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**United States Court of Appeals for the Federal Circuit**

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**2010-1120**

**WEDJ/THREE C'S, INCORPORATED,**

**Appellant,**

**v.**

**Robert M. Gates, SECRETARY OF DEFENSE,**

**Appellee.**

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**Appeal from the Armed Services Board of Contract Appeals in  
Number 56672, Administrative Judge Diana S. Dickinson.**

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**REPLY BRIEF OF APPELLANT,  
WEDJ/THREE C'S, INCORPORATED**

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**March 17<sup>th</sup>, 2010**

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**APPELLANT WEDJ/THREE C'S VALUE ENGINEERING CHANGE PROPOSAL  
DID NOT OFFER A CHANGE TO THE FINISH REQUIREMENT**

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Appellee DSCP would have it that Appellant WEDJ/Three C's Value Engineering Change Proposal offered a Change to the finish requirement of the Landing Craft, Air Cushion (LCAC) air conditioners to be delivered, and since DSCP Contract Number SPO560-03-C-0062 already required that a phenolic thermosetting resin finish be applied to the interior and exterior surfaces of the cabinet enclosure, compressor shroud, and interior sheet metal components of these Landing Craft, Air Cushion (LCAC) air conditioners, Appellant WEDJ/Three C's Value Engineering Change Proposal was properly rejected. Appellee's Brief, at 11 through 13.

Contract requirements for the Landing Craft, Air Cushion (LCAC) air conditioners which are the subject of both DSCP Contract Number SPO560-03-C-0062 and Appellant WEDJ/Three C's Value Engineering Change Proposal are set out in Naval Sea Systems Command Source Control Drawings Numbers 514-6386365 (Drawing '65) and 514-6386366 (Drawing '66). Appellee's Brief, at 3. This is confirmed by the "Action Item" published as a result of the October 7<sup>th</sup>, 1999 meeting of the Landing Craft, Air Cushion (LCAC) Supply Support Integrated Product

Team, an “Action Item” which concludes that “[t]he air conditioner drawing will be modified to require the coating on future procurements.” A168.

Appellant WEDJ/Three C’s Value Engineering Change Proposal of May 14<sup>th</sup>, 2003 explained that the Contract requirements “affected” were Drawing ’65 and Drawing ’66, A232, and, as Appellee DSCP concedes, Appellant WEDJ/Three C’s proposed changes in Contract requirements would have revised Drawing ’65 and Drawing ’66 to incorporate Changes to finish requirements identical to those first requested in the marked-up “red line” versions of Drawing ’65 and Drawing ’66 sent to Appellee DSCP by the United States Navy’s Coastal Systems Station, Dahlgren Division, Panama City, Florida (CSS) on September 29<sup>th</sup>, 1999 and thereafter ignored by Appellee DSCP, A233. Appellee’s Brief, at 7.

In fact, Drawing ’65 and Drawing ’66 had always required a phenolic thermosetting resin finish for the copper condenser coils of the Landing Craft, Air Cushion (LCAC) air conditioners. A108, A131. And upon award, DSCP Contract Number SPO560-03-C-0062 required that a phenolic thermosetting resin finish be applied to the interior and exterior surfaces of the cabinet enclosure, compressor shroud, and interior sheet metal components of the Landing Craft, Air Cushion (LCAC) air conditioners, this *in addition to* the required phenolic thermosetting resin finish

for the copper condenser coils of the Landing Craft, Air Cushion (LCAC) air conditioners. A20.

But the proposed changes to the terms of DSCP Contract Number SPO560-03-C-0062 offered by Appellant WEDJ/Three C's Value Engineering Change Proposal did not require the implementation of a Change to the finish for the Landing Craft, Air Cushion (LCAC) air conditioners—rather, the Contract changes proposed by Appellant WEDJ/Three C's Value Engineering Change Proposal required changes to Drawing '65 and to Drawing '66, changes not made until October 22<sup>nd</sup>, 2003, A259, A267, A281, A289, after Appellant WEDJ/Three C's Value Engineering Change Proposal was rejected on September 9<sup>th</sup>, 2003, A254.

The mandatory Alternative I version of the VALUE ENGINEERING (FEB 2000) clause incorporated by reference in fixed-price DSCP Contract Number SPO560-03-C-0062, Federal Acquisition Regulation 52.248-1, 48 C.F.R. § 52.248-1 (2002), requires, nothing more, or less, than “a change to this, the instant contract, to implement.” A78. That is just what happened here. Appellant WEDJ/Three C's Value Engineering Change Proposal offered changes to the terms of DSCP Contract Number SPO560-03-C-0062 which would *finally* adopt the requirement that the interior and exterior surfaces of the cabinet enclosure, compressor shroud, and in-

terior sheet metal components of the Landing Craft, Air Cushion (LCAC) air conditioners be finished with a thermosetting phenolic resin coating rather than finished with the epoxy powder coating then specified in Drawing '65 and in Drawing '66.

The mandatory Alternative I version of the VALUE ENGINEERING (FEB 2000) clause incorporated by reference in fixed-price DSCP Contract Number SPO560-03-C-0062 obligated Appellant WEDJ/Three C's to engage in a Value Engineering Program and to identify any considerable savings opportunities which would not impair essential functions of the Contract end item, these the Landing Craft, Air Cushion (LCAC) air conditioners. A80. Federal Acquisition Regulation 48.101(b)-(2), 48 C.F.R. 48.102(b)(2) (2002).

Just this is the goal of the Value Engineering Program, the goal which is set out in Federal Acquisition Regulation 48.101(a), *viz.* “[v]alue engineering attempts to eliminate, without impairing essential functions or characteristics, anything that increases acquisition, operation, or support costs. 48 C.F.R. 48.101(a) (2002) (Emphasis added). That which was offered in Appellant WEDJ/Three C's Value Engineering Change Proposal were changes in Contract requirements which would *ensure* reduction of Landing Craft, Air Cushion (LCAC) air conditioner corrosion (and ex-

tension of Landing Craft, Air Cushion (LCAC) air conditioner life expectancy) caused by the severe marine/amphibious environment in which the United States Navy operates Landing Craft, Air Cushion (LCAC) vehicles.

In short, Appellant WEDJ/Three C's Value Engineering Change Proposal properly offered a reduction in Landing Craft, Air Cushion (LCAC) air conditioner acquisition, operation, and support costs, offered a change to Drawing '65 and a change to Drawing '66, and did not offer a Change to the finish requirements of the Landing Craft, Air Cushion (LCAC) air conditioners themselves.

Appellant WEDJ/Three C's Value Engineering Change Proposal complied fully with the mandatory Alternative I version of the VALUE ENGINEERING (FEB 2000) clause incorporated by reference in fixed-price DSCP Contract Number SPO560-03-C-0062. It was legal error for the ASBCA to conclude otherwise.

Respectfully submitted,

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**PROOF OF SERVICE**

Pursuant to FED. R. APP. P. 25(d)(1)(B), the undersigned hereby certifies, under the penalty of perjury, that on Wednesday, March 17<sup>th</sup>, 2010 he caused to be sent, by Overnight Delivery, expenses prepaid, two copies of the foregoing Reply Brief of Appellant WEDJ/Three C's, Incorporated to counsel for the United States at the following address:

P. Davis Oliver, Esq.  
Trial Attorney  
U.S. Department of Justice  
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/s/ Cyrus E. Phillips IV

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Cyrus E. Phillips IV

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(B)(ii), the undersigned hereby certifies, under the penalty of perjury, that this Reply Brief is set in Adobe's Minion® Pro Opticals, a proportionally-spaced Garalde Oldstyle face; that this Reply Brief is set in face 14-point or larger; and that this Reply Brief contains no more than 7,000 words, *viz.* that exclusive of the Table of Contents and the Table of Authorities, FED. R. APP. P. 32(a)(7)(B)(iii), it contains 1,502 words out of 203 lines and 9,477 characters. I make this representation based on "Word Count," as presented in the "Proofing" menu in Microsoft® Office Word 2007 (12.0.6514.5000) SP2 MSO (12.0.6521.5000).

/s/ Cyrus E. Phillips IV

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