

*Spectrum Sciences & Software, Inc.*

v.

*United States*

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Breach of Contract

# The Facts

# The MAC

- 1970s: The U.S. Air Force developed the munitions assembly conveyor (MAC), a bomb assembly line with a 4,000-pound capacity.
- 1990s: The Air Force's increased reliance on guided bomb units ("smart" bombs) strained the MAC operating system – each assembled bomb weighed at least 2,800 pounds, slowing production.

# Pre-CRADA Activity

- Spectrum, a munitions assembly systems manufacturer, undertook a significant, self-funded effort to upgrade the MAC:
  - Gantry.
  - Hoist.
  - Conveyor and braking systems.
  - Interface control board.
  - Work tables.
  - Lighting.
- Spectrum needed the Air Force's cooperation to refine and test its improvements.
- Spectrum negotiated with the Air Force a CRADA, which they signed in October.

# The CRADA

- Spectrum stressed the need to protect its designs and technologies and to ensure the proper use of its proprietary information.
- CRADA provisions:
  - Article 7.1: PROPRIETARY information shall not be disclosed by the receiving party except under a **written agreement of confidentiality** to employees and contractors of the receiving party who have a **need for the information** in connection with their duties UNDER this AGREEMENT.”
  - Article 7.3: The parties agree to **confer and consult with each other prior to publication or other public disclosure** of the results of work UNDER this AGREEMENT to ensure that no PROPRIETARY INFORMATION or military critical technology or other controlled information is released. Prior to submitting a manuscript for publication or before any other public disclosure, each party will **offer the other party ample opportunity to review such proposed publication or disclosure**, to submit objections, and to file applications for letters patent in a timely manner.
  - Article 7.4: UNIT agrees that any **designs, technologies, or the integration of technologies** developed under COLLABORATOR funds are proprietary to COLLABORATOR.
  - Appendix A, section 5: Spectrum has supported the development of a product line of munitions handling equipment prior to this AGREEMENT and specifically claims intellectual property rights particularly as related to their existing product line, and design work completed on the laboratory RAMS which includes modification of the **gantry to 6000 lbs load limit**, the **braking system** on the rail conveyor, the **interface control board** to make it electrical/pneumatic, modification to the **rail conveyor** for torque of GBU's, the development of a 5500 lb electric **hoist** with powered trolley, new **lighting system** and development of a **working table** with modification of container lid. WMOM will protect Spectrum's proprietary rights in accordance with Article 7 of this AGREEMENT.

# Performance Under the CRADA

- 2001: Performance under the CRADA began.
  - Spectrum drawings contained proprietary labels.
  - Spectrum prototypes had words “Spectrum-created test items” stenciled on them in bright orange paint.
  - Spectrum quarterly reports documented progress toward incorporating the improvements listed in the CRADA.
  - Spectrum final report summarized its activities over the entire project.
- 2002: The Air Force wanted to buy Spectrum’s production drawings for the MAC improvements to use to procure an upgraded MAC; Spectrum refused, wanting to pursue a contract to manufacture the upgraded MAC.

# Post-CRADA Activity

- **MAC II procurement:** the Air Force decided to procure a MAC successor.
  - **Procurement team.** Included individuals who were involved with the CRADA and used the CRADA information in connection with the procurement. Other Air Force personnel who had not worked on the CRADA were available.
  - **Spectrum information.** Requested by Air Force employees for use in the MAC II effort.
    - Comments on a statement of objectives later incorporated into procurement documents.
    - Series of pictures for briefings of Air Force officials.
  - **Engineer.** Assigned to draft the MAC II performance specifications and instructed not to look at any Spectrum work product; but he violated that instruction.
    - Briefings where the CRADA team briefed the procurement team on the CRADA results.
      - Pre-CRADA improvements.
      - Slides with pictures.
      - Final status report information.
      - CRADA developments.
      - Features – e.g., 6000-pound weight limit.
    - Consultations with the CRADA project manager and other CRADA team members.
    - A requirements document based on Spectrum's work product.

# Post-CRADA Activity

- **Unsolicited proposal:** submitted by Spectrum proposing to build a new version of the MAC using information developed under the CRADA.
  - **Contracting officer.** Instructed to set aside unopened; but he violated that instruction.
    - Circulation of proposal to the procurement team.
  - **Rejection.** The Air Force advised Spectrum of the MAC II procurement.
- **Draft RFP:** published and distributed by the Air Force to outside vendors.
  - **Review.** Spectrum did not get a chance to review the RFP.
  - **Proprietary information.** Included Spectrum improvements focused on during the CRADA – e.g., “[t]he MAC II loading and unloading systems shall have a working strength of 6,000 lbs.”
  - **Complaint.** Spectrum complained; the Air Force agreed to modify the RFP.
- **MAC II Industry Day:** Air Force personnel familiar with Spectrum’s proprietary information and industry participants discussed the draft RFP and MAC II procurement.



# Post-CRADA Activity

- **Final RFP:** published and distributed by the Air Force to third parties.
  - **Review.** Spectrum did not get a chance to review the RFP.
  - **Modifications.** Omitted requested improvements but kept the requirements listed in the draft RFP.
  - **Award.** Spectrum and D&D Machinery submitted proposals – D&D was awarded the contract.
- **Lawsuit:** Spectrum sued, raising breach of contract claims based on the Air Force's release of its proprietary information.

# The Law

# Breach of Contract

Spectrum must establish that:

- 1) a valid contract existed between Spectrum and the government;
- 2) the contract gave rise to duties or obligations;
- 3) the government breached those duties or obligations; and
- 4) the breaches resulted in damages.

Analysis

# Valid Contract

- “[E]ssentially uncontested here.”
- A CRADA is a contract.
  - Mutual intent (offer and acceptance).
  - Consideration.
  - Government representative with actual authority to bind the Government.

# Duties or Obligations

- Protect Spectrum's proprietary information:
  - Article 7.1: "PROPRIETARY information shall not be disclosed . . . except under a written agreement of confidentiality to employees and contractors of the receiving party who have a need for the information in connection with their duties UNDER this AGREEMENT."
  - Article 7.3: "parties agree to confer and consult with each other prior to publication or other public disclosure . . . to ensure that no PROPRIETARY INFORMATION . . . is released."
- Proprietary information:
  - Appendix A, section 5: "includes modification of the gantry to 6000 lbs load limit, the braking system on the rail conveyor, the interface control board to make it electrical/pneumatic, modification to the rail conveyor for torque of GBU's, the development of a 5500 lb electric hoist with powered trolley, new lighting system and development of a working table with modification of container lid."

# Breach

“[The breaches] ran the gamut – some were isolated, others systematic; some occurred internally within the Air Force, others took the form of ill-advised public disclosures; and some might have occurred innocently enough, while others were in derogation of explicit orders and fully calculated to take advantage of Spectrum.”

- Failed to obtain written confidentiality agreements.
- Shared information with contracting officials involved with the MAC II procurement.
- Requested Spectrum proprietary information under false pretenses.
  - Briefing materials.
  - RFPs.
- Ignored instructions not to look at Spectrum work product.
- Ignored instructions to set aside unsolicited proposal unopened.
- Placed officials who worked with Spectrum under the CRADA onto the MAC II procurement team.
- Briefed the engineer and other key officials on the MAC II procurement team on the CRADA results but not on the CRADA protections or on what information those protections covered.
- Provided Spectrum’s proprietary information to outside contractors.
  - Draft RFP.
  - MAC II Industry Day.
- Deprived Spectrum the chance to review the draft and final RFPs before release.

# Damages

- “The court has little doubt that the breaches here resulted in recoverable damages – at least sufficient enough to move the case into its next phase.”
- Damages awarded: \$1,211,754



# Lesson

“[T]he promises the Government makes in a CRADA to protect proprietary rights are real, subjecting the Government to liability for damages if it breaches those promises.”