

ORIGINAL

FILED
OCT 29 2009
U.S. COURT OF
FEDERAL CLAIMS

In the United States Court of Federal Claims

BAHRAIN MARITIME & MERCANTILE)
INTERNATIONAL B.S.C.)
Dba BMMI)
812 Shaikh Jabber Al Amed)
Al Subah Highway)
Sitra, Kingdom of Bahrain)

Plaintiff,)

v.)

THE UNITED STATES,)

Defendant.)

09-739 C

No. 09- C

Judge

**COMPLAINT ON A
CLAIM UNDER AN EXPRESS CONTRACT**

NATURE OF THE ACTION

1. Plaintiff Bahrain Maritime & Mercantile International B.S.C., Dba BMMI, 812 Shaikh Jabber Al Amed Al Subah Highway, Sitra, Kingdom of Bahrain (BMMI) files this Complaint in accordance with RCFC 7(a)(1). Plaintiff BMMI seeks declaratory

relief under the Contract Disputes Act, 41 U.S.C. § 609(a)(1), and under the Federal Courts Administration Act of 1992, 28 U.S.C. §§ 1491(a)(1), 1491(a)(2). Plaintiff BMMI challenges the Final Decision of a Defense Logistics Agency (DLA) Contracting Officer under 41 U.S.C. § 605(a) asserting a Government Contract Disputes Act Claim for \$273,559.75 under an express Contract between BMMI and the DLA and its Defense Supply Center Philadelphia (DSCP), a Defense Agency of the United States Department of Defense (DoD), a Government Contract Disputes Act Claim arising under DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131 for full-line food supplies distribution to United States Military land and sea customers located throughout Bahrain, Qatar, and Saudi Arabia and backup support to other private party vendors providing full-line food supplies distribution in the Middle East. This Government Contract Disputes Act Claim asserts entitlement to a six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees.

2. Plaintiff BMMI asserts: (1) that by reason of bilateral Modification Number P00030 DSCP has waived any entitlement to the claimed six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees; (2) that DSCP is not entitled to the claimed six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees because Plaintiff BMMI has not received a DLA Contracting Officer's Final Decision on BMMI's Contract Disputes Act Claim of May 15th, 2007 contesting the improper intermediate Contractor Performance Assessment Report (CPAR) on which the claimed six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees is based and because this intermediate Contractor Performance Assessment Report (CPAR) is wrongly rated; and (3) that the amount claimed by DSCP, \$273,559.75, for a six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees is erroneously calculated.

3. Plaintiff BMMI asks that the Court declare: (i) that by reason of bilateral Modification Number P00030 DSCP waived any entitlement to the claimed six-month re-

duction of five percent in otherwise agreed-upon Performance-Based Distribution Fees; (2) that DSCP is not entitled to the claimed six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees because Plaintiff BMMI has not received a DLA Contracting Officer's Final Decision on BMMI's Contract Disputes Act Claim of May 15th, 2007 contesting the improper intermediate Contractor Performance Assessment Report (CPAR) on which the claimed six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees is based and because this intermediate Contractor Performance Assessment Report (CPAR) is wrongly rated; and (3) that the amount claimed by DSCP, \$273,559.75, for a six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees is erroneously calculated.

PARTIES

4. Plaintiff BMMI is a Bahraini stockholding company (B.S.C.) whose shares are publicly traded on the Bahrain Stock Exchange, Plaintiff BMMI is incorporated in the Kingdom of Bahrain, and Plaintiff BMMI is registered there with the Ministry of In-

dustry and Commerce under Commercial Registration Number 10999. The principal activity of Plaintiff BMMI is the wholesale and retail distribution of food and consumable items. Plaintiff BMMI also provides logistics and shipping services. Plaintiff BMMI's operations are located in the Kingdom of Bahrain, in the State of Qatar, in Djibouti, in Gabon, in Mali, in Sudan, and in Ghana.

5. Plaintiff BMMI is the Awardee of DSCP Subsistence Prime Vendor Contract Number SPM300-05-D-3131 (now DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131), and thus a proper "Contractor" under the Contract Disputes Act, 41 U.S.C. § 601(4). DSCP Subsistence Prime Vendor Contract Number SPM-300-08-D-3131, a firm, fixed-price indefinite quantity Contract for up to five years, became effective for Plaintiff BMMI on September 11th, 2005 and continues through September 11th, 2010.

6. DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131 requires that Plaintiff BMMI distribute full-line food stuffs and provide non-food distribution support for United States Military customers within Bahrain, Qatar, and

Saudi Arabia. Plaintiff BMMI must make deliveries within forty-eight hours after receipt of an electronic order for full-line food items or for non-food distribution support of Government-Furnished Material such as Unitized Group Rations, Meals Ready-to-Eat, or Health and Comfort packs. Plaintiff BMMI is required to maintain a fill rate for such electronic orders that is between ninety-six and one-half percent and ninety-seven and one-half percent. Agreed-upon Performance-Based Distribution Fees are increased, or decreased, in increments of five percent if fill rates fall below ninety-six and one-half percent or rise above ninety-seven and one-half percent. Agreed-upon Performance-Based Distribution Fees are likewise increased, or decreased, in increments of five percent based on intermediate Contractor Performance Assessment Reports (CPARs).

7. DLA is a Defense Agency within DoD, 10 U.S.C. § 101(a)(11); DoD is an Executive Department of the United States, 5 U.S.C. § 101; and DLA and its DSCP are instrumentalities of the United States. DLA and its DSCP is an "Agency" just as this term is defined in 28 U.S.C. § 451. DLA and its DSCP is a proper "Executive Agency"

under the Contract Disputes Act, 41 U.S.C. § 601(2). DLA and its DSCP have authority to Award Contracts for the procurement of property. 41 U.S.C. § 602(a)(1). DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-0062 is an express Contract for the procurement of property, an express Contract entered into by an Executive Agency for the procurement of property, and thus an Executive Agency Contract to which the Contract Disputes Act applies, 41 U.S.C. § 602(a)(1). Respondents DLA, its DSCP, DoD, the DLA Contracting Officers, and the DLA Contract Specialist are hereinafter referred to, collectively, as “the Defendants.”

JURISDICTION

8. This Court has jurisdiction under 28 U.S.C. § 1491(a)(1), 28 U.S.C. § 1491(a)(2), and 41 U.S.C. § 609(a)(1). The Final Decision of a DLA Contracting Officer asserting a Government Contract Disputes Act Claim for \$273,559.75 under an express DSCP Contract, Subsistence Prime Vendor Contract Number SPM300-08-D-3131, is sufficiently final for the purposes of the Contract Disputes Act, 41 U.S.C. § 605(a) (“All claims by the government against a contractor relating to a contract shall be

the subject of a decision by the contracting officer.”); is sufficiently final under 28 U.S.C. § 1491(a)(1) for this Civil Action (It is a “claim . . . founded . . . upon any express . . . contract with the United States.”); and is sufficiently final under 28 U.S.C. § 1491(a)(2) for this Civil Action seeking declaratory relief because this Civil Action arises, literally, from a claim “by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978”

9. This Civil Action is timely. Plaintiff BMMI received the DLA Contracting Officer’s Final Decision asserting a \$273,559.75 Government Contract Disputes Act Claim under DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131 shortly after the DLA Contracting Officer’s Final Decision was issued on September 18th, 2009. This Civil Action is timely filed within one year from the date of that DLA Contracting Officer’s Final Decision, 41 U.S.C. § 609(a)(3).

AVERMENTS

The Express DSCP Subsistence Prime Vendor Contract.

10. Under DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131, Plaintiff BMMI is the DSCP Subsistence Prime Vendor for DSCP Zone 4 (Bahrain, Qatar, and Saudi Arabia). Plaintiff BMMI is required to supply chilled products, semi-perishable food stuffs, frozen fish, meat, and poultry, other frozen foods (fruits, vegetables, prepared foods, etc.), dairy and ice cream products, fresh and frozen bakery products, beverage base and juices (for dispensers), beverages and juices (non-dispenser), fresh fruits and vegetables, non-food items, Government-Furnished Materials, and other Military ration items. As a Subsistence Prime Vendor, Plaintiff BMMI provides food to support Military ships, Military shore facilities, mobile kitchen tent facilities, ration break points, trailer-transfer points, and Military training exercise locations within DSCP Zone 4.

11. DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131 is a Firm, Fixed-Price Indefinite Quantity Contract with one eighteen-month base per-

iod, two twelve-month option periods, and a final eighteen-month option period. DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131 was awarded to Plaintiff BMMI on June 3rd, 2005 and became effective September 11th, 2005. Plaintiff BMMI is now in the final eighteen-month option period of DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131; DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131 will expire by its terms on September 11th, 2010.

12. Plaintiff BMMI must make deliveries within forty-eight hours after receipt of an electronic order for full-line food items or for non-food distribution support of Government-Furnished Material such as Unitized Group Rations, Meals Ready to Eat, or Health and Comfort packs. Plaintiff BMMI is required to maintain a fill rate for such electronic orders that is between ninety-six and one-half percent and ninety-seven and one-half percent. Likewise, DLA Contracting Officers are required to provide to Plaintiff BMMI successive intermediate Contractor Performance Assessment Reports (CPARs). Only if Plaintiff BMMI receives from a DLA Contracting Officer

an intermediate Contractor Performance Assessment Reports (CPARs) rating of “probably would award to this vendor today given that I had a choice” are agreed-upon Performance-Based Distribution Fees maintained for a successive period of six months.

13. Agreed-upon Performance-Based Distribution Fees are increased, or decreased, in increments of five percent if fill rates fall below ninety-six and one-half percent or rise above ninety-seven and one-half percent. Agreed-upon Performance-Based Distribution Fees are likewise increased, or decreased, in increments of five percent based on successive intermediate Contractor Performance Assessment Reports (CPARs). If the Subsistence Prime Vendor Contractor receives from a DLA Contracting Officer an intermediate Contractor Performance Assessment Report (CPAR) rating of “probably would award to this vendor today given that I had a choice,” the agreed-upon Performance-Based Distribution Fees are neither increased nor decreased. If the Subsistence Prime Vendor Contractor receives from a DLA Contracting Officer an intermediate Contractor Performance Assessment Report (CPAR) rating

of “probably would not award to this vendor today given that I had a choice,” the agreed-upon Performance-Based Distribution Fees are decreased by five percent for a subsequent period of six months.

14. An initial Contractor Performance Assessment Report (CPAR) is required for new Contracts with a performance period greater than three-hundred sixty-five days. Intermediate Contractor Performance Assessment Reports (CPARs) are required every twelve months thereafter throughout the entire period of performance of such Contracts. A final Contractor Performance Assessment Report (CPAR) is required upon Contract completion. “Contractor Performance Assessment Reporting System (CPARS),” Defense Logistics Agency, January 2002, Section 6., “Frequency of Reporting.” Federal Acquisition Regulation 42.1503(b) provides Contractors an opportunity to submit “comments, rebutting statements, or additional information” in response to a Contractor Performance Assessment Report (CPAR), and provides also that “Agencies shall provide for a review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation.”

15. The Contract Unit Price for DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131 is comprised of a Product Price and an agreed-upon Performance-Based Distribution Fee. The Contract Unit Price is typically a published BMMI Catalog Price based on FOB Origin/Point of Manufacture. The Berry Amendment, 10 U.S.C. § 2533a, generally requires that food stuffs for DoD use OCONUS be grown or produced in the United States. The agreed-upon Performance-Based Distribution Fee is a Firm, Fixed-Price which must sustain all of the Subsistence Prime Vendor Contractor's general and administrative expenses, overhead, profit, packaging/marketing/labeling costs, transportation costs from original CONUS and OCONUS Points of Manufacture to the Subsistence Prime Vendor's distribution facilities, warehousing costs, and local transportation costs to DoD customer locations in Bahrain, Qatar, and Saudi Arabia.

16. The agreed-upon Performance-Based Distribution Fee is only a small part of the Subsistence Prime Vendor Contract Unit Price. As an example, stew beef has a BMMI Catalog Price of \$3.34 per pound, and this BMMI Catalog Price consists of a

Product Price of \$2.99 per pound for beef which must be produced in the United States and a Performance-Based Distribution Fee of \$0.35 per pound, a Performance-Based Distribution Fee which must cover all the costs to Plaintiff BMMI, and any profit, to deliver this stew beef produced in the United States to DoD customers in Bahrain, Qatar, and Saudi Arabia within forty-eight hours after receipt of an electronic order.

The Disputed Contractor Performance Assessment Report (CPAR).

17. Early in 2007 DLA Contracting Officer Maryann DiMeo issued an intermediate Contractor Performance Assessment Report (CPAR) on Plaintiff BMMI's performance under DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131. The period of performance being assessed was March 12th, 2006 through December 11th, 2006. DLA Contracting Officer DiMeo there wrongly asserted that Plaintiff BMMI's average fill rate had fallen below ninety-six and one-half percent in February 2007 (BMMI's average fill rate was claimed to be ninety-five percent in this intermediate Contractor Performance Assessment Report (CPAR)) and wrongly as-

serted that BMMI's customer representatives (both non-Muslim women) were not making periodic visits to DoD customers at Eskan Village Air Force Base near Riyadh, Saudi Arabia.

18. DLA Contracting Officer DiMeo recommended in this intermediate Contractor Performance Assessment Report (CPAR) that “[g]iven what I know today about the contractor’s ability to execute what they promised in their proposal, *I might or might not award to them today* given that I had a choice.” Emphasis added. DLA Contracting Officer DiMeo had not followed the rating schema imposed by DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131, i.e., she had rated Plaintiff BMMI as *I might or might not award to them today* rather than as *probably would not award to them today*. Based on the improper rating in this intermediate Contractor Performance Assessment Report (CPAR) and on the wrongly claimed average fill rate for Plaintiff BMMI, DLA Contracting Officer DiMeo proposed to lower Plaintiff BMMI’s agreed-upon Performance-Based Distribution Fees by five percent for a succeeding period of six months.

19. The fill rates presented in this intermediate Contractor Performance Assessment Report (CPAR) proposed by DLA Contracting Officer DiMeo in no way represented the fill rates which actually had been achieved by Plaintiff BMMI and published by Plaintiff BMMI in its weekly and monthly reports to DSCP. These published fill rates in fact were 97.25 percent before product substitutions and 98.22 percent after product substitutions.

20. Plaintiff BMMI responded to this intermediate Contractor Performance Assessment Report (CPAR) proposed by DLA Contracting Officer DiMeo on May 15th, 2007. Plaintiff BMMI then said that the issue about access to Eskan Village Air Force Base "is not one of gender or religion but of access to the base. We have male, Bahraini members of the team who are not permitted to enter the base and [must] wait overnight for a US Military Driver to drive the BMMI vehicle inside. . . ." Plaintiff BMMI disputed the fill rate claimed by DLA Contracting Officer DiMeo, explaining that "[d]etailed data is available to substantiate customer over ordering." Plaintiff BMMI did not concur with DLA Contracting Officer DiMeo's intermediate Con-

tractor Performance Assessment Report (CPAR) and asked that it be re-evaluated. Plaintiff BMMI's challenge of May 15th, 2007 to this intermediate Contractor Performance Assessment Report (CPAR) is a proper Contract Disputes Act, 41 U.S.C. § 605(a), Contractor Claim. *BLR Group of America, Inc. v. United States*, 84 Fed. Cl. 634, 647-48 (2008).

21. On May 18th, 2007 DLA Contracting Officer DiMeo proposed bilateral Modification Number P00019 purporting to lower Plaintiff BMMI's agreed-upon Performance-Based Distribution Fees by five percent for the period June 10th, 2007 through December 9th, 2007. Proposed bilateral Modification Number P00019 in fact would have cut Plaintiff BMMI's Performance-Based Distribution Fees by some six to fifteen percent on seven items in Plaintiff BMMI's Catalog and would have cut Plaintiff BMMI's Performance-Based Distribution Fees by some sixteen to fifty percent on three items in Plaintiff BMMI's Catalog. Plaintiff BMMI complained on June 26th, 2007 about these inordinate cuts in Plaintiff BMMI's Performance-Based Distribution Fees, and proposed bilateral Modification Number P00019 was then withdrawn.

22. DLA Contracting Officer DiMeo issued a revised Contractor Performance Assessment Report (CPAR) on September 14th, 2007. There was not, as required by Federal Acquisition Regulation 42.1503(b), a higher level review. There was no DLA Contracting Officer's Final Decision as was required by 41 U.S.C. § 605(c). This time, DLA Contracting Officer DiMeo lowered Plaintiff BMMI's Performance-Based Distribution Fees rating from *I might or might not award to them today* to *I probably would not award to them today*. DLA Contracting Officer DiMeo provided no explanation for this lowered rating for Plaintiff BMMI's Performance-Based Distribution Fees. DLA Contracting Officer DiMeo did not attempt to reconcile the fill rate claimed in her intermediate Contractor Performance Assessment Report (CPAR) and the fill rates published by Plaintiff BMMI in its weekly and monthly reports to DSCP, published fill rates which were never contested or questioned by DSCP. DLA Contracting Officer DiMeo then authorized a five percent reduction in Plaintiff BMMI's agreed-upon Performance-Based Distribution Fees for a succeeding six-month period.

23. Eskan Village is south of Riyadh Air Base and is a home to the Saudi Arabian National Guard (SANG), the "White Army," and to the U.S. Army's Office of the Program Manager for the Saudi Arabian National Guard Modernization Program. DoD facilities at Eskan Village are managed by a provisional U.S. Air Force unit, the 64th Air Expeditionary Group. The SANG is the King of Saudi Arabia's private army consisting of persons drawn from tribes loyal to the King and to the Al Saud.

24. On November 8th, 2007 DLA Contracting Officer DiMeo proposed bilateral Modification Number P00023 purporting to represent a lump sum five percent reduction in Plaintiff BMMI's agreed-upon Performance-Based Distribution Fees, this for a period of six months. Plaintiff BMMI's sales during the period March 12th, 2006 through December 11th, 2006 were \$39,748,133.03, but this was for a period of two hundred seventy-five days and DLA Contracting Officer DiMeo had demanded a five percent reduction in Plaintiff BMMI's agreed-upon Performance-Based Distribution Fees for a period of only six months (one hundred-eighty days). To account for this shorter period, DLA Contracting Officer DiMeo reduced Plaintiff BMMI's actual

sales from \$39,748,133.03 to \$26,016,959.80 and DLA Contracting Officer DiMeo thus demanded five percent of Plaintiff BMMI's sales for six months, \$1,300,847.99.

25. When Plaintiff BMMI explained to DLA Contracting Officer DiMeo that the Performance-Based Distribution Fees provision of DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131 *authorizes a reduction only in the Performance-Based Distribution Fees, not in the Subsistence Prime Vendor Contract Unit Price*, proposed bilateral Modification Number P00023 was never signed.

The Letter of June 4th, 2008 and Agreed-Upon Bilateral Modification P00030.

26. Representatives from Plaintiff BMMI met at DSCP in Philadelphia, Pennsylvania in early 2008 to explain Plaintiff BMMI's Dispute with the five percent reduction in Plaintiff BMMI's agreed-upon Performance-Based Distribution Fees for a six-month period which had been authorized by DLA Contracting Officer DiMeo on September 14th, 2007, a Dispute which had arisen under the revised intermediate Contractor Performance Assessment Report (CPAR) of September 14th, 2007 because DSCP had not complied with Federal Acquisition Regulation 42.1503(b), because

DLA Contracting Officer DiMeo had not complied with 41 U.S.C. § 605(c), and because DLA Contracting Officer DiMeo had provided no explanation for her lowered rating and did not attempt to reconcile the fill rate claimed in her intermediate Contractor Performance Assessment Report (CPAR) with the fill rates published by Plaintiff BMMI in its weekly and monthly reports to DSCP, published fill rates which were never contested or questioned by DSCP.

27. On June 4th, 2008 DLA Contracting Officer Tina Frederico wrote Plaintiff BMMI:

DSCP has taken into consideration, weaknesses in the Performance Based Distribution Fee (PBDF) language presented by BMMI at the 2007 DSCP Subsistence Customer Conference. In light of valid points made, revised PBDF language has been drafted in detail, addressing compatibility issues with the CPARS system language. Please take the opportunity to review this new language; DSCP hopes to contractually implement these revisions via a bilateral modification if BMMI is in agreement with the terms.

Should BMMI agree to the revised PBDF terms, it is proposed that the Contracting Officer waive the obligation to enforce measures resulting from the CPARS rating for the 12 December 2006 through 11 December 2007 period. *Contractual actions that would otherwise result from the current PBDF language will not be executed. . . .*

Emphasis added. DLA Contract Specialist Teresa Jimenez transmitted DLA Contracting Officer Frederico's letter to Plaintiff BMMI as an attachment to an electronic message, therein stating "Look forward to finding a resolution to this matter."

28. In fact, there had been no further intermediate Contractor Performance Assessment Reports (CPARs) and there was no obligation, no measures pending in June 2008 to enforce reductions in Plaintiff BMMI's agreed-upon Performance-Based Distribution Fees after the revised Contractor Performance Assessment Report (CPAR) which had been issued by DLA Contracting Officer DiMeo on September 14th, 2007.

29. On June 9th, 2008 Plaintiff BMMI wrote DLA Contracting Officer Frederico to acknowledge receipt of her letter of June 4th, 2008. Plaintiff BMMI then accepted DSCP's proposal.

30. On July 24th, 2008 DLA Contracting Officer Frederico issued a proposed bilateral modification, Modification Number P00030. Attached were pages with revised Performance-Based Distribution Fees language. Block 14. of this proposed bilateral modification recites that "[t]his modification hereby formally replaces the former

Performance Based Distribution Fee Clause language as stated on the following pages.” Block 13.C. of this proposed bilateral modification cites Federal Acquisition Regulation Subpart 33.2, “Disputes and Appeals,” as the authority for the proposed bilateral modification. DLA Contracting Officer Frederico signed Modification Number P00030 on July 24th, 2008; a representative for Plaintiff BMMI signed Modification Number P00030 on August 13th, 2008.

The Government Contract Disputes Act Claim.

31. On September 2nd, 2008 Plaintiff BMMI sent an electronic message to DLA Contract Specialist Jimenez explaining that based on the last sentence of DLA Contracting Officer Frederico’s letter of June 4th, 2008 (“Contractual actions that would otherwise result from the current PBDF language will not be executed.”), Plaintiff BMMI had signed Modification P00030 with the expectation that Defendants were no longer seeking the five percent reduction in Plaintiff BMMI’s agreed-upon Performance-Based Distribution Fees for a six-month period which had been authorized by DLA Contracting Officer DiMeo on September 14th, 2007.

32. DLA Contract Specialist Jimenez responded in an electronic message that same day that she did not concur with this expectation of Plaintiff BMMI.

33. On December 11th, 2008 Plaintiff BMMI wrote DLA Contracting Officer Frederico, again explaining that Plaintiff BMMI had signed Modification P00030 with the expectation that Defendants were no longer seeking the five percent reduction in Plaintiff BMMI's agreed-upon Performance-Based Distribution Fees for a six-month period which had been authorized by DLA Contracting Officer DiMeo on September 14th, 2007.

34. On September 18th, 2009 DLA Contracting Officer Frederico sent Plaintiff BMMI a Demand Notice, announcing that Plaintiff BMMI owes Defendants \$273,559.75. This Demand Notice sets out the Government's Contract Disputes Act Claim:

BMMI is indebted to the United States Government in the amount of \$273,559.75 under the above-referenced contract. This debt is due to the CPARS rating of March 2006 to December 2006 based on the Performance Based Distribution Fee (PBDF) language in the contract. The binding contract entitles DSCP to the amount, although BMMI argues that the bilateral

modification language of P00030 waives this right. The letter sent on June 2008 does not emphasize a waiver for the period of March 2006 to December 2006 and specifies waiving the time frame of December 2006 to December 2007 from the PBDF evaluation.

DLA Contracting Officer Frederico's Demand Letter explains that this Demand Letter is her Final Decision under the "Disputes" Clause of DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131.

COUNT I

DEFENDANTS WAIVED ANY ENTITLEMENT TO THE CLAIMED
SIX-MONTH REDUCTION IN PLAINTIFF'S PERFORMANCE-BASED DISTRIBUTION FEES.

35. Plaintiff BMMI incorporates and re-alleges paragraphs numbers 1. through 34. hereinabove as if fully set forth herein.

36. Defendants waived any entitlement to the claimed six-month reduction in Plaintiff's Performance-Based Distribution Fees when, in the letter of June 4th, 2008, Defendants wrote that "[c]ontractual actions that would otherwise result from the current PBDF language will not be executed."

COUNT II

DEFENDANTS ARE NOT ENTITLED TO THE CLAIMED SIX-MONTH REDUCTION IN PLAINTIFF'S PERFORMANCE-BASED DISTRIBUTION FEES BECAUSE THE DLA CONTRACTING OFFICER HAS NOT RULED ON PLAINTIFF'S CONTRACT DISPUTES ACT CLAIM CONTESTING THE IMPROPER INTERMEDIATE CONTRACTOR PERFORMANCE ASSESSMENT REPORT (CPAR) AND BECAUSE THIS INTERMEDIATE CONTRACTOR PERFORMANCE ASSESSMENT REPORT (CPAR) IS WRONGLY RATED.

37. Plaintiff BMMI incorporates and re-alleges paragraphs numbers 1. through 34. hereinabove as if fully set forth herein.

38. Defendants are not entitled to the claimed six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees because Plaintiff BMMI has not received a DLA Contracting Officer's Final Decision on BMMI's Contract Disputes Act Claim of May 15th, 2007 contesting the improper intermediate Contractor Performance Assessment Report (CPAR) on which the claimed six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees is based and because this intermediate Contractor Performance Assessment Report (CPAR) is wrongly rated.

COUNT III
DEFENDANT'S CLAIM IS ERRONEOUSLY CALCULATED.

39. Plaintiff BMMI incorporates and re-alleges paragraphs numbers 1. through 34. hereinabove as if fully set forth herein.

40. Defendants have not, and cannot, explain just how they are due \$273,559.75 as a lump sum under the former Performance-Based Distribution Fees provision of DSCP Subsistence Prime Vendor Contract Number SPM300-08-D-3131, this for a claimed six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff BMMI respectfully requests:

(a) that the Court declares that by reason of bilateral Modification Number P00030 Defendants have waived any entitlement to the claimed six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees;

(b) that the Court declares that Defendants are not entitled to the claimed six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees because Plaintiff BMMI has not received a DLA Contracting Officer's Final Decision on BMMI's Contract Disputes Act Claim of May 15th, 2007 contesting the improper intermediate Contractor Performance Assessment Report (CPAR) on which the claimed six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees is based and because this intermediate Contractor Performance Assessment Report (CPAR) is wrongly rated;

(c) that the Court declares that the that the amount claimed by Defendants, \$273,559.75, for a six-month reduction of five percent in otherwise agreed-upon Performance-Based Distribution Fees is erroneously calculated;

(d) that the Court grants Plaintiff BMMI such other and further relief as may be just and proper.

Respectfully submitted,



Cyrus E. Phillips, IV
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October 29th, 2009

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