

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Wesleyan Company, Inc.) ASBCA No. 53896
)
Under Contract Nos. DAAK60-84-M-1116)
DAAK60-84-M-3573)
DAAK60-85-M-2329)
DAAK60-85-M-3337)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

Wesleyan Company, Inc. (Wesleyan) appeals the denial of a claim for alleged government breach of confidentiality agreements applicable to three unsolicited proposals submitted between 11 March 1983 and 10 April 1985. In our decision of 22 April 2005, we dismissed the appeal for lack of subject matter jurisdiction. *Wesleyan Company, Inc.*, ASBCA No. 53896, 05-1 BCA ¶ 32,950. The Federal Circuit has reversed and remanded that decision in part on the ground that government purchases of prototypes “for evaluative or demonstrative purposes” gave a procurement contract basis for jurisdiction over “a subset” of Wesleyan’s claim. *Wesleyan Company, Inc. v. Harvey*, 454 F.3d 1375, 1379-81 (Fed. Cir. 2006), *reh’g denied*, 2006 U.S. App. LEXIS 26243 (Fed. Cir. Oct. 5, 2006). The Court instructs us that:

On remand, the Board should first determine whether language on four of the six purchase orders indicating that the Wesleyan systems are being purchased for evaluative or demonstrative purposes is sufficient to incorporate by reference previously executed documents relating to the

evaluative process, namely the confidentiality provisions of the DAR legend, MoU, and Policy Statements. If the Board answers this question affirmatively, then it may entertain only those portions of Wesleyan’s complaint alleging a breach of the confidentiality agreement as incorporated into the procurement contracts.

Id. at 1379.¹

The parties have submitted briefs, and the government has moved for summary judgment on the threshold issue posed by the Court. Wesleyan opposes the motion. We conclude that there is no genuine issue of material fact that the purchase orders did not incorporate by reference the confidentiality agreements applicable to the unsolicited proposals. Nevertheless, we deny the government’s motion because genuine issues of material fact remain as to whether the purchase orders as issued by the government were modified by tags reserving proprietary rights attached to the prototypes shipped by Wesleyan, and if so, whether the government breached the reservations.

SUPPLEMENTAL STATEMENT OF FACTS
FOR PURPOSES OF THE MOTION

1. We incorporate by reference in this opinion the facts set forth in our decisions of 7 May 2004 and 22 April 2005 in this appeal. *See Wesleyan Company Inc.*, ASBCA No. 53896, 04-1 BCA ¶ 32,628 (hereinafter “*Wesleyan I*”), and *Wesleyan Company, Inc.*, ASBCA No. 53896, 05-1 BCA ¶ 32,950.

2. The Defense Acquisition Regulation (DAR) legend, Memoranda of Understanding (MOUs) and Policy Statements referred to in the Court’s opinion were required by the government as a condition for evaluating Wesleyan’s unsolicited proposals (*see Wesleyan I*, SOF ¶¶ 4-8). The DAR legend was specified in DAR 3-507.1 entitled “Restrictions on Disclosure and Use of Data in Proposals and Quotations.” A data rights legend was specified for the title page and for each individual page of a proposal for which the submitter was claiming data rights. The DAR legend was applicable only to the data on the specific page of the proposal on which it appeared. *See* 32 CFR § 3-507.1 (1982).

3. There were two Policy Statement/MOU documents required by the government and signed by Wesleyan’s president for the evaluation of its unsolicited proposals. The

¹ In light of the remand basing jurisdiction on the purchase orders, we have amended the caption in this appeal to show the four purchase orders issued to Wesley as the contracts under which the appeal is taken.

first was signed on 26 April 1983 and was entitled: “POLICY STATEMENT AND MEMORANDUM OF UNDERSTANDING FOR EVALUATION BY THE ARMY MATERIAL COMMAND OF UNSOLICITED ARTICLES, DISCLOSURES, INVENTIONS, AND VOLUNTARY PROPOSALS FOR CONTRACT” (app. supp. R4, tab R). The second was signed on 15 January 1985 and was entitled: “POLICY STATEMENT AND MEMORANDUM OF UNDERSTANDING FOR EVALUATION OF UNSOLICITED PROPOSALS FOR CONTRACT” (app. supp. R4, tab AJ).

4. Both of the Policy Statement/MOU agreements set forth confidentiality provisions that were expressly applicable only to the submitter’s “voluntary submissions” and “the above proposal.” The only reference to procured material in either agreement was a statement in paragraph 10 of the 26 April 1983 agreement that: “The provisions of any contract for procurement or grant resulting from these disclosures will supersede this understanding.” (App. supp. R4, tabs R, AJ)

5. The government issued a total of four purchase orders to Wesleyan for prototypes of its FIST hydration system.² Those purchase orders were issued on DD Form 1155 on the dates and for the quantities and prices as follows:

Date	Order No.	Qty	Price
22 Dec 83	DAAK60-84-M-1116	2	\$6,000
27 Jul 84	DAAK60-84-M-3573	7	\$8,400
4 Apr 85	DAAK60-85-M-2329	8	\$3,800
26 Jun 85	DAAK60-85-M-3337	12	\$5,700

(Gov’t br., attachs. 3, 5, 6, 7)

6. The four purchase orders referred to by the Court as indicating that the prototypes were being purchased for evaluative or demonstrative purposes are more specifically identified in footnote 2 of the Court’s opinion as follows (454 F.3d at 1377):

2. One purchase order stated that the “[i]tems are needed at the Infantry School for a limited user evaluation”, another indicated that “[t]his item is being procured as NDI prototypes, for initial evaluation to determine its acceptability with respect to the Mask Drinking System SN-CIE”, a third noted that “[t]he items are urgently required for the upcoming p² NBC² Demo in April 1985”, and the fourth specified that

² The documents refer to Wesleyan’s hydration system as either the “FIST/FLEX” or the “FIST” system. For present purposes there is no substantive difference.

“[t]hese items are required for the upcoming Natick/HEL 1985 New Thrust Demo in August 1985.”

7. The quotations in footnote 2 of the Court’s opinion do not in fact appear in any of the DD Form 1155 purchase orders issued by the government to Wesleyan. The quotations in footnote 2 are taken from four DA Forms 3161 “Request for Issue or Turn-In.”³ These forms are internal government supply system documents addressed by the requesting activity to the appropriate supply/procurement activity. (Gov’t br., attach. 1) The relationship between each DA Form 3161 quoted by the Court in footnote 2 and the purchase orders issued to Wesleyan is described in the following paragraphs 8-11.

8. The first quotation in footnote 2 is the justification in a 30 May 1984 DA Form 3161 request for turn-in of two FIST hydration systems with instructions that they be sent to the U.S. Army Infantry School. The systems being turned in had been received by the U.S. Army Natick Research & Development Center from Wesleyan in April 1984 pursuant to the purchase order issued on 22 December 1983. (*See* SOF ¶ 5; gov’t br., attachs. 3, 4; app. supp. R4, tab AD).

9. There is no relationship whatsoever between the second quotation in the Court’s footnote 2 and any purchase order issued to Wesleyan. The second quotation is the justification in an 8 July 1988 DA Form 3161 request for issue of 33 FIST hydration systems. The request listed Mine Safety Appliances Company (MSAC) as the sole source. The requested systems were procured from MSAC, a licensed manufacturer of Wesleyan, under Purchase Order DAAK60-88-M-1779.⁴ The systems were shipped to Natick from MSAC on 2 December 1988. (Gov’t br., attach. 8 at 1-2).

10. The third quotation in footnote 2 is the justification in a 2 April 1985 DA Form 3161 request for issue of eight FIST hydration systems. These systems were procured from Wesleyan under the 4 April 1985 purchase order. (*See* SOF ¶ 5; Gov’t br. attach. 6).

11. The fourth quotation in footnote 2 is the justification in a 21 May 1985 DA Form 3161 request for issue of 12 FIST hydration systems. These systems were procured from Wesleyan under the 26 June 1985 purchase order. (*See* SOF ¶ 5; Gov’t br., attach. 7)

³ The DA Form 3161 is either a request for issue or a request for turn-in of material depending on which box is checked at the top of the form.

⁴ The purchase order document is not in evidence but is referenced by number in the DD Form 250 “Material Inspection and Receiving Report” showing the items shipped on 2 December 1988 from MSAC to Natick (gov’t br., attach. 8 at 1).

12. The 26 June 1985 purchase order was the last procurement of FIST hydration systems from Wesleyan. Thereafter, FIST hydration systems were procured by the government only from MSAC. The first purchase from MSAC was in 1988 as indicated above (*see* SOF ¶ 9). Additional purchase orders for FIST hydration systems were issued to MSAC on 19 September 1989, 13 March 1990, 18 April 1990 and 23 July 1991. There is no evidence that either the government or MSAC intended to give Wesleyan any contractual rights under any of the purchase orders issued to and accepted by MSAC. (Gov't br., attachs. 8-12)

13. The four DD Form 1155 purchase orders issued to Wesleyan for a total of 29 FIST systems at a total cost to the government of \$23,900 contained no confidentiality provisions, made no reference to the DAR legend or the Policy Statement/MOU agreements applicable to the voluntary submissions in the unsolicited proposals, and stated no restrictions on the government's use of the purchased material. (Gov't br., attachs. 3 at 1, 5 at 1, 6 at 1, 7 at 1; app. br., ex. B at JA 66-70, Backside of DD Form 1155)

14. There is no evidence that Wesleyan included on the shipping documents or invoices for the purchased material any reservation of rights in data in the purchased material. However, Wesleyan's President, has declared under penalty of perjury that: "I developed a tag and physically attached a tag to each prototype of the FIST/FLEX hydration systems that I sent to the U.S. Army between 1984-1987" (app. br., attach. 13 at 1-2). An example of the tag, allegedly found in Wesleyan's files in March 2006, had the following handwritten statement:⁵

Fluid intake suction tubing (FIST) hydration system hand
fabricated prototype. U.S. Army Contract
DAAK60-84-M-3573 use of concept or design of
prot[o]type without written consent of Wesleyan Company,
Inc. Hydraulic Systems 1030 N. State St., Chicago, IL 60610
312-337-3198 is prohibited. All rights reserved © 1984 U.S.
Army contact: Mr. Pat Snow Natick Labs

(Gov't br., attach. 13 at 3-5)

⁵ The evidence regarding the tagging of the equipment was submitted by Wesleyan as a supplement to the Rule 4 file on 14 November 2006, after the Court's remand, and was not in the record before the Court. We rule on the government's objection to consideration of this evidence in the Decision below.

15. On deposition, Mr. Patrick Snow testified that he managed the government's evaluation of Wesleyan's unsolicited proposals and the purchased prototypes for "maybe" 15 months beginning in 1983. He physically handled only one or two prototypes, and could not recall seeing any type of tags on them when he received them. When asked whether he understood at the time that the prototypes were subject "to some sort of confidentiality agreement," Mr. Snow answered: "I can't recall . . . But I can only guess again that I would have expected those to be, you know, proprietary in nature." (App. br., ex. C at 11, 14, 16-18)

16. On deposition, Mr. Michael Golden testified that in the mid 1980s, as a government employee at Aberdeen Proving Ground, he was involved in examining and evaluating "about a half dozen" FIST hydration system prototypes, but could not recall "any attachments, any kind of string" on the prototypes. Asked whether "the concept of keeping vendors' ideas . . . within the government" also applied to the prototypes he handled, Mr. Golden answered: "I don't recall any specific paperwork, but I certainly would have handled those systems in a similar manner, yes." (App. br., ex. D at 11, 13, 15-16, 18-21)

DECISION

There is no genuine issue of material fact that the quotations in footnote 2 of the Court's opinion do not appear in any of the purchase orders issued by the government to Wesleyan (*see* SOF ¶¶ 7-11). There is also no genuine issue of material fact that none of the four purchase orders issued to Wesleyan contained any confidentiality provisions, or references to the confidentiality agreements applicable to the voluntary submissions in the unsolicited proposals, or restrictions on the government's use of the purchased material (*see* SOF ¶ 13). Moreover, even if the "evaluative or demonstrative purposes" justifications in the DA Forms 3161 were deemed to be part of the DD Form 1155 purchase orders, there is nothing implicit in those terms that necessarily requires or implies confidentiality as to the purchased material, or restricts the persons by whom it may be evaluated or to whom it may be demonstrated.

Nevertheless, while our answer to the Court's question is "no," the record on the remand shows genuine issues of material fact as to (i) whether Wesleyan tagged the prototypes that it shipped in response to the purchase orders with reservations of proprietary rights, and (ii) if so, whether the government accepted the tagged material and then used it in any manner that breached the reservation on the tag. These issues are raised by the declaration of Wesleyan's President, the documentary evidence of the alleged tags used, and the deposition testimony of two government employees who handled the purchased prototypes. *See* SOF ¶¶ 14-16.

The government argues that (i) the evidence of the tagged material was not in the record of our decision on jurisdiction, (ii) it was not before the Court on the appeal of our decision, and (iii) our decision on the remand must address the threshold issue defined by the Court and “nothing more” (gov’t br. at 23). The Court, however, also instructed us that: “Wesleyan is entitled to a full and fair determination of the procurement-related portion of its claim.” 454 F.3d at 1380. Although raised late in the proceedings, consideration of the tagged material issue is necessary to give Wesleyan a full and fair determination of the procurement-related portion of its claim and is warranted at this time by the broader mandate of the Court.

The government also argues that if Wesleyan shipped the prototypes with tags reserving proprietary rights, it did not comply with the purchase order contracts “formed . . . when Wesleyan commenced performance” (gov’t br. at 26). We disagree. The contract formed when Wesleyan began performance of a purchase order was an option contract, with Wesleyan as the offeree. See RESTATEMENT (SECOND) OF CONTRACTS § 45 (1981). If in response to the purchase order, Wesleyan shipped items with non-compliant tags, it was making a counter-offer that the government was free to reject by returning or telling Wesleyan to retrieve the items. But if the government accepted and used the items with the tags, it may be bound contractually to the reservation of proprietary rights on the tags. *Bloch Lumber Company, Inc.*, ASBCA No. 23512, 79-2 BCA ¶ 14,167 at 67,947. We do not decide this question pending further development of the facts and circumstances relating to the tags.

The government’s motion for summary judgment is denied.

Dated: 23 October 2007

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

(Signatures Continued)
I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman

EUNICE W. THOMAS
Administrative Judge
Vice Chairman

Armed Services Board
of Contract Appeals

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. 53896, Appeal of Wesleyan Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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