

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Jurass Company) ASBCA No. 51527
)
Under Contract No. SPO600-98-D-1000)

APPEARANCE FOR THE APPELLANT: Ms. Natalia Krantz
Director

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OPINION BY ADMINISTRATIVE JUDGE PEACOCK

This appeal involves the termination for cause of a commercial items contract for the supply of winter grade diesel fuel in Ukraine in support of the nuclear disarmament program. The Board has issued three previous decisions on motions in the appeal. Those decisions concerned reinstatement of the appeal and reconsideration of that decision. *Jurass Co.*, ASBCA No. 51527, 04-1 BCA ¶ 32,631, *revised and aff'd on recon.*, 04-2 BCA ¶ 32,663. The Board also denied the government's summary judgment motion regarding the propriety of the termination. *Jurass Company*, ASBCA No. 51527, 06-1 BCA ¶ 33,186. Appellant primarily alleges that the fuel delivered complied with the pertinent Russian specifications for such fuel incorporated into the contract. We deny the appeal.

FINDINGS OF FACT

A. The Contract and Fuel Specification

1. The referenced contract was awarded to Jurass Company (Jurass or appellant) on 3 November 1997 by the Defense Fuel Supply Center, now Defense Energy Support Center (government), for delivery of an estimated quantity of 3,654 metric tons of winter

grade diesel fuel. The contract was a firm fixed price, commercial items, requirements contract with an estimated value of \$822,150. The ordering period, as extended, was through 31 January 1998. Orders were to be issued, and the acquisition was to be administered, by Defense Fuel Region Europe (DFRE). (R4, tabs 1, 3-5)

2. The contract was awarded to support the Defense Special Weapons Agency's (DSWA) Cooperative Threat Reduction (CTR) Program. The fuel was to be delivered to Ukrainian military bases for use by DSWA's contractor, Bechtel National, Inc. (Bechtel), in the disarmament of Ukrainian nuclear missile silos. (R4, tabs 4, 7, 9A, 22, 24, 25, 26; tr. 33-34, 42, 72-73, 197-98)

3. The contract contained the following pertinent SPECIAL NOTES (R4, tab 2):

(b) Product to be delivered by rail car. All rail cars must be sealed at loading point. Military locomotive will move rail cars from designated town train station to military base. Product will be sampled by the Ukrainian Military while in contractor rail cars. After test results are received, all on-specification fuel will be accepted and off-loaded into Ukrainian Military fuel tanks. Any off-specification fuel will be handled in accordance with Clause I1.03-1.

....

(c) Title to supplies and risk of loss thereof shall pass from the contractor to the Government (Ukrainian Ministry of Defense) when the supplies pass into the receiving facility (Military storage tanks and/or transport equipment). Acceptance for quality and quantity will be made at destination based on actual net quantity received. A representative from the contractor must be present for sampling and off loading at the military base. All product delivered must be accompanied by a certification of product specifications and quantity. A certification as to quality and quantity will be made by the Ukrainian Ministry of Defense [MOD] on the contractor's delivery documents. Invoice, delivery documentation, signed DFRE-Issued order document (unless otherwise specified, a DD Form 1155) and Ukrainian Military Certificate of Quality will be presented to DSWA's representative at Hughes Aircraft Systems International (Hughes) in Kiev, Ukraine.

....

- (e) Contractor must inform DSWA's representative in Ukraine as well as DFRE in Germany at least (5) working days in advance of a pending delivery in order to make arrangements for DSWA and/or DFRE personnel to witness all deliveries performed under any contract resulting from this solicitation. DFRE personnel will also verify the net quantity received and will review the inspection and testing of samples drawn from the contractor's rail cars as performed by Ukrainian MOD lab personnel. Failure to notify the designated representatives of delivery dates and times and any subsequent changes may result in the inability of Hughes to certify invoices for payment. Points of contact at Hughes, DFRE and any other necessary DSWA representative will be provided after award of a contract. Notwithstanding G150.07-3, certification and authorization will be performed by Hughes or other designated DSWA representatives.

....

- (h) All three parties, Ukrainian Ministry of Defense personnel, contractor representatives and designated U.S. Government representatives, must be present for delivery of supplies under any contract awarded on the basis of this solicitation.

4. Clause II.03-1 of the contract, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (OCT 1995), set forth the following pertinent provisions (R4, tab 1 at 11):

- (a) **INSPECTION/ACCEPTANCE.** The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance....

....

(c) **CHANGES.** Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

....

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

5. Clause B1.05-1(b) stated that “[a]fter test results are received, all on-specification fuel will be accepted...” (R4, tab 4 at 3).

6. Clause G-150.07-3 provided in pertinent part (R4, tab 1 at 28):

G150.07-3 SUBMISSION OF INVOICES FOR PAYMENT (PC&S) (UKRAINE) (DFSC AUG 1995)

(a) **GENERAL.** This contract is for overseas fuel deliveries for posts, camps, and stations. Invoices will be paid on the basis of the Contractor’s delivery to the point of first receipt by the Government.

(b) **RESPONSIBILITY FOR SUPPLIES.** Title to the supplies shall vest in the Government upon delivery to the point of first receipt by the Government. Notwithstanding any other provision of the contract, the Contractor shall assume all responsibility and risk of loss for supplies (1) not received at destination, (2) damaged in transit, or (3) not conforming to purchase requirements. The Contractor shall either replace, or correct, such supplies promptly at its expense, provided instructions to do so are furnished by the

Contracting Officer within 90 days from the date title to the supplies vests in the Government.

(c) **PREPARATION OF INVOICE.** Upon delivery of supplies to the point of first receipt by the Government, the Contractor shall prepare an invoice in accordance with the terms of this contract....

(d) **CERTIFICATION OF INVOICE.** The Contractor agrees that the submission of an invoice to the Government for payment is a certification that the supplies for which the Government is being billed have been delivered in accordance with instructions issued by the Ordering Officer, in the quantities shown on the invoice, and that such supplies are in the quantity designated by the order and of the quality designated by the contract. The Ordering Officer will certify and authenticate that the invoice is proper for payment. Upon certification and authentication, the Ordering Office will submit the invoice to the applicable Paying Office.

7. Clause B1.05 of the contract required delivery of winter grade diesel fuel conforming to specification GOST 305-82 Z (latest revision) (R4, tabs 1, 2, 4; tr. 44, 72, 197). The GOST is the Russian state standard for fuel specifications. It remained the standard for many of the former Soviet block countries after the dissolution of the USSR, including Ukraine during the 1997 through 1998 time period. (Tr. 140, 150)

8. Under GOST 305-82, there are various grades of diesel fuel, each with unique properties and specifications. The grades vary depending on climatic conditions and environmental requirements. (R4, tab 9; tr. 150-51) GOST 305-82 Z is a specification for a particular grade of winter diesel fuel (R4, tab 9 at 2-3; tr. 152).

9. Bechtel specifically requested the purchase of the GOST 305-82 Z fuel. Bechtel required fuel that would permit equipment operation in extremely cold temperatures and preclude previously-experienced problems with fuel freezing in the equipment and causing damage. (R4, tabs 9A, 22-26; tr. 32-34, 42-44, 47)

10. GOST 305.82 Z requires that the diesel fuel have a “cloud point” no warmer than -25 degrees Celsius¹ (R4, tab 9 at 2; ex. G-4 at 2; tr. 91, 152, 156). Cloud point is the temperature at which ice crystals begin to form in the fuel, and are visible to the naked eye (tr. 69, 153, 187). Fuel cannot be used at temperatures colder than its cloud point because it will freeze in and damage the equipment (tr. 104-05, 154).

¹ All temperatures referenced herein are in Celsius.

11. Note 3 to GOST 305-82 Z provides that, with the agreement of the “user” of the fuel, a depressant additive may be added to certain diesel fuels (“carbamide deparaffination”) to lower the cloud point from -5 degrees to -11 degrees (R4, tab 9; tr. 105, 107). Use of a depressant additive can negatively impact other properties or additives in the fuel, thus requiring agreement of the “user.” Fuel produced using a depressant additive to achieve required specifications is of inferior quality and less expensive than fuel that is fully refined to specification requirements. (Tr. 113-115, 157, 159-60)

12. GOST 305-82 Z also specifies “distillation” requirements. Distillation involves heating the fuel in one container, with the vapor traveling via a tube to another container where it is cooled. The percentage values represent the amount vaporized and recovered at specified temperatures. The test measures the level of contaminants in the fuel and the efficiency with which it will burn. (Tr. 69, 92-93, 153-54) GOST 305-82 Z requires 50% distillation at a temperature no higher than 280 degrees and 96% distillation at a temperature no higher than 340 degrees (R4, tab 9; ex. G-4; tr. 156).

13. TU38.101889-81 is an unrelated Russian fuel specification for a fuel known as DZp grade diesel fuel. DZp fuel is produced from summer grade diesel fuel by using cloud point depressants. (App. supp. R4, tab A9; tr. 156-157) The specification for DZp fuel contains more relaxed requirements for cloud point and distillation that do not conform to GOST 305-82 Z and TU38.101889-81 is not a later revision to the GOST 305-82 Z specification (tr.158-62).

B. Performance

14. The government issued three delivery orders to Jurass on 4 November 1997 requiring delivery of fuel on 11, 13 and 17 November 1997, respectively (R4, tab 16).

15. Jurass experienced delivery delays due to document requirements imposed by Ukraine pertaining to fuel entering the country on a tax-free basis (R4, tab 7).

16. On 31 December 1997, the government issued revised orders extending the delivery date for the three initial orders. In addition, the government issued nine new orders. These revised and new orders required delivery on various dates during the period 5 January through 4 February 1998. (R4, tab 16)

17. Sometime prior to 23 January 1998, appellant delivered fuel in rail cars to one of the designated delivery locations in Ukraine. According to an analysis of this fuel that was prepared by the producer and submitted by appellant, the fuel was refined on 31 December 1997 and was described as “WINTER DIESEL FUEL DZp-0.1, HAVING 0.0413% DEPRESSANT . . . TU38.101889-81.” The producer indicated that the cloud

point of the fuel was -11 degrees and that 50% and 96% of the fuel was distilled at 258 degrees and 355 degrees, respectively. (App. supp. R4, tab A12)

Sampling and Initial Tests

18. On or about 23 January 1998, the government Quality Assurance Representative (QAR) took samples of fuel that had been delivered in rail cars (R4, tab 7 at 1; tr. 78).

19. The QAR noted that the rail cars were covered with heavy fuel oil, indicating that the cars had not been properly cleaned prior to being loaded with diesel fuel. Therefore, the QAR considered that there was a significant risk that the diesel fuel had been contaminated by the heavy fuel oil. The QAR also observed ice crystals in the fuel, indicating the possibility of excess water. (Tr. 80-83; exs. G-1, -2)

20. On 23 January 1998, the on-site Ukrainian military laboratory also tested fuel samples. The cloud point of the tested fuel was determined and certified by the laboratory to be -5 degrees and the distillation rates were 50% at 249 degrees and 89% at 280 degrees. (R4, tab 10)

21. On or about 24 January 1998, the government advised Jurass that the fuel did not conform to the specifications and requested that appellant take corrective action to cure the failure (R4, tab 12).

22. Jurass objected to the sampling procedures, challenged the findings and requested that new samples be tested at a different laboratory. The government offered to have the tests performed at an independent commercial laboratory. Jurass refused and instead insisted upon using another laboratory of its own choosing. (R4, tab 7 at 2, tabs 12-13, 18 at 1; tr. 94-95)

23. In the meantime, the government internally explored options for the fuel to meet specification, however, none were viable (R4, tab 7 at 2, tab 17).

Retesting

24. The retesting was performed on or about 3 February 1998 (R4, tab 11).

25. On 5 February 1998, Jurass submitted a Russian version and English translation of the laboratory's certificate and retesting results to the government (R4, tabs 11, 13).

26. The 3 February 1998 lab tests found that the multiple fuel samples analyzed had cloud points of -11 degrees and distillation rates of 50% at 256 degrees and 96% at

349 degrees. The laboratory accurately sets forth the GOST 305-82 Z standards for winter grade diesel as requiring a cloud point of -25 degrees and distillation rates of 50% at 280 degrees and 96% at 340 degrees. Yet, the certificate concludes that the fuel “corresponds to GOST 305-82. . . [taking] into consideration [¶] 3 of Notes [and referencing an alleged deviation relating to distillation authorized by a Ukrainian military order not in the record]” (R4, tab 11; app. supp. R4, tabs A3, A11, A14)

27. The QAR was present for, and disagreed with the results of, the February lab retests. The QAR witnessed, and we find that, the fuel began to cloud at -10 degrees. (R4, tabs 17, 19 item C; tr. 98, 184)

28. The February lab certificate was the first reference to “note 3” of the 305-82 Z specification (or the alleged deviation) in the record. Clause M 72 , EVALUATION OF OFFERS (EXCEPTIONS/DEVIATIONS) (DFSC NOV 1993), of the solicitation specifically permitted offerors to indicate if they could not meet the specifications and required that in such cases, offerors provide a copy of the specification for the fuel that they intended to supply. Jurass never stated to DESC in its offer, during negotiations or at any point prior to the February retest that it required a deviation, intended to deliver DZp grade fuel, or fuel manufactured to “note 3.” (R4, tab 1 at 22; tr. 45-47, 109-11, 164-66, 175, 183-84)

29. Jurass knew or should have known that Bechtel would be the primary “user” of the fuel (tr. 73, 167-68, 182-83).

30. Neither the government nor Bechtel agreed to accept fuel manufactured to the “note 3” exception to cloud point requirements (tr. 34-35, 47, 111-12, 201-03).

31. Based on the results of the tests and retests we find that the fuel delivered by Jurass failed to meet the GOST 305-82 Z cloud point and 96% distillation requirements (R4, tabs 6, 7, 9-11, 17; tr. 50-51, 93, 115, 158, 202).

C. Termination

32. Jurass did not offer assurances that it would correct the deficiencies and deliver fuel conforming to GOST 305-82 Z as requested by the government. On or about 6 February 1998, Jurass advised the government that it believed the fuel delivered met the quality requirements of the contract and that it would continue to deliver fuel of the same quality (*i.e.*, fuel with the same cloud point and distillation rates). (R4, tab 13; app. supp. R4, tab A3)

33. The latest date for delivery of conforming supplies expired on 4 February 1998 (R4, tab 16).

34. The government did not accept the fuel (R4, tab 12; tr. 93).

35. On or about 12 February 1998, the contracting officer rejected the fuel. In a final decision dated 12 February 1998, she terminated the contract and pending delivery orders for cause citing Jurass's failure to timely deliver conforming fuel and its failure to offer assurances that it would supply fuel compliant with GOST 305-82Z in the future. (R4, tabs 6-11, 13, 16, 17; tr. 50-51, 93, 115, 158, 202). This timely appeal followed.

DECISION

A contractor's failure to deliver supplies conforming to contract requirements establishes a prima facie case of default. *General Injectables & Vaccines, Inc. v Gates*, 519 F.3d 1360, 1363, *reh. denied*, 527 F.3d 1375 (Fed. Cir. 2008). In this case, appellant inexcusably failed to deliver the specified fuel and failed to cure the default or offer assurances that it would supply fuel compliant with the specifications in the future. Accordingly, the government's termination of the contract for cause was proper.²

The fuel supplied by appellant did not satisfy either the cloud point or distillation test parameters for winter grade diesel fuel specified in the GOST 305-82 Z specification incorporated into the contract. The cloud point of the fuel delivered was measured at -5 degrees and -10 degrees at the 23 January and 3 February tests, respectively (findings 20, 27). These readings were considerably warmer than the specified requirement that the fuel not reach its cloud point at temperatures above -25 degrees.

With respect to distillation, GOST 305-82 Z required that 50% of the fuel evaporate at temperatures no higher than 280 degrees and that 96% distillation occur at a temperature no higher than 340 degrees. The retest results indicated that the requisite 96% distillation was not achieved until higher temperatures were reached.

Appellant contemporaneously challenged the sampling procedures used for the first tests. We have not made detailed findings concerning the sampling procedures because regardless of the efficacy of the results of the first tests, appellant also failed the second tests conducted by its hand-picked laboratory. The record is also clear that all tested fuel never approached the requisite "cloud point" temperature in particular at either series of tests.

The failures of both the cloud point and distillation requirements were substantial. Use of the fuel would have had a material adverse impact on the ability of equipment to function in the harsh winter environment prevailing at project sites in Ukraine. The fuel was to be provided to United States government contractor personnel performing a

² Because we conclude that the termination was justified for the reasons stated herein, we need not address other government contentions regarding the propriety of the termination.

critical and sensitive mission under extreme conditions and the fuel delivered by appellant could have crystallized, frozen in the fuel lines and engines, and damaged the equipment.

Jurass does not contest that the fuel failed to conform to specified criteria. Instead, it appears to maintain that the fuel was acceptable either pursuant to an exception to GOST 305-82Z or under an alternative specification.³

The “note 3” exception to GOST 305-82Z relied on by appellant required both the agreement of the “user” of the fuel and that the fuel not reach its cloud point at temperatures warmer than -11 degrees. There was no deviation request, Government consent or waiver of the cloud point and distillation requirements. Nor was there any agreement by either the government or Bechtel to accept noncompliant fuel pursuant to “note 3”. Appellant knew or should have known that the ultimate user of the fuel would be Bechtel. There are vague references in the appellant’s submissions to the possible willingness of one or more Ukrainian military officials to accept the fuel. It is unnecessary to attempt to decipher the ambiguous documents or determine whether there was any binding “agreement” between Jurass and a Ukrainian military official, because the Ukrainian military was not the “user” of the fuel and had no authority to enter into a “note 3” agreement for the fuel. Nor did the Ukrainian military have contractual authority to change or waive specification requirements or “accept” nonconforming fuel. Moreover, the cloud point of the fuel was reached at -10 degrees (even at the 3 February retest) and was, therefore, not compliant with that “note 3” prerequisite in any event.

The alternative specification relied on by appellant pertained to a different grade of fuel and was not applicable to the winter grade diesel fuel to be delivered under this contract. DZp fuel is refined pursuant to different specification requirements. The pertinent DZp specification was not a later revision of GOST 305-82Z and has no relevance to this contract. In essence, appellant knowingly purchased and attempted to substitute a lesser grade fuel that it knew would not conform to the more rigorous requirements of GOST 305-82 Z.

Despite appellant’s noncompliance with the specification, the government independently considered the use of additives to bring the fuel up to acceptable standards for its intended use. However, it ultimately determined that alternative options for the fuel would create countervailing negative impacts on the properties and performance of the fuels. There is no persuasive evidence that the government’s determination was unreasonable.

³ Jurass, proceeding *pro se*, did not appear at the hearing nor has it filed post-hearing briefs in this appeal. We have examined its pre-hearing submissions and issues mentioned in our prior decision denying summary judgment as a basis for determining and addressing matters in dispute.

In light of the delivered fuel's noncompliance and appellant's inability or unwillingness to cure the default by delivering fuel that conformed to the specifications, we conclude that the government's termination for cause was proper.

The appeal is denied.

Dated: 25 June 2009

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 51527, Appeal of Jurass Company, rendered in conformance with the Board's Charter.

Dated:

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