

**BEFORE THE ARMED SERVICES
BOARD OF CONTRACT APPEALS**

APPEAL OF:

WESLEYAN COMPANY, INC.

UNDER CONTRACT NOS.:

**DAAK 6084M116, DAAK
6084M3573, DAAK
6085M3337, and
DAAK 6085M2329**

ASBCA No. 53896

SEP 5 4 10 PM '02
ARMED SERVICES
BOARD OF
CONTRACT APPEALS

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COMPLAINT

Appellant, Wesleyan Company, Inc. ("Wesleyan"), by and through its undersigned counsel, hereby respectfully files its Complaint in this matter. Wesleyan received the Board's Notice of Docketing on August 12, 2002. Accordingly this Complaint is timely filed within the 30-day period prescribed by Rule 6(a) of the Board's Rules of Practice.

1. Wesleyan is located at 230 Oxford Road, Kenilworth, IL 60043. During the period relevant to the claim and the performance of the underlying contracts, Wesleyan was located at 155 N. Harbor Drive, Suite 1804, Chicago, IL 60601 and 1030 N. State Street, Chicago, IL 60610.

2. Wesleyan was established on August 26, 1981 by its President, the inventor and patent holder of the technologies and intellectual property at issue in this appeal, Mr. Wesley Schneider.

3. The inventions owned by Wesleyan were conceived through Mr. Schneider's efforts to enhance the hydration components of standard issue soldier field equipment. Mr. Schneider's inventions included essentially "hands free" hydration concepts for soldiers wearing Nuclear, Biological, and Chemical ("NBC") protective gear allowing them to obtain water through the gas mask without having to stop and put down their weapons in order to retrieve the canteen and connect it to the mask.

4. Army hydration equipment remained substantially unchanged from the introduction in the 1960's of plastic one-quart canteens and a collapsible two-quart canteen as part of a soldier's individual equipment until Mr. Schneider introduced his concepts to the Army in the early 1980's.

5. The Army's hydration methods prior to Mr. Schneider's offer included a cumbersome twenty-two step field manual instruction for soldiers to follow in order to take a sip of water while wearing a protective mask.

6. At the time Mr. Schneider first approached the Army in the 1980's with his later-patented concepts, the Army did not have an intention to enhance the soldier hydration components of standard issue individual equipment.

7. In 1981, Mr. Schneider invented a unique hydration system in the form of a spray belt for commercial use by joggers.

8. Rather than pursuing the spray belt concept for commercial applications, Mr. Schneider developed a military application for his hydration system by enhancing the

24. In March 1984, USHEL requested an additional NBC protective-suited manikin, wearing the standard protective mask modified with the FIST concept for a demonstration tour pursuant to its previously-executed bailment agreement with Wesleyan.

25. In June 1985, the Battelle Memorial Institute ("Battelle") issued a report regarding the need to improve the Army's mask drinking system. Battelle is a contractor that operates the Chemical and Biological Defense Information Analysis Center at the Edgewood Area of Aberdeen Proving Grounds.

26. On information and belief, the Army improperly disclosed and conveyed FIST/FLEX concepts to Battelle.

27. On information and belief Battelle in turn revealed Wesleyan's proprietary concepts to other contractors responsible for mask deployment and soldier hydration.

28. In response to Wesleyan's unsolicited proposal, in 1985 Natick Labs though Purchase Order Nos. DAAK 60-85-M-3337, DAAK 60-85-M-2329, et al. acquired prototypes of the FIST/FLEX hydration systems that were configured both with and without an aspirator bulb as part of the connection tube. (Attachment H).

29. On December 30, 1985, Wesleyan submitted a second unsolicited proposal for the Wesleyan FIST Fountain, a technology that allowed canteens to be safely refilled in an NBC-contaminated area directly from the Army's standard five-gallon water can. (Attachment I).

30. The FIST Fountain was developed by Wesleyan as an adjunct item to the FIST/FLEX as Mr. Schneider became encouraged by the Army's response to Wesleyan's inventions.

31. The cover page to the FIST Fountain proposal contained the following restrictive legend:

THIS DATA SHALL NOT BE DISCUSSED OUTSIDE THE GOVERNMENT AND SHALL NOT BE DUPLICATED, USED OR DISCUSSED IN WHOLE OR IN PART FOR ANY PURPOSE OTHER THAN TO EVALUATE THE DATA.

Id.

32. Subsequent pages contained the annotation, "The title page restricts the use/disclosure of this data." Id.

33. As noted above, Wesleyan submitted FIST/FLEX prototypes at the specific request of the numerous Army commands. Those prototypes were purchased by the Army and subjected to tests and field trials at Natick Labs and at numerous Army units including the Infantry School and the Chemical School.

34. Based upon these tests, trials and field data, Mr. Schneider refined his FIST/FLEX invention and continued to provide prototypes and other relevant information and ideas to the Army over a period of years.

35. Each prototype provided by Wesleyan incorporated Wesleyan's intellectual property and inventions including the central concept of an experimental collapsible pouch for liquids and a stem rod for direct intake of fluids into a mask wearer's mouth. (Attachment J).

36. Wesleyan responded to input from Natick Labs by making improvements in other prototype versions included a suspender mount sleeve to attach the drink device permanently to web gear.

37. At all times Wesleyan believed that its concepts and intellectual property were being safeguarded and protected by the Army from unauthorized release to third

parties. To the extent Wesleyan's prototypes were provided to other contractors involved in mask/protective suit development efforts, Wesleyan believed and understood that the same restrictions governing disclosure and competing use applied equally to these contractors as well.

38. On information and belief, in 1986 employees of the Army's Chemical Research and Development ("CRDC") released Wesleyan's proprietary information directly to employees of ILC Dover without permission from Wesleyan. (Attachment K).

39. At the time of release of Wesleyan's information and data, ILC Dover was working with CRDC to develop a competing concept with the FIST/FLEX device. This competing "dual-valve" concept was initiated years after Wesleyan submitted its proposal.

40. In 1986, Natick Labs' Research Institute of Environmental Medicine conducted human performance trials on the FIST/FLEX device.

41. The human performance trials produced official Army scientific justification for a FIST/FLEX procurement as a means to alleviate "voluntary dehydration" for soldiers in higher MOPP levels.

42. In 1987, following efforts by Wesleyan, Congress appropriated \$600,000 in funding for development of a program for soldier hydration using FIST/FLEX technology.

43. Concurrently, Natick Labs employees began developing an in-house mask drink device on behalf of the Army that contains many of the same concepts as the FIST/FLEX but used a dual transfer tube.

44. In addition to the in-house efforts at Natick, in 1987 CRDC personnel and ILC Dover under contract were working jointly on a dual hose drink system.

45. In June 1988, the Army issued a Statement of Need for a mask hydration system.

46. On September 27, 1989, a Natick Labs employee working on the dual valve device filed a patent application citing Wesleyan's FIST/FLEX as prior art and assigned his patent to the Army. This device was in direct competition with the FIST/FLEX for the appropriated soldier hydration research and development funds. (Attachment L).

47. In 1990, again prompted by Mr. Schneider's efforts, Congress appropriated an additional \$1 million dollars for a hydration system incorporating many concepts from the FIST/FLEX. Congress focused upon improved soldier clothing and equipment for the field in light of heightened NBC threats.

48. Natick Labs conducted a Mask Drinking System (Interim) (MDS-I) evaluation from 1989-1992.

49. On May 26, 1992, Natick Labs ended the type classification process for the FIST/FLEX asserting that the device did not meet particular requirements. This decision was based, in part, upon a recommendation of the Army Chemical School. Despite the recommendation that MDS-I be terminated, the Chemical School did request that "the material developer continue efforts with a soldier hydration system.... While the concept of a constant connection mask drinking system may have merit, there may also be other new and novel systems that would solve our deficiency." (Attachment M).

50. Despite the termination of type classifications, Natick Labs determined that "the lessons learned over the last four years involving a constant connection hydration system should be utilized in a full scale research and development effort." (Attachment N).

51. Despite the type classification cancellation, Natick Labs was confident that a device could be developed to meet the requirements of the MDS program based on the technical knowledge derived from Wesleyan's proposal and the operational knowledge gained from testing Wesleyan's concepts.

52. In a 1992 communication to Congress with respect to the 1989 appropriations expenditures, the Army's Deputy Chief of Staff for Combat Service Support informed Congress that "lessons learned during the evaluation of the CMIDS [Chemical Mask Improved Drinking System] will be applied to continuing research in materials and designs for an improved mask drinking system." (Attachment O).

53. The lessons learned during the evaluation of the CMIDS were based solely upon Wesleyan's previously furnished FIST/FLEX technology.

54. In 1993 the MDS-I program was restructured into concept called Dehydration Reduction, Integrated Components System ("DRINCS"). (Attachment P).

55. The experience and lessons derived from analyzing Wesleyan's concepts were incorporated into the DRINCS program.

56. The Army continued to develop concepts based upon the intellectual property contained in Wesleyan's unsolicited proposals without compensating Wesleyan.

57. Today, the U.S. Army is conducting an on-going procurement of the soldier hydration system as a component of the Land Warrior/Modular Lightweight

Load-carrying Equipment ("MOLLE") system. Battelle is significantly involved in the development and deployment of the MOLLE system.

58. Camelbak Products, Inc., ("Camelbak") of Petaluma, California, through subcontract with Specialty Plastics, became Natick Labs' principal supplier of both non-NBC hardened and NBC-hardened soldier hydration systems in conjunction with the MOLLE development program at Natick.

59. A review of documents obtained as a result of Wesleyan's previous Freedom of Information Act ("FOIA") request to the Army for relevant files from Natick Labs and other commands has revealed a Camelbak brochure included in the Army's files from the early 1990s. (Attachment Q.)

60. Since Camelbak's NBC-hardened system also consists of butyl-based collapsible canteen with a constant connection device to the mask, an elongated drink tube, flow valves and the other features of Wesleyan's design, Wesleyan asserts on information and belief that this is proof of yet another instance in which the Army improperly disclosed to potential competitors Wesleyan's FIST/FLEX concepts and intellectual property contained in Wesleyan's unsolicited proposals and in the prototypes submitted for testing purposes under the above-discussed bailment agreement and purchase orders.

61. Based upon information and belief, the Army continues improperly to reveal Wesleyan's concepts to third parties currently involved in the development of soldier hydration and mask drink systems who are actual or potential competitors to Wesleyan and whose developments are based solely upon Wesleyan's improperly-disclosed concepts.

62. On April 15, 2002 Wesleyan filed its duly-certified claim with the cognizant Army Contracting Officer. See Notice of Appeal, Exhibit B.

63. On July 19, 2002 the Contracting Officer issued her final decision and denied Wesleyan's claim. See Notice of Appeal, Exhibit A.

64. The Contracting Officers' decision nonetheless conceded that "[I]n this case, there is no dispute about the Army's policies encouraging companies to submit unsolicited proposals and Wesleyan's submission of such unsolicited proposals. There is also no dispute the Army promised not to reveal information except to evaluate Wesleyan's UPs." Id. (emphasis added).

**Count I – Breach of Implied in Fact Contract
to Safeguard Proprietary Information in Unsolicited Proposals**

65. Wesleyan incorporates by reference paragraphs 1- 64 above as if set forth in full text herein.

66. Wesleyan furnished trade secrets, data, concepts, processes, and devices in confidence to the Army in its properly-marked proprietary unsolicited proposals with the understanding that use of such data, concepts, processes and devices would be limited to evaluating Wesleyan's unsolicited proposals for future development and procurement.

67. Natick Labs prescribed procedures pursuant to which it promised to safeguard the information submitted by Wesleyan in the unsolicited proposals.

68. Wesleyan's unsolicited proposals contained restrictive legends that were more than adequate to put the Army on notice of the need to safeguard the proprietary information therein.

69. The Army breached its duty to safeguard Wesleyan's concepts by not abiding by the regulations governing unsolicited proposals and by ignoring the restrictive legends contained in Wesleyan's proposals.

70. The Army's actions and course of dealing show that a "mutual intent" existed between the Army and Wesleyan that the data submitted be safeguarded.

71. Both the Army and Wesleyan clearly possessed knowledge of a need to protect the data, and the title page of each unsolicited proposal clearly gave this knowledge.

72. The Army's development of hydration systems, both internally and through contractors, embodies the precise concepts contained in Wesleyan's unsolicited proposals and presentations to Natick Labs and other Army commands. This is dispositive evidence that the Army breached its implied in fact contract to safeguard the proprietary information in Wesleyan's proposals. See E.M. Scott & Associates, ASBCA No. 45869, July 28, 1994.¹

Count II – Breach of Express Contract

73. Wesleyan incorporates by reference paragraphs 1- 72 above as if set forth in full text herein.

74. The purchase orders, invoices, and bailment agreements between the Army and Wesleyan for the delivery of Wesleyan FIST/FLEX prototypes show that the parties intended to create and did create express contracts to obtain Wesleyan

¹ In a prior ruling in the E.M. Scott case, this Board recognized that it had jurisdiction under the Contract Disputes Act to entertain a firm's claim alleging an implied-in-fact agreement with the government concerning the use of proprietary data. This Board also recognizes the Federal Circuit's holding in Airborne Data, Inc. v. United States, 702 F.2d 1350 (Fed. Cir. 1983), that an implied-in-fact contract can be found to exist, as is the case here, when an agency promised it would safeguard data submitted and a party submitted data with markings to that effect.

FIST/FLEX prototypes strictly for government evaluation and testing purposes, and solely with respect to the integration of Wesleyan prototypes into gas mask and protective suit systems provided by other contractors.

75. The Army breached these express contracts by disclosing to third parties, or by misappropriation for internal development, the concepts, proprietary information and intellectual property of Wesleyan contained in the FIST/FLEX prototype devices.

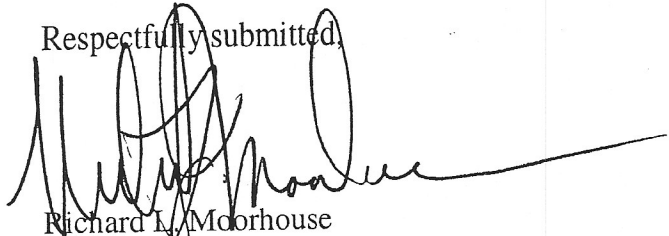
WHEREFORE, Wesley requests a hearing on the merits and an opportunity to present oral and written testimony in support of this Appeal.

Wesleyan respectfully requests that the Board sustain this Appeal in its entirety and find that Wesleyan is entitled to a payment in the full amount of \$20,776,000, as claimed, plus interest running from the date the claim was filed with the Army Contracting Officer on April 15, 2002.

Wesleyan further requests that the Board grant such other relief as it deems just and proper, including recovery of Wesleyan's costs of filing and pursuing this Appeal, including reasonable attorneys' fees.

DATED: September 5, 2002

Respectfully submitted,

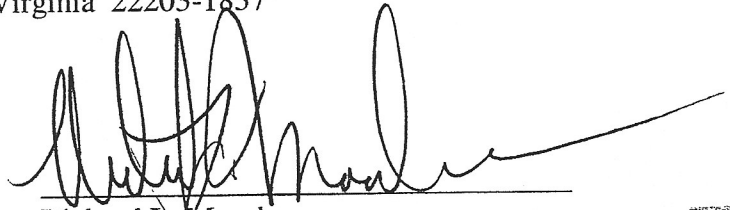


Richard L. Moorhouse
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Complaint was served by hand, this
5th day of September, 2002, upon:

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