

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

_____	)	
L-3 COMMUNICATIONS SECURITY	)	
AND DETECTION SYSTEMS	)	
CORPORATION DELAWARE	)	
	)	Civil Action No. 04-10339-RWZ
Plaintiff,	)	
	)	
v.	)	
	)	
AMERICAN SCIENCE &	)	
ENGINEERING, INC.	)	
	)	
Defendant	)	
_____	)	

AS&E'S [PROPOSED] POST-HEARING SUPPLEMENTAL SUBMISSION

Last Friday, June 17, 2005, after the hearing on summary judgment, counsel for L-3 took the deposition of Mr. Roy Lindquist, the former United States Customs Service official who served as liaison between the Customs Service and AS&E during AS&E's work on Mobile CargoSearch. Mr. Lindquist's testimony is further evidence that AS&E's designs for the Mobile CargoSearch system were not yet fixed and, indeed, still under development, as of February 12, 1995, the critical date.

AS&E has previously noted that its witnesses testified that AS&E's October 1994 contract with the government was a "development contract" due to the additional design and development work AS&E would have to undertake before the Mobile CargoSearch could be built. See Docket Entry 80 (AS&E's Response To Supplemental Submission of L-3). Corroborating that testimony, Mr. Lindquist testified that AS&E's contract with the government was an agreement to use its "best efforts" to design, build and deliver a Mobile CargoSearch truck and that, as late as February 14, 2005, success in that venture was "not guaranteed." Specifically, Lindquist testified as follows:

Q You have no memory of anyone at AS&E expressing any reservations as to the viability of the design they presented [to Lindquist on February 14, 1995]?

A It was a best effort contract.

Q What does that mean?

A It means they were going to perform work and the results were not guaranteed.

See **Exh A** (Lindquist Depo.) at page 46.

The uncertainty surrounding AS&E's ability to reduce its inventions to practice is build into the fabric of its "best efforts" contract with the government. Indeed, Mr. Lindquist testified that the contract did not obligate AS&E to deliver a completed Mobile CargoSearch vehicle to the government.

Q So then just so I understand this, Mr. Lindquist, how this goes, if AS&E failed to deliver an operating fully functional truck – Mobile CargoSearch, if they failed to do that, would they be in breach of their best efforts contract?

A No.

Id. at pages 92-93.

Thus, by acknowledging the late stage uncertainty surrounding the viability of A&SE's Mobile CargoSearch designs, uncertainties acknowledged in the "best efforts" contract, Lindquist confirms that the inventions disclosed in the patents in suit were not ready for patenting prior to February 12, 1995, the critical date.

CONCLUSION

For all of these reasons, and those stated in AS&E's initial brief, AS&E respectfully requests that the Court grant it summary judgment on L-3's inequitable conduct claims and deny summary judgment on L-3's on-sale bar claims.

Dated: June 24, 2005

AMERICAN SCIENCE AND
ENGINEERING, INC.

By its attorneys,

/s/ John F. Ward
John F. Ward, BBO # 646689
BROMBERG & SUNSTEIN LLP
125 Summer Street
Boston, Massachusetts 02110
Tel: (617) 443-9292
Facsimile: (617) 443-0004
jward@bromsun.com

01945/00511 396258.1