

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Boeing Company) ASBCA No. 60373
)
Under Contract No. W58RGZ-09-C-0161)

APPEARANCES FOR THE APPELLANT: Scott A. Felder, Esq.
Kevin P. Anderson, Esq.
Craig Smith, Esq.
Wiley Rein LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
Christina Lynn E. McCoy, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE D’ALESSANDRIS ON
APPELLANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pending before the Board is a motion for partial summary judgment filed by appellant, The Boeing Company (Boeing), seeking determinations, as a matter of law, that software developed with costs charged to a Technology Investment Agreement (TIA) pursuant to 10 U.S.C. § 2358 constitute software developed “exclusively at private expense” as that term is defined in the Department of Defense Federal Acquisition Regulation Supplement (DFARS) 252.227-7014(a)(8), and that the TIAs at issue in this appeal did not make a blanket grant of government purpose rights in non-deliverable software developed with costs charged to the TIAs. The Army Contracting Command – Redstone (Army or government) opposes the motion, asserting that material facts in dispute prevent entry of summary judgment. We disagree and grant Boeing’s motion, holding that, to the extent the software at issue was developed with costs charged to the TIAs at issue, the software was developed “exclusively at private expense” as defined in DFARS 252.227-7014(a)(8), and that the TIAs do not make a blanket award of government purpose rights, or greater rights, to the government.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

The LRIP Contract

1. Effective 30 July 2009, the Army awarded Contract No. W58RGZ-09-C-0161 (LRIP Contract) to Boeing (R4, tabs 12, 16).¹ The contract's statement of work required Boeing to "[r]emanufacture...AH-64D Block I model aircraft into AH-64D [Apache Block III] model aircraft utilizing remanufactured Government Furnished Equipment (GFE) fuselages" (R4, tab 12 at 52). The work would have a low rate of initial production (LRIP) (*id.*).

2. The LRIP Contract does not contain a specially-negotiated clause addressing license rights in the software developed under the TIAs (R4, tab 12 at 64-66 (Statement of Work §§ C.3.6.1 3.6.2)), but incorporates by reference DFARS 252.227-7014, RIGHTS IN NONCOMMERCIAL COMPUTER SOFTWARE AND NONCOMMERCIAL COMPUTER SOFTWARE DOCUMENTATION (JUN 1995) (R4, tab 12 at 27). In relevant part, DFARS 252.227-7014(a) provides that:

(8) *Developed exclusively at private expense* means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

....

(9) *Developed exclusively with government funds* means development was not accomplished exclusively or partially at private expense.

(10) *Developed with mixed funding* means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

3. The funding of software is relevant because, subject to exceptions not relevant here, the DFARS provides that the government will receive unlimited rights in software developed exclusively at government expense; government purpose rights in software developed with mixed funding; and restricted rights in software delivered

¹ For simplicity we refer to the contractor as Boeing throughout this opinion, even though certain actions were performed by Boeing's predecessor, the McDonnell Douglas Helicopter Company.

or required to be provided to the government under a contract and developed exclusively at private expense. DFARS 252.227-7014(b)(1)–(b)(3). The DFARS clause also provides that the parties may negotiate to provide the government with greater data rights in software, if appropriate. DFARS 252.227-7014(b)(4).

4. Also relevant to this appeal are the Department of Defense Grant and Agreement Regulations (DoDGARs). The guidance relevant to the TIAs at issue in this appeal is found in DoD 3210.6-R, Interim Guidance DoDGARs (Apr. 26, 1994) at part 37 (app. mot., ex. 1) and a TIA Supplement (Dec. 2, 1997) (app. mot., ex. 5). The 1994 Interim Guidance addresses “cooperative agreements” that were predecessors to the TIAs at issue in this appeal. The guidance does not require software developed under cooperative agreements to be delivered to the government and does not require that the government receive any rights in software developed but not delivered pursuant to the agreements. However, the guidance recommends that the government “should generally seek” to negotiate rights similar to government purpose rights. (App. mot., ex. 1, tab B at 37-9) The TIA supplement similarly encouraged the government to negotiate software rights in TIA agreements, which were then a new type of cooperative agreement (app. mot., ex. 7 at 3). This stands in marked contrast with the government’s treatment of software produced under non-TIA cooperative agreements which required the government to receive something equivalent to government purpose rights in software funded by cooperative agreements other than TIA agreements. *See* 32 C.F.R. § 34.25(b)(2).

The AMUST-D TIA

5. Effective 12 November 2001, Boeing and the Army’s Aviation Applied Technology Directorate (AATD) entered into TIA No. DAAH10-02-2-0001 (R4, tab 1). The TIA was for the Airborne Manned-Unmanned System Technology—Demonstration (AMUST-D) research and development effort. The AMUST-D TIA called for the government to contribute \$8,827,130 to the effort, while Boeing did not contribute any funds to the effort (*id.* at 1). Article I of the AMUST-D TIA provides that “[t]his [TIA] is a cooperative agreement pursuant to 10 U.S.C. 2358 Research Projects” (*id.* at 4). Under the TIA, Boeing was to develop software for the Apache helicopter called the “Warfighter’s Associate” (WA), and was also to “assist in the development of the Mobile Commander’s Associate” (*id.* at 26). The TIA additionally provides that:

The Grants/Agreements Officer represents, warrants and assures the other Party to this Agreement that this Agreement is not a procurement contract or grant agreement under 31 U.S.C. Sections 6303 and 6304 for purposes of FAR Section 31.205-18(a), and that such other Party’s [independent research & development (IR&D)] costs incurred in performance under this Agreement are

not construed to be sponsored by, or required in performance of a procurement contract or grant agreement.

(*Id.* at 4)

6. Several provisions of the AMUST-D TIA directly address data rights in software. Article X allocates intellectual property rights other than patent rights, which are addressed in Article IX (R4, tab 1 at 16). Article X.A, Definitions, incorporates definitions of “Computer Software” and “Government Purpose Rights,” among other terms, from DFARS 252.227-7014 (*id.* at 16-17). Article X.B, “Allocation of Principal Rights,” states: “The Government shall have Government Purpose Rights to AMUST-D deliverable Technical Data and Computer Software in whole and in part, except as” specified in the following numbered paragraphs (*id.* at 17-18). Article X.D.4 states that “UAV Connectivity and UAV Management module’s source code will be delivered with Government Purpose Rights” (*id.* at 19). The article further states: “All other remaining source code which is delivered prior to the final flightworthy version will be delivered as ‘Restricted to AATD use only.’ The final flightworthy version of source code shall be delivered with Government Purpose Rights.” (*Id.*) Attachment 2 specifies the deliverables under the AMUST-D TIA (*id.* at 3, 30-34). The required deliverables expressly exclude certain software developed, added, or modified to accommodate the WA software developed under the TIA: “Longbow Apache production software added, modified, or developed under this Agreement for accommodation of WA software developed under this Agreement is not deliverable” (*id.* at 33).

The MCAP TIA

7. Effective 20 June 2003, Boeing and the AATD entered into TIA No. DAAH10-03-2-0002 (R4, tab 2). The TIA is for the Manned/Unmanned Common Architecture Program (MCAP) research and development effort. The TIA calls for Boeing to contribute [REDACTED] and for the government to contribute \$11,800,000 to the effort (*id.*). Article I states: “This [TIA] is a Cooperative Agreement pursuant to 10 U.S.C. 2358 Research Projects” (*id.* at 3). Under the MCAP TIA, Boeing is to work on “develop[ing] an affordable, high-performance embedded mission avionics processing architecture for potential application to Army combat helicopters and tactical unmanned air vehicles” (*id.*). Article I further provides:

The Grants/Agreements Officer represents, warrants and assures the other parties to this Agreement that this Agreement is not a procurement contract or grant Agreement under 31 U.S.C. Sections 6303 and 6304 for purposes of FAR Section 31.205[-]18(a), and that such other parties’ IR&D costs incurred in performance under

this Agreement are not construed to be sponsored by, or required in performance of a procurement contract or grant Agreement.

(*Id.*)

8. Article XIII of the MCAP TIA covers intellectual property rights other than patent rights (which are addressed in Article XII) (R4, tab 2 at 18). In Article XIII.A, Definitions, the MCAP TIA defines “Government Purpose Rights” in full text (*id.*). Article XIII.A does not define “Computer Software,” though it does define “Technical Data” as excluding “computer software” (*id.* at 18-19). Article XIII.B, “Allocation of Principal Rights,” sets forth the parties’ agreement regarding the rights granted to the Army in deliverables under the TIA “[i]n consideration of Government funding” (*id.* at 19-20). Under Article XIII.B.3, other than “Special Technical Reports,” “[a]ll other deliverables, reports and documentation delivered under the Agreement shall be in accordance with Attachment 7 (Data Rights in Deliverable Reports/Documentation)” (*id.* at 19). Attachment 2, sets forth the deliverables under the MCAP TIA (*id.* at 2, 31-37). Neither software nor source code are specified as deliverables. Attachment 7, Data Rights in Deliverable Reports/Documentation, restates the deliverables listed in Attachment 2 and the rights granted to the government in those deliverables, as specified in Article XIII.B (*id.* at 47). Neither Article XIII.B nor Attachment 7 states that the Army would receive any rights in non-deliverable software developed under the TIA.

9. In December 2014, Boeing delivered to the government certain software pursuant to the LRIP Contract. Boeing marked portions of the software with restricted rights, asserting that the software was developed exclusively at private expense pursuant to the TIAs discussed above. (Compl. ¶¶ 13-14, answer ¶¶ 13-14) By letter dated 12 February 2015, the government challenged Boeing’s assertion of restricted rights in the software pursuant to DFARS 252.227-7019(g) and asserted that the government possessed government purpose rights in the software because it was developed with mixed funding (R4, tab 87). On 13 April 2015, Boeing responded to the government’s challenge to Boeing’s assertion of restricted rights in the software (R4, tabs 91-92). On 18 September 2015 the government’s contracting officer issued a final decision finding that Boeing failed to justify its assertion of restricted rights in the software and denying Boeing’s asserted data rights restrictions pursuant to DFARS 252.227-7019(g)(6)(i) (R4, tab 93 at 3). Boeing subsequently timely appealed to this Board.

DECISION

Boeing asserts that it is entitled to partial summary judgment that, as a matter of law, software developed with costs charged to a TIA constitute development at private expense according to DFARS 252.227-7014(a)(8). Additionally, Boeing seeks summary judgment in part that the TIA agreements at issue in this appeal do not make a blanket grant of government purpose rights in software developed with costs charged to the TIAs. As Boeing's motion raises questions of law and contract interpretation, they are amenable to resolution by summary judgment.

Boeing's motion is limited to interpretation of the DFARS clause and the TIAs. Boeing does not seek summary judgment holding that the software at issue in this appeal was, in fact, developed with costs charged to the TIAs at issue. Additionally, Boeing seeks summary judgment that the TIAs did not provide a blanket grant of government purpose rights in the software developed with TIA funding. Boeing does not dispute that the TIAs expressly granted to the government rights in certain specified software developed with TIA funds. In opposition to Boeing's motion, the government asserts that there are material issues of fact preventing the entry of summary judgment because Boeing did not demonstrate that the software at issue was developed with TIA funding. In addition, the Army seeks to demonstrate that it has obtained government purpose rights in some of the software at issue. However, as these are not matters upon which Boeing seeks partial summary judgment, the Army's purported material factual disputes simply are not relevant to the resolution of Boeing's motion.

I. Software Developed with Costs Charged Solely to the TIAs are Developed Exclusively at Private Expense

Contract interpretation is a matter of law. *See, e.g., ThinkQ, Inc.*, ASBCA No. 57732, 13 BCA ¶ 35,221 at 172,825. In interpreting a contract, we begin with the plain language of the contract. *See, e.g., Banknote Corp. of America, Inc. v. United States*, 365 F.3d 1345, 1353 (Fed. Cir. 2004). An additional canon of contract interpretation is that the contract should be read as a whole, harmonizing and giving meaning to all provisions. *ThinkQ*, 13 BCA ¶ 35,221 at 172,825 (citing *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004)).

Boeing seeks partial summary judgment holding that, to the extent software was developed with costs charged to TIAs awarded pursuant to 10 U.S.C. § 2358, that the software was developed exclusively at private expense pursuant to DFARS 252.227-7014(a)(8), even if the government contributed funds to the TIA. Boeing relies upon the funding test of DFARS 252.227-7014, and statutory and regulatory provisions providing that the TIAs are cooperative agreements that are not procurement contracts.

As noted in the statement of facts, the AMUST-D and MCAP TIA each provided that they were issued pursuant to 10 U.S.C. § 2358 Research Projects, and the TIAs explicitly provided that they were not “procurement contracts.” This is consistent with the definition of “contract” in FAR 2.101 as “a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them” but specifically excluding “grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.*”² Thus, a cooperative agreement, such as a TIA, is not a “contract” as defined in the FAR. (SOF ¶¶ 5-7)

Pursuant to 10 U.S.C. § 2320, the Secretary of Defense was to prescribe regulations defining the government’s interests in technical data.³ *See* 10 U.S.C. § 2320(a)(1). In response, DoD promulgated DFARS 252.227-7013 and then adopted the same definitions in DFARS 252.227-7014 pertaining to computer software. As quoted above, DFARS 252.227-7014(a) provides that:

(8) *Developed exclusively at private expense* means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

....

(9) *Developed exclusively with government funds* means development was not accomplished exclusively or partially at private expense.

(10) *Developed with mixed funding* means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

Here, to the extent that the software was funded by the AMUST-D and MCAP TIAs, the costs were not allocated to a government contract, because the TIAs were not “contracts” pursuant to the definition in the FAR. (SOF ¶¶ 5-7) Thus, the funding satisfies the definition of “developed exclusively at private expense” at DFARS 252.227-7014(a)(8). The expenditures do not satisfy the definition of “developed with mixed funding” because the costs charged to the TIAs were not charged directly to a government contract as required by DFARS 252.227-7014(a)(10).

² 31 U.S.C. § 6305 authorizes executive agencies to use cooperative agreements.

³ The definition of “technical data” excludes computer software.

“Developed exclusively with government funds” is defined as not being developed exclusively at private expense and not developed with mixed funding. Because the costs satisfy the definition of “developed exclusively at private expense” they cannot be “developed exclusively with government funds.” See DFARS 252.227-7014(a)(9).

For technical data developed exclusively at private expense, contractors may “restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons.” 10 U.S.C. § 2320(a)(2)(B). This provision is also applicable to computer software pursuant to DFARS 252.227-7014(b)(3) (providing the government with restricted rights in software developed exclusively at private expense and “required to be delivered or otherwise provided to the Government” under the contract). The DFARS provision does not provide the government with any specific rights in noncommercial software developed exclusively at private expense and not delivered or required to be provided to the government.⁴ Thus, we hold that, to the extent Boeing developed software with costs charged to the AMUST-D and MCAP TIAs the software was developed exclusively at private expense pursuant to DFARS 252.227-7014(a)(8).

In opposition, the government asserts that summary judgment is inappropriate because there are material facts in dispute. First, the government asserts that Boeing has not established that the software in question was developed with costs charged to the AMUST-D and MCAP TIAs (gov’t opp’n at 11, ex. 2). However, the actual funding of the software was not a subject of Boeing’s motion, and, thus, the government’s argument is not relevant. Similarly, the government’s argument that Boeing was unable to segregate work under a predecessor to the LRIP contract between software developed exclusively at private expense and software developed at government expense (gov’t opp’n at 8, 12), is irrelevant to interpretation of the contract in this appeal.

The government asserts that the fact that the government funded part of the cost of the MCAP TIA and the entire cost of the AMUST-D TIA means that the software was not funded exclusively at private expense (gov’t opp’n at 12). According to the government, “the fact that the TIAs were not procurement contracts is irrelevant to the application of the DFARS 252.227-7014 funding test under the LRIP contract” (*id.*). In the government’s analysis, the “costs” in the DFARS definition of “developed at exclusively at private expense” are government costs when the government funds a TIA. The government asserts that “it does not matter if the ‘costs’ were not allocated to a government contract because they were not Boeing’s ‘costs’ to allocate in the first place” (*id.* at 13-14).

⁴ Boeing is not asserting restricted rights in software that it agreed to deliver with other than restricted rights (app. mot. at 9 n.2).

As support for its position, the government relies upon the Court of Federal Claims' holding in *KSD, Inc. v. United States*, 72 Fed. Cl. 236 (2006), a bid protest action challenging a sole-source award of a helicopter parts contract to McDonnell Douglas Helicopter Company, the manufacturer of the helicopter. In *KSD* one of the bases for the Army's justification of the sole-source procurement was that McDonnell Douglas retained technical data rights in the part. *Id.* at 255-57. *KSD* challenged the Army's assertion that McDonnell Douglas retained data rights, but the court found that the development costs were independent research and development costs that did not create government rights in the technical data. *Id.* at 258-60. McDonnell Douglas, participating in the protest as an intervenor, cited the DFARS provision for technical data (DFARS 252.227-7013) and the holding in *INSLAW, Inc. v. United States*, 39 Fed. Cl. 307, 346 (1997), which in turn cited our decision in *Bell Helicopter Textron*, ASBCA No. 21192, 85-3 BCA ¶ 18,415 at 92,434, for the proposition that "at private expense" means entirely funded without any Government reimbursement, direct or indirect, other than through IR&D [independent research and development] cost allocations." *KSD*, 72 Fed. Cl. at 260 (bracketed text in original).

The government's analysis here relies upon "at private expense" as excluding funds from a TIA because such funds do not meet the *KSD* definition that the item in question be "entirely funded without any Government reimbursement, direct or indirect, other than through IR&D...costs allocations" (gov't opp'n at 14-16). However, this language originates in our 1985 decision in *Bell Helicopter* which interpreted an Armed Services Procurement Regulation (ASPR) predating the 1984 enactment of 10 U.S.C. § 2320. *Bell Helicopter*, 85-3 BCA ¶ 18,415 at 92,370.⁵ Moreover, our decision in *Bell Helicopter* was issued more than a decade before the establishment of TIAs in 1997 (app. mot., ex. 5). Thus, the fact that the Board in *Bell Helicopter* did not address TIAs, which did not yet exist, in interpreting an ASPR provision this is not applicable to the appeal at issue, provides no support for the government's position.

The government does not explicitly argue that its own regulation at DFARS 252.227-7014 is arbitrary and capricious, but asserts that a TIA funded entirely by the government cannot be developed "exclusively at private expense" (gov't opp'n at 2). To the extent the government is challenging the regulation, *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires that we defer to an agency's reasonable interpretation of a statute where Congress has not spoken directly on an issue. *Chevron*, 476 U.S. at 842-43. Here, 10 U.S.C. § 2320(a)(3) delegated to the Secretary of Defense the definition of the terms "developed," "exclusively with Federal Funds" and "exclusively at private expense." In addition, the statute requires the Secretary to "specify the manner in

⁵ See *Cubic Defense Applications, Inc.*, ASBCA No. 58519, 18-1 BCA ¶ 37,049, for a detailed history of contractor rights in technical data.

which indirect costs shall be treated and shall specify that amounts spent for independent research and development and bid and proposal costs shall not be considered to be Federal funds for the purposes of the definitions under this paragraph.” 10 U.S.C. § 2320(a)(3). Here, the DFARS provision is a reasonable interpretation of the statute as the TIAs are intended to provide research and development funding, and we defer to the DFARS provision.

II. The AMUST-D and MCAP TIAs did Not Confer Government Purpose Rights or Greater Rights in Software Developed with Costs Charged to the TIAs

Boeing additionally seeks partial summary judgment that the AMUST-D and MCAP TIAs did not confer on the Army blanket government purpose rights, or greater rights, in the software developed with costs charged to the TIAs. As we held above that software developed with funds charged to the TIAs is software “developed exclusively at private expense” pursuant to the DFARS provision, the government only receives the rights granted in the TIA and the rights provided by DFARS 252.227-7014(b). Here, Boeing seeks summary judgment holding that the TIAs themselves did not convey greater property rights to the Army for software not specifically addressed in the terms of the agreement.

As set forth in the statement of facts, both the AMUST-D and MCAP TIAs set forth with specificity the rights that would be provided to the Army in software developed with the TIA funding (SOF ¶¶ 5-7). We interpret and apply the terms of the agreements as written. Because no provision of the TIAs granted to the Army blanket data rights beyond the rights granted by DFARS 252.227-7014, we grant summary judgment in favor of Boeing, holding that the TIAs did not confer on the Army blanket government purpose rights, or greater rights, in the software developed with costs charged to the TIAs.

In opposition, the government asserts that certain provisions of the TIAs grant the government rights in software without requiring delivery (gov’t opp’n at 11). These provisions, Articles XII.B and XX in the MCAP TIA, and Article IX.B in the AMUST-D TIA, pertain to rights in patents that are irrelevant to the rights in software at issue in this motion. *See* DFARS 252.227-7014(i). The government additionally raises the undisputed point that the government is entitled to government purpose rights in the deliverable software developed with TIA funds (gov’t opp’n at 17-18). Boeing does not assert restricted rights in software that was required to be delivered to the government with other than restricted rights (app. mot. at 9 n.2). After detailing the deliverables under the TIAs in which the government has government purpose rights, the government curiously asserts that “[t]hus, it is quite possible that all of the software developed under the AMUST-D TIA was, in fact, delivered to the government with [government purpose rights]” (gov’t opp’n at 19). This speculation

that something is “quite possible” fails to raise an issue of material fact in opposition to a motion for summary judgment.

The government argues that the grant of data rights in the TIAs conveys an “intent to confer broad rights on the government” and urges that we interpret the agreements as a whole (gov’t opp’n at 19). While we agree that the TIAs must be interpreted as a whole, we disagree with the government’s proposed interpretation. As discussed in detail above, the TIAs are carefully written to delineate the specific data rights conveyed to the government. The express grant of specific rights contained in the TIAs, implies that the rights were not granted in software not specifically addressed in the TIAs and not deliverable to the government. The limited grant of data rights in the TIAs does not imply that there was an unexpressed intent between the parties to create unspecified blanket rights in all other software. DFARS 252.227-7014(b)(4) provides that the parties may negotiate specific data rights by mutual agreement. The government’s failure to negotiate specifically for additional data rights does not create such rights due to a vague “intent” not explicitly stated in the TIAs themselves.

The government additionally asserts that summary judgment should not be entered in favor of Boeing because additional discovery is needed (gov’t opp’n at 21-22). However, the government has not demonstrated that additional discovery is necessary. In deciding motions for summary judgment, we look to Federal Rules of Civil Procedure Rule 56. *See* Board Rule 7(c)(2). FED. R. CIV. P. 56(d),⁶ “When Facts Are Unavailable to the Nonmovant,” provides that:

If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

Here, the government did not request time to take discovery but simply asserts that we should deny Boeing’s motion because the government might be able to develop facts in the future to oppose the motion. This is insufficient.

⁶ FED. R. CIV. P. 56(d) was previously located at FED. R. CIV. P. 56(f).

Rule 56(d) requires a sworn statement justifying the non-moving party's failure of proof. Once the moving party has established its initial burden for summary judgment, the non-moving party must either establish the existence of material facts in dispute pursuant to FED. R. CIV. P. 56(c), or explain why it cannot establish the existence of material facts pursuant to FED. R. CIV. P. 56(d). The non-moving party cannot request deferral of ruling on a summary judgment motion simply by noting that discovery is not complete, but must explain specifically how additional discovery will allow the party to rebut the summary judgment motion. *See, e.g., Garcia v. United States Air Force*, 533 F.3d 1170, 1179-80 (10th Cir. 2008); *Serdarevic v. Advanced Medical Optics, Inc.*, 532 F.3d 1352, 1363-64 (Fed. Cir. 2008).

Here, the government did provide an affidavit in support of its position; however, the affidavit raises factual issues questioning whether the software in question was, in fact, funded by the TIAs at issue (gov't opp'n, ex. 2). These are not material issues of facts with regard to Boeing's motion which simply seeks summary judgment that, to the extent the software was funded with costs charged to the TIAs, that such software was developed exclusively at private expense. The government does not allege that it was unable to respond to Boeing's arguments regarding the proper interpretation of the LRIP Contract, the AMUST-D and MCAP TIAs, the applicable DFARS clause, or other relevant guidance. The government does assert that additional discovery is required to determine "the intention of the parties at the times the TIAs were formed as to how rights in software developed but not delivered under the contracts were to be handled" (gov't opp'n at 22). The government's argument is premised on the proposition that the TIAs are ambiguous, a proposition that we reject. We interpret the TIAs by giving the words their plain meaning, and do not find them to be ambiguous.

Finally, as we grant Boeing's motion for summary judgment without reference to its arguments regarding government policy through DoDGARs we need not address the government's arguments in opposition (gov't opp'n at 23-24). However, we note that the DoDGARs' policy was to encourage the government to negotiate for data rights, and a failure by the Army to do so here is fatal to the Army's argument.

CONCLUSION

Appellant's motion for partial summary judgment is granted.

Dated: July 17, 2018



DAVID D'ALESSANDRIS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
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. 60373, Appeal of The Boeing Company, rendered in conformance with the Board's Charter.

Dated:

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