

## In the United States Court of Federal Claims

<hr/>	
BAHRAIN MARITIME & MERCANTILE	)
INTERNATIONAL B.S.C.	)
Db a BMMI	)
812 Shaikh Jabber Al Amed	)
Al Subah Highway	)
Sitra, Kingdom of Bahrain	)
	)
Plaintiff,	)
	)
v.	)
	)
THE UNITED STATES,	)
	)
Defendants.	)
<hr/>	

No. 09-739C  
Senior Judge James F. Merow

**PLAINTIFF’S OBJECTION TO  
DEFENDANTS’ MOTION FOR A MORE DEFINITE STATEMENT**

1. Plaintiff Bahrain Maritime & Mercantile International B.S.C., Db a BMMI, 812 Shaikh Jabber Al Amed Al Subah Highway, Sitra, Kingdom of Bahrain (BMMI) files this RCFC 7.2(a)(1) Objection to Defendants’ RCFC 12(e) Motion for a More Definite Statement.

THE FEDERAL GOVERNMENT CONTRACT DISPUTES ACT CLAIM HERE AT ISSUE

2. This is a \$273,559.75 Federal Government Contract Disputes Act Claim by Defendants Defense Logistics Agency (DLA) and its Defense Supply Center Philadelphia (DSCP); a Federal Government Contract Disputes Act Claim against Plaintiff BMMI, a Federal Government Contractor, asserted by a DLA Contracting Officer in a Contract Disputes Act Final Decision of September 18<sup>th</sup>, 2009 under an express Contract between Plaintiff BMMI and the DLA and its DSCP; a Federal Government Contract Disputes Act Claim, 41 U.S.C. § 605(a), 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.

3. The controversy in this Case goes back to early 2007 when a DLA Contracting Officer issued a Contractor Performance Assessment Report (CPAR) claiming Federal Government entitlement to a five percent reduction in Plaintiff BMMI's agreed-

upon Performance-Based Distribution Fees. Plaintiff BMMI's Complaint, October 29<sup>th</sup>, 2009, Paragraphs Numbers 17 through 20. But the DLA Contracting Officer's CPAR itself was disputed, and while it was later reviewed (but not at the higher level required), the CPAR has of yet not been the subject of a DLA Contracting Officer's Contract Disputes Act Final Decision. Plaintiff BMMI's Complaint, October 29<sup>th</sup>, 2009, Paragraph Number 22.

4. The Federal Government Contract Disputes Act Claim here was the subject of exchanges between the parties in 2008 and 2009, Plaintiff BMMI's Complaint, October 29<sup>th</sup>, 2009, Paragraphs Numbers 24 through 34, but there was no resolution of this Federal Government Claim, and this Federal Government Claim has now resulted in the DLA Contracting Officer's Contract Disputes Act Final Decision and Demand Notice, Plaintiff BMMI's Complaint, October 29<sup>th</sup>, 2009, Paragraph Number 34, the same DLA Contracting Officer's Contract Disputes Act Final Decision and Demand Notice which is the subject of Plaintiff BMMI's Complaint of October 29<sup>th</sup>, 2009 contesting this Federal Government Contract Disputes Act Claim.

5. Plaintiff BMMI makes no Federal Government Contractor Claims of its own against Defendants DLA and its DSCP nor could it, this because Plaintiff BMMI has not presented such written Federal Government Contractor Claims for a DLA Contracting Officer's Contract Disputes Act Final Decision, 41 U.S.C. § 605(a), nor has Plaintiff BMMI demanded a DLA Contracting Officer's Contract Disputes Act Final Decision on written Federal Government Contractor Contract Disputes Act Claims previously presented by Plaintiff BMMI to a DLA Contracting Officer, *viz.*, Plaintiff BMMI's challenge of May 15<sup>th</sup>, 2007 to the intermediate CPAR issued by a DLA Contracting Officer early in 2007.

6. Plaintiff BMMI is a Bahraini corporate entity, Plaintiff BMMI's Complaint, October 29<sup>th</sup>, 2009, Paragraph Number 4, and Plaintiff BMMI, a citizen of Bahrain, is a citizen of a foreign Government just as this term is defined in 28 U.S.C. § 2502(a), popularly known as the "Reciprocity Act." Defendants DLA and its DSCP made a voluntary election on September 11<sup>th</sup>, 2005 to deal with Plaintiff BMMI, a citizen of a foreign Government, when Defendants DLA and its DSCP awarded Plaintiff BMMI

an express Contract, 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. Plaintiff BMMI's Complaint, October 29<sup>th</sup>, 2009, Paragraphs Numbers 5 and 6.

7. Bahrain is a democratic hereditary constitutional monarchy, as is England, and sovereignty is there exercised in the manner set out in the Constitution of the Kingdom of Bahrain dated February 14<sup>th</sup>, 2002. Kingdom of Bahrain, eGovernment Portal, Rules and Regulations, <http://www.bahrain.bh/pubportal/wps/portal/> (last visited March 4<sup>th</sup>, 2010).

8. One would think that our Federal Government, Defendants DLA and its DSCP, when it makes a Federal Government Contract Disputes Act Claim against one of its Federal Contractors, as they did here on September 18<sup>th</sup>, 2009, had already located the relevant documents "and individuals with material knowledge of the

events underlying the facts in this matter.” But we were told on December 22<sup>nd</sup>, 2009 that Defendants DLA and its DSCP needed more time (beyond the sixty calendar days allowed by RCFC 12(a)(1)(A)) to do that which Plaintiff BMMI had supposed has already occurred, that is, to locate the relevant documents and interview individuals with material knowledges of the events underlying the Federal Government’s Contract Disputes Act Claim of September 18<sup>th</sup>, 2009. Defendants’ Motion, December 22<sup>nd</sup>, 2009, at Paragraph 3, page 2.

9. On December 28<sup>th</sup>, 2009 the Court allowed Defendants DLA and its DSCP until February 26<sup>th</sup>, 2010 to respond to Plaintiff BMMI’s Complaint of October 29<sup>th</sup>, 2009 contesting this Federal Government Contract Disputes Act Claim. On February 26<sup>th</sup>, 2010, after Defendants DLA and its DSCP had been given all of the time extension they had asked for, Defendants DLA and its DSCP again did not respond to Plaintiff BMMI’s Complaint, but instead Defendants DLA and its DSCP assert that Plaintiff BMMI must now prove compliance with the strictures imposed by the Reciprocity Act, 28 U.S.C. § 2502(a), and this even though Defendants DLA and its DSCP

have already made a voluntary election to deal with Plaintiff BMMI, a citizen of a foreign Government. Defendants' Motion, February 26<sup>th</sup>, 2010, at pages 2 through 3.

#### ARGUMENT

##### I. DEFENDANTS' RCFC 12(E) MOTION IS INAPPOSITE.

Defendants DLA and its DSCP move for a More Definite Statement under RCFC 12(e). RCFC 12(e) by its terms permits a defending party to "move for a more definite statement of a pleading to which a responsive pleading is allowed but *which is so vague or ambiguous that the party cannot reasonably prepare a response.* (Emphasis added). RCFC 12(e) requires that such Motions be made before filing a responsive pleading and requires also that such Motions "must point out the defects complained of and the details desired." Defendants DLA and its DSCP assert that Plaintiff BMMI, a Federal Government Contractor and a citizen of a foreign Government here contesting a Federal Government Contract Disputes Act Claim, must now prove that United States citizens possess reciprocal rights in Bahrain. Defendants' Motion, February 26<sup>th</sup>, 2010, at page 2.

Defendants' Motion nowhere avers that Plaintiff BMMI's Complaint of October 29<sup>th</sup>, 2009 contesting this Federal Government Contract Disputes Act Claim is vague or ambiguous. Instead, Defendants DLA and its DSCP aver, correctly, that Plaintiff BMMI's Complaint of October 29<sup>th</sup>, 2009 is "entirely silent on the issue of reciprocity," and from this Defendants DLA and its DSCP wrongly conclude that Plaintiff BMMI's Complaint of October 29<sup>th</sup>, 2009 "fails to plead jurisdiction sufficiently." Defendants' Motion, February 26<sup>th</sup>, 2010, at page 3.

Under the "well-pleaded complaint" rule, jurisdiction need only be pleaded, not ultimately proven, *Acceptance Insurance Companies, Inc. v. United States*, 503 F.3d 1328, 1334-35 (Fed. Cir. 2007), and here Plaintiff BMMI, in short and plain statements, has asserted jurisdiction under specific statutory provisions of the Contract Disputes Act of 1978, section 10(a)(1) of the Contract Disputes Act of 1978, 41 U.S.C. § 609(a)(1), as implemented by the Tucker Act, 28 U.S.C. § 1491(a)(2).

RCFC 8 demands notice Pleading, *viz.*, RCFC 8(a) requires only that a Pleading must contain: (1) "a short and plain statement of the grounds for the court's jurisdic-

tion, unless the court already has jurisdiction and the claim needs no new jurisdictional support;” (2) “ a short and plain statement of the claim showing that the pleader is entitled to relief; and” (3) “a demand for the relief sought, which may include relief in the alternative or different types of relief.” RCFC 8(e) requires that Pleadings “must be construed so as to do justice.” As the Court has noted, this concept of notice Pleading rejects any notion that Pleadings are a trap for the unwary, and this Court recognizes that notice Pleading “is made possible by the liberal opportunity for discovery and the other pretrial procedures . . . .” *M.A. DeAtley Construction, Inc. v. United States*, 71 Fed. Cl. 370, 372-73 (2006), quoting *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957).

Where, as here, the Federal Government has custody of the relevant records and access to individuals with material knowledges of the underlying facts, and where, as here, any ambiguities or omissions in a Complaint can be resolved through discovery, a RCFC 12(e) Motion for a More Definite Statement must be denied, just as this RCFC 12(e) Motion for a More Definite Statement filed by Defendants DLA and its

DSCP must be denied. *Whalen v. United States*, 80 Fed. Cl. 685, 693-94 (2008). Defendants DLA and its DSCP have not made the required RCFC 12(e) showing that Plaintiff BMMI's Complaint of October 29<sup>th</sup>, 2009 contesting this Federal Government Contract Disputes Act Claim is either vague or ambiguous. Defendants DLA and its DSCP cannot establish that available discovery and this Court's Case Management Procedures, RCFC Appendix A, will somehow foreclose their right, if necessary, to inquire into the reciprocal right of United States citizens to proceed in Bahrain on the same terms as a Bahraini citizen may proceed in Bahrain.

II. SPECIFIC STATUTORY PROVISIONS OF THE CONTRACT DISPUTES ACT OF 1978 TRUMP THE RECIPROCITY ACT, A GENERAL JURISDICTIONAL STATUTE.

The Reciprocity Act, 28 U.S.C. § 2502(a), is a general jurisdictional statute enacted just after the American Civil War to address, among other things, Claims against the Federal Government arising from abandoned cotton captured by the Union Army. *Ferreiro v. United States*, 350 F.3d 1318, 1320-21 (Fed. Cir. 2003). As has been carefully explained by the United States Court of Appeals for the Federal Circuit and its pre-

decessors, the Reciprocity Act, 28 U.S.C. § 2502(a), if it is applicable, only requires *equal treatment* of United States citizens, that is, there must be evidence that United States citizens may sue the foreign sovereign of Bahrain on the same terms as Bahraini citizens may sue the sovereign of Bahrain. *Ferreiro*, 350 F.3d, at 1322.

Plaintiff BMMI is not proceeding against Defendants DLA and its DSCP under the general jurisdiction afforded for Claims against the Federal Government by the Tucker Act, 28 U.S.C. § 1491(a)(1)—rather, Plaintiff BMMI is contesting a Federal Government Contract Disputes Act Claim by Defendants DLA and its DSCP made against a Federal Government Contractor, this as expressly permitted by section 10(a)(1) of the Contract Disputes Act of 1978, 41 U.S.C. § 609(a)(1), and by the Tucker Act, 28 U.S.C. § 1491(a)(2). Plaintiff BMMI's Complaint, October 29<sup>th</sup>, 2009, Paragraph Number 8.

Section 10(a)(1) of the Contract Disputes Act of 1978, 41 U.S.C. § 609(a)(1) explicitly promises Federal Government Contractors as Plaintiff BMMI that they may contest Federal Government Contract Disputes Act Claims, 41 U.S.C. § 605(a), di-

rectly in the United States Court of Federal Claims. This right is unconditional. The Contract Disputes Act of 1978 expressly defines a Federal Government “Contractor” as “a party to a Government contract other than the Government.” 41 U.S.C. § 601-(4). This definition in the Contract Disputes Act of 1978 makes no distinction between Federal Government Contractors who are citizens of the United States and Federal Government Contractors who are citizens of foreign Governments.

This Court holds that the specific statutory provisions of the Contract Disputes Act of 1978 trump general statutory provisions otherwise applicable to Cases filed in the United States Court of Federal Claims. *Brickwood Contractors, Inc. v. United States*, 77 Fed. Cl. 624, 629-30 (2007) (statutory time limitations). Doing so, this Court acknowledges the cardinal rule of statutory interpretation that specific provisions control over more general provisions. *Geo-Seis Helicopters, Inc. v. United States*, 77 Fed. Cl. 633, 645 (2007) (Federal Acquisition Regulations).

The Reciprocity Act, 28 U.S.C. § 2502(a), is a general jurisdictional statute otherwise applicable to Cases filed in the United States Court of Federal Claims. Section

10(a)(1) of the Contract Disputes Act of 1978, 41 U.S.C. § 609(a)(1), as implemented by the Tucker Act, 28 U.S.C. § 1491(a)(2), is a specific jurisdictional statute which expressly and unconditionally promises Federal Government Contractors as Plaintiff BMMI, a citizen of a foreign Government, that they may contest Federal Government Contract Disputes Act Claims directly in the United States Court of Federal Claims.

The strictures of the Reciprocity Act, 28 U.S.C. § 2502(a), are inconsistent with the unconditional right afforded Federal Government Contractors, including Federal Government Contractors who are citizens of a foreign Government, to contest Federal Government Contract Disputes Act Claims, 41 U.S.C. § 605(a), directly in the United States Court of Federal Claims under section 10(a)(1) of the Contract Disputes Act of 1978, 41 U.S.C. § 609(a)(1), as implemented in the Tucker Act, 28 U.S.C. § 1491(a)(2). Section 10 of the Contract Disputes Act of 1978, 41 U.S.C. § 609, is a broad and comprehensive provision which controls this Court's specific Contract Disputes Act jurisdiction. *Bell BCI Co. v. United States*, Fed. Cl. No. 03-1613C, February 24<sup>th</sup>, 2010, slip op. at 4.

Defendants DLA and its DSCP made a voluntary election on September 11<sup>th</sup>, 2005 to deal with Plaintiff BMMI, a citizen of a foreign Government, when Defendants DLA and its DSCP awarded Plaintiff BMMI an express Contract, 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. Defendants DLA and its DSCP made a voluntary election on September 18<sup>th</sup>, 2009 to assert a Federal Government Contract Disputes Act Claim, 41 U.S.C. § 605(a), against Plaintiff BMMI, a Federal Government Contractor and a citizen of a foreign Government with whom Defendants DLA and its DSCP have chosen to deal.

Given these voluntary elections by Defendants DLA and its DSCP, and given the controlling, specific statutory provisions of the Contract Disputes Act of 1978 which explicitly and unconditionally promise Federal Government Contractors as Plaintiff BMMI, a citizen of a foreign Government, that they may contest Federal Government

Contract Disputes Act Claims, 41 U.S.C. § 605(a), directly in the United States Court of Federal Claims, the strictures of the Reciprocity Act, 28 U.S.C. § 2502(a), are here inapplicable.

III. THE ELECTION DOCTRINE PRECLUDES APPLICATION OF THE RECIPROCITY ACT TO CONTESTED CONTRACT DISPUTES ACT CLAIMS.

Section 7 of the Contract Disputes Act of 1978, 41 U.S.C. § 606, allows Federal Government Contractors to file an Appeal with an Agency Board of Contract Appeals within ninety calendar days from receipt of a Federal Contracting Officer's Contract Disputes Act Final Decision. Section 10(a)(1) of the Contract Disputes Act of 1978, 41 U.S.C. § 609(a)(1), allows Federal Government Contractors an *election*—instead of an Appeal filed with an Agency Board of Contract Appeals, Federal Government Contractors may bring a Case directly to this Court “*notwithstanding any . . . rule of law to the contrary.*” (Emphasis added).

Federal Government Contractors must choose between an Appeal to an Agency Board of Contract Appeals else a Case filed in this Court. Once this choice of forum is

made, it is irrevocable and a Federal Government Contractor who makes an informed, knowing, and voluntary choice of forum may not later change the selected forum. *American Telecom Corp. v. United States*, 59 Fed. Cl. 467, 470-71 (2004).

The Reciprocity Act, 28 U.S.C. § 2502(a), is inapplicable to Agency Boards of Contract Appeal. Agency Boards of Contract Appeals hear without challenge Appeals filed by Federal Government Contractors who just happen to be citizens of foreign Governments. *E.g., Inversa, S.A. v. Department of State*, U.S. Civilian Board of Contract Appeals No. 440, July 29<sup>th</sup>, 2008, 2008 CIVBCA LEXIS 202, \*5, \*70-\*71 (Contract Disputes Act Claim from a Panamanian citizen concerning leased premises in Panama City, Panama. Here the U.S. Civilian Board of Contract Appeals cites *Sam Grey Enterprises, Inc. v. United States*, 43 Fed. Cl. 596, 601-02 (1999) for the proposition that United States substantive law is applied in a Contract Disputes Act matter (there it was a Bahamian lease), this as is required under *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943), to maintain uniform rules of Public Contract law).

Application of the strictures of the Reciprocity Act, 28 U.S.C. § 2502(a) to contested Contract Disputes Act Claims filed in this Court under section 10(a)(1) of the Contract Disputes Act, 41 U.S.C. § 609(a)(1), as implemented in the Tucker Act, 28 U.S.C. § 1491(a)(2), as is proposed in Defendants' RCFC 12(e) Motion, is not the uniform rule of Public Contract law demanded by *Clearfield Trust*, nor is it consistent with the express will of Congress, that Federal Government Contractors have an *election* to proceed in an Agency Board of Contract Appeals under Section 7 of the Contract Disputes Act of 1978, 41 U.S.C. § 606, else in this Court under Section 10(a)(1) of the Contract Disputes Act of 1978, 41 U.S.C. § 609(a)(1), as implemented in the Tucker Act, 28 U.S.C. § 1491(a)(2).

Federal Government Contractors are afforded an election by Section 10(a)(1) of the Contract Disputes Act of 1978, 41 U.S.C. § 609(a)(1), to bring Cases arising from contested Contract Disputes Act Claims directly to this Court notwithstanding any rule of law to the contrary. These elections, once made, are irrevocable. The Reciprocity Act, 28 U.S.C. § 2502(a), is such a rule to the contrary if it is applied, as is pro-

posed in Defendants' RCFC 12(e) Motion, to a contested Contract Disputes Act Claim.

IV. THE RECIPROCITY ACT DOES NOT APPLY TO A FEDERAL GOVERNMENT CONTRACT DISPUTES ACT CLAIM.

Only once has this Court applied the strictures of the Reciprocity Act, 28 U.S.C. § 2502(a), to a Case before the Court under the Contract Disputes Act of 1978, and there the Court applied the strictures of the Reciprocity Act, 28 U.S.C. § 2502(a) to a contested Contract Disputes Act Claim made against the Federal Government by a Federal Government Contractor, a citizen of a foreign Government, 41 U.S.C. § 605(a). *Mexican Intermodal Equipment S.A. de C.V. v. United States*, 61 Fed. Cl. 55, 61-62 (2004). This Case is different—this Case is a contested Federal Government Contract Disputes Act Claim, 41 U.S.C. § 605(a), made against Plaintiff BMMI, a Federal Government Contractor, a citizen of a foreign Government with whom the Federal Government has voluntarily elected to deal, and this Case is proceeding under section 10(a)(1) of the Contract Disputes Act of 1978, 41 U.S.C. § 609(a)(1), as

implemented in the Tucker Act, 28 U.S.C. § 1491(a)(2), a specific jurisdictional statute which expressly and unconditionally promises Federal Government Contractors as Plaintiff BMMI, a citizen of a foreign Government, that they may elect to contest Federal Government Contract Disputes Act Claims directly in the United States Court of Federal Claims.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff BMMI respectfully requests:

(a) that the Court deny Defendants' RCFC 12(e) Motion for a More Definite Statement; and

(b) that the Court order that within thirty calendar days after entry of its Opinion denying Defendants' RCFC 12(e) Motion for a More Definite Statement, Defendants DLA and its DSCP shall file their response to Plaintiff BMMI's Complaint of October 29<sup>th</sup>, 2009 contesting a Federal Government Contract Disputes Act Claim of September 18<sup>th</sup>, 2009; and

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

Respectfully submitted,

/s/ Cyrus E. Phillips IV

---

Cyrus E. Phillips IV  
Virginia State Bar Number 03135

March 8<sup>th</sup>, 2010

Colonial Place I  
2111 Wilson Boulevard, Suite 700  
Arlington, Virginia 22201-3052

Telephone: (703) 351-5044  
Facsimile: (703) 351-9292  
Mobile: (703) 819-5944  
Electronic Mail: [lawyer@procurement-lawyer.com](mailto:lawyer@procurement-lawyer.com)

Attorney of record for Plaintiff,  
Bahrain Maritime & Mercantile International B.S.C.

**CERTIFICATE OF SERVICE**

I hereby certify, under penalty of perjury, that as required by RCFC 5(a)(1)(B), on Monday, March 8<sup>th</sup>, 2010 a true and complete copy of this Plaintiff BMMI's RCFC 7.2(a)(1) Objection to Defendants' RCFC 12(e) Motion for a More Definite Statement was filed electronically via the Court's Electronic Case Filing System, through which notice of this filing will be sent to:

Russell J. Upton, Esq.

Electronic Mail: [Russell.J.Upton@usdoj.gov](mailto:Russell.J.Upton@usdoj.gov)

Attorney of record for Defendants,  
Defense Logistics Agency and its  
Defense Supply Center Philadelphia.

/s/ Cyrus E. Phillips IV

---

Cyrus E. Phillips IV