Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION FOR SUMMARY RELIEF DENIED: November 30, 2005

GSBCA 16378

GEO-MARINE, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Paul W. Searles, Sharon N. Freytag, Holly L. Clarke, and Kendyl H. Darby of Haynes and Boone, LLP, Dallas, TX, counsel for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **NEILL**, and **DeGRAFF**.

DeGRAFF, Board Judge.

Pending is appellant's motion for summary relief. Because there are material facts in dispute and appellant has not persuaded us it is entitled to relief as a matter of law, we deny the motion.

General Background[1]

The United States Air Force experiences over 500 bird strikes each year during low-level and range operations, and these strikes cost the Air Force in excess of $20 million. In the 1980s, the Air Force formed a team whose mission was to reduce the potential for bird strikes, and the team developed the Bird Avoidance Model (BAM), which shows a distribution of birds based upon historical data. The Air Force also funded an investigation into using the Next Generation Radar (NEXRAD) network as a source of producing near real time hazard advisories, and the final report on this project was completed in 1995. In the autumn of 1998, the Air Force conducted a demonstration project to assess the technical capabilities of NEXRAD to identify potentially hazardous concentrations of birds moving in the northeast corridor of the United States. The demonstration project's system, the Avian Hazard Advisory System (AHAS), produced near real time advisories and forecasts by processing radar data and weather data, and then archived the data for integration into the BAM. Exhibit 3.

Geo-Marine, Inc. performed the 1998 demonstration project work for the Air Force, pursuant to a contract with the United States Army Corps of Engineers. The scope of Geo-Marine's work included providing all labor and materials necessary to provide an assessment of a near real time bird hazard advisory system which used radar to identify concentrations of birds in the northeast United States. It also included, but was not limited to, installing and testing all necessary hardware and software required to download, process, and disseminate bird hazard advisories; and developing and testing bird hazard warning procedures. Geo-Marine's work was to be completed by November 30, 1998, and was to be followed by a written report. Exhibit 1036.

On October 27, 1998, the General Services Administration (GSA) issued a solicitation for environmental advisory services. The contract to be awarded was a nonmandatory, indefinite quantity, multiple award Federal Supply Schedule contract for commercial items. In order to purchase the supplies or services covered by the contract, federal agencies would issue delivery orders or task orders to one of the contractors. The contractors would be required to furnish the equipment, labor, and supplies and to perform all of the operations needed to provide the ordered services. Exhibit 1001 at 1, 2, 16, 17, 43.

Geo-Marine responded to the solicitation and on August 27, 1999, GSA awarded it contract number GS-10F-0207J. The contract period ran from August 27, 1999, through August 26, 2004. Exhibits 1004, 1005, 1006.

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[1] All citations are to exhibits contained in the appeal file.

On October 7, 1999, GSA's Federal Technology Service's Federal Systems Integration and Management (FEDSIM) Contracting Center placed order number T0000AJ3022 under the contract. According to the order's statement of work, although GSA placed the order, the client agency was the United States Air Force. The purpose of the statement of work was to continue the 1998 demonstration project and to expand the geographic coverage of the AHAS to cover the entire continental United States. In addition, the statement of work said it would include predicting potentially hazardous raptor activity by correlating daily forecast weather data with data from the BAM, continuing the development and testing of weather suppression algorithms, and developing a bird hazard advisory format that would be integrated into military flight operations. Exhibit 3.

The order's statement of work set out nine tasks Geo-Marine was to perform. Among other things, Geo-Marine was required to install, configure, and test hardware and software; to develop and test bird hazard warning procedures; to train people to use the AHAS; to acquire and process NEXRAD data for bird hazard advisories and weather data for raptor hazard advisories, to compile and disseminate bird hazard advisories according to established format and procedures, to maintain backup files of all advisories, and to prepare files for integration with the BAM; and to archive NEXRAD data and associated data files and export them to the BAM. The development and testing of advisory procedures was one of the items to be delivered by Geo-Marine to GSA. The contract required Geo-Marine to submit an annual report, including an analysis of the hardware and software it used. Exhibit 3.

The order provided the Air Force would furnish Geo-Marine with all hardware and software required for the project, the latest version of the BAM with all associated files and documentation, and the latest update of the Bird Strike Database. It also contained the following provision:

> All government provided products and facilities remain the property of the government and will be returned upon completion of the support services. All documented procedures, customized software, and applications enhancements developed under this statement of work become the property of the United States Government.
>
> The Government shall provide all hardware, software (licenses), supplies, and special services required by the contractor for database development, application creation, and Web site development. This will include services to install and configure these tools at contractor and government locations. These will remain the property of the Government, although certain hardware, software, and service assets may be used at the Contractor's offices for database development, system configuration, application development and

> testing, and Web site development and maintenance purposes. The Contractor will return all items that were used during the performance of these requirements at the end of the performance period.
>
> All documentation, software enhancements, programming code, specifications, and unique procedures developed during this performance period will become the property of the Government and will not be subject to proprietary license agreements with the contractor. Modification and distribution of end products for use at other installations will be at the discretion of the government.

Exhibit 3 at 15-16.

On June 25, 2003, a representative of the Air Force told the GSA contracting officer's representative, Nancy Self, that several Geo-Marine employees had resigned. The Air Force was concerned about a possible disruption in the AHAS service. Ms. Self contacted the contracting officer about the resignations and relayed the concerns about a disruption of the AHAS service, and the contracting officer directed her to obtain a copy of "our software and our database." Exhibit 1295 at 43-45, 48-49.

On the evening of June 25, Ms. Self sent the following written request to Ronald White:

> The General Services Administration (GSA), FEDSIM, as a representative of the US Air Force Safety Center, has a task order with Geo Marine to provide enhancements to and operation of the Avian Hazardous [sic] Advisory System (AHAS). Under this task order, FEDSIM provided Geo Marine, as government Furnished Equipment/Information (GFE/I), with the latest version of AHAS and BAM. FEDSIM has paid for all enhancements to the system and has unrestricted data rights to the system and all enhancements.
>
> Request all AHAS executable and batch file from date to deliver to file output for website for the be [sic] to me immediately. In addition, please send a copy of Version System documents and the most current database.

Exhibit 1089. Mr. White was a Geo-Marine employee who submitted his resignation on June 9, to be effective on June 30. Mr. White subsequently made his resignation effective as of June 25. Exhibit 1223 at GMI-000325-26. At her deposition, Ms. Self testified she did not know Mr. White had resigned when she contacted him. Exhibit 1295 at 59.

Mr. White attempted to send Ms. Self AHAS computer code, but not the batch files or databases, in two zip files. One of the files was not transmitted to Ms. Self. Exhibits 1090-92. On June 26, Ms. Self asked Mr. White to send her a copy of the AHAS files on compact disk and he said he would have someone else send it. Exhibits 1094, 1095. We do not know whether Ms. Self ever received the material she requested.

On July 22, 2003, Ms. Self and an Air Force representative visited Geo-Marine's facility in Panama City, Florida. They met with Geo-Marine employees and determined Geo-Marine was not operating and maintaining the AHAS in accordance with the terms of the task order. Exhibit 30.

On July 23, the contracting officer terminated Geo-Marine's performance of the task order. The termination notice said, "Geo Marine must immediately surrender all equipment, updated software, updated database, and information provided by the Government for performance of this order." Exhibit 31.

Also on July 23, Ms. Self and the Air Force representative returned to Geo-Marine's facility to oversee the removal of various items of property, including computer hardware and software. Exhibit 1227. A Geo-Marine employee helped them determine which computers belonged to the Government and which belonged to Geo-Marine. Geo-Marine's designated point of contact for the order was present when the property was identified and removed. Exhibit 1296 at 59. Software, the AHAS database, and the BAM resided on some of the hardware. Exhibits 1269 at 41, 1284 at 8. Subsequently, GSA transferred the hardware together with the resident software to another contractor, AET, which began operating the AHAS. Exhibits 1205, 1273.

Software Development and Enhancement

According to two individuals familiar with the AHAS, during the demonstration project performed pursuant to the Corps contract, Geo-Marine used government funds to write and to develop enhanced software, including weather suppression algorithms, in order to meet the contract's requirements for demonstrating an operational system. Exhibits 1282, 1298 at 130. The report Geo-Marine prepared regarding its work on the demonstration project says during the course of the project, two methods of weather suppression were implemented and two others were tested. It also says Geo-Marine anticipated continuing to develop weather suppression in later phases of the AHAS project in order to complete the fine-tuning begun during the demonstration project. Exhibit 1039.

In two nearly identical papers, one of which was presented at a conference in April 2000, Geo-Marine said in 1999 it pursued development of the AHAS concept and new radar

algorithms using in-house funding. Exhibit 1047 at 1749, 1048 at 1787. In an e-mail message sent from Geo-Marine to the Air Force in June 2001, Geo-Marine said it had recently upgraded AHAS to the central region of the country and in an attachment, Geo-Marine explained what it did in the upgrade. Among other things, Geo-Marine said the system upgrade was achieved in part by algorithm improvements it made in the autumn of 2000, based upon its internal research and development projects. Exhibit 1060.

In an October 2001 report prepared for the GSA contract, Geo-Marine said it used several versions of a weather suppression algorithm during performance of its work under the GSA contract. Exhibit 1063 at 34. The earliest of these versions seem to be the same as those which it used during its performance of the Corps contract. *Compare* Exhibit 1039 at 1349 *with* Exhibit 1063 at 34. In the October 2001 report, Geo-Marine said it had begun an internal research and development program in the spring of 1999 to find a better algorithm and by the fall of 2000, it had developed an improved algorithm. The report said at some point Geo-Marine began using this algorithm in its performance of the GSA contract. Geo-Marine also said it had replaced commercial software which proved to be unreliable with custom written software it had produced. Exhibit 1063 at 34-35.

In a paper prepared in 2001, Geo-Marine said from the fall of 1998 until the spring of 2001, it used standard image processing techniques to remove weather from the radar images. The paper said in the spring of 2000, Geo-Marine launched a development program to create an algorithm which could more accurately distinguish biological targets from weather. Geo-Marine said it demonstrated a test version of its algorithm software in the fall of 2000, and began using the new algorithm on the AHAS in June 2001. Exhibit 1064.

The manager of the Geo-Marine office where the AHAS project staff was located thought the development of AHAS belonged to the taxpayers because it was all done with taxpayer dollars, and Geo-Marine management never expressed a different understanding to him. He was not aware of any proprietary software or source code developed by Geo-Marine. Exhibit 1297 at 109-11. Geo-Marine's project manager for the AHAS project shared this view. Exhibit 1298 at 134. The Air Force representative familiar with the AHAS project said the software work performed by Geo-Marine was required in order to fulfill the terms of the GSA order. Exhibit 1282.

Discussion

When considering a motion for summary relief, we review affidavits, declarations, documents, and appeal file exhibits. Board Rule 108 (48 CFR 6101.8 (2004)). We do not weigh evidence in order to determine the truth of the matter. Rather, we examine evidence in order to determine whether there are factual issues in dispute. Summary relief is

appropriate when there are no genuine issues of material fact in dispute and when the moving party is entitled to relief as a matter of law. A fact is material if it will affect our decision. An issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant at a hearing. Summary relief will be granted if the movant demonstrates there is an absence of evidence to support an essential element of the non-movant's claim or defense. Although the non-movant is entitled to the benefit of the doubt as to the facts, it cannot rest its opposition upon allegations, conclusions, and denials contained in its pleadings. If the moving party demonstrates the absence of a genuine issue as to any material fact, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue as to a material fact to be resolved at a hearing. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

In its motion for summary relief, Geo-Marine contends it developed weather suppression algorithms and encoded them into software using its own funds, not government funds, and installed its software in 2001 on the government-owned computers which the Government removed from Geo-Marine's facility in July 2003. Geo-Marine says it was not required to develop or to deliver software under either the demonstration project contract with the Corps or the contract and order with GSA. As a result, Geo-Marine argues, when Ms. Self sent her request to Mr. White on June 25, 2003, and when GSA took the government-owned computers and their resident software from Geo-Marine on July 23, GSA breached the contract and also breached its duty to cooperate with Geo-Marine and its duty not to hinder Geo-Marine's performance. In brief, Geo-Marine says GSA breached its obligations because it requested and received something it was not entitled to request or receive.

What GSA requested

On June 25, 2003, Ms. Self requested "all AHAS executable and batch file from date to deliver to file output for website for the be [sic] to me immediately. In addition, please send a copy of Version System documents and the most current database." For two reasons, we cannot find as a matter of fact that Ms. Self's request included weather suppression algorithms which Geo-Marine developed and encoded into software using its own funds. First, after reading the words of the request, we are not sure what it includes. The request includes executable and batch files, Version System documents, and a database. We cannot tell whether any of these would include software containing weather suppression algorithms developed by Geo-Marine at its expense. Second, as discussed immediately below, the undisputed facts do not show that Geo-Marine developed weather suppression algorithms and encoded them into software using its own funds.

The Corps contract required Geo-Marine to provide all labor and materials necessary to provide an assessment of a near-real-time bird hazard advisory system which used radar to identify concentrations of birds. It required Geo-Marine to install and test all necessary hardware and software required to download, process, and disseminate bird hazard advisories. It also required Geo-Marine to develop and test bird hazard warning procedures.

According to two individuals familiar with the AHAS, during the demonstration project, Geo-Marine used government funds to write and to develop enhanced software, including weather suppression algorithms, in order to meet the contract's requirements for demonstrating an operational system. The report Geo-Marine prepared regarding its work on the demonstration project says during the course of the project, two methods of weather suppression were implemented and two others were tested. It also says Geo-Marine anticipated continuing to develop weather suppression in later phases of the AHAS project in order to complete the fine-tuning begun during the demonstration project.

The purpose of the GSA order was to continue the demonstration project. The GSA order required Geo-Marine to install, configure, and test hardware and software, and to develop and test bird hazard warning procedures. Geo-Marine was also required to process NEXRAD data for bird hazard advisories and to compile and disseminate the advisories. In addition, it was required to archive NEXRAD data and associated data files and export them to the BAM. The development and testing of advisory procedures was one of the items to be delivered by Geo-Marine to GSA. Two individuals familiar with the AHAS project were not aware that Geo-Marine had developed any proprietary software or source code.

In October 2001, Geo-Marine told GSA it had used several versions of a weather suppression algorithm during performance of its work under the GSA contract. The earliest of these versions seem to be the same as those which it used during its performance of the Corps contract. Geo-Marine also told GSA it had developed an improved algorithm which it used in its performance of the GSA contract.

Undisputed facts do not lead to the conclusion that Geo-Marine developed weather suppression algorithms and encoded them into software using its own funds. Viewing the facts in a light most favorable to GSA, it appears Geo-Marine developed weather suppression algorithms at government expense during the course of the Corps contract, and fine-tuned or enhanced the algorithms at government expense in order to perform the GSA order.

Assuming, however, that Ms. Self's request included algorithms which Geo-Marine developed and encoded into software using its own funds, Geo-Marine has not persuaded us as a matter of law that the request was for something more than GSA was entitled to receive according to the contract. Geo-Marine says it was not required to develop or to deliver

software under the contract and order with GSA. In support of its motion, Geo-Marine refers to several Federal Acquisition Regulation clauses which are not contained in the contract. The GSA order, however, said development and testing of advisory procedures was one of the items to be delivered by Geo-Marine to GSA and it contained a clause which said all customized software, software enhancements, documentation, programming code, applications enhancements, and unique procedures developed under the statement of work and during the period of performance belonged to the Government. The language of the order undermines Geo-Marine's claim that the contract gave GSA no right to request whatever customized software, enhanced software, or programming code Geo-Marine developed under the GSA order's statement of work.

What GSA received

On July 23, 2003, Ms. Self and the Air Force representative returned to Geo-Marine's facility to oversee the removal of various items of government-owned property, including computer hardware and software. We cannot find as a matter of fact that during the process of removing property from Geo-Marine's facility, GSA received software containing weather suppression algorithms which Geo-Marine developed and encoded into software using its own funds. Geo-Marine says in 2001, it installed software in which it had the sole proprietary interest. There is no evidence, however, to show such software resided on the computers in 2003. The undisputed facts do not show what software was installed on the government computers which GSA removed from Geo-Marine's facility.

In addition, as discussed in the previous section, the undisputed facts do not show that Geo-Marine developed weather suppression algorithms and encoded them into software using its own funds. Assuming Geo-Marine did perform such work, and assuming the algorithms it developed were contained in the software which resided on the computers GSA removed from Geo-Marine's facility in July 2003, for the reasons discussed above, Geo-Marine has not persuaded us as a matter of law that GSA received anything more than it was entitled to receive according to the contract.

Decision

The motion for summary relief is denied. We cannot determine, based upon undisputed facts and as a matter of law, that GSA requested or received something it was not contractually entitled to request and receive.

MARTHA H. DeGRAFF
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

EDWIN B. NEILL
Board Judge