

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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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

This is our fourth decision on a claim by Wesleyan Company, Inc. (Wesleyan) that the government violated its proprietary data rights in its FIST/FLEX protective mask drinking system. Familiarity with our prior decisions and the remand from the Federal Circuit is presumed. *See Wesleyan Company, Inc.*, ASBCA No. 53896, 04-1 BCA ¶ 32,628, 05-1 BCA ¶ 32,950, 07-2 BCA ¶ 33,710; and *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).

In our 23 October 2007 decision on the government's motion for summary judgment following the remand, we held that the four purchase orders issued to Wesleyan for a total of 29 FIST/FLEX prototypes contained no provisions for reservation of proprietary rights by Wesleyan. However, we also held that there were genuine issues of material fact as to (i) whether Wesleyan tagged the purchased prototypes with a reservation 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. *See Wesleyan Company*, 07-2 BCA ¶ 33,710 at 166,898-99.

After hearing on the merits, we conclude that the 29 purchased prototypes were tagged as alleged by Wesleyan when shipped to the government. However, we further

conclude that, if the government was contractually bound by the tags, Wesleyan has failed to prove by a preponderance of the evidence that any of the 29 purchased prototypes were used in any manner that violated the reservation of rights on the tags.

### FINDINGS OF FACT

1. The 29 FIST/FLEX prototypes purchased by the government from Wesleyan were procured on four purchase orders issued by the U.S. Army Natick Research & Development Center (Natick) between 22 December 1983 and 26 June 1985 (supp. R4, tabs BI, BK, BN, BP). Wesleyan shipped to Natick the 29 ordered prototypes each with an attached handwritten tag that stated:

Fluid Intake Suction Tubing (FIST) Hydration System Hand  
Fabricated Prototype U.S. Army Contract #DAAK60-84-M-  
[last four digits of purchase order No.] Use of Concept or  
Design of Prototype 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.

(App. ex. A; tr. 1/62, 79-84) There is no evidence of any protest or rejection of the shipments by Natick on account of the handwritten tags, but there is also no evidence that the contracting officer who issued these purchase orders ever became aware of the tags.

2. The first FIST/FLEX purchase order (DAAK60-84-M-1116) issued by Natick to Wesleyan was issued on 22 December 1983 for two prototypes to be delivered by 23 March 1984 (supp. R4, tab BI). In May 1984, Natick sent these prototypes to the Infantry School at Ft. Benning, Georgia “for limited a user evaluation” (supp. R4, tab BJ). The Infantry School “didn’t see much value in [the FIST/FLEX system] for use with the infantry man.” Mr. Wesley Schneider, Wesleyan’s President and inventor of the FIST/FLEX system, did not agree with the Infantry School evaluation, but he had no personal knowledge that the Infantry School did anything improper with the two prototypes. (Tr. 1/201-03)

3. The second FIST/FLEX purchase order (DAAK60-84-M-3573) issued by Natick to Wesleyan was issued on 27 July 1984 for seven prototypes to be delivered by 13 September 1984 (supp. R4, tab BK). The procurement request for this purchase order stated that the prototypes were “needed for the HEL/Natick New Thrust Dem 86/87 in October 1984” (supp. R4, tab BL).<sup>1</sup> Mr. Schneider was aware of the intended use of

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<sup>1</sup> HEL is the abbreviation for the U. S. Army Human Engineering Laboratory. The “dem” or “demo” referred to in the procurement requests for the second, third and fourth purchase orders included tests and evaluations of the submitted FIST/FLEX

these prototypes at the time of purchase, did not protest that it violated the reserved rights on the tags, and testified that he “can’t say for certain” that there was any improper use of those prototypes by the government (tr. 1/207-09).

4. On 19 March 1985, Mr. Schneider was awarded Patent No. 4,505,310 for the FIST/FLEX system. The Patent described the system in pertinent part as follows:

#### BRIEF DESCRIPTION OF THE INVENTION

A fluid delivery system suitable for use with protective masks includes a delivery tube sealed, at one end, to the drinking mouthpiece contained within the mask and attached at its other end to a bulb-type siphon pump. A supply tube is attached liquid-tightly at one end to the bulb siphon pump and, at the other end, to a plug member.

A canteen structure is provided with a removable cap having a socket which cooperates with the plug member at the end of the supply tube to form an air-tight positive fit when the plug is inserted into the socket. Means are provided in the canteen construction to enable liquid to be withdrawn from the canteen without requiring venting of the canteen’s contents or injection of air into the canteen in order to equalize the air pressure within the canteen with the atmosphere. In one version of such a construction, the canteen structure includes a rigid outer wall and an inner pliable liner within which the liquid is carried, and a selectively openable and closable valve enabling the air pressure between the inside and the outside of the rigid portion of the canteen structure to be equalized while the liner collapses as liquid is withdrawn therefrom. In another version, the canteen structure is formed with sidewalls fashioned in a flexible, bellows-like configuration, giving the canteen structure sufficient flexibility to enable the canteen structure to flex during the withdrawal of liquid therefrom without sustaining permanent deformation or damage due to material fatigue.

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systems. (App. supp. R4, tab AV at 1) A “demo” also included a public display of mannequins wearing the prototypes (tr. 5/34).

The supply tube is preferably coiled to present a compact, easily stored construction when not in use, and which may be stretched to connect the mask and the canteen structure, when the canteen structure is carried in a typically belt-worn carrying case. The canteen then need not be removed during the drinking operation....

....

Hand-pumping of the bulb-type siphon pump thus provides a supply of liquid extending in a path from the interior of the canteen structure to the users mouth without being exposed to the atmosphere and, thereby, any chemical agent or contaminant present.

(Supp. R4, tab CD at 1, 4)

5. The third FIST/FLEX purchase order (DAAK60-85-M-2329) issued by Natick to Wesleyan was issued on 4 April 1985 for eight prototypes to be delivered by 19 April 1985 (supp. R4, tab BN). The procurement request for this purchase order stated that the prototypes were “urgently required for the upcoming P<sup>2</sup> NBC<sup>2</sup> Demo in April 1985” (supp. R4, tab BM).<sup>2</sup> Mr. Schneider knew of the intended use of these eight prototypes when the purchase was made, made no protest that it violated any reserved rights, and testified that he had no personal knowledge of any inappropriate use of the eight prototypes by the government (tr. 2/26-28).

6. On 10 and 22 April 1985, Wesleyan submitted to Natick respectively an unsolicited proposal and revised FIST/FLEX prototype that “redresses the...concerns raised by the Natick HEL CPV Test Bed evaluation conducted last Fall” (app. supp. R4, tab AQ). On 29 May 1985, the Natick Commanding Officer replied to those submissions in relevant part as follows:

Our Individual Protection Laboratory has completed a preliminary evaluation of your April 10, 1985 Unsolicited Proposal for the revised FIST/FLEX Hydration System. As cited in your proposal, the original System, tested in the Natick/Human Engineering Laboratory (HEL) New Thrust Demo, September 1984, was found to have deficiencies. The revised System, submitted with this proposal, appears to

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<sup>2</sup> The acronym means Physiological and Psychological Effects of Extended Operations and NBC Environments on Combat Vehicle Crew Performance (app. supp. R4, tab AV at 1).

eliminate some of these problems. However a more extensive evaluation, conducted by the users, will be required to determine its potential military use.

We have included these revised Systems in upcoming tests. Eight Systems are currently being evaluated in the Physiological and Psychological Effects of Extended Operations and NBC Environments on Combat Vehicle Crew Performance (p<sup>2</sup>NBC<sup>2</sup>) test at HEL and twelve Systems will be evaluated in the Demo 85 in September 1985, at Fort Sill, Oklahoma.

We expect that the report on these tests will be available in late October and we will provide a copy to you at that time.

(App. supp. R4, tab AV at 1)

7. The fourth FIST/FLEX purchase order (DAAK60-85-M-3337) issued by Natick to Wesleyan was issued on 26 June 1985 for 12 prototypes to be delivered by 3 July 1985 (supp. R4, tab BP). The purchase request for this order stated that the prototypes were “required for the upcoming Natick/HEL 1985 New Thrust Demo in August 1985” (supp. R4, tab BO). Mr. Schneider knew of the intended use of these 12 prototypes when the purchase was made, did not object at that time to that use, and testified that he had no personal knowledge that any of them were used in an inappropriate way (tr. 2/51-53, 115-16).

8. There is no credible evidence of any use of the 29 FIST/FLEX prototypes purchased by Natick from Wesleyan other than the uses described in findings 2, 3, 5 and 7 above. There is no credible evidence as to what if anything was done with the 29 prototypes after their evaluation was completed (tr. 3/89, 106).

9. Wesleyan produced “maybe total 50” FIST/FLEX prototypes during the years 1983-1987. Mr. Schneider testified that, in addition to the 29 prototypes sold to Natick, “I was sending prototypes to different commands and showing them the nuance, the different iterations, of the technology that I had developed.” (Tr. 1/84) He further testified that he told those agencies to which he had given prototypes that “if you think there was benefit in keeping [the prototype], then please do...” (tr. 2/79). Wesleyan’s post-hearing brief states that Wesleyan provided “20 or so” FIST/FLEX prototypes “to other Army commands besides Natick Labs for demonstration purposes” (app. br. at 9).<sup>3</sup>

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<sup>3</sup> In addition to the FIST/FLEX prototypes sold to Natick or provided free to other Army commands, Wesleyan in December 1983 loaned a FIST/FLEX prototype to HEL

Wesleyan does not allege and the evidence does not otherwise show that the “20 or so” prototypes sent to Army commands other than Natick were purchased by those commands.

10. Mr. Patrick Snow was the Natick engineer responsible for the initial evaluation of Wesleyan’s FIST/FLEX proposal (tr. 3/83). In December 1985, Mr. Schneider observed a FIST/FLEX prototype disassembled on Mr. Snow’s desk (tr. 1/87-89). Mr. Schneider considered the disassembly of the prototype to be an “improper use” (tr. 1/178-80). At hearing, Mr. Snow testified that he did not remember breaking down the system, but “it would have been likely that I would have” because “part of the evaluation was to look at the...hardiness, if you will, [of] the components and [of] the chemical capacities of the components” (tr. 3/103).

11. In September 1986, Battelle-Columbus Laboratories issued a report on a government-funded study “to identify concepts for improving the drinking and communication (speech) systems currently integrated into the XM40 protective mask and to provide a system for food intake” (app. ex. B at 3, 5). The XM40 protective mask drinking system required the user for each drink to detach the canteen from a belt at the hip, raise it to the level of the mask, attach a short drinking tube in the mask to the canteen, hold the canteen in an inverted position above the drinking tube inlet to the mask, and then drink by alternately blowing and sipping through the tube (app. ex. B at 39).<sup>4</sup> The Battelle Report discussed six “suggested improvements” to the XM40 mask drinking system that it otherwise stated was “reported to function satisfactorily” (*id.* at 22-23).

12. Wesleyan alleges that four of the suggested improvements in the Battelle Report “closely replicated the information not in the FIST/FLEX or FIST Fountain patents but in the prototypes...” (app. br. at 15).<sup>5</sup> We do not agree. Two of the cited improvements, “permanent attachment to the inlet tube [from the mask] to canteen [at the waist]” and “squeezable, flexible canteen,” were in fact shown in the FIST/FLEX patent (app. ex. B at 22-23; supp. R4, tab CD at 4). The other two cited improvements, “longer inlet tube [at the mask]” and “increase size of the check valve on the inlet tube,” were directed at making it easier for the XM40 mask user to attach the mask drinking tube to the canteen when the canteen was raised from the user’s hip to the mask (app. ex. B at 22,

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for integration by a private company, ILC Dover, Inc, into a protective suit being developed for HEL by ILC. Mr. Schneider knew of the intended use of the prototype when he entered into the bailment agreement with HEL. (App. supp. R4, tabs Z, AB; tr. 1/191-95, 5/15-17)

<sup>4</sup> Blowing air into the drinking tube was necessary to counteract the negative pressure created in the rigid canteen body when water was sipped out.

<sup>5</sup> The FIST Fountain was a system for filling canteens in a nuclear, biological, and chemical (NBC) environment (app. supp R4, tab BI).

42). Those suggested improvements were unique to the XM40 mask drinking system and did not replicate any part of the FIST/FLEX prototypes where the canteen remained at the hip and water was moved by the hand pump through the drink tube up to the mask (*see* finding 4).

13. The Battelle Report makes no reference either to the FIST/FLEX system by name or to the FIST/FLEX concept of moving fluid by hand-pump from a flexible canteen on the hip to the mask. To the contrary, in discussing the merits of attaching the drinking tube to the canteen at the hip, the Battelle Report stated: “For this concept, the placement of the canteen could be critical, because the effort required to suck water up the drinking tube may be prohibitive.” (App. ex. B at 45-47) The report did not suggest the possibility of using a hand-pump to overcome this difficulty. That omission is indicative that the authors of the report had no information about the FIST/FLEX system and had never seen a FIST/FLEX prototype. We find nothing in the September 1986 Battelle Report indicating any improper disclosure by the government of the concept or design of the 29 FIST/FLEX prototypes purchased from Wesleyan.

14. On 17 December 1986, ILC Dover, Inc. (ILC) wrote to Wesleyan stating that it was working on a “dual hose Concept” for a protective mask drinking system, that it had received a “statement of need” from the government “which referenced your company,” and that it wanted to “buy from you and incorporate your equipment into our drink evaluations.” The letter requested “a brief description of your system and prices for 1 to 5 units,” and stated: “It is not unreasonable to assume that both the dual Hose Concept and your Hand Pump Concept may find a market in the US Army overall requirements.” (App. supp. R4, tab BX)

15. Wesleyan contends that “[d]isclosure of Wesleyan’s FIST/FLEX concept was referenced” in the ILC 17 December 1986 letter, and that the government “statement of need” was “a proprietary document” (app. br. at 13). The “statement of need” referred to in the ILC letter is not in evidence, but there is otherwise no evidence that it contained any proprietary data of Wesleyan that had not already been disclosed in Wesleyan’s 19 March 1985 patent, or in its loan of a FIST/FLEX prototype to HEL for use by ILC in December 1983. (*See* finding 9, footnote 3 above.) Moreover, ILC’s request for “a brief description of your system, and pricing for 1 to 5 units,” is inconsistent with it having already been given access by the government to a FIST/FLEX prototype. We find no evidence in the ILC letter of any unauthorized use of the 29 FIST/FLEX prototypes purchased from Wesleyan by Natick.

16. On 20 June 1988, Wesleyan licensed Mine Safety Appliances Company (MSA) to manufacture and sell the FIST/FLEX system (app. supp. R4, tab CK). Between 1988 and 1991, the government purchased 336 FIST/FLEX systems from MSA for an extended test and evaluation under the nomenclature “Mask Drinking System–Interim” (MDS-I) (supp. R4, tabs BR, BT, BU, BV, BX). In June 1992, the government

concluded that the FIST/FLEX (MDS-I) system was “not suitable for type classification due to problems with durability, compatibility and safety” (app. supp. R4, tab DT at 4).<sup>6</sup>

17. In 1989, FasTrak Systems, Inc. (FasTrak) was organized to develop and market a hands-free hydration system for bicyclists. This system consisted of a flexible back-pack reservoir with a drinking tube and bite valve through which the cyclist could suck water while cycling. The idea for this system originated from a bicycle race in Texas in the summer of 1988 where a contestant (Michael Edson) had sewn a medical IV bag filled with water into the back of his racing jersey with a clamped-off tube running over his shoulder. (Tr. 3/156-58) A fellow contestant (Roger Fawcett) purchased the idea from Mr. Edson and after further development was issued a patent (No. 5,085,349) on 4 February 1992 for a hands-free, bite valve actuated hydration system. A separate cut-off valve was later added to this system “somewhere around [the] ‘99 to 2000 time frame.” (Tr. 3/156-66; ex. G-2)

18. In 1997, a Natick employee (John Kirk) contacted CamelBak with regards to using its hydration system as a component of the “Modular Lightweight Load Carrying Equipment” (MOLLE) system then being developed by Natick. The hydration system Mr. Kirk was seeking for the MOLLE was not a nuclear, biological and chemical (NBC) resistant protective mask drinking system. Mr. Kirk was not involved in the development of NBC resistant systems, and there is no evidence that he had any knowledge of Wesleyan’s FIST/FLEX system or of the 29 prototypes of that system purchased by Natick in 1983-85. (Tr. 3/71)

19. FasTrak was renamed CamelBak Products, LLC (CamelBak) in 1998 (tr. 3/166-67). On 21 June 2005, CamelBak was issued a patent (US 6,908,015 B2) for a “personal hydration system with component connectivity.” This system consisted of a flexible back-pack reservoir with a drinking tube extending from the reservoir and ending in a quick-connect assembly to which other components could be connected depending on the capability desired. One such component was a further length of drinking tube connecting to a protective mask. (Supp. R4, tab CB at 1)

20. On 11 July 2006, a second patent (US 7,073,688 B2) was issued to CamelBak for substantially the same item as the 21 June 2005 patent, but with additional connecting components including a pump for filling or emptying the reservoir through the drinking tube at the quick-connect point. Unlike the pump in the FIST/FLEX system, this pump did not pump water from the reservoir to the mouth. It provided a means for re-filling the back-pack reservoir “without having to access the fill port” and for removing drink fluid from the reservoir “without requiring a user to suck the drink fluid out of the reservoir through the drink tube, compress the reservoir to urge the drink fluid through the drink

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<sup>6</sup> “Type classification” is the decision to adopt a system, stock it and field it to soldiers (tr. 3/121).

tube, or open the cap of the fill port and pour the drink fluid from the fill port.” (Supp. R4, tab CC at 1, 15, 24; tr. 3/167-70)

21. At hearing Wesleyan’s patent attorney testified that one of the functions of the pump in CamelBak’s 11 July 2006 patent is “to extract drinking water from the reservoir for drinking purposes” (tr. 2/210-11). Neither the illustration of the system with the protective mask option on page 1 of the patent, nor the block diagram of the pump attached to the quick-connect assembly at Sheet 13 of the patent, nor the written description of the pump function at column 18 of the patent, indicate that the pump could be used to move fluid directly from the reservoir to the user’s mouth for drinking purposes (supp. R4, tab CC at 1, 15, 24).<sup>7</sup> The CamelBak designated corporate spokesperson credibly testified that the pump in CamelBak’s 11 July 2006 patent “is specifically designed to fill a CamelBak without taking it off your back” and that no CamelBak products use a pump to move the fluid in the reservoir to the mouth (tr. 3/156, 168-70).

22. The CamelBak personal hydration system with component connectivity had a lever-operated plastic shut off valve that was specially designed for the system as an integral component of the quick-connect (“hydrolink hydrolock”) assembly (ex. A-12; tr. 3/179). This valve was described in detail in the CamelBak 21 June 2005 and 11 July 2006 patents (supp. R4, tab CB at 18-19, tab CC at 23). The 29 FIST/FLEX prototypes purchased by Natick from Wesleyan had a lever-operated brass shut-off valve that was procured from a plumbing supply center. It was not designed and manufactured specifically for the FIST/FLEX system. (Ex. A-5; tr. 1/48-50, 174, 184) It was not shown or described in the Wesleyan patent (supp. R4, tab CD).

23. There is no evidence of any contacts between the government and FasTrak/CamelBak by which any details of the 29 FIST FLEX prototypes purchased from Wesleyan by the government between December 1983 and June 1985 might have been improperly disclosed. FasTrak/CamelBak was not in existence in 1983-1985 when the 29 prototypes were purchased and used. Mr. Snow, the Natick engineer responsible for the initial evaluation of the FIST/FLEX prototypes never had any dealings with a company named FasTrak and had never heard of a company called CamelBak (tr. 3/83, 106). Mr. Snow’s successor in 1988, Mr. Davio, was responsible for evaluation of the FIST/FLEX (MDS-I) systems purchased from MSA.<sup>8</sup> Mr. Davio never had any relationship with either FasTrak or Camelback either during or after his evaluation. (Tr. 3/8-10, 43)

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<sup>7</sup> The clause “without requiring a user to suck the drink fluid out of the reservoir” at column 18 appears in a listing of the alternative means of emptying the reservoir for purposes other than drinking. In that context, the clause does not refer to an alternative means of drinking. (See finding 20 above)

<sup>8</sup> See finding 16 above.

24. The first time CamelBak heard of the Wesleyan Company and saw a picture of a FIST/FLEX prototype was “this year [2008], just a few months ago” when it was asked by the government for assistance in the appeal (tr. 3/171-73). CamelBak is “not aware of any products that were designed or sold based on any of the photographs [of the FIST FLEX prototypes] that we’ve seen” (tr. 3/174).

25. On 15 April 2002, Wesleyan submitted a certified claim in the amount of \$20,776,000 for the government’s alleged improper disclosure of the concepts, processes and devices of its FIST/FLEX and FIST Fountain Systems (R4, tab BG). By final decision dated 19 July 2002, the contracting officer denied the claim entirely (R4, tab BH). This appeal followed.

### DECISION

We have found above that the 29 FIST FLEX prototypes purchased from Wesleyan by the government were each shipped with a tag stating that “Use of Concept or Design of Prototype Without Written Consent of Wesleyan Company, Inc.... is prohibited.” We have further found that the government received the prototypes and subsequently used them without objection to the tagged reservation of rights. (Findings 1-3, 5, 7) In light of our finding that the government did not violate that reservation, we need not determine if the government was contractually bound by the reservation in the absence of proof that the contracting officer had actual knowledge thereof.

It is not disputed that the 29 purchased prototypes were used for the test and evaluation purposes for which they were procured as indicated in (i) the documentation sending the first two purchased prototypes to the Infantry School (finding 2), (ii) the purchase requisitions for the remaining 27 prototypes purchased from Wesleyan (findings 3, 5, 7), (iii) Wesleyan’s 22 April 1985 letter submitting a revised FIST/FLEX system that “redresses” the “concerns raised” by the tests of the second purchase order prototypes in the Fall of 1984 (finding 6), (iv) the Natick Commanding Officer’s 29 May 1985 letter to Wesleyan confirming the uses of the prototypes procured under the second and third purchase orders and the intended use of the prototypes to be procured under the fourth purchase order (finding 6), (v) the testimony of Wesleyan’s president and inventor of the FIST/FLEX system that he knew of the intended uses of the purchased prototypes (findings 2, 3, 5, 7), (vi) the absence of any evidence that he protested or objected to those uses at the time of the purchases (*id.*), and (vii) his testimony that he had no personal knowledge that the 29 prototypes were used improperly or inappropriately (*id.*).

Wesleyan contends that the disassembly of one of its prototypes (not specifically identified as one of the purchased prototypes) by the Natick evaluator, Mr. Snow, indicated a government attempt to “reverse engineer” the system for production by the government or another contractor (app. br at 13). We do not agree. Disassembly was

consistent with evaluating the hardiness and chemical capacities of the components of the system and did not necessarily indicate an attempt to reverse engineer (finding 10). Moreover, there is also no credible evidence that the FIST/FLEX system was in fact reverse engineered for use by the government. Wesleyan itself states in its post-hearing brief that the Army “still uses the cumbersome above-the-head canteen-to-mask hydration procedure” (app. br. at 18).

Wesleyan argues that the September 1986 Battelle Report recommendations for improvement of the existing protective mask drinking system indicate that it had “improper access to the Wesleyan’s proprietary FIST/FLEX information embodied in the prototypes delivered by that time to the Army” (app. br. at 14-15). We do not agree. Of the four recommendations in the Battelle Report that Wesleyan alleges “closely replicated” information that was available only in the prototypes, two of the recommendations were similar to features shown in the FIST/FLEX patent, and the other two were unique to the existing mask drinking system and had no counter part in the FIST/FLEX system (findings 11-13).

Wesleyan contends that the 17 December 1986 letter from ILC to it shows an unauthorized disclosure of the concept and design of the FIST/FLEX purchased prototypes to a third party (app. br. at 13-14). We do not agree. There was nothing in the ILC letter about the FIST/FLEX system that it could not have learned from the patent issued on 19 March 1985, or that it could not have observed on the FIST/FLEX prototype that Wesleyan had loaned to it in 1983 (findings 14-15).

Wesleyan contends that the CamelBak patents for a personal hydration system with component connectivity, issued after the expiration of the Wesleyan patent, “all disclose identical features of the Wesleyan FIST/FLEX hydration system that are either embodied in the prototypes or both in the prototypes and also disclosed in the Wesleyan patent” (app. br. at 24). Wesleyan further argues that: “CamelBak’s principle patents disclose two things unique to Wesleyan’s FIST/FLEX design: a shut-off valve, which is not disclosed in Wesleyan’s patent, and a bulb pump, which is disclosed, that can be used to promote the flow of water either from the reservoir into the mask or from a refilling source into the reservoir” (*id.*). Apart from the fact that they were both lever-operated and prevented leakage from the fluid reservoir through the drinking tube, the Wesleyan valve on the purchased prototypes and the CamelBak valve had nothing in common. The Wesleyan valve was a brass valve procured from a plumbing supply center. The CamelBak valve was a plastic valve designed specifically as an integral component of the quick-connect (hydrolink hydrolock) assembly. (Finding 22) We find insufficient similarity between the two valves to conclude that the latter was derived, 20 years later, from the former. There is also insufficient similarity between the function of the two pumps. The CamelBak pump is used only for filling and emptying the reservoir. The Wesleyan FIST/FLEX pump was used only for moving water from the reservoir to the mouth for drinking purposes. (Findings 4, 20, 21)

The concept and design of the CamelBak protective mask drinking system is a flexible reservoir on the user's back from which drinking fluid is withdrawn by the user sucking on a drinking tube. The concept and design of the FIST/FLEX system is a flexible canteen on the user's hip from which drinking fluid is withdrawn by the user squeezing a hand pump on the drinking tube. These are substantially different concepts and designs, and there is no credible evidence that the CamelBak concept and design patented in 2005 and 2006 were in any way derived from an improper disclosure of one or more of the 29 Wesleyan FIST/FLEX prototypes purchased by the government in 1983-1985. Even if there were sufficient similarity between the two concepts and designs, Wesleyan has not shown that any similar feature, that was not disclosed in the patent, was derived from the 29 purchased prototypes and not from the "20 or so" prototypes that Wesleyan provided at no charge to the government. (Finding 9) Whatever obligation the government may have had with respect to its use of the loaned or freely-given prototypes, that obligation did not arise out of a procurement contract, and any claim for a breach of that obligation would not be within our jurisdiction.

On this record, Wesleyan has failed to prove by a preponderance of the evidence any government violation of the tagged reservation of rights on the 29 FIST/FLEX prototypes purchased by Natick from Wesleyan.

The appeal is denied.

Dated: 14 January 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. 53896, Appeal of Wesleyan Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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