additional information and revisions, including removing some trips. The spreadsheets attached to his email showed that for Submission No. 1, Group 1, PWC was claiming \$11,275,925.00 for about 530 truck trips, down from the original 548 truck trips, and for Group 2, PWC was claiming \$6,269,965.00 for about 267 truck trips, down from the original 280 truck trips. (App. supp. R4, vol. 9, tab 19 at 5808, 5812)

In August 2005, DSCP’s Ginny Barnwell calculated “potential payments” to PWC of \$727,195 out of the \$4,313,815 claimed in Submission No. 2, and \$682,920 out of the \$4,944,970 claimed in Submission No. 3 (app. supp. R4, vol. 9, tab 9 at 5701; Ford decl. at 7-8, ¶ 19). On 9 July 2007 CO Ford emailed PWC indicating that PWC could invoice \$690,160 for Submission No. 2 for payment. PWC never submitted an invoice. (App. supp. R4, vol. 9, tab 22 at 5848; Ford decl. at 8, ¶ 21)

At some point, PWC indicated that it did not agree with the approach of using average return times for trips with no documented return dates. Based on this indication, DSCP turned its attention to other matters. (Ford decl. at 9, ¶ 23) CO Ford explained that she could not rely solely on PWC’s spreadsheets because they were prepared by PWC. She explained that for her to verify and certify PWC’s invoices for payment, she needed to review all supporting documentation in PWC’s possession. She said that while PWC had shared some the underlying supporting documentation of its spreadsheets, it has not shared all. (*Id.* at 9, ¶ 24)

By letter dated 21 September 2009, PWC submitted a claim to CO Ford certified by PWC’s General Counsel, Sam McCahon (R4, tab 12). The claim explained that in late

2004 PWC discovered that it had not billed certain truck trips that had departed between October 2003 and September 2004. According to PWC, to receive payment it was only required to submit its invoices supported by (1) the number of trucks used for transport; (2) the type of trucks used; and (3) the round trip time in days for each truck; and the contract did not contain any other requirements. (*Id.* at 2) The claim letter contended that, throughout 2004, it received payment based on invoices it submitted supported by spreadsheets identifying each truck, the type of truck, and the round trip time for each truck invoiced (*id.* at 3). PWC contended, now, contrary to prior practice, DSCP refused to pay for the truck trips in the three submissions unless it provided information and documentation beyond what Mod. 2 required. PWC's claim was accompanied by eight binders⁴ containing the spreadsheets and other supporting documentation which allegedly were not contractually required. PWC's \$23,482,240 claim was summarized in the table below:

	Truck-trips in Submission	Truck-Trips in Claim	Claim Binder(s)	Current Claimed Amount
Submission No. 1, Group 1	548	395	1-4	\$8,980,565
Submission No. 1, Group 2	280	241	5-6	\$5,808,280
Submission No. 2	84	66	7	\$3,776,090
Submission No. 3	82	77	8	\$4,917,305
			Grand Total of this Claim	\$23,482,240

(*Id.* at 7)

PWC's counsel notified CO Ford in his 16 November 2010 letter that Sam McCahon, was not authorized to certify PWC's claim. To correct what it perceived as a defect in the certification, the letter forwarded a certification signed by Mohammad H. Al-Kandari, PWC's General Manager of its Prime Vendor program who, according to counsel, was "duly authorized by PWC to bind PWC to the Claim." (R4, tab 18) PWC's 27 January 2011 letter asked the Board to docket the appeal on the basis that its claim was "deemed" denied pursuant to 41 U.S.C. § 7103(f)(5). The Board docketed the appeal on 31 January 2011 as ASBCA No. 57510.

In opposing PWC's motion for summary judgment, DSCP referred to the six truck trips it set out in its supplemental answer as examples of PWC's failure to provide supporting documentation to satisfy the verification requirement for payment (gov't resp. to mot. at 43-44). DSCP says these examples are not "trivial trips" but in the aggregate totaled 1,208 trip days for which PWC claimed \$775,000. We set out three of the six

⁴ PWC submitted the binders as a part of its supplemental Rule 4 file.

truck trips below to determine whether these samples contain issues of material fact that would preclude summary judgment.

Submission No. 1, Truck Trip 1: According to the spreadsheet PWC furnished with its claim, Truck Trip 1 involved PWC Vehicle 343 (Reefer). This truck was loaded in Kuwait on 1 December 2003 and marked returned on 9 December 2004, over a year later. PWC billed \$241,345.00 for this truck trip. (R4, tab 12C) DSCP's comment on this truck in a 2005 spreadsheet was "Insufficient Documentation: (Unsigned DN, No MT or RDAR, No proof of delivery or return)" (app. supp. R4, vol. 9, tab 11 at 5744). The government points out in its supplemental answer that the Delivery Note PWC submitted shows a handwritten date of 1/12/03 on the top left and a note "Arrived on 9/12/04" on the bottom right (app. supp. R4, vol. 7, tab 1 at 4552). The Convoy Report PWC submitted suggests that Truck 343 was in a convoy on 4 December 2003 (*id.* at 4553). An "ITV ARCHIVE List Query (FOUO)" suggests Truck 343 was in 439 QM ROM SITE on 7 December 2003 (*id.* at 4557). There is no documentation explaining where Truck 343 was from 7 December 2003 to 9 December 2004 (supp. answer, ¶ 22).

Submission No. 3, Truck Trip 1: According to PWC's spreadsheet PWC furnished with its claim, Truck Trip 1 involved Truck 182739. The spreadsheet shows this truck was loaded on 9 March 2004 and it returned on 6 September 2004. PWC billed 181 days or \$116,860.00 for this truck trip. (R4, tab 12D) Because the truck's return date to Kuwait was not documented, PWC established 6 September 2004 as its return date by counting seven days from the date the truck left for another trip (supp. answer ¶ 31). The convoy report shows Truck 182739 carrying a cargo of "BEEF JERKY COOKIES MOOPIE" was a part of a convoy on 11 March 2004 going to SYCAMORE (app. supp. R4, vol. 8, tab 1 at 5058), and it was last seen on 17 March 2004 at "BALAD IZ NORTH GATE" (*id.* at 5061). There is no documentation from 17 March 2004 and when the truck was loaded for another trip on 13 September 2004 (supp. answer ¶ 32).

Submission No. 1, Group 2, Truck Trip 2: According to PWC's spreadsheet furnished with its claim, this truck trip involved Truck 234, a Reefer. The truck trip lasted 76 days from 5 September to 20 November 2003. PWC claimed \$49,135 for this truck trip. (R4, tab 12B) The supporting documentation shows a PWC Transport Spot Status for Truck 234 with a handwritten date of 5/9/2003. The convoy report bearing the date 8 September 2003 is not legible. (App. supp. R4, vol. 5, tab 2 at 2825, 2826) Two ITV ARCHIVE List Queries are provided: one for a vehicle with a license plate number 232445, and the second with a license plate number 622665 (*id.* at 2827, 2830). There is no obvious tie-in between Truck 234 and the vehicles bearing these license plates. There is a PWC Transport Truck Status Report for Truck 234 with a handwritten date of 27/11/03 (*id.* at 2829). DSCP points out that PWC assumed Truck 234 returned on 20 November 2003 without establishing where the truck was between 6 September and 20 November 2003 (supp. answer ¶ 44).

DECISION

Moving for summary judgment, PWC bases its argument as one of pure contract interpretation. It contends “DLA has never challenged the terms of Mod 2 that require DSCP to pay for each trip-day of each truck-trip, and there is no genuine issue of material fact that PWC provided documentation that met or exceeded the Mod 2 requirement to provide ‘supporting documentation showing the number of trucks used for transport, the type of truck used for transport, and their round trip time in days, according to the categories [in Mod 2]’” (app. mot. at 16).

PWC also asks us to enter partial summary judgment declaring that PWC is “entitled to Transportation Fees regardless of the reasons why truck-trips may have lasted longer than anticipated,” and that “PWC is not required to establish ‘the cause of delay’ in order to receive payment” (app. mot. at 20). Finally, PWC asks us to enter summary judgment in its favor “for every trip-day of every truck-trip for which [DSCP] cannot establish the existence of a genuine issue of *material* fact” (*id.*). As a way to “eliminate uncontroverted issue before the Board,” PWC’s motion asks us, in the alternative, to declare “the type of documentation PWC was required to provide for payment under the Contract,” and contends in that respect, it was only required to provide “*the number of trucks used for transport, the type of truck used for transport, and their round trip time in days*” (*id.*).

DSCP’s response acknowledges that if PWC were able to establish that a truck-trip occurred and the time it spent in the field was not caused by PWC, was not due to destruction of the truck or force majeure, and it had sufficient documentation to support the trip-days claimed, it would be entitled to payment in accordance with the rates established in paragraph 4 of Mod. 2 (gov’t resp. at 48). Opposing PWC’s motion, DSCP argues that “the actual calculation of the days the trucks were in the field, the reasons for the time the trucks spent in the field, and the type of trucks used, are questions of fact that bear directly on the amount [claimed],” and depending upon the facts, the amount owed could vary from the amount claimed (*id.* at 50-51). As to whether PWC is required to explain the “cause of delay” in determining the amount of fees payable, DSCP points out, that under paragraph 2 of Mod. 2 the transport costs incurred by PWC must be “**specifically associated with delivery to deployment zone site(s)**” (*id.* at 51-52).

Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). “[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Contract interpretation is a question of law generally amenable to summary judgment.

Varilease Technology Group, Inc. v. United States, 289 F.3d 795, 798 (Fed. Cir. 2002); *Textron Def. Sys. v. Widnall*, 143 F.3d 1465, 1468 (Fed. Cir. 1998).

As a matter of substantive law, contract interpretation begins with the plain language of the agreement. *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004). “[P]rovisions of a contract must be so construed as to effectuate its spirit and purpose...an interpretation which gives a reasonable meaning to all of its parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result.” *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (quoting *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978)).

When read in its entirety, paragraph 5 of Mod. 2 conveys far more than what PWC proffers as its meaning. In order to effectuate payment, paragraph 5 assigns separate responsibilities to the contracting parties: As the contractor, PWC’s part was to submit its invoices citing the proper purchase order numbers, and accompanied its submission with “supporting documentation” showing “[1] the number of trucks used for transport, [2] the type of truck used for transport, and [3] their round trip time in days, according to the categories [dry or refrigerated truck].” As the government, DSCP’s part was to “verify and certify” the invoices for payment by DFAS. That paragraph 5 gives the CO and the COR the right to “verify” invoices tells us that payment of the invoices is not automatic but is subject to confirmation or substantiation.⁵ That PWC must submit documentation that is “supporting” tells us that a secondary document such as PWC’s own spreadsheet is not sufficient, and that, in order to get paid, PWC is obligated to submit the underlying documents that independently support the critical facts needed to determine the exact amount due for each trip invoiced.

PWC’s interpretation would read out the CO’s verification and certification role in the payment process scheme set out in paragraph 5, Mod. 2. Its interpretation would permit payment on the strength of no more than PWC’s spreadsheet alone, and render the requirements for submitting “supporting documentation” and for verification and certification prior to payment by DFAS meaningless and inexplicable.

PWC also asks us to grant partial summary judgment that it is “entitled to Transportation Fees regardless of the reasons why truck-trips may have lasted longer than anticipated,” and “PWC is not required to establish ‘the cause of delay’ in order to receive payment” (mot. at 20). While paragraph 4 of Mod. 2 places no cap on the daily fee over the three-day minimum a truck is allowed to accumulate, it does, however, specify how truck-days for each truck is to be factually determined: “Days will be charged based upon time of reporting of loading until truck(s) return(s) to PWC

⁵ The term “verify” means “to confirm or establish the truth or truthfulness of.” BLACK’S LAW DICTIONARY 1556 (7th ed. 1999).

distribution facility in Kuwait.” Moreover, paragraph 2 of Mod. 2 places certain limitations on the fees payable: It provides that “[t]ransport costs incurred by PWC” must be “specifically associated with delivery to deployment zone site(s).” Thus, when a truck fails to return for an extended period raises a question with respect to whether and to what extent the truck was actually performing delivery services for the government to the designated site. Also, a truck’s failure to return for an extended period could be the result of a force majeure situation under which fault or negligence could become relevant.

PWC does not confront the six examples DSCP gave in its amended answer. Instead, it places the initial burden on establishing the lack of a genuine dispute of material facts for summary judgment on DSCP, the nonmovant, and contends that DSCP must “demonstrate the existence of genuine issues of material fact for each trip-day of each truck-trip in the Claim to avoid summary judgment,” and that “judgment should be entered against DLA for every trip-day of every truck-trip for which it cannot establish the existence of a genuine issue of *material* fact” (app. mot. at 20).

PWC, as the movant, bears the initial burden of showing that there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-34 (1986). Only if the movant makes this showing will the burden shift to the nonmovant to show that there is a genuine factual issue for trial. *Id.* If the movant fails to submit sufficient evidence to meet its initial burden of establishing the absence of any genuine issue of material fact, then summary judgment must be denied even if the nonmovant fails to oppose the proffered evidence. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160 (1970).

Other than its contract interpretation argument, PWC completely fails to demonstrate that there is no genuine issue of material fact with respect to each of the truck trips claimed. Thus, it fails to carry its initial burden showing there are no genuine issues of material fact and summary judgment must be denied. Although not required to do so, we have examined the six examples DSCP provided, three of which are set out in some detail in this decision. We agree that if they are representative of the other truck trips claimed, there are genuine issues of material precluding summary judgment.

PWC asks that we declare the “type” of documents it was required to provide in order to receive payment. Under *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271, *reh’g denied*, 186 F.3d 1379 (Fed. Cir. 1999), we are given certain discretion to issue a declaratory judgment decision in situations “involving a fundamental question of contract interpretation or special need for early resolution of a legal issue.” *See also Raytheon Co.*, ASBCA Nos. 57576, 57679, 13-1 BCA ¶ 35,209 at 172,750 (holding we have jurisdiction to render declaratory judgments under the CDA involving claims seeking interpretation or adjustment of contract terms); *Sarang-National Joint Venture*, ASBCA No. 54992, 06-1 BCA ¶ 33,232 at 164,682. Given that there are some 779 truck trips in PWC’s claim, we believe it is important to set forth our opinion at this stage of the proceedings that the spreadsheets PWC submitted with its invoices containing no

more than a summary of information it derived from other sources are not alone sufficient to support its claim for payment. PWC's interpretation misses one of the central purposes of paragraph 5, Mod. 2. The purpose for requiring "supporting documentation" is to enable the CO and the COR to verify, after the fact, that the government received the transport services for which it is being asked to pay. Verification cannot not be accomplished without examining the content of a document or the contents of several documents where necessary. Specifying the "type" of documents PWC is required to provide does nothing to ensure that PWC meets its obligation to provide documentation in whatever form in support of the amount claimed for each truck trip, as with any proponent of a claim, PWC should present the best evidence available to it to support its claim. It remains to be seen whether that evidence will be sufficient to carry its burden of proof.

CONCLUSION

PWC's motion for summary judgment on the basis that it provided documentation that met or exceeded the Mod. 2 requirements for payment is denied because its interpretation is inconsistent with the language, purpose, and intent of paragraph 5, Mod. 2.

PWC motion for partial summary judgment on the basis that it is not required to prove the cause of delay is denied because it is inconsistent with the language, purpose and intent of Mod. 2.

PWC's motion for summary judgment that it is entitled to payment for every truck-day of every truck-trip for which DSCP cannot establish the existence of a genuine issue of material fact is denied because PWC, as the movant, has failed to carry the initial burden of establishing the absence of genuine issues of material fact in its summary judgment motion.

We decline to specify the type of documentation PWC was required to provide in order to receive payment because to do so does nothing to ensure that PWC meets its obligation to provide the documentation in whatever form in support of the amount claimed for each truck trip.

Dated: 13 May 2013



PETER D. TING
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



CRAIG S. CLARKE
Administrative Judge
Acting 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. 57510, Appeal of The Public Warehousing Company, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals