

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Ship Analytics International, Inc.) ASBCA No. 50914
)
Under Contract No. N61339-87-C-0128)

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OPINION BY ADMINISTRATIVE JUDGE DELMAN

Ship Analytics International, Inc. (SA or appellant) seeks damages from the Department of Navy for breach of a contract to furnish ship-handling trainers subject to a restricted rights software license. Appellant also seeks damages for bad faith, misrepresentation and unfair dealing. A hearing was held on entitlement only. We have jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.* For reasons stated, we sustain the appeal.

FINDINGS OF FACT

1. On 2 September 1986, the Naval Training Systems Center in Orlando, Florida (Government) issued a request for proposals (RFP) for a "Device 20B6D, SWOSCOL Bridge/CIC Trainer," plus related data and support to be delivered to the Surface Warfare Officers School in Coronado, California, with an option to obtain an identical device for the school in Newport, Rhode Island.

2. The trainer was a computer-based simulator system for teaching ship-handling skills to naval students. Each trainer was to have four bridges, two simulating a bridge of a class frigate and two of a class destroyer. Each bridge also was to have a combat information center, typifying the equipment found aboard vessels of each class. The bridges were to operate both independently and in a combined exercise. The RFP also called for an instructor's station, known as a problem control center, associated with each

bridge, as well as one head instructor's station to oversee the entire exercise. The simulation was to provide cues for ship control, interior and exterior ship communications and display of radar/sonar information. (R4 supp., tab 82) However it was not to provide a simulated out-the-window or real world visual setting for the trainee.

The Government's Rights in Delivered Computer Software

3. Included in the RFP were DFARS 252.227-7013 (MAY 1981), RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE (hereinafter "Clause 7013") and Clause H40, RIGHTS IN COMPUTER SOFTWARE AND DOCUMENTATION (hereinafter "Clause H40").

4. Clause 7013 prescribed the rights of the Government in computer software delivered under a Government contract. Generally, when computer software has been designed, developed or generated under a Government contract, the Government has "unlimited rights" to the delivered software. When the Government has unlimited rights to software, it has the right to use the software for any purpose whatsoever and may allow third parties to do the same. Clause 7013(a), (ex. G-6)

5. When computer software has not been designed or developed under a Government contract but rather at private expense, Clause 7013 provides the contractor with the right to enter into a license agreement with the Government as part of the underlying contract to restrict the Government's use of the software. By executing the license the Government acknowledges that it does not have unlimited rights to the software, that is, it may not use the software for any purpose whatsoever — but rather possesses "restricted rights" as defined by Clause 7013 and the DFARS regulations. Clause 7013(a) enumerates specific minimum rights of the Government and also grants the Government any other specific rights not inconsistent with these enumerated rights that are described in the contract or the license. (*See* finding 7 below)

6. When a contractor delivers software to the Government that was developed at private expense and also can show that the software was sold, leased or licensed to the general public in significant quantities at established market or catalog prices, the software is deemed "commercial computer software" under Clause 7013(a). The Government's right to use this type of software, when appropriately marked with a restrictive legend, is the most restricted. The Government's rights of use are enumerated and limited by Clause 7013(b)(3)(ii) and neither the Government nor a third party is entitled to any additional rights under other contract clauses. (Ex. G-6)

7. Under Clause 7013, "restricted rights" applied to "computer software, listed or described in a license or agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights . . ." Clause 7013(b)(3)(i). The Government's minimum restricted rights were defined by Clause 7013(a) as follows (ex. G-6):

rights that apply only to computer software, and include, as a minimum, the right to --

(1) Use computer software with the computer for which or with which it was acquired, including use at any Government installation to which the computer may be transferred by the Government;

(2) Use computer software with a backup computer if the computer for which or with which it was acquired is inoperative;

(3) Copy computer programs for safekeeping (archives) or backup purposes; and

(4) Modify computer software, or combine it with other software, subject to the provision that those portions of the derivative software incorporating restricted rights software are subject to the same restricted rights.

In addition, restricted rights include any other specific rights not inconsistent with the minimum rights in (1) - (4) above that are listed or described in this contract or described in a license or agreement made a part of this contract.

8. Clause H40, a local Navy clause, added third party rights to the restricted rights granted by Clause 7013. Clause H40(a) provided that the Government could disclose restricted rights computer software to a third party “where the purpose of said access is to have said one or more third parties perform services for the Government on or with the software.” Clause H40(b) provided that the Government could copy the software “for use by the Government on equipment at a software support facility, and for use by the third party(s) identified in [H40(a)] on equipment at the third party’s or other outside facility” in order to perform the services. Clause H40(c) provided that the Government could disclose documentation delivered with the software to the third party “with the restriction that it not be used, duplicated or disclosed except in direct performance of the services identified in [H40(a)] above” (Ex. G-25 at 50)

Negotiation of Agreements

9. On 18 December 1986, SA responded to the Government’s RFP with a multi-volume technical and price proposal. SA proposed to use its privately-developed PILOTSHIP 2000 Software (the software) as the basis for its delivery, and conditioned its proposal upon the execution of a software license agreement granting the Government restricted rights to the software pursuant to Clause 7013.

10. This software was developed with private funding within SA’s commercial division, and was first delivered under a commercial contract in the early 1980s. Prior

to the subject contract with the Government, SA had performed a number of other commercial contracts that involved this software. Each of those contracts included a software license agreement (tr. 2/19-20), and called for simulators with visual systems for which appellant was a paid license fee (tr. 2/216). PILOTSHIP 2000 was not sold, leased or licensed in substantial quantities to the general public at market or catalog prices.

11. The Government sought clarification of appellant's proposal. Insofar as pertinent here, the Government sought clarification as to whether appellant agreed to disclose the source code of its software to the Government, since source code was a deliverable under the contract. The Government also wanted appellant's assurances that it would comply with all contract provisions. (R4, tab 6)

12. In response to the Government's request for clarification, appellant, on 12 June 1987, revised the language in its proposal to *inter alia*, assure the Government that it agreed to provide the Government with source code and to grant the restricted rights under Clause 7013 as well as the third party rights under Clause H40. Appellant was wary about disclosing source code to its customers; once source code was disclosed, its proprietary software could be reverse-engineered (tr. 2/20). On the other hand, appellant recognized the Government's need to maintain and support the software over the life of the trainer. Appellant made known to the Government its understanding of how the source code would be used (R4, tab 7):

We recognize NTSC's [the Navy's] concern that the Government have adequate ability to support and maintain the 20B6D software for the life of the trainer. Therefore, we have supplemented our original proposal to provide express contract assurances that the source code will be delivered and licensed to the Government for the 20B6D device in accord with required DFAR Data/Software provision

Paragraph 3.4.2 of Volume III of the proposal was revised to state as follows:

SA's proposed restricted rights software (source code) license with the additional minimum rights of Clause H40 will fully support the Government's requirements for operation and maintenance of the 20B6D Trainer Devices

It does not appear that the Government took exception to or sought clarification of appellant's proposal in this respect.

13. The Government awarded the contract to SA on 31 August 1987. Thereafter, the Government timely exercised its option to obtain the trainer system for its school in Newport, Rhode Island.

14. During the performance of the contract, the parties negotiated and executed a software licensing agreement (SLA) for appellant's PILOTSHIP 2000 software as contemplated by appellant's proposal. During the negotiations appellant sought additional rights and restrictions regarding the use of the source code and software, *i.e.*, seeking to limit third parties to binary, not source code; seeking a right of approval before the Government could modify the software; seeking rights to any software and/or data base changes made by the Government. The Government rejected these proposals. Appellant ultimately agreed to withdraw them.

15. During a progress meeting in March 1989, the contracting officer advised appellant's CEO that appellant's software documentation would be needed to maintain and support the trainer (tr. 2/34-39, 42-43). This was consistent with appellant's amended technical proposal as stated above. Appellant agreed to provide the documentation. Appellant's CEO, who discussed the matter with the contracting officer at the meeting, stated at trial and we find as follows (tr. 2/56):

Ship Analytics promised to deliver the source code because the Government indicated its concern about being able to maintain the software, maintain the software [sic], if Ship Analytics was not in business or not capable of maintaining the software for them.

That the source code was contemplated for maintenance and support was also reflected in the minutes of the meeting, which recorded the parties' agreement that the school sites of Coronado and Newport would be licensed for binary code only, but that source code and full documentation would be provided to and licensed only for a Government support facility to be identified later: "The Government expressed intent is that the third site to be added to the license will function only as a Government operated software support activity for the Device 20B6D." (R4, tab 12 at 2) The parties' understanding was reiterated in appellant's letter to the contracting officer dated 17 July 1989. Appellant wrote that the third site – the Government's software support and maintenance facility – was not restricted to using the software with the host system hardware, but its license "is only for the software maintenance facility to support the trainer devices furnished under the NTSC Device 20B6D Trainer contract" (R4, tab 19). The contracting officer took no exceptions.

16. In its 17 July letter appellant also agreed to allow the Government to disclose source code to third parties. However during the negotiations of the SLA it was never suggested that a third party could have greater rights to the source code than the Government, nor would that be consistent with the Government's restricted rights in the software. Appellant remained concerned that a third party competitor could use the software to its competitive disadvantage. On the other hand it realized that it could not legally restrict the Government's choice of third parties, and hence it stated in the 17 July

letter that “As an observation (not a condition), we request that the Government be sensitive to the implications of disclosure of source code (software design) to our direct competitors for commercial visual simulation systems.” (R4, tab 19)

17. The parties executed the SLA, effective 17 November 1989. The SLA, Para. 2.5, authorized third party access to the licensed software to perform “services” on or with the software in connection with the host systems provided to the Government (R4, tab 2), using the same term “services” as used in Clause H40 (finding 8). The SLA was executed subject to all contract provisions. The SLA was incorporated into the contract by bilateral Modification No. P00008 in November 1989. Insofar as pertinent, Modification No. P00008 provided that the SLA “shall not serve to diminish or revise any rights to software or other data” under any other contract provision. (R4, tab 2)

18. After some project delay, appellant performed its contract to deliver the trainers to the Government. The trainer system for Coronado was accepted on 8 September 1992 (ex. G-14). The trainer system for Newport was accepted on 22 October 1992 (ex. G-13). During contract performance appellant made some changes to its source code and software to accommodate the Government’s needs (tr. 6/103). However, we find that the scope and number of these changes were minimal, and that appellant did not materially design or develop its PILOTSHIP 2000 software under this contract (ex. A-34).

19. In late 1992, roughly three years after the execution of the SLA and roughly five years after execution of the contract, appellant proposed a legend for its software that limited use by others to “third party maintenance purposes” (R4, tab 24). The Government objected, stating its view that the term “maintenance” was too restrictive since the contract in Clause H40 allowed for performance of “services” (R4, tab 25). Appellant revised the language to permit use for “third party purposes” (R4, tab 26), which was accepted by the Government.

The Enzian Procurement

20. In 1993-1994 the Government sought to obtain an upgraded trainer that would provide a more sophisticated and realistic out-the-window simulation experience for its naval students. It chose to obtain the system on a sole source basis from a small business, Enzian Technology, Inc. (Enzian) through the Small Business Administration (SBA) under Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a).

21. The Government awarded the contract to SBA and Enzian on 5 February 1995. Under the contract Enzian designed, fabricated, tested and delivered a simulation training system to the Government, preserving the functionality of appellant’s trainer but with visual enhancement. It purchased additional hardware and computers and made additional connections to this equipment, and modified appellant’s licensed software to perform this work. Enzian added source code to appellant’s source code to send a special data packet to

a new Onyx computer to control visual scenes (tr. 3/227). It also changed the rate at which data was scanned from every four seconds to every one second (tr. 3/229). These software modifications allowed for the visual enhancements. Enzian's work did not interfere with ongoing simulation training of the naval students; it did not work upon the existing training systems delivered by appellant. Enzian performed its work at its own facilities, with a copy of appellant's source code and software provided by the Government and with additional computers it obtained. Contract award, including options, was roughly \$6 million dollars and performance extended over a number of years. Appellant's SLA was made a part of Enzian's contract.

22. Upon learning of the impending Enzian procurement, appellant objected. By letter to the Government dated 8 July 1994, SA put the Government on notice that any breach of appellant's licensing agreement would result in damages to appellant (R4, tab 27). On 9 May 1995, after contract award to Enzian, appellant issued a notice of termination of license to the Government for breach of the Government's obligations under the license and contract. Appellant contended, among other things, that the Government exceeded its contract rights to allow third party access to appellant's licensed software and source code which was limited to services to maintain and support the trainer host system as delivered by SA under its contract (R4, tab 28). The Government rejected appellant's contention, stating that the Government's right to use appellant's software and source code included trainer "enhancements" (R4, tab 29).

23. Appellant restated its position by letter to the contracting officer dated 18 July 1995 (R4, tab 31):

Specifically, our claim can be stated very simply. NAWC [the Navy] has authorized the use of our commercially licensed software beyond the host configuration and our license fee structure associated with the original delivery of the device, and at a minimum owes Ship Analytics its commercial license fee schedule for the expansion of the devices' capabilities to include visuals. Clearly, our software must support the visual subfunction of the trainer which was not in the original specification and the as delivered configuration as licensed by Ship Analytics. Your addition of visuals exceed [sic] the capabilities paid for in the original license. Further, our license clearly does not allow release of the software to a third party under a new host configuration. [Emphasis in original]

Appellant sought damages, in the nature of additional license fees, in the amount of \$680,000.

24. From 1995-1997, the parties met on numerous occasions to discuss appellant's objections. The Navy's General Counsel represented the Government in many of these discussions. During this period of time Government program officials made certain written and oral statements to appellant and to the General Counsel related to the parties' dispute in general and to the scope of Enzian's work in particular (exs. A-18, -19, -20, -21, -22), which appellant contends were bad faith misrepresentations of fact and unfair dealing. The Government contests appellant's allegations.

25. In early 1997, the parties explored the feasibility of resolving appellant's contentions through alternative disputes resolution (ADR). Appellant submitted a certified claim on 16 April 1997 (R4, tab 39). The claim was denied on 25 April 1997 (R4, tab 40). This appeal followed. The parties did not agree on ADR and a full hearing on entitlement was held before this Board.

26. At the hearing the Government offered excerpts of texts and other extrinsic documentary evidence to support its interpretation of the term "services" in Clause H40 and software "maintenance" generally (exs. G-16, -17, -19, -20, -29, -31, -32). This evidence was not persuasive. It did not persuade the Board that these terms have a well-recognized definition in the industry or in Government software procurement that the parties were charged with knowing. No expert testimony was presented on this issue. The Government's evidence also provided little guidance in assisting us to glean the parties' understanding of software services in the context of this contract, which provided the Government with restricted rights to computer source code and software.

Credibility of Witnesses

27. Our findings of fact were made after due consideration of the credibility of the witnesses at the hearing. Given the nature of the administrative hearing we allowed the fact witnesses to offer their understanding of whether the Government violated the SLA and/or the contract. The Board gave due consideration to all of these opinions, with one exception below, but ultimately arrived at its own conclusion based upon its own evaluation of the evidence, the contract and the law.

28. We gave little weight to the technical and legal opinions of appellant's contracts administrator, called as a fact witness by the Government. We found particularly telling her admitted lack of technical and legal understanding of the contract and SLA provisions (tr. 3/109-10). We also considered her admitted personal animosity towards appellant's current CEO, appellant's key witness, who precipitated an unpleasant incident at the time she was laid off (tr. 3/118-22).

29. Under Clause C8 of appellant's contract, the Government had the option to obtain certain on-site contractor maintenance services (CMS) for the trainer and its

software. Clause C8, as amended by Modification No. P00010, provided as follows (ex. G-25):

ITEM 0009 - On-Site Contractor Maintenance Service (CMS)

(a) The Contractor shall provide On-Site CMS consisting of the following:

(1) total maintenance support necessary to maintain the training device(s), software, tools and test equipment, in an operable condition. The criteria for operational condition shall be the tests and parameters which qualified the training device(s) for acceptance by the Government

(2) all maintenance personnel, tools and test equipment, spare/repair parts, repair or repairables, and preventative maintenance actions

(3) maintain a log of all maintenance actions and submittal of all required reports

(4) assist Navy instructors to ensure continuity of training

(5) furnish designated individuals with operation and maintenance instruction (i.e., informal OJT, over-the-shoulder training) on the system equipment, having special emphasis on troubleshooting, adjustment, and inspection procedures

(6) provide support necessary to assist Government designated personnel (i.e., military, civil service, contractor operation and maintenance of simulators (COMS) personnel, or independent civilian contractor personnel) in the verification/validation of technical documentation

Also Clause C12, added by Modification No. P00005, obligated appellant to provide onsite/field services to support the proper operation of the trainers (ex. G-25).

30. We find the following regulation pertinent to this RFP and contract award (DFARS 27.404-2(b) (1986), renumbered DFARS 227.481-2(b) (1988)):

27.404 *Acquisition of Rights in Computer Software*

....

27.404-2 *Procedures*

....

(b) General

....

(2) The clause at 252.227-7013, Rights in Technical Data and Computer Software, shall be included in every contract under which computer software may be originated, developed, or delivered. That clause establishes the circumstances under which the Government secures unlimited rights in both technical data and computer software, limited rights in technical data, and restricted rights in computer software

(3) Contracts under which computer software developed at private expense is acquired or leased shall explicitly set forth the rights necessary to meet Government needs and restrictions applicable to the Government as to use, duplication and disclosure of the software. Thus, for example, such software may be needed, or the owner of such software will only sell or lease it, for specific or limited purposes such as for internal agency use, or for use in a specific activity, installation or service location. In any event, the contract must clearly define any restrictions on the right of the Government to use such computer software, but such restrictions will be acceptable only if they will permit the Government to fulfill the need for which such software is being acquired. The recital of restrictions may be complete within itself or it may reference the contractor's license or it may reference the contractor's license or other agreement setting forth restrictions. If referencing is employed, a copy of the license or agreement must be attached to the contract. The minimum rights are provided in the Rights in Technical Data and Computer Software clause at 252.227-7013, and need not be included in the recital.

(4) When computer software developed at private expense is modified or enhanced as a necessary part of

performing a contract, only that portion of the resulting product in which the original product is recognizable will be deemed to be computer software developed at private expense to which restricted rights may attach.

POSITIONS OF THE PARTIES

Appellant does not dispute that the Government or a third party had the right to modify appellant's software and source code in its existing trainer under the contract (tr. 7/53). Clause 7013 so provided as did the SLA, Para. 2.4 (R4, tab 2). Appellant's technical proposal under the RFP also contemplated the possibility of software changes for the trainer, *i.e.*, adding a new satellite navigation receiver by adjusting parameters in a software subroutine; adding a new piece of equipment to a vessel's bridge by adding a new software subroutine (ex. A-33 at I.5.51). Appellant also did not object to software changes necessitated by the Government's dismantling of a number of bridges at the Coronado school and transferring them to the Newport school (tr. 7/57). According to appellant these and other types of software modifications and changes -- to maintain and support appellant's delivered trainers -- were consistent with the parties' understanding, Clause C8 of the contract, and the Government's restricted rights in the software under the contract. Appellant contends that the manufacture of a visual trainer upgrade exceeded these support and maintenance rights.

The Government rejects the notion that the parties had an understanding of the type of services to be performed on or with the software. The Government's witnesses at the hearing uniformly maintained an expansive understanding of the term "services" in Clause H40:

- (1) Government Contract Administrator:
"To do anything on the 20B6 for as long as the Navy wishes to keep it in its system" (tr. 4/16).
- (2) Contracting Officer (author of CO Decision):
"It's open services. It's open to whatever services the Government requires" (tr. 4/122).
- (3) Contracting Officer (negotiator of SLA):
"It covers any effort where the intent is to get the contractor's time and effort for a particular task and then we have many, many examples provided in the federal acquisition regulation and in other areas" (tr. 5/109).

However the record does not show that the Government shared its understanding with appellant during the negotiation of the contract and SLA. To the contrary the weight of the credible evidence is that during the negotiation of the key agreements, the contracting

officer shared *appellant's* understanding that the source code and documentation would be used to maintain and support the existing trainer, or at the very least was aware of appellant's understanding to this effect and failed to object.

DECISION

There is no question that appellant conditioned its proposal to manufacture the trainers upon the execution of a SLA restricting the Government's rights to use its PILOTSHIP 2000 software; that the Government accepted appellant's proposal subject to that condition; and that after award the Government executed a SLA restricting the use of this software. By these actions, the Government acknowledged that appellant's software was developed at private expense and that the Government did not have unlimited rights to its use. The Government possessed "restricted rights" to appellant's software under Clause 7013, the SLA and this contract.

If appellant could show that it delivered to the Government "commercial computer software," that is, software sold, leased or licensed in substantial quantities to the general public at market or catalog prices, the Government's rights to this software would be the most restrictive and would be limited to those under Clause 7013. However the evidence does not show that appellant's software was commercial computer software as so defined (finding 10). Hence pursuant to the plain language of Clause 7013(a), the Government was able to exercise its rights under Clause 7013 plus its third party rights under Clause H40 unless the latter were inconsistent with the former (findings 5, 7). We are not persuaded of any inconsistency. We conclude, therefore, that the Government possessed certain third party rights under Clause H40 as part of its restricted software rights under this contract.

Clause H40(a) provides the Government with the right to permit third party access to the appellant's restricted use software, and by necessity to the source code to perform "services" on or with the appellant's software. The parties dispute whether the Government exceeded this right when it contracted with Enzian to manufacture the visual trainer upgrade. The dispute involves the parties' understanding of the ambiguous term "services" in this contract provision. Appellant contends that the Government breached this clause because the parties understood that the software services to be performed by the Government and/or third parties through disclosure of appellant's source code were reasonably limited to those incident to the maintenance and support of appellant's delivered trainers. The Government contends that it did not breach this clause because the parties did not have this understanding, and the meaning of the term services was "open" and allowed the Government to use or modify appellant's source code and software for any purpose consistent with its trainer needs, including the manufacture of a superior trainer.

We conclude that appellant's interpretation is more reasonable for the following reasons: (1) it is consistent with the interpretation conveyed by appellant to the Government and relied upon by appellant during the negotiation of the contract; (2) it is

consistent with the interpretation conveyed by the contracting officer to appellant and relied upon by appellant during the negotiation of the SLA; (3) it is consistent with the contract's definition of onsite contractor maintenance and field services for the trainer and its software; and (4) it is generally consistent with the restricted rights in software granted to the Government under this contract. On the other hand the Government's interpretation (1) does not meet the requirements of the DFARS; (2) was not shared with the contractor during negotiations of either the contract or SLA; and (3) is so broad that it is tantamount to a virtual grant of "unlimited rights" in the software which is inconsistent with the restricted rights granted to the Government under this contract.

Appellant's Understanding Conveyed To The Government

The record reflects that appellant was chary about releasing its proprietary source code to the Government and to third parties. Appellant's understanding, per its letter to the Government and the revisions to its technical proposal dated 12 June 1987 was that source code would be made available to support the delivered device's software and for the operation and maintenance of the delivered trainers (finding 12). Appellant relied upon this interpretation preaward. The Government did not dispute appellant's understanding and awarded the contract to appellant. It is well settled that a party who enters into a contract with knowledge of the other party's reasonable interpretation is bound thereby. *See Perry and Wallis, Inc. v. United States*, 427 F.2d 722, 725 (Ct. Cl. 1970); *Lykes-Youngstown Corp. v. United States*, 420 F.2d 735, 743 (Ct. Cl. 1970), *cert. denied*, 400 U.S. 865 (1970); RESTATEMENT (SECOND) OF CONTRACTS § 201(2) (1981).

The Understanding Conveyed by the Contracting Officer to Appellant

At a meeting in March 1989 during the negotiation of the SLA, the contracting officer also expressed to appellant that the Government needed the software source code and software documentation for the support and maintenance of the delivered trainer. Appellant relied upon this representation, as indicated in the minutes of the meeting and appellant's subsequent letter (finding 15). We give considerable weight to the parties' understanding during the negotiation of this agreement. On the other hand, we give little weight to the Government's interpretation a number of years after the fact (finding 19).

The Contract Addresses "Services" Consistent with Appellant's Interpretation

Clause H40 does not define "services" but Clauses C8 and C12 address the contractor's obligation to provide specific maintenance and support services on the trainer and the software delivered by appellant (finding 29). It is reasonable to expect that services addressed in one section of the contract would apply to services left undefined in another section. Appellant's interpretation -- that the software services to be performed by third parties would be performed on the trainer delivered by appellant -- is consistent with that

reasonable expectation; the Government's interpretation is not. Appellant's interpretation of services has support in the contract; the Government's interpretation does not.

Moreover, the DFARS direct the Government to explicitly set forth in the contract its rights, needs and restrictions in computer software developed at private expense (finding 30) The reason for such clarification is self-evident, and serves to promote the interests of both parties. The Government's open-ended interpretation of "services" under Clause H40 is inconsistent with its obligation to explicitly set forth its requirements under the regulations, and is also generally inconsistent with the restricted nature of its use of the source code and software contemplated by the SLA and the contract.

In February 1995, the Government contracted with Enzian to manufacture a visual trainer upgrade. Enzian designed and delivered a complete trainer system for the Government, purchasing and assembling additional hardware to manufacture a trainer different than and superior to the one delivered by SA. Enzian used and modified SA's licensed source code and software to manufacture this system. It is undisputed that neither Enzian nor the Government paid appellant a license fee for use of appellant's software in Enzian's trainer notwithstanding appellant's demands. Based on all the foregoing, we conclude that Enzian's use of appellant's licensed software to manufacture a trainer for the Government exceeded the rights of a third party to perform "services . . . on or with the software" under Clause H40 as reasonably interpreted and understood by the parties. The Enzian procurement was a material breach of appellant's contract. In view of this conclusion, we need not address appellant's other claimed grounds for breach.

Appellant seeks an order from the Board directing the Government to "cease and desist" from the use of appellant's software and source code and directing the return of all copies to appellant. Appellant has not persuaded us that we have jurisdiction to issue such an order, which is of an injunctive nature. *Maria Manges*, ASBCA No. 25350, 81-2 BCA ¶ 15,398. Assuming *arguendo*, that we have jurisdiction, appellant has not presently persuaded us that its legal remedy of monetary damages is inadequate. The issue of appellant's remedy is better treated as a quantum issue which was not tried in these proceedings, and shall be addressed by the parties on remand.

In addition to disputing appellant's contract interpretation, the Government contends that this appeal should be denied because SA has failed to prove any damages. However, this hearing was held on entitlement only and appellant was not obligated to prove damages beyond showing that some damage was incurred to support a finding of liability. *See Cosmo Construction Co. v. United States*, 451 F.2d 602, 605 (Ct. Cl. 1971). For present purposes we find it sufficient that appellant provided credible evidence that it had the practice of charging licensing fees for the use of its software in a trainer with visual capabilities (finding 10), which fees were not paid in this instance. We remand the issue of damages for negotiation.

We also hear the Government to argue, as an affirmative defense, that since appellant modified its software during contract performance that the Government and Enzian should have “unlimited rights” to all, or a significant part of appellant’s software as delivered under the contract. We do not agree. The weight of the credible evidence is that appellant did not materially develop or design its PILOTSHIP 2000 software under this contract (finding 18). Indeed this was the parties’ understanding and expectation during the contract term when the SLA was negotiated. If the Government’s view was otherwise, it would not have agreed to a restricted use license for the software to be delivered under the contract. Assuming *arguendo* that some discrete design was performed by appellant, the Government has not persuaded us as part of its affirmative defense that Enzian properly and solely worked on that “newly designed” portion of the software that was purportedly free of restriction.

We have considered the Government’s other affirmative defenses and believe they are without merit. We do not believe that appellant is legally or equitably estopped from asserting its contract interpretation of Clause H40. At no time did appellant represent to the Government that the Government’s procurement of an upgraded trainer from a third party using its software was a legitimate exercise of the Government’s restricted rights under this contract. In fact, when SA first heard of the impending Enzian procurement, it protested promptly in writing (finding 22). Nor is the Board persuaded that the law of copyright compels a decision in the Government’s favor, as argued by the Government. Under Clause 7013(c)(1), the Government’s rights under any copyright license are no greater than the restricted rights agreed to by the parties under the contract.

Bad Faith, Misrepresentations, Unfair Dealing

We recently had occasion to restate a contractor’s burden of proof in order to prove bad faith under a Government contract. In *Kirk/Marsland Advertising, Inc.*, ASBCA No. 51075, 99-2 BCA 30,439, we stated as follows at 150,408:

“The contractor’s burden to prove the Government acted in bad faith . . . is very weighty.” *Krygoski Construction Co., Inc. v. United States*, [41 CCF ¶ 78,985] 94 F.3d 1537, 1541 (Fed. Cir. 1996), *cert. denied*, 520 U.S. 1210 (1997). Specifically, the contractor must overcome the familiar “presumption that public officials act ‘conscientiously in the discharge of their duties.’” *Kalvar Corp. v. United States*, [22 CCF ¶ 80,737] 543 F.2d 1298, 1301 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977) quoting *Librach v. United States*, [7 CCF ¶ 71,181] 147 Ct. Cl. 605, 612 (1959). The presumption may be rebutted by “well-nigh irrefragable proof.” *Kalvar, supra*, 543 F.2d at 1301-02 quoting *Knotts v. United States*, 121 F. Supp. 630, 631 (Ct. Cl. 1954). This proof, in turn, “has been equated with evidence of some specific intent to injure” the

contractor. *Kalvar, supra*, 543 F.2d at 1302 (emphasis in original); see also, *City of Adelanto*, ASBCA Nos. 48202, 48633, 96-2 BCA ¶ 28,422 at 141,971.

We have reviewed appellant's exhibits which seek to illustrate that certain statements attributed to Government officials were false, misleading and made in bad faith. We do not believe these statements, even if inaccurate in certain respects, were made with a specific intent to injure appellant, or otherwise constituted sufficient evidence to overcome the well settled presumption of the regularity of the conduct of public officials. We deny appellant's claim for damages in this respect.

In conclusion, we sustain the appeal and remand for negotiation of quantum consistent with this opinion.

Dated: 11 January 2001

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 50914, Appeal of Ship Analytics International, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals