

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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WEDJ/Three C's, Inc. ) ASBCA No. 56672  
 )  
Under Contract No. SPO560-03-C-0062 )

APPEARANCE FOR THE APPELLANT: Cyrus E. Phillips IV, Esq.  
Arlington, VA

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.  
DLA Chief Trial Attorney  
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Trial Attorney  
Defense Supply Center,  
Philadelphia (DLA)

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

This appeal arises from a contract awarded by Defense Supply Center Philadelphia (DSCP or government) to WEDJ/Three C's, Inc. (WEDJ) for air conditioners for Landing Craft, Air Cushion (LCAC) vessels. WEDJ claimed entitlement to a share of collateral savings under the instant contract and acquisition savings under this and several later contracts in the total amount of \$11,058,652 as a result of alleged constructive acceptance by DSCP of a Value Engineering Change Proposal (VECP). DSCP denied WEDJ's claim in its entirety and WEDJ timely appealed the denial. The government moves for summary judgment on the basis that WEDJ did not present a valid VECP and, even if it had, there was no government acceptance, constructive or otherwise (gov't mot. at 7). WEDJ opposes the government's motion. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The record reflects that over a period of almost fifteen years WEDJ and the government worked together on the development and use of non-corrosive coatings for the LCAC air conditioners. In a 29 September 1999 letter, the Naval Surface Warfare Center (NSWC) advised the Defense Industrial Supply Center, predecessor to DSCP, that a LCAC air conditioner had been completely coated with HERESITE P-413 baked on phenolic coating as a test in January 1998 and continued to operate, virtually free of corrosion. The letter enclosed, for use in subsequent procurements, NAVSEA Drawings 514-6386365 and 514-6386366 which had been "red lined" and "updated to

specify use of a HERESITE P-413 protective coating vice an epoxy powder coating” as follows:

3.3.1.2.1.2 Heresite P-413 Coatings. Each air conditioner’s compressor shroud, the inside/outside of the air conditioner’s cabinet and wherever possible – other internal components shall be coated with Heresite P-413 in accordance with MIL-V-12276.

(R4, tab 1 at Sheets 1, 13 of 23, Sheets 1, 12 of 24)

2. On 25 March 2003 DSCP issued Solicitation No. SPO560-03-R-0116 for five NSN 4120-01-353-4903 (NSN-4903) air conditioners and five NSN 4120-01-353-4904 (NSN-4904) air conditioners, all in accordance with Drawing 514-6386365, Revision F (R4, tab 2 at 1-5 of 18).

3. The government received one proposal from the “only presently known manufacturer” which was WEDJ (app. supp. R4, tab 69). The record reflects that, on 27 March, prior to submitting its bid, WEDJ advised DSCP that the correct drawing number for NSN-4904 was 514-6386366, sought clarification of the warranty clause in the solicitation and advised that the “Units does [sic] not consist of corosion [sic] preventive coating” (R4, tab 4; *see also* app. supp. R4, tab 40). Later in the day on 27 March 2003 WEDJ submitted its proposal to provide the specified air conditioners at a price of \$25,656.00 for each NSN-4904 and \$31,787.00 for each NSN-4903 (R4, tab 3; app. supp. R4, tab 39). On 28 March 2003 internal DSCP e-mail messages indicate that the 25 March 2003 solicitation did not include a requirement for the HERESITE P-413 coating (app. supp. R4, tab 67). On 1 April 2003 WEDJ and the government had a telephone conversation in which the government communicated to WEDJ that the solicitation had been amended to include the HERESITE P-413 coating requirement and WEDJ indicated that it would “be able to comply with [the] coating” and would “call back with new price” (app. supp. R4, tab 68). On 2 April 2003 WEDJ advised the government via fax that:

RE: SOL SPO560-03-R-0116 OUR TELECON 01APR 2003  
REVISED PAGES 2,3,4 AND 5 ENCLOSED – CHANGE  
TO FULL “HERESITE” COATING REQUIREMENT –  
ALL OTHER PAGES REMAIN UNCHANGED AS  
SUBMITTED 27MAR 2003

....

[]FULL HERESITE COATING TO BE ADDED TO UNIT  
DESCRIPTION....

(App. supp. R4, tab 41)

4. On 8 April 2003 DSCP awarded Contract No. SPO560-03-C-0062 to WEDJ for five NSN-4904 air conditioners in accordance with Drawing 514-6386366, Revision G, and five NSN-4903 air conditioners in accordance with Drawing 514-6386365, Revision F. It is undisputed that the contract also contained the following:

NOTE:

HERESITE P-413 COATING HAS BEEN ADDED AS AN ADDITION TO DRAWING 514-6386366 REV G AND DRAWING 514-63863[6]5 REV F FOR THIS CONTRACT ONLY.

(R4, tab 5 at 1, 2 of 12)

5. The contract incorporated by reference FAR 52.248-1, VALUE ENGINEERING (FEB 2000) (ALTERNATE I) (R4, tab 5 at 10 of 12). The clause provided:

“Value engineering change proposal (VECP)” means a proposal that—

(1) Requires a change to this, the instant contract, to implement;...

6. On 14 May 2003 WEDJ submitted VECP No. C0062-001 to contracting officer (CO) Jones under the instant contract. No other contract numbers were referenced in the VECP. In Blocks 10 and 11 of the VECP WEDJ identified Drawings 514-6386365 and 514-6386366 as the specifications and drawings affected. In Block 20 WEDJ proposed to retrofit the “Existing Fleet Inventory.” (R4, tab 7 at 2) The VECP also requested the CO approve the following:

**BLOCK 15. “DESCRIPTION OF CHANGE”**

Under Protective finish, paragraph 3.3.1.2.1.2 of both specifications, delete the epoxy powder coated requirement in accordance with MIL-C-24712 and replace with “HERESITE” P-413 baked phenolic coating, 4-6 mils dry film thickness, (DFT) in accordance with MIL-V-12276. Apply coating to interior and exterior surfaces of cabinet enclosure, including compressor shroud and wherever possible, all other interior sheet metal components. On

sheet 4 of both specifications, under “Military”, delete reference to MIL-P-24441 Paint, Epoxy-Polyamide, General Specification for and [sic] MIL-C-24712 Coatings, Powdered Epoxy.

Form, Fit and Function remain unchanged.

....

**BLOCK 16. “NEED FOR CHANGE”**

(1) To prolong the life of existing LCAC air-conditioning units which operate for only 6 – 8 months before requiring labor intensive repairs or replacement due to corrosion caused by their continued exposure to severe marine/amphibious environmental conditions. (2) To reduce the number of extra air-conditioners required as part of a three (3) craft, six (6) month deployment Pack-Up-Kit, thereby increasing the net payable capacity and (3) to eliminate the large backlog of units awaiting repair at ACU locations.

....

**BLOCK 18. “PRODUCTION EFFECTIVITY BY SERIAL NUMBER”**

Existing Contract: 5 EA 24,000 BTUH, 03-3744 thru 03-3748  
5 EA 33,000 BTUH, 03-3749 thru 03-3753  
Future LCAC air-conditioning unit contracts, produced by any manufacturer, that employ any phenolic coating for corrosion protection purposes.

(R4, tab 7 at 3-5) The VECP estimated the total savings to the government to be \$118,388 if the government purchased one NSN-4903 and one NSN-4904 each with the HERESITE coating instead of five of each provided with the “existing design.” The VECP estimated WEDJ’s share of the savings to be \$59,194. The VECP then estimated the total savings to the government to be \$1,040,970 if the government purchased five NSN-4903 and five NSN-4904 each with the HERESITE coating instead of twenty-five of each, presumably without the HERESITE coating, at WEDJ’s 2003 pricing. The VECP estimated WEDJ’s share of these savings to be \$520,485. (*Id.*) There is no evidence or allegation by WEDJ that it had submitted a VECP at any time prior to the 14 May 2003 VECP.

7. On 9 September 2003 CO Jones advised WEDJ that its VECP had been disapproved for the following reasons:

1. The coating modification Heresite was specified and paid for by the Government in November 1997 to coat an entire prototype unit.
2. The Government invested their funds in developing, implementing, and testing this change; the Navy drawing has been revised to specify this change.
3. The contractor did not use its own resources to develop modification.
4. Additionally, there is no data provided to substantiate the replacement-estimated cost/savings.

(R4, tab 11; *see also* app. supp. R4, tabs 71-74) On 16 September 2003 WEDJ responded to the disapproval of its VECP, indicating that it intended to submit a revised VECP “further documenting our participation in this change process.” WEDJ also argued that the drawings had not been revised, “only redlined to incorporate the coating change. This redline effort was based upon our recommended changes to the drawings, which were specifically requested by the Navy.” (R4, tab 12) There is no evidence in the record before us of a revised VECP.

8. On 22 October 2003 Drawings 514-6386365 and 514-6386366 were formally revised to incorporate the requirement for a full HERESITE P-413 coating (R4, tab 29 at 3).

9. On 4 September 2008 WEDJ submitted a certified claim to the CO in which it alleged that DLA had constructively accepted WEDJ’s VECP:

Despite your subsequent denial of the WEDJ[] VECP, in fact [DSCP] had earlier constructively accepted the WEDJ[] VECP when [DSCP] amended Solicitation Number SPO560-03-R-0116 on March 27<sup>th</sup>, 2003, and since then [DSCP] has purchased LCAC air conditioners finished with multiple coats of bake-on phenolic resin in lieu of epoxy powder coating.

The source control drawings for the LCAC air conditioner were not officially revised until October 22<sup>nd</sup>, 2003....

As a result of this constructive acceptance of the WEDJ[] VECP, [DSCP] has obtained the equivalent of not

less than five times the number of LCAC air conditioners which would otherwise have been required had the WEDJ[] VECP not been constructively accepted by [DSCP].

(R4, tab 29 at 3; *see also* compl. ¶ 2 (alleging 22 October 2003 constructive acceptance), ¶¶ 24-26 (alleging 27 March 2003 constructive acceptance)) In contrast to the estimated share of savings presented in WEDJ's VECP of either \$59,194 or \$520,485 (dependent upon quantity) (SOF ¶ 6), WEDJ now claimed that its share of acquisition savings was \$10,958,652 including instant contract savings under Contract No. SPO560-03-C-0062 and future contract savings under Contract Nos. SPO560-03-C-0108, SPO560-04-C-0102, SPO500-04-D-0388/SPM500-04-D-0388. It also claimed its share of collateral savings to be \$100,000 under Contract No. SPO560-03-C-0062. The claim referenced four contracts, the instant contract and three contracts awarded after the instant contract, each of which, as awarded, included the full HERESITE coating requirement (R4, tab 29 at 3-4; app. opp'n at 7-10), for LCAC air conditioning units. (R4, tab 29)

10. On 19 November 2008 the CO denied WEDJ's claim in its entirety, citing the same reasons given in the 9 September 2003 disapproval of WEDJ's VECP (R4, tab 30).

11. On 5 December 2008 WEDJ's appeal of the CO final decision was docketed at the Board.

### DECISION

The government has moved for summary judgment on the basis that WEDJ did not present a valid VECP and that, even if the VECP had been valid, the government did not constructively accept a VECP from WEDJ (gov't mot. at 7). WEDJ opposes the motion by arguing that its 14 May 2003 submission was a valid VECP that was constructively accepted by the government on either 27 March 2003 or 22 October 2003 (SOF ¶ 8; app. opp'n at 12-13, 15-16, 18).

We evaluate the government's motion for summary judgment under the well-settled standard that:

Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.... The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment.

*Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). In the course of our evaluation, the Board’s role is not “to weigh the evidence and determine the truth of the matter,” but rather to ascertain whether material facts are disputed and whether there exists any genuine issue for trial.” *Holmes & Narver Constructors, Inc.*, ASBCA Nos. 52429, 52551, 02-1 BCA ¶ 31,849 at 157,393 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)), *aff’d*, 57 Fed. Appx. 870 (Fed. Cir. 2003). A material fact is one which may make a difference in the outcome of the case. *Liberty Lobby*, 477 U.S. at 248.

The moving party bears the burden of establishing the absence of any genuine issue of material fact. *Mingus Constructors*, 812 F.2d at 1390. The non-moving party must then set forth specific facts showing the existence of a genuine issue of material fact for trial; conclusory statements and bare assertions are insufficient. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984); *Mingus Constructors*, 812 F.2d at 1390-91; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Although the onus is on the moving party to persuade us that it is entitled to summary judgment, the movant may obtain summary judgment, if the non-movant bears the burden of proof at trial, by demonstrating that there is an absence of evidence to support the non-moving party’s case. *E.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Summary judgment is appropriate in that situation, even though some factual issues may remain unresolved, because “a complete failure of proof concerning an essential element of a nonmoving party’s case necessarily renders all other facts immaterial.” *Id.*, 477 U.S. at 323.

*Holmes & Narver*, 02-1 BCA ¶ 31,849 at 157,395; *see also Schneider’s of OKC*, ASBCA No. 54327, 04-2 BCA ¶ 32,776 at 162,074.

The Value Engineering clause “clearly sets forth specific requirements which a proposal must meet in order to qualify as a VECP.” *Schneider’s of OKC*, 04-2 BCA ¶ 32,776 at 162,075. At a minimum, in order to meet its burden of proof at trial, WEDJ “must show that it submitted a valid VECP and that the government accepted the VECP.” *Id.* at 162,076. A valid VECP must contain a proposed change to contract requirements for implementation. FAR 52.248-1(b); *NI Industries, Inc.*, ASBCA No. 29535, 87-2 BCA ¶ 19,688 at 99,658. The government motion for summary judgment has presented evidence that WEDJ’s 14 May 2003 submission was not a valid VECP because it proposed to “change” the contract requirement to a full HERESITE P-413 coating which was already required in the 8 April 2003 contract as awarded. It is therefore incumbent upon WEDJ to come forward with evidence that disputes the failure of its 14 May 2003 VECP to propose a change to the instant contract requirements.

The alleged change to the contract proposed by WEDJ's 14 May 2003 VECP was the use of HERESITE P-413 to coat certain interior and exterior surfaces in the LCAC air conditioners ordered under the contract. In its VECP, WEDJ identified Drawings 514-6386365 (Revision F) and 514-6386366 (Revision G) as the specifications /drawings affected by its proposed change. (SOF ¶ 6) It is undisputed that the two drawings were "red-lined" on 27 September 1999 to incorporate references for the use of the full HERESITE P-413 coating, however, WEDJ takes the position in this appeal that the red-lined drawings were never actually "revised" to include the full HERESITE coating (SOF ¶¶ 7-9). The record demonstrates, however, that the amended solicitation, WEDJ's own amended proposal and the instant contract, as awarded, contained the requirement for the full HERESITE coating (app. opp'n at 7; SOF ¶¶ 3-4, 9). The record reflects that over many years WEDJ and the government worked together on the development and use of the HERESITE coating for the LCAC air conditioners (SOF ¶ 1). However, nowhere in the record or its arguments in this appeal has WEDJ alleged nor offered any evidence that it submitted a VECP for the use of the full HERESITE P-413 coating prior to the 8 April 2003 award of the instant contract which admittedly included the requirement. Nor has WEDJ alleged or directed us to anything in the record before us that would demonstrate that its VECP proposed something different from the instant contract requirement. WEDJ has failed to produce evidence of triable disputed facts that its 14 May 2003 VECP proposed a change to the instant contract requirements (SOF ¶ 5). To the extent WEDJ argues that the incorporation into the solicitation and resultant contract of the requirement for full HERESITE coating was at its suggestion, thereby entitling it to share in any savings, it is well-established that a contractor's suggestion/proposal, not identified as a VECP at the time, and the government's acceptance of it:

[R]esulted in a binding agreement that could not be abrogated by [the contractor's] subsequent identification of the proposals as a VECP without the acquiescence of both parties. In order to share in VE savings, a contractor must make the Government aware that it is submitting a VE proposal before the proposal is accepted....

As an additional basis for denying the appeal for lack of timely identification as a VECP, we note that under the Value Engineering clause definitions, a VECP means a proposal requiring implementation of a change to the contract. After a cost reduction [proposal] is made a part of a contract it can no longer qualify as a VECP because there is no longer a required change.

*NI Industries*, 87-2 BCA ¶ 19,688 at 99,658.

To the extent that appellant may be arguing that the [14 May 2003 VECP] somehow “relates back” to appellant’s [pre-contract award contacts regarding the requirement for the full HERESITE coating], the contract, by definition, precludes a VECP after the change that is the subject of the VECP has already been made part of the contract. The VECP clause contemplates government review and an informed government decision on a VECP. *Erickson Air Crane Company of Washington, Inc. v. United States*, 731 F.2d [810] at 816. That cannot occur when an alleged VECP is submitted after the contract has already been changed.

*Schnider’s of OKC*, 04-2 BCA ¶ 32,776 at 162,077; *see also M.C. & D. Capital Corp.*, ASBCA Nos. 38181 *et al.*, 91-1 BCA ¶ 23,563, *aff’d*, 948 F.2d 1251 (Fed. Cir. 1991).

WEDJ argues that its VECP proposed changes beyond what was already required by the instant contract because it proposed that Drawings 514-6386366, Revision G, and 514-6386365, Revision F, be formally revised, as opposed to the 1999 red-lining, that the existing fleet be retrofitted, and that the requirement for full HERESITE coating be extended to all future procurements (app. opp’n at 15-17). These alleged changes, however, do not meet the basic requirement that a VECP must propose changes to be implemented in the instant contract (SOF ¶ 5), which was identified by WEDJ in its VECP as solely Contract No. SPO560-03-C-0062 (SOF ¶ 6). A formal revision of drawings to incorporate a requirement that is already in the red-lined versions, as well as already required by the contract, does not propose a change to the instant contract work. Likewise, a proposal to retrofit the existing fleet did not include work under the instant contract. Without meeting the threshold FAR requirement of affecting the instant contract work, there was no valid VECP to be accepted by the government and it follows that there is no basis for WEDJ to be paid a share of alleged acquisition savings, including future contract savings.

WEDJ also argues in its opposition motion that the alleged failure of the government to respond to two interrogatories/document requests presents an obstacle to a grant of summary judgment. We disagree. The discovery requests were propounded on 18 December 2007 and, in correspondence dated 20 April 2009, counsel for WEDJ stated that “[t]he parties are agreed that discovery, which is already ongoing *without dispute*, will conclude by Friday, May 8<sup>th</sup>, 2009” (emphasis added). In the time between that letter and WEDJ’s 16 June 2009 opposition to the motion, the subject was never raised to the Board. Further, the interrogatories/document requests raised by WEDJ pertain to documents and individuals relevant to a meeting that took place on 3 April 2003, before contract award. WEDJ has failed to allege or demonstrate, and we have been unable to discern, how any of the requested information would change the undisputed facts that the

contract at issue, as awarded, contained the requirement for the full HERESITE P-413 coating and that WEDJ's later 14 May 2003 VECP proposed to incorporate the very same requirement into the contract. As a result, none of the discovery information is material to the issues now before the Board.

CONCLUSION

On the basis of the undisputed facts before us, and weighing all inferences in WEDJ's favor, we conclude that the alleged change proposed in WEDJ's VECP was already a contract requirement. The VECP was thus invalid and WEDJ has failed to produce or even allege the presence of any evidence to be presented at trial that could overcome this fatal flaw in its theory of recovery. It would therefore be impossible for WEDJ to prevail at trial on the issues of constructive acceptance of the invalid VECP and a resultant share of alleged savings. Accordingly, the government's motion for summary judgment is granted and the appeal is denied.

Dated: 20 November 2009

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DIANA S. DICKINSON  
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. 56672, Appeal of WEDJ/Three C's, Inc., rendered in conformance with the Board's Charter.

Dated:

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