

2010-1120

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WEDJ/THREE C'S, INCORPORATED,

Appellant,

v.

ROBERT M. GATES, SECRETARY OF DEFENSE

Appellee.

Appeal from the Armed Services Board of Contract Appeals in No. 56672,
Administrative Judge Diane S. Dickinson

BRIEF FOR APPELLEE

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, appellee's counsel states that he is unaware of any other appeal in or from this action that was previously before this Court or any other appellate court under the same or similar title. Appellee's counsel is also unaware of any case pending in this or any other court that will directly affect or be directly affected by this Court's decision in this appeal.

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BRIEF OF APPELLEE, ROBERT M. GATES

STATEMENT OF THE ISSUES

1. Whether the Armed Services Board of Contract Appeals (“board”) properly concluded that WEDJ/Three C’s Value Engineering Change Proposal was invalid based upon the undisputed fact that the alleged change—requiring air conditioner units to be coated with a corrosion resistant material—was already a requirement of Contract No. SPO560-03-C-0062.
2. Whether the board properly concluded that WEDJ/Three C’s attempt to apply its alleged change to all future contracts is an invalid Value Engineering

Change Proposal because it does not require a change to the instant contract to implement.

STATEMENT OF THE CASE

I. Nature of the Case

This appeal arises from WEDJ/Three C's Inc.'s ("WEDJ") claim that it is entitled to a share of collateral savings under a contract between it and the Defense Supply Center Philadelphia ("DSCP") as a result of the purported acceptance by DSCP of a Value Engineering Change Proposal ("VECP"). After DSCP denied WEDJ's claim, WEDJ appealed to the board. The board granted the Government's motion for summary judgment upon the ground that the alleged change proposed in WEDJ's VECP was already a contractual requirement. WEDJ appeals from that decision.

II. Statement of Facts

A. The Navy's Concern About The Effect Of Corrosion On Its Air Conditioner Units

WEDJ was the sole source manufacturer of all air conditioners utilized on the U.S. Navy's Landing Craft, Air Cushion vessels ("LCAC"). JA 223.¹ In August 1996, the Navy met with WEDJ and expressed its concern that the air conditioners built by WEDJ were experiencing the effects of corrosion. JA 81. One of the recommendations that emerged from that meeting was that the air

¹ Citations to "JA __" refer to a page in the parties' joint appendix.

conditioners should be coated with Heresite to prevent corrosion. JA 83, 85.

Heresite is the registered trademark for a pure phenolic thermosetting resinous coating. JA 146. A year later, following further discussions between WEDJ and the Navy concerning corrosion, WEDJ suggested that it provide the Navy with a sample air conditioner unit to test on a LCAC vessel. JA 88. The sample unit would be Heresite coated, instead of powder coated. Id. The Navy accepted WEDJ's suggestion and ordered the sample, Heresite-coated unit. JA 89, 93.

B. The Navy Wants Subsequent Procurements Of Air Conditioners To Include Heresite Requirement

The test installation was very successful. JA 96. In a September 27, 1999 letter from the Navy's engineering agent, the Coastal Systems Station ("CSS"), to the military's procurement office, the Defense Industrial Supply Center ("DISC"), CSS wrote that "[w]e have recently reported a highly successful test installation An air conditioner (NSN 4120-01-353-4904) completely coated with HERESITE-P-413 baked on phenolic coating has been installed on LCAC-69 since January 1998 and continues to operate, virtually free of corrosion." Id. As a result of the successful test installation, the Navy provided red-line changes to Naval Sea Systems Command ("NAVSEA") Source Control Drawings 514-6386365 ("Drawing '65") and 514-6386366 ("Drawing '66") for use in subsequent procurements. JA 96, 145. The red-line changes to the drawings delete the requirement that the LCAC air conditioner units be coated with epoxy powder, and

add the requirement that those units be coated with Heresite P-413. JA 110, 132,145. Although CSS had provide revised drawings with the Heresite coating requirement for use in future procurements, none of the Navy's orders of air conditioners from WEDJ in 2001 or 2002 contained that requirement. JA 183-221.

C. Negotiations Between DSCP and WEDJ Result In A Contract That Contains Heresite Requirement

On March 25, 2003, the Defense Supply Center Philadelphia ("DSCP"), the successor to DISC, issued solicitation SPO560-03-R-0016 for the procurement of ten LCAC air conditioner units. JA 35. Shortly thereafter, DSCP commenced negotiations with WEDJ, the only known manufacturer of the LCAC air conditioner units. JA 225. In a March 27, 2003 telephone conversation with DSCP, WEDJ stated that because the air conditioner units do not have corrosion preventive coating, WEDJ can only warrant the items for a year. JA 413. WEDJ referenced the September 27, 1999 letter from the Navy that recommended adding the Heresite requirement to future procurements and said "nothing came of it." Id. Internally, DSCP recognized that WEDJ's position was correct and that "there was no requirement for WEDJ to use corrosion resistant materials, therefore, they didn't." JA 224. As a result, DSCP concluded that "we can't impose the warranty requirement unless we modify the solicitation to insist that they redesign with corrosion resistant material." Id.

In an April 1, 2003 email from Thomas Whelan of CSS to John O’Keefe, a manager at the Defense Supply Center Columbus, Whelan reports a conversation he had with WEDJ in which WEDJ stated that it was working on a solicitation for air conditioner units that did not include the requirement to completely coat the units with Heresite, and that the requirement would cost \$1500 per unit and is “well worth it.” JA 228. Mr. Whelan’s reaction to that conversation was unequivocal; he told Mr. O’Keefe: “[I] [s]trongly recommend you take action to make sure that the current solicitation is modified to include the Heresite P-413 coating vice the powder coating that [CSS] red-lined out of the NAVSEA drawings in SEP99.” JA 228-29. Later that same day, Mr. O’Keefe relayed that message to DSCP, stating “[t]he [solicitation] needs to be modified to include Heresite P-413 coating” Id. Later that evening, DSCP notified WEDJ in a telephone conversation that the “A/C units now [have] a requirement for the Heresite P-413 coating.” JA 414. WEDJ responded that it “will be able to comply with [the] coating.” Id. An internal DSCP price negotiation memorandum indicates that on April 1, 2003, the parties had agreed upon a “new requirement to add Heresite P-413 coating to the air conditioner units.” JA 225. On April 2, 2003, WEDJ advised DSCP via fax that:

RE: SOL SPO560-03-R-1116 OUR TELECON 01 APR 2003
REVISED PAGESS 2,3,4 AND 5 ENCLOSED—CHANGE
TO FULL ‘HERESITE’ COATING REQUIREMENT—
ALL OTHER PAGES REMAIN UNCHANGED AS

SUBMITTED 27MAR 2003

JA 73.

On April 8, 2003, DSCP awarded contract SP0560-03-0062 to WEDJ for the supply of LCAC air conditioner units to the Navy. JA 18. The contract states: “HERESITE P-413 COATING HAS BEEN ADDED AS AN ADDITION TO DRAWING 514-6386366 REV G AND DRAWING 514-63863[6]5 FOR THIS CONTRACT ONLY.” JA 20. The air conditioner units specified in contract line item 1 carry the following designation: “P/N SE24C20H-21-H.” JA 21. That designation is identical to the designation given to the sample Heresite-coated unit WEDJ provided the Navy in 1997. JA 88.

D. WEDJ Submits A Value Engineering Change Proposal That Seeks To Add A Heresite Requirement That Is Already Incorporated In The Contract

A month after the award of the contract, WEDJ submitted a Value Engineering Change proposal pursuant to section I065 of that contract and Federal Acquisition Regulation (“FAR”) 52.248-1. JA 397. FAR 52.248-1 provides that “[v]alue engineering change proposal (VECP) means a proposal that requires a change to this, the instant contract, to implement” Block 2 of the VECP identifies Contract No. SPO560-03-C-0062, i.e., the contract that DSCP awarded to WEDJ on April 8, 2003, as the applicable contract. JA 397. Block 10 of the VECP, identifies Drawings '65 and '66 as the specifications affected. JA 398.

WEDJ requested that DSCP adopt the following purported changes to the contract in Block 15 of the VECP entitled: "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 MIL-C-24712 Coatings, Powdered Epoxy.

JA 399. WEDJ's alleged changes are identical to the red-lined changes to Drawings '65 and '66 attached to the Navy's September 16, 1997 letter to DISC that required LCAC air conditioner units to be coated with Heresite instead of epoxy powder and as required by the contract. JA 73, 110, 132. Under Block 18 of the VECP entitled: "Production Effectivity by Serial Number," WEDJ wrote:

Existing Contract: 5EA 24,000 BTUH, 03-3744 thru 03-3748
 5EA 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.

JA 401.

Per its VECP, WEDJ estimates that its proposal results in a total savings of \$1,040,970 and that WEDJ's portion of those savings is \$520,485. JA 403.

E. DSCP Denies WEDJ's VECP Claim

On September 9, 2003, DSCP denied WEDJ's VECP because: (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; (3) the Navy drawing had been revised to specify this change; (4) WEDJ did not use its own resources to develop the modification; and (5) WEDJ failed to provide data to substantiate the replacement-estimated cost savings. JA 254.

F. NAVSEA Formally Revises Drawings

On October 22, 2003—six months after the April 2003 contract added Heresite coating to Drawings '65 and '66—NAVSEA formally revised those drawings to incorporate the Heresite requirement. JA 278.

III. Course of Proceedings Below

A. The Contracting Officer's Decision

On September 4, 2008, WEDJ submitted a certified claim to the contracting officer, which alleged that DSCP constructively accepted WEDJ's VECP on March 27, 2003, when it amended the solicitation and subsequently purchased LCAC air conditioners coated with Heresite. JA 390. WEDJ also alleged that DSCP's constructive acceptance of the VECP is evidenced by the formal revision of Drawings '65 and '66 in October 2003. Id. On November 18, 2008, the

contracting officer issued her final decision denying WEDJ's VECP claim because "it was the Navy, not WEDJ, that utilized its funding to develop, test and direct the use of the Heresite coating on the LCAC air conditioners." JA 396.

B. The Board's Decision

On December 5, 2008, WEDJ appealed the contracting officer's final decision. JA 1. The Government moved for summary judgment upon the ground that WEDJ failed to present a valid VECP, and even if the VECP had been valid, the Government did not constructively accept the VECP. *Id.*

The board granted the Government's motion for summary judgment, concluding upon the basis of undisputed facts, and weighing all inferences in WEDJ's favor, that the alleged change proposed in WEDJ's VECP was already a contractual requirement. JA 10. The board also found that WEDJ's proposed change that the requirement for full Heresite coating be extended to all future procurements does not meet the basic requirement that a VECP propose changes to be implemented in the instant contract. JA 9.

SUMMARY OF THE ARGUMENT

The board properly concluded that WEDJ's VECP was invalid because the undisputed facts show that WEDJ's proposed change to the contract—requiring air conditioner units ordered under the contract be coated with Heresite—was already

a requirement of that contract. The undisputed evidence demonstrates that the instant contract, as awarded, contained the Heresite coating requirement.

The board also properly concluded that WEDJ's attempt to apply the proposed change to future contracts did not meet the basic requirement that a VECP must propose changes to be implemented in the instant contract.

ARGUMENT

I. Standard Of Review

Under the Contract Disputes Act, the Federal Circuit reviews legal conclusions of the board without deference. 41 U.S.C. § 609(b); Gates v. Raytheon, 584 F.3d 1062, 1066-67 (Fed. Cir. 2009). Nonetheless, the Court “give[s] the [b]oard’s legal conclusions careful consideration due to the board’s considerable experience in construing government contracts.” Ryste & Ricas, Inc. v. Harvey, 477 F.3d 1337, 1340 (Fed. Cir. 2007).

The board’s grant of summary judgment is a legal conclusion, which the Court reviews without deference. Rex Sys., Inc. v. Cohen, 224 F.3d 1367, 1371 (Fed. Cir. 2000). “Summary judgment is appropriate when the record, when examined in a light most favorable to the non-movant, indicates that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Ryste, 477 F.3d at 1340 (internal citations omitted). Only disputes over facts that might affect the outcome of the suit under the governing law will properly

preclude the entry of judgment. Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)); Lear Siegler Servs. v. Rumsfeld, 457 F.3d 1262, 1266 (Fed. Cir. 2006) (“Summary judgment is properly granted only when there is no genuine issue of material fact”).

II. The Board Properly Concluded That WEDJ’s Value Engineering Change Proposal Was Invalid Based Upon Undisputed Evidence That Shows The Proposed Change Was Already A Requirement Of The Instant Contract

In order to state a valid VECP claim, WEDJ must establish that its “proposal was in actuality a change to the contract.” C.A. Rassmussen, Inc. v. United States, 52 Fed. Cl. 345, 348 (2002); FAR 52.248-1 (“[v]alue engineering change proposal (VECP) means a proposal that . . . [r]equires a change to this, the instant contract, to implement.”). WEDJ argues that its VECP offered a change to the contract DSCP awarded WEDJ on April 8, 2003, and the Government constructively accepted that change in October 2003 when NAVSEA formally revised Drawings ’65 and ’66 to incorporate the Heresite requirement. App. Br. at 50. WEDJ’s argument rests upon the following incomplete chronology of events: In September 1999, the Navy provided revised drawings that included the Heresite requirement, subsequent procurements in 2001 and 2002 did not include that requirement, WEDJ’s VECP in May 2003 proposed the addition of the requirement, and “[i]t was not until October 22, 2003 that [WEDJ’s] proper Value Engineering Change Proposal was constructively accepted.” Id.

This chronology conspicuously omits the following undisputed facts that demonstrate that the April 2003 contract contained the same Heresite requirement that would later form the basis of WEDJ's VECP claim. Although the Navy's procurement of air conditioner units from WEDJ in 2001 and 2002 did not include the Heresite requirement, by the spring of 2003, when WEDJ and DSCP entered into negotiations for a new contract, the inclusion of a Heresite requirement was an issue that was important to both the Navy and WEDJ. JA 228. During those negotiations, WEDJ informed Thomas Whalen of CSS, the Navy's engineering agent, that the solicitation did not include a requirement to completely coat the air conditioner units with Heresite, and that the requirement will cost approximately \$1500 per unit and "is well worth it." Id. Mr. Whalen wholeheartedly agreed with WEDJ's assessment, telling a procurement official that "[I] [s]trongly recommend you take action to make sure that the current solicitation is modified to include the [Heresite] coating vice the powder coating that [CSS] red-lined out of the NAVSEA drawings in SEP99." JA 228-29. As a result, the parties agreed to add Heresite as a requirement. JA 225. And the contract, as awarded, contained the Heresite requirement, as stated on page two of that agreement: "HERESITE P-413 HAS BEEN ADDED TO DRAWING 514-6386366 REV G AND DRAWING 514-63863[6]5 FOR THIS CONTRACT ONLY." JA 20.

Despite the fact that the contract awarded to WEDJ in April 2003 contains the Heresite requirement, WEDJ, the following month, submitted a VECF based upon a revision to Drawings '65 and '66 that would “delete the epoxy powder coated requirement in accordance with MIL-C-24712 and replace with ‘HERESITE’ P-413 baked phenolic coating” JA 399. WEDJ has not presented any evidence to dispute the fact that its VECF purports to add a requirement that is already contained in the contract. WEDJ’s reliance on NAVSEA’s formal revision of Drawings '65 and '66 in October 2003 to incorporate the Heresite requirement is misplaced because that revision occurred after both DSCP and WEDJ ensured that the Heresite requirement was expressly incorporated in the April 2003 contract. At bottom, WEDJ’s argument that its VECF proposed a change to the April 2003 contract ignores the plain language of that contract.

WEDJ attempts to manufacture an issue of fact by claiming that the board’s conclusion that the April 2003 contract contained the Heresite requirement “was an improper finding of fact” because it was “a choice among the possible inferences which could be drawn” from the record. App. Br. at 52. Specifically, WEDJ argues that “it can just as easily be supposed that [the April 2003 contract] is in fact a Contract only for [WEDJ] Source Controlled Part Number SE2420H-021-H and for [WEDJ] Source Controlled Part Number SE33C24H-H, not a contract for

the marked up red-line version of [Drawings '65 and '66]." App. Br. at 53. However, the April 2003 contract does not merely imply or suggest that Heresite should be used to coat LCAC air conditioners, it expressly provides that "HERESITE HAS BEEN ADDED" to Drawings '65 and '66. JA 20. Moreover, WEDJ's argument presents a false dichotomy. By WEDJ's own admission, the nomenclature used to describe air conditioner units designated under Part Numbers SE2420H-021-H and SE33C24H-H indicates that those units are to be coated with Heresite. WEDJ explained that "[w]e would designate that unit with P/N SE24C20H-021-H in lieu of -P. The H would designate heresite coating, in lieu of powder coating." JA 88. Likewise, applying WEDJ's reasoning to part number SE3324H-H, the "-H" designation indicates that the air conditioner units that correspond to that part number are to be coated with Heresite. Of course, that result is consistent with the plain language of the contract that imposes the Heresite requirement.

Because WEDJ's VECP is based upon a requirement that is already contained in the April 2003 contract, the board correctly found that the VECP was invalid.

III. The Board Properly Concluded that WEDJ's Proposed Change To Extend The Coating Requirement To All Future Contracts Is Not A Valid Engineering Change Proposal

While WEDJ's previous argument ignored the plain language of the April 2003 contract containing the Heresite requirement, WEDJ's next argument, by contrast, acknowledges that the contract "included a requirement that [LCAC] air conditioners be finished with baked-on phenolic resin instead of the specified epoxy powder coating, but this [c]hange for these [LCAC] air conditioners applied 'FOR THIS CONTRACT ONLY'" App. Br. at 45. WEDJ argues that its VECP is valid because it offered to change this Heresite requirement by offering to extend the requirement to "all future contracts" made by DSCP for LCAC air conditioners. Id.

WEDJ's attempt to apply the Heresite requirement to "all future contracts" fails to state a valid VECP claim. The alleged difference between the instant contract's Heresite requirement and WEDJ's proposed change is that the change purports to extend the requirement to all future contracts. FAR 52.248.1 defines a VECP as a "proposal that requires a change to this, the instant contract, to implement." Thus, the board correctly found that a purported requirement to extend Heresite coating to all future procurements does not meet the basic requirement that a VECP must propose changes to be implemented in the instant contract.

Finally, under both the April 2003 contract and WEDJ's proposed change regarding future procurements, LCAC air conditioner units are required to be coated with Heresite. WEDJ argues that the board found its proposed change invalid because the proposal did not "alter the end item delivered;" in other words, the proposal did not require a non-Heresite coating. App. Br. at 43. WEDJ's characterization of the board's holding bears no resemblance to the board's actual holding. As stated above, the board concluded that WEDJ's proposal to extend the Heresite requirement to all future contracts was not a valid VECP claim because it did not require a change in the instant contract to implement. JA 9.

CONCLUSION

For these reasons, we respectfully request the Court to affirm the decision of the board.

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CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that on this 11th day of March , 2010, I caused to be place in United States Mail, first class, postage prepaid copies of Appellee's Brief addressed to:

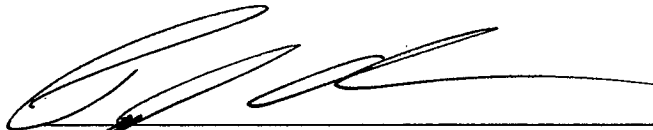
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