
IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Number 06-436C

Judge Mary Ellen Coster Williams

ULYSSES, INC,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

PLAINTIFF'S MEMORANDUM OF CONTENTIONS OF FACT AND LAW

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**PLAINTIFF'S MEMORANDUM OF
CONTENTIONS OF FACT AND LAW**

INTRODUCTION

Plaintiff's Memorandum of Contentions of Fact and Law is filed pursuant to RCFC Appendix A, ¶ 14(a), and the Court's Scheduling Order of November 16th, 2011 (ECF Document Number 137, filed November 16th, 2011).

This is a Contract Disputes matter before the Court for *de novo* review under 41 U.S.C. § 7104(b)(1). Plaintiff Ulysses, Incorporated (Ulysses) has presented to a Contracting Officer at the United States Department of Defense's Defense Logistics Agency and its Defense Supply Center Columbus (DSCC) a certified Contract Claim seeking reinstatement of two cancelled Purchase Orders, else payment of the agreed-upon firm fixed-price of \$95,115. Defendant DSCC has timely asserted Counterclaims under the False Claims Act, 31 U.S.C. §§ 3729-3733; under the Special Plea in Fraud Provision, 28 U.S.C. § 2514; and under the Anti-Fraud Subparagraph of the Contract Disputes Provisions, 41 U.S.C. § 7103(c)(2). Defendant DSCC seeks an Award up to \$44,000 for the False Claims, the forfeiture of Ulysses' certified \$95,115 Claim under the Special Plea in

Fraud Provision, and an Award of not less than \$95,115 under the Anti-Fraud Subparagraph of the Contract Disputes Provisions. (ECF Document Number 17-1, filed May 17th, 2007).

Ulysses' certified Claim for re-instatement, together with Ulysses' certified Claim for money damages, is properly before the Court. As the United States Court of Appeals for the Federal Circuit has recently explained, the Contract Disputes jurisdiction of the United States Court of Federal Claims is extended by 28 U.S.C. § 1491(a)(2) beyond monetary disputes to "*nonmonetary disputes on which a decision of a contracting officer has been issued.*" *Todd Construction, L.P. v. United States*, 656 F.3d 1306 (Fed Cir. 2011), 2011 U.S. App. LEXIS 17980, *11. The *Todd Construction* Court says that so long as there a decision of the Contracting Officer, then "all claims which are based on a valid contractual theory provide the Claims Court with CDA [Contract Disputes Act of 1979] jurisdiction," says that a "contractor's claim need not be based on the contract itself (or a regulation that can be read into the contract) as long as it relates to its performance under the contract." *Id.*, 2011 U.S. App. LEXIS 17980, *18-*19.

This Contract Disputes proceeding here in the United States Court of Federal Claims encompasses the entire scope of the "claims" over which Defendant DSCC's Contracting Officer was given authority under Federal Acquisition Regulation 2.101, "Definitions," 48 C.F.R. § 2.101

(October 2005), a provision which defines “claim” as “a written demand or written assertion by one of the contracting parties [here it was Ulysses] seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or *other relief arising under or relating to the contract.*” 48 C.F.R. § 2.101 (October 2005) (emphasis added):

the CFC [United States Court of Federal Claims] suit is not a “review,” but an original action, and the CFC does not “affirm” or “reverse” the CO [Contracting Officer], but simply decides entitlement *vel non* to the adjustment. It is acting as a trial court of first instance, not an appellate court. *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987) (Under the CDA [Contract Disputes Act of 1979], “where an appeal is taken to a board or court, the contracting officer’s award is not to be treated as if it were the unappealed determination of a lower tribunal which is owed special deference or acceptance on appeal.”).

Bath Iron Works Corp. v. United States, 20 F.3d 1567, 1580 (Fed. Cir. 1994).

CONTENTIONS OF FACT

THE REQUIRED PRINTED CIRCUIT CARDS

This Civil Action concerns a DSCC requirement for a printed circuit card for use in the AN/AWM-54 Aircraft Firing Circuit Test Set, a portable, battery-operated flight-line test set used to check for stray voltages and line resistance in firing circuit tests of the bomb release and missile firing circuits of Navy aircraft. The requirements for this Test Set are set out in Military Specification

Number MIL-A-81917(AS) (March 7th, 1973), "Aircraft Firing Circuit Test Set AN/AWM-54." (MIL-A-81917). The Test Set uses two printed circuit cards, Part Number 178AS112, and Part Number 178AS114. The details necessary to manufacture these two printed circuit cards are set out in Naval Air Systems Command Drawing Number 178AS112 and in Naval Air Systems Command Drawing Number 178AS114:

3.7.7 Printed Wiring Board Assemblies - The printed wiring board assemblies, P/N 178AS112 and P/N 178AS114 *shall be manufactured in accordance with the documents listed on drawing 30003-178AS112 and 30003-178AS114* and shall meet the requirements stated thereon.

MIL-A-81917, paragraph 3.7.7 (Emphasis added). There are no other controlling requirements for manufacture of these two printed circuit cards. The Line Resistance printed circuit card, Part Number 178AS114, is more complex than the Stray Energy printed circuit card, Part Number 178AS112.

The AN/AWM-54 Aircraft Firing Circuit Test Set, and these printed circuit cards, the Stray Energy printed circuit card, Part Number 178AS112, and the Line Resistance printed circuit card, Part Number 178AS114, are not "Commercial Items." "Commercial items" are defined in Federal Acquisition Regulation 2.101 as "items" "of a type customarily used for nongovernmental purposes" and "sold, leased, or licensed to the general public." 48 C.F.R. § 2.101 (October 2001). Hopefully, the general public has no need or use for a device to check for stray voltage before bombs or rockets are

loaded on a pylon beneath an aircraft wing, this circuit testing to ensure against premature release of these bombs or rockets.

Ulysses has previously manufactured and delivered the AN/AWM-54 Aircraft Firing Circuit Test Set, providing these Test Sets to other prime Contractors and to the Australian Government. Ulysses has manufactured and delivered to DSCC the Line Resistance printed circuit card, Part Number 178AS114, a printed circuit card more complex than the Stray Energy printed circuit card, Part Number 178AS112. Ulysses has manufactured and delivered to another prime Contractor the Stray Energy printed circuit card, Part Number 178AS112.

The DSCC requirements here at issue are requirements for the Stray Energy printed circuit card, Part Number 178AS112. Ulysses has not previously manufactured and delivered to DSCC the Stray Energy printed circuit card, Part Number 178AS112, and Ulysses has not represented that it has ever done so. Despite this, DSCC insists that it has been somehow misled by Ulysses. DSCC does not recognize that this misapprehension is one of DSCC's own making, and that this misapprehension results from DSCC's failure to consider information readily available to DSCC, or that would have been made available had DSCC only asked.

THE PURCHASE ORDERS

On June 1st, 1998 DSCC opened Offers submitted on a quantity of the Stray Energy printed circuit card, Part Number 178AS112. DSCC's Abstract of these Offers records that the price offered by Ulysses was "based on being manufacturer of the next higher assembly," viz. the AN/AWM-54 Aircraft Firing Circuit Test Set. Subsequently DSCC wrote to Ulysses that "[y]our recent offer submitted in response to the above solicitation was not eligible as an alternate item," and this letter from DSCC provided to Ulysses the names of contact persons "[i]f you wish to pursue approval prior to issuance of the next requirement." Ulysses did not pursue such an approval.

On March 20th, 2002 Ulysses submitted to DSCC by facsimile Quoted prices on different quantity ranges of the Stray Energy printed circuit card, Part Number 178AS112. Ulysses' facsimile Quotation identified the item only as a "Circuit Card Assembly," "Part Number 178AS112", and did not represent or identify any other controlling requirement for the manufacture of Part Number 178AS112. DSCC entered this Quotation into a system of electronic records, and in this system of electronic records DSCC added representations not made by Ulysses, viz., DSCC's electronic records for this Quotation stated that this requirement was for Stray Energy printed circuit cards, Part Number

178AS112, “manufactured by/under the direction of” Raytheon Technical Services Company.

DSCC’s electronic records for this Quotation went on to state that:

You have stated that the product offered for NSN [National Stock Number] is an “exact product.” Exact product means CAGE [Contractor and Government Entity] 072E5 [Raytheon Technical Services Company] Part Number 178AS112, manufactured by or under the direction of CAGE 072E5. If you intend to manufacture this item, but are not CAGE 072E5, you must have evidence of a current contractual relationship with CAGE 072E5 to manufacture and sell this item as CAGE 072E5 P/N 178AS112 in order to quote exact product. . . .

The controlling manufacturing requirements for the Stray Energy printed circuit card, Part Number 178AS112, are set out in Naval Air Systems Command Drawing Number 178AS112, *and they are not set out by Raytheon Technical Services Company*. This is just as Ulysses represented in its facsimile Quotation of March 20th, 2002.

DSCC did not reconcile the differences between the representations in Ulysses’ facsimile Quotation sent to DSCC on March 20th, 2002 and the “manufactured by/under the direction of” requirements of DSCC’s electronic records for that Quotation. DSCC then knew, this as recently as June 1st, 1998, that Ulysses had Offered prices on a quantity of the Stray Energy printed circuit card, Part Number 178AS112, upon the premise that these prices offered by Ulysses were “based on being manufacturer of the next higher assembly,” *viz.* the AN/AWM-54 Aircraft Firing Circuit Test Set.

DSCC could only have supposed in March 2002 that Ulysses intended to manufacture the Stray Energy printed circuit card, Part Number 178AS112, and that this manufacturing would not occur “by/under the direction of” Raytheon Technical Services Company.

DSCC could have simply asked Ulysses to confirm that it would deliver Stray Energy printed circuit cards, Part Number 178AS112, “manufactured by/under the direction of” Raytheon Technical Service Company, else DSCC could have requested a Pre-Award Survey under Federal Acquisition Regulation 9.106-1, “Conditions For Preaward Surveys,” 48 C.F.R. § 9.106-1 (October 2001). A Pre-Award Survey would have been particularly appropriate since “*the information on hand or readily available to the contracting officer, including information from commercial sources, is not sufficient to make a determination regarding responsibility.*” 48 C.F.R. § 9.106-1 (October 2001) (Emphasis added). But DSCC did nothing.

Instead, DSCC issued unilateral Purchase Order Number SP0960-02-M-4209 to Ulysses on April 29th, 2002. This unilateral Purchase Order was an Offer for deliveries F.O.B. origin of a total quantity of eighty-five Stray Energy printed circuit cards, Part Number 178AS112, to two different destinations, and this on or before August 27th, 2002. The Offer in this unilateral Purchase Order includ-

ed this remark: “Accelerated delivery is acceptable and desired at no additional cost to the Government.”

The Schedule in this unilateral Purchase Order describes the Offer for that which was to be delivered as a “Circuit Card Assembly” and the Schedule references both “Part Number 178AS112” and “Raytheon Technical Services Company.” But the Schedule in this unilateral Purchase Order does not include the “manufactured by/under the direction of” requirements set out in DSCC’s electronic records for the earlier Quotation, requirements added by DSCC, and representations not made by Ulysses. This unilateral Purchase Order further provides that inspection and acceptance is to occur at Ulysses’ New Jersey facility, and it assigns these responsibilities to a local Defense Contract Management Agency office.

By June 18th, 2002 DSCC had generated further requirements for Stray Energy printed circuit cards, Part Number 178AS112, and DSCC sent a facsimile to Ulysses asking for “pricing” on a total quantity of ninety-nine each. On June 19th, 2002 Ulysses responded with a Quotation sent by facsimile. Once again, Ulysses’ facsimile Quotation identified the item only as a “Circuit Card Assembly,” “Part Number 178AS112,” and did not represent or identify any other controlling requirement for the manufacture of Part Number 178AS112.

Based on Ulysses' earlier facsimile Quotation of March 20th, 2002, and on Ulysses' subsequent facsimile Quotation of June 19th, 2002, DSCC cannot have been confused about Ulysses' intentions—Ulysses itself was intending to manufacture the Stray Energy printed circuit cards, Part Number 178AS112, a printed circuit card which, per the requirements of MIL-A-81917, paragraph 3.7.7, is to be manufactured in accordance with Naval Air Systems Command Drawing Number 178AS112, and not by/under the direction of another Contractor.

Once again, DSCC neither made further inquiries of Ulysses nor did DSCC conduct a Pre-Award Survey—DSCC issued unilateral Purchase Order Number SP0960-02-M-5456 to Ulysses on June 27th, 2002.

This second unilateral Purchase Order is an Offer for deliveries F.O.B. origin of a total quantity of ninety-nine Stray Energy printed circuit cards, Part Number 178AS112, these to two different destinations, and on or before November 4th, 2002. The second unilateral Purchase Order again included this remark: "Accelerated delivery is acceptable and desired at no additional cost to the Government."

The Schedule in this second unilateral Purchase Order described the Offer for that which was to be delivered as a "Circuit Card Assembly" and the Schedule references both "Part Number 178AS-

112” and, this time, “Frequency Selective Networks, Incorporated.” There is no explanation of the change in this second Offer from the earlier references to Raytheon Technical Services Company, and neither does the second unilateral Purchase Order include the “manufactured by/under the direction of” requirements. This second unilateral Purchase Order again provides that inspection and acceptance is to occur at Ulysses’ New Jersey facility, and the second unilateral Purchase Order assigns these inspection and acceptance responsibilities to a local Defense Contract Management Agency office.

DSCC now baldly asserts that Ulysses falsely claimed to be an approved manufacturer of the Stray Energy printed circuit cards, Part Number 178AS112, and that Ulysses practiced or attempted to practice fraud against the United States when it did so. (ECF Document Number 17-1, filed May 17th, 2007, at pages 12, 13 of 15). The facts are otherwise—Ulysses never claimed that DSCC had blessed Ulysses as a manufacturer of the Stray Energy printed circuit cards, Part Number 178AS112, and DSCC well knew, as early as September 1st, 1998, that Ulysses was Offering itself as a manufacturer, this based on Ulysses’ previous manufacture of the “next higher assembly,” the AN/AWM-54 Aircraft Firing Circuit Test Set.

Legally, Ulysses never made an Offer. Instead, it was DSCC that made these Offers, and these Offers made by DSCC did not include the “manufactured by/under the direction of” requirements.

DSCC never reconciled the differences between the representations in Ulysses’ facsimile Quotation sent to DSCC on March 20th, 2002 and the “manufactured by/under the direction of” requirements of DSCC’s electronic records for that Quotation. DSCC misled itself by ignoring its own records and not cross-checking what it wrongly thought were representations made by Ulysses—in fact, these representations were not made by Ulysses even though DSCC’s electronic records supposed that they had.

In July 2002 it finally dawned on the DSCC Contracting Officer that Ulysses itself was manufacturing the Stray Energy printed circuit cards, Part Number 178AS112, which were the subject of the Offers in the two unilateral Purchase Orders, the first open for deliveries through August 27th, 2002, and the second open for deliveries through November 4th, 2002. So on August 19th, 2002 the DSCC Contracting Officer directed Ulysses to Stop Work on both Purchase Orders. The Purchase Orders were no longer unilateral Offers, for now the DSCC Contracting Officer had imposed a Stop Work requirement on Ulysses. The Purchase Orders were now bilateral obligations, and, as it turned out, Ulysses had paid heed to the requests for accelerated deliveries and had substantial work in process

before August 19th, 2002. This action was Ulysses' Acceptance of the DSCC Offers in the two Purchase Orders.

There followed exchanges of correspondence between Ulysses and the DSCC Contracting Officer, and between the DSCC Office of Counsel and Ulysses, the DSCC Office of Counsel having stepped into the fray. Ulysses sought approval to continue, this on the ground that Ulysses had previously manufactured and delivered the "next higher assembly," the AN/AWM-54 Aircraft Firing Circuit Test Set, providing these Test Sets to other prime Contractors and to the Australian Government. Likewise, Ulysses sought approval to continue because Ulysses had manufactured and delivered to DSCC the Line Resistance printed circuit card, Part Number 178AS114, a printed circuit card more complex than the Stray Energy printed circuit card, Part Number 178AS112.

Ulysses did not Stop Work as directed; instead Ulysses proceeded with manufacture and by November 13th, 2002 the first accepted Purchase Order was ninety-five percent complete and the second accepted Purchase Order was eighty to eight-five percent complete.

The DSCC Contracting Officer was steadfast: he wrote Ulysses on November 20th, 2002 that the "government is not responsible for costs of manufacturing an item that does not meet stated military specifications and standards." Clearly, he was unaware that paragraph 3.7.7 of MIL-A-81917

provides that the Stray Energy printed circuit card, Part Number 178AS112, is to be manufactured in accordance with the requirements of Naval Air Systems Command Drawing Number 178AS112, and that *neither Raytheon Technical Services Company nor Frequency Selective Networks, Incorporated are a part of the applicable Military Specifications and Standards.*

The *problem* was not meeting Military Specifications and Standards; rather the *problem* was that DSCC itself had not blessed Ulysses to be a manufacturer of the Stray Energy printed circuit card, Part Number 178AS112.

On February 14th, 2003 the DSCC Contracting Officer wrote Ulysses that unless Ulysses could deliver Stray Energy printed circuit cards, Part Number 178AS112, “manufactured by/under the direction of” Raytheon Technical Services Company in response to both Purchase Orders, each Purchase Order would be “cancelled without cost to the government.” Frequency Selective Networks, Incorporated, as set out in the Schedule of Purchase Order Number SP0960-02-M-5456, was suddenly out of the picture.

The DSCC Contracting Officer then had no right to cancel these two now bilateral Purchase Orders for other than commercial items. This is Federal Acquisition Regulation 13.302-4, “Termination Or Cancellation of Purchase Orders”:

(a) If a purchase order that has been accepted in writing by the contractor is to be terminated, the contracting officer shall process the termination in accordance with—

(1) 12.403(d) and 52.212–4(1) for commercial items; or

(2) Part 49 or 52.213–4 for other than commercial items.

(b) If a purchase order that has not been accepted in writing by the contractor is to be canceled, the contracting officer shall notify the contractor in writing that the purchase order has been canceled, request the contractor’s written acceptance of the cancellation, and proceed as follows:

(1) If the contractor accepts the cancellation and does not claim that costs were incurred as a result of beginning performance under the purchase order, no further action is required (*i.e.*, the purchase order shall be considered canceled).

(2) *If the contractor does not accept the cancellation or claims that costs were incurred as a result of beginning performance under the purchase order, the contracting officer shall process the termination action as prescribed in paragraph (a) of this subsection.*

48 C.F.R. § 13.302-4 (October 2002) (Emphasis added). Federal Acquisition Regulation 52.213-4,

“Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items),” the Federal

Acquisition Regulation referenced in Federal Acquisition Regulation 13.302-4(a)(2), provides:

(f) *Termination for the Government’s convenience.* The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. *Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges that the Contractor can demonstrate to the satisfaction of the Government, using its standard record keeping system, have resulted from the termination.* The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any

right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred that reasonably could have been avoided.

48 C.F.R. § 52.213-4 (October 2002) (Emphasis added).

The accepted Purchase Orders should have been Terminated for Convenience, this as required by the applicable Federal Acquisition Regulation. Instead, on June 17th, 2003 each accepted Purchase Order was cancelled "at no cost or liability to the Government."

THE CERTIFIED CONTRACT DISPUTES CLAIM

On February 16th, 2006 Ulysses submitted and certified to the DSCC Contracting Officer a Contract Disputes Claim arising from the unlawful "cancellation" of the two accepted, bilateral Purchase Orders. Ulysses sought re-instatement of the accepted Purchase Orders, again asking DSCC's blessing of Ulysses as a manufacturer of the Stray Energy printed circuit cards, Part Number 178AS-112, this on the premise that Ulysses had previously manufactured and delivered the AN/AWM-54 Aircraft Firing Circuit Test Set; that Ulysses had manufactured and delivered to DSCC the Line Resistance printed circuit card, Part Number 178AS114, a printed circuit card more complex than the Stray Energy printed circuit card, Part Number 178AS112; and that Ulysses had manufactured and delivered to another prime Contractor the Stray Energy printed circuit card, Part Number 178AS112.

Ulysses sought also in this certified Contract Disputes Claim to recover the total agreed-upon price of the Stray Energy printed circuit cards, Part Number 178AS112. Ulysses contended that it was entitled to recover this sum even though it had been directed to Stop Work on August 19th, 2002 yet Ulysses had continued thereafter to assemble the Stray Energy printed circuit cards, Part Number 178AS112. Ulysses' Contract Disputes Claim explained that work on these Stray Energy printed circuit cards, Part Number 178AS112, was still to be completed.

DSCC finds fraud in this certified Contract Disputes Claim because "Ulysses falsely claimed that it was entitled to payment under two Government contracts." (ECF Document Number 17-1, filed May 17th, 2007, page 12 of 15). One wonders whether DSCC has read the Federal Acquisition Regulations which govern this matter, for if DSCC had done so, DSCC would have learned that its "cancellations" of June 17th, 2003 were unlawful and in violation of Federal Acquisition Regulation 13.302-4(b)(2), "Termination Or Cancellation Of Purchase Orders," 48 C.F.R. § 13.302-4(b)(2) (October 2002). Ulysses was entitled, at least, to nothing less than a recovery of *a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges that the Contractor can demonstrate to the satisfaction of the Government, using its standard record keeping system, have resulted from the termination.* Federal Acquisition

Regulation 52.213-4, “Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items),” 48 C.F.R. § 52.213-4 (October 2002).

On April 7th, 2006 the DSCC Contracting Officer issued his Final Decision on the certified Contract Disputes Claim of February 16th, 2006. The DSCC Contracting Officer insists in this Final Decision that the Purchase Orders are for Stray Energy printed circuit cards, Part Number 178AS112, manufactured by/under the direction of Raytheon Technical Services Company in the one instance and manufactured by/under the direction of Frequency Selective Networks, Incorporated in the other. Because Ulysses incurred performance costs for Stray Energy printed circuit cards, Part Number 178AS112, of its own manufacture, the DSCC Contracting Officer found that the “cancellation was proper, no contract for the specified part was entered into, and the government is not obligated to pay you for the costs you expended in manufacturing your own parts.”

ISSUES OF FACT AND LAW TO BE RESOLVED

- I. WHAT ARE THE TERMS OF THE DSCC OFFERS? ARE THE ITEMS SET OUT IN THE SCHEDULE OF THESE INSTRUMENTS TO BE MANUFACTURED IN ACCORDANCE WITH THE APPLICABLE MILITARY SPECIFICATION AND A NAVAL AIR SYSTEMS COMMAND DRAWING, OR INSTEAD ARE THE ITEMS TO BE MANUFACTURED ONLY BY THOSE CONTRACTORS NAMED IN THESE SCHEDULES?

The DSCC Contracting Officer and Ulysses do not agree just what was Offered by the unilateral Purchase Orders. Was it Stray Energy printed circuit cards, Part Number 178AS112, manufactured, as required by the applicable Military Specification, MIL-A-81917, paragraph 3.7.7, in accordance with the details set out in Naval Air Systems Command Drawing Number 178AS112, or was it Stray Energy printed circuit cards, Part Number 178AS112, manufactured by/under the direction of Raytheon Technical Services Company in the one instance and manufactured by/under the direction of Frequency Selective Networks, Incorporated in the other?

There is an analogy here—common law principles of Offer and Acceptance which teach, had Ulysses itself made an “Offer” on the requirements set out in these unilateral Purchase Orders, that it is the former, not the latter. Ulysses “Offered,” in each instance, Stray Energy printed circuit cards, Part Number 178AS112, of its own manufacture. This Ulysses “Offer” of a particular part number, Part Number 178AS112, would have had to mean something, and as a prior manufacturer of the

“next higher assembly,” the AN/AWM-54 Aircraft Firing Circuit Test Set, this Ulysses “Offer” must have constituted an “Offer” to manufacture Stray Energy printed circuit cards, Part Number 178AS-112, in accordance with the detailed requirements of Naval Air Systems Command Drawing Number 178AS112.

Yes, DSCC’s electronic records for this “Offer” (it was, in fact, a Quotation) stated that this requirement was for Stray Energy printed circuit cards, Part Number 178AS112, “manufactured by/under the direction of” Raytheon Technical Services Company, but this was never a representation in Ulysses’ facsimile “Offer,” and the “manufactured by/under the direction of” language in DSCC’s electronic records did not make its way into DSCC’s “Acceptance” of such an “Offer,” this the Schedule of each Purchase Order.

More to the point, this is not a simple case of Offer and Acceptance because we are here dealing with unilateral Purchase Orders authored by DSCC, not by Ulysses, and under Federal Acquisition Regulation 13.004(a), “Legal Effect Of Quotations,” 48 C.F.R. § 13.004(a) (October 2001) these unilateral Purchase Orders are treated as Government Offers, not Government Acceptances:

A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract. Therefore, issuance by the Government of an order in response to a supplier’s quotation does not establish a contract. The order is an offer by the Gov-

ernment to the supplier to buy certain supplies or services upon specified terms and conditions. A contract is established when the supplier accepts the offer.

48 C.F.R. § 13.004(a) (October 2001). (Emphasis added).

Gonzales-McCaulley Investment Group, Inc. v. United States, Fed. Cl. No. 11-298C, November 14th, 2011, 2011 U.S. Claims LEXIS 2171, *22-*23, places particular emphasis on the requirement for “specified terms and conditions” in the Government’s Offer, here the DSCC Offer embodied in the Schedules of these two Purchase Orders. Neither Schedule included a requirement for Stray Energy printed circuit cards, Part Number 178AS112, “manufactured by/under the direction of” others, and when the DSCC Contracting Officer issued the Stop Work order on August 19th, 2002, a date well before the date the DSCC Offers embodied in these two Purchase Orders lapsed on August 27th, 2002 and on November 4th, 2002, the DSCC Contracting Officer conceded Ulysses’ Acceptances of DSCC’s Offers in these Schedules by stopping Ulysses’ partial performances under these two Purchase Orders.

Unlike the circumstances in *Smart Business Machines v. United States*, 72 Fed. Cl. 706, 709 (2006), here DSCC did not give Ulysses time to comply with the Offers embodied in these two Purchase Orders because DSCC directed Ulysses to Stop Work before the times at which these Offers would have lapsed.

Thus there were Acceptances, and not a lapse of DSCC's Offers. Ulysses timely Accepted the Offers embodied in the Schedules of these two Purchase Orders because the "specified terms and conditions" of these DSCC Offers did not include a requirement for Stray Energy printed circuit cards, Part Number 178AS112, "manufactured by/under the direction of" others. Since this requirement was not expressed in the Schedules of these two Purchase Orders, it was not a "specified term and condition" of DSCC's Offers as required by Federal Acquisition Regulation 13.004(a), "Legal Effect of Quotations," 48 C.F.R. § 13.004(a) (October 2001). Just as in *Gonzales-McCaulley*, DSCC never included in its Offers a "specified term," a requirement for Stray Energy printed circuit cards, Part Number 178AS112, "manufactured by/under the direction of" Contractors other than Ulysses. *Id.*, 2011 U.S. Claims LEXIS 2171, *23. Ulysses never represented itself as other than the manufacturer of the Stray Energy printed circuit cards, Part Number 178AS112, Ulysses produced in response to these Government Offers.

II. IS ULYSSES ENTITLED TO RECOVER FOR WORK PERFORMED AFTER THE DATE OF RECEIPT OF THE STOP WORK ORDER, OR IS ULYSSES ENTITLED TO A MONETARY RECOVERY FOR WORK PERFORMED ONLY THROUGH THE DATE OF RECEIPT OF THE STOP WORK ORDER?

Had not DSCC unlawfully cancelled these two accepted Purchase Orders in violation of Federal Acquisition Regulation 13.302-4(b)(2), "Termination Or Cancellation Of Purchase Orders," 48

C.F.R. § 13.302-4(b)(2) (October 2002), Ulysses' monetary recovery would be limited by the *Termination for the Government's Convenience* Provision to a percentage of the agreed-upon price for each Purchase Order reflecting the percentage of the work performed prior to the date of receipt of the Stop Work Order. But the cancellations of these accepted Purchase Orders were Breaches, not the Convenience Terminations which were required by the Federal Acquisition Regulation. So do these Breaches enlarge the time period in which Ulysses may recover costs expended for the work performed?

This is an easy one. The DSCC Contracting Officer very well knew or should have known, even before July 2002, that Ulysses itself was manufacturing the Stray Energy printed circuit cards, Part Number 178AS112, yet the DSCC Contracting Officer stood by while Ulysses continued the work after the DSCC Contracting Officer had issued the Stop Work Order, stood by for almost a year until June 17, 2003 when the DSCC Contracting Officer then unlawfully cancelled the already accepted Purchase Orders. This is akin to seeking Contract performance with no intention of honoring the Contract, and such Breaches are grounds for invalidating the safe harbor of a Convenience Termination. *NCLN20, Inc. v. United States*, 99 Fed. Cl. 734, 759 (2011), citing *Salsbury Industries v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990) (“[W]hen the government contracts with a party

knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the termination for convenience clause.”).

Ulysses is here entitled to recover for a Contract Breach, and this recovery is not limited by the *Termination for the Government’s Convenience* Provision.

III. ULYSSES HAS NOT MISREPRESENTED ITS STATUS AS A MANUFACTURER APPROVED BY DSCC; RATHER DSCC’S ELECTRONIC RECORDS HAVE MISREPRESENTED THE TERMS OF ULYSSES’ FACSIMILE QUOTATION.

DSCC relies on a familiar litany of Civil fraud and forfeiture provisions to support its Counterclaims. Simply put, the essential elements of these provisions require DSCC to show that Ulysses made a misrepresentation or Claim that was somehow false, and then they require DSCC to prove on the part of Ulysses some degree of knowledge of the falsity of this misrepresentation or Claim. *M.A. DeAtley Construction, Inc. v. United States*, 75 Fed. Cl. 812, 818 (2007). The requisite degree of knowledge—whether reckless disregard for the truth or intent—depends on proof of knowledge of the alleged misrepresentations/falsities followed by subsequent assurances of rectitude. *M.A. DeAtley*, 75 Fed. Cl., at 819.

This is the first hole below the waterline of DSCC’s Counterclaim. Even if DSCC’s electronic records had accurately recounted the representations of Ulysses’ facsimile Quotation of March 20th,

2002 (and they did not), DSCC cannot show that Ulysses had any knowledge of DSCC's electronic records, particularly so since the "manufactured by/under the direction of" language in DSCC's electronic records did not make its way into the Schedules of the two unilateral Purchase Orders issued by DSCC.

In order to avoid Counterclaims of fraud or misrepresentation a Contract Disputes Claim must reflect a diligent investigation of basic facts, *Daewoo Engineering and Construction Co., Ltd. v. United States*, 73 Fed. Cl. 547, 579 n. 53 (2006). Mere inconsistencies or discrepancies in a Contract Disputes Claim are insufficient for Counterclaims of fraud or misrepresentation—there must be proof of intent to deceive or mislead, *Daewoo Engineering*, 73 Fed. Cl., at 584, and there may be no "horse trading," i.e., submission of an inflated Claim with expectation to settle for a lower amount, *Daewoo Engineering*, 73 Fed. Cl., at 583 n. 59. A Contract Disputes Claim which properly triggers Counterclaims of fraud or misrepresentation is one in which the Claims made are untrue, assertions about which the Contractor knew or should have known better. *Daewoo Engineering*, 73 Fed. Cl., at 597.

DSCC has here not graced us with a showing just which elements of the certified Contract Disputes Claim are untrue, and DSCC says nothing to support the required showing that Ulysses knew or should have known that elements of the certified Contract Disputes Claim were untrue. Instead,

we have only DSCC's *ipse dixit* that Ulysses "falsely contended" (how, we ask?) in its certified Contract Disputes Claim that Ulysses was entitled to the agreed-upon payment under the two accepted Purchase Orders; that Ulysses falsely claimed to have been an approved manufacturer (approved by whom, we ask, because Ulysses never claimed, either in the facsimile Quotation, in the correspondence, or in the certified Contract Disputes Claim, to be a manufacturer approved by DSCC); and that Ulysses presented its certified Contract Disputes Claim "with the intent to cause the Government to pay Ulysses amounts to which it knows it is not entitled" (but what did Ulysses "know"?). (ECF Document Number 17-1, filed May 17th, 2007, pages 12 and 13 of 15).

A certified Contract Disputes Claim with which an Agency does not agree is not a certified Contract Disputes Claim subject to Counterclaims of fraud and misrepresentation. Agencies must show the fraud or misrepresentation with particularity, and once this hurdle has been overtaken, then Agencies must show that the Contractor knew or should have known better. DSCC wants Stray Energy printed circuit cards, Part Number 178AS112, manufactured by a Contractor which DSCC has approved. Ulysses wants DSCC acceptance of Stray Energy printed circuit cards, Part Number 178AS112, manufactured by Ulysses because Ulysses has in fact manufactured for and delivered to

others these Stray Energy printed circuit cards, Part Number 178AS112. These are garden variety elements of a Contract Dispute, not fraud or misrepresentation.

APPLICABLE LEGAL PRINCIPLES AND DEFENDANT'S ANTICIPATED LEGAL POSITION

The case law in the United States Court of Federal Claims concerning Purchase Orders has developed under Federal Acquisition Regulation 13.302, "Purchase Orders," 48 C.F.R. § 13.302 (October 2001) and its five subparagraphs, Federal Acquisition Regulation 13.302-1, "General," 48 C.F.R. § 13.302-1 (October 2001); Federal Acquisition Regulation 13.302-2, "Unpriced Purchase Orders," 48 C.F.R. § 13.302-2 (October 2001); Federal Acquisition Regulation 13.302-3, "Obtaining Contractor Acceptance And Modifying Purchase Orders," 48 C.F.R. § 13.302-3 (October 2001); Federal Acquisition Regulation 13.302-4, "Termination Or Cancellation Of Purchase Orders," 48 C.F.R. § 13.303-4 (October 2001); and Federal Acquisition Regulation 13.302-5, "Clauses," 48 C.F.R. § 13.302-5 (October 2001).

A key provision of the Federal Acquisition Regulation which informs case law about Quotations and Offers generally, and about Purchase Orders particularly, is Federal Acquisition Regulation 13.004, "Legal Effect Of Quotations," 48 C.F.R. § 13.004 (October 2001).

In this Memorandum of Contentions of Fact and Law, Ulysses has made careful (and required) distinctions between Offers (not here in issue) and Quotations, referring to Federal Acquisition Regulation 13.004(a), "Legal Effect Of Quotations," 48 C.F.R. § 13.004(a) (October 2001) and to case law in the United States Court of Federal Claims which has developed as a consequence of that Federal Acquisition Regulation.

When DSCC argues that Ulysses was bound by the "manufactured by/under the direction of" language in DSCC's electronic records, logically it treats the two unilateral Purchase Orders here in issue as "Acceptances" of the "Offer" set out in DSCC's electronic records. But this was not the "Offer" set out in Ulysses' facsimile Quotation of March 20th, 2002, and neither are DSCC's electronic records or the two DSCC Purchase Orders "Acceptances" of Ulysses' "Offers." DSCC's anticipated legal position ignores Federal Acquisition Regulation 13.004(a), "Legal Effect Of Quotations," 48 C.F.R. § 13.004(a) (October 2001), which explains that Purchase Orders are Government "Offers," not Government "Acceptances."

OBJECTIONS TO LISTED WITNESSES AND EXHIBITS

DSCC's Preliminary Witness List, RCFC App. A, ¶ 13(b), reserves the right to call unidentified witnesses to authenticate documents listed on DSCC's Preliminary Exhibit List, RCFC App. A, ¶ 13(a). DSCC's Preliminary Witness List includes just four persons, the first a Procurement Analyst said to have been involved in DSCC's electronic records system; the second, the DSCC Contracting Officer; the third, the owner of Ulysses at the time here in question; and the fourth, a former employee of Ulysses. Ulysses objects to none of these listed witnesses.

But DSCC's Preliminary Exhibit List includes Declarations from two of these listed witnesses (Exhibits Numbers 10. and 24.) and a Declaration from a third person (Exhibit Number 6.) who is not listed as a Witness. Ulysses objects to these Declarations as surplusage and not relevant. DSCC's Preliminary Exhibit List likewise includes Transcripts for two persons (Exhibits Numbers 16., 19., 50., and 51.) who are listed as Witnesses as well. Ulysses likewise objects to these Transcripts and for the same reason that Ulysses objects to the Declarations.

Ulysses objects to DSCC's Exhibit Number 5., the Naval Aviation Ordnanceman Training Course. MIL-A-81917, not this Training Course, is the document relevant to the manufacturing requirements of the Stray Energy printed circuit card, Part Number 178AS112.

Ulysses objects to DSCC's Exhibit Number 15. which concerns the Debarment of Ulysses from further Government acquisitions. These Purchase Orders are not the subject of that Debarment and the Debarment is thus irrelevant.

Ulysses objects to DSCC's Exhibits Numbers 17., 18., and 19. which concern the Criminal conviction of Ulysses. These Criminal matters are not here in issue, and they are not relevant to this Civil matter.

BIFURCATION OF THE ISSUES FOR TRIAL

Bifurcation of the issues for trial is appropriate. Should the Court not order DSCC to re-instate these two unlawfully cancelled Purchase Orders, the amount of the money damages which will remain is not certain. That is, the question will then become whether Ulysses is entitled its costs of performance through August 19th, 2002, the date Ulysses received the DSCC Contracting Officer's Stop Work Order, or whether Ulysses is entitled to recover its costs of performance through June

17th, 2003, the date the accepted Purchase Orders were unlawfully cancelled by the DSCC Contracting Officer.

Bifurcation will save both Parties the time and expense of assembling and reviewing the accounting records. Should the Court decide to make a monetary award to Ulysses, a remand to the Parties with direction from the Court setting out the period over which these costs of performance are to be calculated will conserve time for the Court, and for the Parties.

Respectfully submitted,

/s/ Cyrus E. Phillips IV

Cyrus E. Phillips IV

Virginia State Bar Number 03135

January 21st, 2012

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on Saturday, January 21st, 2012 a true and complete copy of this Plaintiff's Memoranda of Contentions of Fact and Law was filed electronically via the Court's Electronic Case Filing System, through which notice of this filing will be sent to:

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/s/ Cyrus E. Phillips IV

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