

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Recon Optical, Inc. ) ASBCA No. 56289  
)  
Under Contract No. W15QKN-06-C-0152 )

APPEARANCES FOR THE APPELLANT: William J. Spriggs, Esq.  
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Army Chief Trial Attorney  
MAJ David Abdalla, JA  
MAJ Charlotte M. Emery, JA  
CPT John J. Pritchard, JA  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Recon Optical, Inc. (ROI) moves for reconsideration of our decision of 20 March 2009 denying its First Motion for Summary Judgment. That motion sought summary judgment on the ground that the government failed to issue a cure notice before terminating the captioned contract for default. The termination notice was issued on 10 December 2007. At that time, the specified contract completion date for delivery of 275 Common Remotely Operated Weapon Station (CROWS) systems was 31 December 2007. *See Recon Optical, Inc.*, ASBCA No. 56289, 09-1 BCA ¶ 34,110.

Prior to the termination, the ROI CROWS systems had failed two successive design verification tests (DVTs). The first DVT failure occurred over an extended period from the summer of 2006 through April 2007. On 4 May 2007, the contracting officer issued a cure notice to ROI. The cure notice stated that ROI's failure to pass the DVT was a condition endangering performance of the contract and required ROI to cure the condition by (i) providing three "fully compliant" CROWS systems no later than 14 May 2007 for a second DVT and (ii) successfully completing the second DVT. *Id.* at 168,668.

ROI provided four CROWS systems by 14 May 2007 for the second DVT, but after a further four months those systems failed to complete the second DVT successfully. In response to the second DVT failure, ROI informed the contracting officer that it would require a number of performance specification waivers, engineering changes and an extension of the contract completion date through July 2008. After considering the second DVT results and ROI's response thereto, the contracting officer terminated the contract for default without issuing another cure notice. *Id.* at 168,668-69.

Our 20 March 2009 decision denied ROI's First Motion for Summary Judgment on the ground of genuine issues of material fact as to, *inter alia*, (i) the significance of the differences between the two DVTs, and (ii) whether ROI concurred in the use of the UMR2 test for purposes of curing the default. *Id.* at 168,670. ROI argues on reconsideration that the second DVT (UMR2) "contained fundamentally different test specifications" than the first DVT (UMR1), and that even if it had agreed to the "more stringent testing" during the UMR2 DVT, it was nevertheless entitled as a matter of law to notice and an opportunity to cure any alleged deficiencies found during that DVT (app. reply br. at 1).

With respect to the first genuine issue of material fact identified in our prior decision, ROI states that we "found" in SOF ¶ 8 of that decision that "the performance specifications...applied during the UMR2 DVT were different (more rigorous) than the performance specifications...applied during the UMR1 DVT" (app. reply br. at 3). We made no such "finding." In SOF ¶8 we did not state that UMR2 was more rigorous than UMR1. We stated only that "The parties do not dispute that the UMR2 DVT requirements were different from the UMR1 DVT requirements." *Id.* at 168,668. The significance of the differences between UMR1 and UMR2 remains a genuine issue of material fact bearing on the right of ROI to a second cure notice. There is nothing in ROI's motion for reconsideration persuading us to the contrary.

With respect to the second genuine issue of material fact identified in our prior decision, ROI concedes, for purposes of its motion, that it concurred in the use of "more stringent testing during the UMR2 DVT" (app. reply br. at 1). The second DVT was a requirement of the 4 May 2007 cure notice. If in fact ROI agreed to the UMR2 test for the second DVT, its failure to pass that test, whether or not more rigorous than the first DVT, was a failure to cure. ROI cites no legal support for the proposition that the government must issue a cure notice for a contractor's failure to cure.

The motion for reconsideration is denied.

Dated: 16 July 2009

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MONROE E. FREEMAN, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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. 56289, Appeal of Recon Optical, Inc., rendered in conformance with the Board's Charter.

Dated:

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