

Issue: "Reverse Engineering"

To cover up for the blatant theft of Wesleyan's intellectual property and ideas the Army took, the ^{Army} Judge's ruling says it was just part of

ARMED SERVICES BOARD OF CONTRACT APPEALS

skow's job to disassemble prototypes - even when tags on them forbid it!

Appeal of --

Wesleyan Company, Inc.)

ASBCA No. 53896

Under Contract Nos. DAAK60-84-M-1116)

DAAK60-84-M-3573)

DAAK60-85-M-2329)

DAAK60-85-M-3337)

APPEARANCES FOR THE APPELLANT:

Richard L. Moorhouse, Esq.

L. James D'Agostino, Esq.

David T. Hickey, Esq.

Greenberg Traurig LLP

Washington, DC

APPEARANCES FOR THE GOVERNMENT:

Craig S. Clarke, Esq.

Chief Trial Attorney

CPT John J. Pritchard, JA

Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

This is our fourth decision on a claim by Wesleyan Company, Inc. (Wesleyan) that the government violated its proprietary data rights in its FIST/FLEX protective mask drinking system. Familiarity with our prior decisions and the remand from the Federal Circuit is presumed. *See Wesleyan Company, Inc.*, ASBCA No. 53896, 04-1 BCA 1132,628, 05-1 BCA 32,950, 07-2 BCA 33,710; and *Wesleyan Company, Inc. v. Harvey*, 454 F.3d 1375, 1379-81 (Fed. Cir. 2006), *reh'g denied*, 2006 U.S App. LEXIS 26243 (Fed. Cir. Oct. 5, 2006).

In our 23 October 2007 decision on the government's motion for summary judgment following the remand, we held that the four purchase orders issued to Wesleyan for a total of 29 FIST/FLEX prototypes contained no provisions for reservation of proprietary rights by Wesleyan. However, we also held that there were genuine issues of material fact as to (i) whether Wesleyan tagged the purchased prototypes with a reservation of proprietary rights, and (ii) if so, whether the government accepted the tagged material and then used it in any manner that breached the reservation on the tag. *See Wesleyan Company*, 07-2 BCA 1133,710 at 166,898-99.

See my comments to (W. Schneider)
all in R&D

sending the first two purchased prototypes to the Infantry School (finding 2), (ii) the purchase requisitions for the remaining 27 prototypes purchased from Wesleyan (findings 3, 5, 7), (iii) Wesleyan's 22 April 1985 letter submitting a revised FIST/FLEX system that "redresses" the "concerns raised" by the tests of the second purchase order prototypes in the Fall of 1984 (finding 6), (iv) the Natick Commanding Officer's 29 May 1985 letter to Wesleyan confirming the uses of the prototypes procured under the second and third purchase orders and the intended use of the prototypes to be procured under the fourth purchase order (finding 6), (v) the testimony of Wesleyan's president and inventor of the FIST/FLEX system that he knew of the intended uses of the purchased prototypes (findings 2, 3, 5, 7), (vi) the absence of any evidence that he protested or objected to those uses at the time of the purchases (id.), and (vii) his testimony that he had no personal knowledge that the 29 prototypes were used improperly or inappropriately (id). Schneider did not have cognizance over the prototypes after delivering them to the Army. Only after the FOIA in 2002 were these unauthorized releases known to Wesleyan.

Wesleyan contends that the disassembly of one of its prototypes (not specifically identified as one of the purchased prototypes) unnecessary to determine where purchased or not, all tagged to prevent misuse/all rights were reserved by Wesleyan. by the Natick evaluator, Mr. Snow, indicated a government attempt to "reverse engineer" the system for production by the government or another contractor (app. hr at 13). We do not agree. Disassembly was consistent with evaluating the hardness and chemical capacities of the components of the system impossible to visually determine "chemical capacities" of anything-needs to be tested under surety agent protocols and they were strictly managed and done at Edgewood MD, not Natick, MA where Snow dissembled the Wesleyan prototype without authorization as mandated by the tagged restrictions-all rights reserved. and did not necessarily indicate an attempt to reverse engineer (finding 10). Moreover, there is also no credible evidence that the FIST/FLEX system was in fact reverse engineered for use by the government. Whether the Board likes it or not, my testimony about Miller is credible evidence to establish the Army's motive for reverse engineering and using that knowledge to proceed with in-house competitive design programs CONCURRENT with Natick serving as "independent" evaluator-after March 3, 1989, Natick became direct competitor to Wesleyan, see Hubbard's testimony. Remember, the Seekins patent cites the original Wesleyan US patent as its ONLY domestic citation! Wesleyan itself states in its post-hearing brief that the Army "still uses the cumbersome above-the-head canteen-to-mask hydration procedure" (app. br. at 18). Only for nbc drinking procedures; for non-nbc, Camelbak replicated the F/F. Camelbak copied it by reducing the number of drink steps from 22 down to 4 steps per drink, Pentheny TR Vol 3 p.128 line 19-25; p. 129 line 11-19.

Wesleyan argues that the September 1986 Battelle Report recommendations for improvement of the existing protective mask drinking system indicate that it had "improper access to the Wesleyan's proprietary FIST/FLEX information embodied in the