

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Revenge Advanced Composites ) ASBCA No. 57111  
)  
Under Contract No. H92222-08-C-0039 )

APPEARANCE FOR THE APPELLANT: Carrol H. Kinsey, Jr., Esq.  
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Washington, DC

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
MAJ Patrick L. Vergona, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING

The United States Special Operations Command (USSOCOM) at MacDill Air Force Base, Florida, awarded a contract to Revenge Advanced Composite (RAC) to build a high-speed Special Operation Forces Craft (SOC) demonstrator using an advanced carbon fiber process. After it had been paid the contract amount, RAC submitted a certified claim seeking an adjustment for providing a Global Positioning System (GPS) navigation system and seating for the craft's enclosed cabin. It contends that the contract did not specifically require these items. The contracting officer (CO) denied the claim and RAC appealed. The government has moved for summary judgment. RAC opposes the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 9 May 2007, USSOCOM awarded the first of two contracts to RAC (R4, tab 1). The contract was to investigate the feasibility of using an advanced composite manufacturing process to build a SOC that would be used in harsh environments (*id.* at 9 of 25). The government conducted a "30% Design Review" as a part of this contract. The review included an evaluation of "Helm station design, seat design and placement, maneuverability controls, navigational controls, maintenance processes (ease of use)." (R4, tab 1 at 10 of 25)

2. RAC's "Helm Station Design and Ergonomics" deliverable provided under the contract recommended that "[c]areful consideration must be given to the placement of operational controls and data management devices in the cockpit of a high speed small craft." To minimize "[t]he physical and sensory bombardment of continual and varying

shock loads to the operator,” the report said it was important to select “a seating system that will provide additional protection as well as aid in proper support for the occupant,” and to place “control and navigation systems so that they will minimize efforts needed and reduce the effect of repeated shock and fatigue upon the operators’ ability to perform.” (R4, tab 3 at 1 of 4) With respect to seating, RAC identified several seating systems including two Ullman products (*id.* at 3 of 4). With respect to “Navigational Controls and Displays,” RAC recommended “displays which are more visual in nature as opposed to controls which need constant manual input...so that they are easily visualized with minimal impact on the operators[?] forward vision” (*id.* at 4 of 4).

3. On 19 September 2008, the government awarded a second contract—Contract No. H92222-08-C-0039 (Contract 0039)—to RAC (R4, tab 10). The purpose of this contract was for RAC to “[d]esign, fabricate, outfit, and deliver an advanced carbon fiber composite craft technology demonstrator” (*id.* at 5 of 18). The contract was structured as a fixed-price incentive (FPI) contract with \$6,120,210.00 as its ceiling price. The contract set out the incentive formula as follows:

Contract delivery date is 2 March 2009. If delivered on that date the contractor will receive a total amount of \$5,620,210.00.

The Government is providing an early delivery incentive as follows: if the contractor delivers on 16 January 2009, the contractor shall receive an incentive of \$500,000.00 and authorized to invoice for a total amount of \$6,120,210.00; OR \$17,241.00 per day for each government business day prior to 2 March 2009. In either of these cases, the total contract price ceiling of \$6,120,210.00 shall not be exceeded.

(*Id.* at 2 of 18)

4. The Statement of Work (SOW) of Contract 0039 provides, in relevant part, as follows:

2. SCOPE.

a. Research Objective. The main research objective is to evaluate the use of an advanced carbon fiber process on a combatant craft at approximately half-scale size of a MkV SOC. The composite fiber will have to be shaped and constructed to enable use on a SOF combatant craft. If successful, then it should demonstrate the following:

....

(5) Withstand speeds in excess of 37 knots in a Sea State 3.

....

b. Performance. The contractor shall be responsible for the design, selection, installation, operation, and testing of all systems and components which are necessary or required, whether prescribed or implied, for the correct operation of the craft. The contractor shall be responsible for the design of the hull envelope, interior and exterior arrangements, and all other features of the craft. The contractor shall be responsible for all engineering calculations that are necessary to ensure proper craft design, operations, and performance and demonstrating that the craft conforms to the SOW and regulatory agency requirements.

The contractor is responsible for ensuring full compliance with the contract terms, conditions, performance, and operating requirements. These requirements take precedence over the contractor's proposal, unless terms and conditions are clearly called out in the Exceptions/Conditions section of the contractor's proposal.

c. Deliverables.

(1) Design, fabricate, outfit, and deliver an advanced carbon fiber composite craft technology demonstrator. The advanced carbon fiber composite craft will have at a minimum the following capabilities:

(a) The entire craft shall be designed and constructed to withstand the hydrodynamic and hydrostatic pressures, acceleration, vibration and other loads imposed during severe marine service in the harsh operating environment. The craft will routinely operate in sea state 3. It shall be operable at full load in seas up to and including sea state 4, and it shall be capable of remaining afloat and maintaining steerage in sea state 5.

(b) Sufficient functional sensors in place to capture data such as load values during rough sea conditions located sufficiently throughout the craft to provide conclusive

understanding of craft performance and effects on personnel onboard (CRDL A001 - Strain Gage/Accelerometer Sensor Plan).

(c) Navigation systems sufficient to safely navigate independently to and from confined inter-coastal waters to open ocean and return. This includes navigation lights as described in American Boat and Yacht Council (ABYC) Standard A-16.

....

(i) Human Systems Interface shall be considered throughout the optimization process with particular attention to crew accessibility and protection from the marine environment. The craft design shall take into account all aspects of human factors for safety of crew and passengers while underway.

(R4, tab 10 at 4-5 of 18)

5. Contract 0039 incorporated by reference in section I, FAR 52.243-1, CHANGES—FIXED-PRICE (AUG 1987) (R4, tab 10 at 13 of 18). It included in full text Clause 5652.201-9002, AUTHORIZED CHANGES ONLY BY CONTRACTING OFFICER (2005), which provides, in pertinent part:

The Contractor shall not comply with any order, direction or request of Government personnel unless it is issued in writing and signed by the Contracting Officer, or is pursuant to specific authority otherwise included as part of this contract. Except as specified herein, no order, statement, or conduct of Government personnel who visit the contractor's facilities or in any other manner communicates with Contractor personnel during the performance of this contract shall constitute a change under the Changes clause in Section I. In the event the Contractor effects any change at the direction of any person other than the Contracting Officer, the change will be considered to have been made without authority and no adjustment will be made in the contract price to cover any increase in cost incurred as a result thereof....

(R4, tab 10 at 14 of 18) The government asserts that during performance of Contract 0039, the CO did not order the addition of seats or a GPS navigation system (mot. ¶ 7).

6. At RAC's request (R4, tab 14), the CO issued Modification No. P00001 on 10 March 2009 extending the delivery date of the demonstrator craft from 2 to 30 March 2009 (R4, tab 15). Because RAC did not deliver the demonstrator craft before 2 March 2009, it was not entitled to any incentive payments (mot. ¶ 9). RAC invoiced the government \$5,620,210.00 for the demonstrator craft on 31 March 2009 (R4, tab 29). The government paid \$4,122,240.00 on 11 May 2009 (R4, tab 30) and paid \$1,497,970.00, the balance, on 10 June 2009 (R4, tab 31).

7. RAC submitted a "claim" by letter dated 30 September 2009. It summarized the bases of its "claim" in the following paragraph:

In order to comply with Section 2.a.(5) and Section 2.b as well as Sections 2.c.(1)(a)/(b) and (i) it was necessary to install seating and gps instrumentation to allow safe vessel operation in all sea states as the vessel design will not allow for standing operators it is an enclosed cabin. The testing and instrumentation requirement as well as data collection required a gps navigation system be installed for tracking and speed reference.

RAC's letter enclosed a \$209,244.78 invoice. (R4, tab 17) The "claim" was not certified as required by 41 U.S.C. § 1703(b)(1).

8. The CO's 13 October 2009 e-mail reply took the position that the contract placed on RAC the responsibility to provide "the appropriate craft operating systems and human systems interfaces," and "these costs were identified" in RAC's August 2008 cost proposal and formed the basis of awarding the contract on a firm fixed-price basis (R4, tab 18).

9. On 27 October 2009, RAC forwarded as an attachment to its e-mail a certified claim dated 26 October 2009. RAC took the position that the claimed costs were recoverable because the seating and the GPS navigation system were not specifically set out in the SOW:

No specific requirements for technology, systems, or additional equipment were set out in the SOW. In particular, neither navigation nor seating was included in the SOW. However, in response to requirements placed on RAC by USSOCOM during contract performance that necessitated installation of a GPS navigation system to allow for USSOCOM-required testing, instrumentation, and data collection and installation of seating that would accommodate standing operators in an enclosed cabin, RAC installed

equipment that met those requirements. Because those USSOCOM requirements were not spelled out in the SOW, RAC is entitled to recover the cost of that equipment, as well as the associated labor and engineering costs, as indicated on the cost breakdown attached to our original claim.

(R4, tab 20)

10. With respect to whether RAC installed the GPS navigation system and the cabin seating at the direction of government officials, the government asked RAC to identify the specific USSOCOM representative who directed the installation of (a) a GPS navigation system, and (b) seating “that would accommodate seated operators in an enclosed cabin” as a part of its discovery. RAC’s answer to (a) above states “There was no specific direction, written or oral, provided to RAC by USSOCOM representatives on how to comply with the statement of work.” RAC’s answer to (b) above states “There was no specific direction, written or oral, provided to RAC by USSOCOM representatives on how to comply with the statement of work.” RAC asserted that in providing the GPS navigation system and the seating, it undertook a good faith effort to meet the contract requirements as set out in a “nebulous, vague statement of work” underlying Contract 0039. (Mot., attach. 1 at 10-11, interrogatory 6 and answer)

11. RAC also admitted without qualification to the following government request for admission:

3. Admit that Contract No. H92222-08-C-0039 required the Appellant to produce the special operations craft described above in accordance with the performance requirements identified in Section C of Contract No. H92222-08-C-0039.

(Mot., attach. 1 at 14)

12. The CO issued her decision on 10 November 2009 denying RAC’s certified claim (R4, tab 22). The decision explained that the government’s requirements were stated “in terms of performance required rather than specific...standards, specifications, or detailed design-oriented documents.” The decision points out that the SOW required “Navigation systems sufficient to safely navigate independently to and from confined inter-coastal waters to the open ocean and return” and “[t]he craft design shall take into account all aspects of human factors for safety of crew and passengers while underway.” The decision asserted that “the Government identified through the performance requirements in the SOW the need for navigation systems and seating.” The decision contended that RAC included the navigation systems and seating in its cost proposal for Contract 0039, and thus these requirements “were not added during performance of the

second contract,” and the costs claimed for the navigation system and seating had been paid. (*Id.*) Both the GPS navigation system and the cabin seating were specifically included in RAC’s proposal (R4, tab 7 at 13, 54). Under the heading “ELECTRONICS,” RAC’s proposal summary referred to quotes it received for the “Simrad Package” (GPS) and the “Ullman Seating Package” (*id.* at 46). RAC’s 26 October 2009 certified claim acknowledged the GPS navigation system and the seating as “contemplated features [but] not included in the...contract” (R4, tab 20 at 2).

13. RAC received the CO decision on 24 November 2009 (R4, tab 22). Its counsel timely appealed the decision by notice dated 12 February 2010. The Board docketed the appeal as ASBCA No. 57111.

### DECISION

In moving for summary judgment, the government contends that it is entitled to judgment as a matter of law because RAC entered into a firm fixed-price contract and RAC was responsible for achieving the results set out in what was a performance type specification (mot. at 8-11). In opposing the motion, RAC says “The lack of specific direction by USSOCOM representatives does not end the matter” (opp’n at 4). RAC’s opposition identifies as a genuine issue of material fact that the contract “did not provide specific seating and navigation systems,” and the contract requirements were “set out in a nebulous [and] vague” fashion in the SOW (*id.* at 3). RAC asks us “to defer decision on the motion for summary judgment pending hearing testimony of witnesses” because “the genuine issues of material fact...will be further developed through testimony of witnesses at the hearing” (*id.* at 4-5).

Summary judgment is appropriate when there is no genuine dispute<sup>1</sup> as to any material fact and the moving party is entitled to a judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are those facts which, under the governing law, “might affect the outcome of the suit.” *Id.* at 248. The moving party bears the burden of establishing the absence of any genuine dispute as to any material fact. “When the moving party has carried its burden...its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.... [T]he nonmoving party must come forward with ‘specific facts showing that there is a *genuine issue for trial.*’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

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<sup>1</sup> We note the 2010 amendment to FED. R. CIV. P. 56 changed the word “issue” in former subdivision (c)(2) to “dispute” in current subdivision (a). According to the Committee Notes to subdivision 56(a), this change “better reflects the focus of a summary judgment determination.”

The bases RAC gives in opposing the government's motion for summary judgment are the same ones it gave in its complaint: (1) "The Statement of Work (SOW) in the contract at issue included various non-specific performance requirements" (compl. at 1); and (2) "No specific requirements for technology, systems, or additional equipment were set out in the SOW" (*id.* at 2). While RAC has alleged generally that the contract requirements are "nebulous" and "vague," its opposition has advanced no evidentiary conflict requiring a hearing. "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine issue for trial." *Comptech Corp.*, ASBCA No. 55526, 08-2 BCA ¶ 33,982 at 168,086, *citing Penn Screw & Machine Works, Inc.*, ASBCA No. 32382, 89-3 BCA ¶ 22,205 at 111,694.

The material facts are not in dispute. RAC was awarded a FPI contract to produce a high-speed SOC demonstrator made out of advanced carbon fiber. The performance parameters and minimum capabilities of the craft were set out in the SOW. There is no dispute that the SOW did not specifically require a GPS navigation system nor seating in the craft's enclosed cabin. There is no dispute that in order to meet the minimum capabilities stated in the SOW, RAC had to install the GPS navigation system and the seating. It is also undisputed that no government representatives directed RAC to install the GPS navigation system and the seating.

What is left for us to decide is whether, under the undisputed facts of this case, the government, as the moving party, is entitled to judgment as a matter of law. Contract interpretation is a question of law generally amenable to summary judgment. *Varilease Technology Group v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002); *Textron Def. Sys. v. Widnall*, 143 F.3d 1465, 1468 (Fed. Cir. 1998). Resolution of this case turns on whether the specification as set out in the SOW is a "design" specification or a "performance" specification. The substantive law in this connection is well established. As the Federal Circuit explained in *Blake Constr. Co. v. United States*, 987 F.2d 743, 745 (Fed. Cir. 1993):

Performance specifications "set forth an objective or standard to be achieved, and the successful bidder is expected to exercise his ingenuity in achieving that objective or standard of performance, selecting the means and assuming a corresponding responsibility for that selection."  
*J.L. Simmons Co. v. United States*, 188 Ct. Cl. 684, 412 F.2d 1360, 1362 (Ct. Cl. 1969). Design specifications, on the other hand, describe in precise detail the materials to be employed and the manner in which the work is to be performed. The contractor has no discretion to deviate from the specifications, but is "required to follow them as one would a road map."

On the more general level, the specification assigns the responsibility “for the design, selection, installation, operation, and testing of all systems and components which are necessary or required, whether prescribed or implied, for the correct operation of the craft” to the contractor. The contractor is also “responsible for all engineering calculations that are necessary to ensure proper craft design, operations, and performance and demonstrating that the craft conforms to the SOW.” (SOF ¶ 4, SOW ¶ 2.b.)

On the more specific level relating to the “minimum” capabilities of the craft to be delivered, the specification requires “Navigation systems sufficient to safely navigate independently to and from confined inter-coastal waters to open ocean and return” (SOF ¶ 4, SOW ¶ 2.c.(1)(c)). As RAC admitted, while there were no specific requirements for technology, systems, or equipment in the SOW, installation of a GPS navigation system was necessary to satisfy the required testing, instrumentation and data collection for tracking and speed reference (SOF ¶¶ 7, 9). Similarly, while there was no specific requirement for seating, its installation was nonetheless necessary to “allow safe vessel operation in all sea states as the vessel design will not allow for standing operators it is an enclosed cabin” (SOF ¶ 7). Indeed, RAC itself identified the need for seating for the protection and support of the occupant in the cockpit of a high speed small craft in its first research contract (SOF ¶ 2).

Since the specification did not prescribe in specific detail either the instrumentation or the interior arrangements for human systems interface to be installed, but left to RAC’s ingenuity and discretion to provide what it determined would work “for the correct operation of the craft” (SOF ¶ 4, SOW ¶ 2.b.), we conclude that the specification is of a performance variety.

### CONCLUSION

Because selecting and providing the GPS navigation system and the seating in the enclosed cabin were objectives the contract specification assigned to RAC to achieve, we hold installation of the GPS navigation system and the seating was within the scope of the contract. Accordingly, RAC is not entitled to the adjustment claimed.

The government’s motion is granted. This appeal is denied.

Dated: 23 February 2011



PETER D. TING  
Administrative Judge  
Armed Services Board  
of Contract Appeals

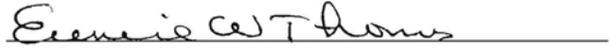
(Signatures continued)

I concur



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

I concur



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. 57111, Appeal of Revenge Advanced Composites, rendered in conformance with the Board's Charter.

Dated:

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