

Receipt number AUSFCC-5726220

## In the United States Court of Federal Claims

	)	
<b>THE GOVERNMENT OF GREECE</b>	)	
<b>THE HELLENIC AIR FORCE</b>	)	
Plaintiff,	)	
	)	
v.	)	<b>Civil Action No.</b> <u>19-1615 C</u>
<b>THE UNITED STATES OF AMERICA</b>	)	
	)	
Defendant.	)	
	)	

### COMPLAINT

The Government of Greece, Hellenic Air Force (“HAF”) brings this action for money damages against the United States of America government (“U.S. GOVERNMENT”) to recover for a breach of contract, U.S. GOVERNMENT’S failure to act in good faith and fair dealings, U.S. GOVERNMENT’S violations of Department of Defense Directives and U.S. GOVERNMENT’S unjust enrichment. HAF through the Foreign Military Sales (“FMS”) via Letter of Agreement (“LOA”) contracted with the U.S. GOVERNMENT for the procurement of military goods, including but not limited to surveillance cameras, to be install on HAF’s RF-4 aircraft. This LOA was entitled GR-D-QBM. HAF fully performed its obligations under the LOA and paid all monies owed. The U.S. GOVERNMENT; however, failed to provide flight worthy and operational cameras as agreed, improperly closed and terminated the GR-D-QBM case. Further, upon information and belief, U.S. GOVERNMENT made serious material misrepresentations about rectifying Supply Discrepancy Reports (“SDR”). In support of its Complaint, HAF pleads as follows:

## **INTRODUCTION**

1. This lawsuit follows from the collapse of a procurement of military goods, including upgrades to KS-127 cameras on the RF-4 aircrafts for the Hellenic Air Force (“HAF”) in Greece by a contract entitled “GR-D-QBM”.

2. On or about August 1999, the HAF requested Recon/Optical, Inc., (“Recon/Optical”) as the prime contractor for upgrades for surveillance cameras and corollary military items.

3. As the GR-D-QBM contract included confidential and U.S. export-controlled technologies, the HAF could proceed only through the U.S. GOVERNMENT’s Foreign Military Sales (“FMS”) program.

4. Through the FMS program, the U.S. GOVERNMENT and the HAF agreed that Recon/Optical would be the sole source contractor for GR-D-QBM case.

### **THE FOREIGN MILITARY SALES PROGRAM**

5. The Foreign Military Sales (“FMS”) program is a form of security assistance authorized by the Arms Export Control Act (“AECA”), 22 U.S.C. § 2751, *et seq.* Under Section 3 of the Act, the U.S. GOVERNMENT may sell defense articles and services to foreign countries and international organizations when the President decides that a prospective purchaser is eligible. The U.S. Department of State approves individual programs on a case-by-case basis. Through FMS, the U.S. GOVERNMENT uses U.S. contractors to procure the articles and/or services requested and approved.

6. FMS agreements are facilitated through binding contracts between the U.S.

GOVERNMENT and an authorized foreign purchaser. To initiate a purchase under the FMS program, the customer submits a Letter of Request (“LOR”) to the U.S. GOVERNMENT, requesting defense articles and/or services. Upon approval of the request the U.S. GOVERNMENT executes a purchase agreement in the form of a Letter of Offer and Acceptance (“LOA”).

7. In negotiating the LOA, the foreign purchaser may request a specific contractor as the prime supplier for the requested goods and/or services through “sole source” procurement. The sole source must be approved by the U.S. GOVERNMENT.

8. The Defense Security Cooperation Agency (DSCA) of the U.S. Department of Defense, issues the Security Assistance Management Manual (SAMM), DSCA 5105.38-M. The SAMM is the source of policy and guidance for implementing security assistance under the FMS program to comply with the AECA and other directives.

**THE HAF SEEKS UPGRADES ON ITS CAMERA SYSTEMS FOR R-4 AIRCRAFTS**

9. In August 1999, the HAF initiated a contract under the FMS program via a LOR with the U.S. GOVERNMENT. The LOR contract included upgrading the KS-127 cameras for the HAF’s RF-4 aircrafts and other equipment.

10. The parties negotiated the LOA/contract GR-D-QBM, for the firm, fixed price of \$23,369,723.00, for the procurement, upgrade, and support of KS-127 cameras using RF-4E interface (form, fit, and interchangeable), related equipment, and administrative services for HAF’s RF-4E Aircraft. Yet, numerous amendments would be necessary by the U.S. GOVERNMENT over the following years to maintain GR-D-QBM’s intent. (Ex. 1-4)

11. By letter dated March 3, 1999, the HAF requested Recon/Optical, Inc., be designated as prime contractor for lines 001, 002, 003, 004, 005 and 006 of the LOA, which

the U.S. GOVERNMENT approved.

12. After the signing of the LOA, the parties conducted a Preliminary Design Review (“PDR”) on June 20-22, 2000.

13. The Preliminary Design Review revealed that the original camera design by Recon/Optical was incompatible with the RF-4 Aircraft and would require structural changes.

14. On or about September 27, 2000, Recon/Optical management communicated to the HAF that Recon/Optical would have to upgrade to the focal length of the cameras and make changes from the Digital Tape Recorder to the Solid State Recorders to cover the requirements of GR-D-QBM, **at no cost to the HAF.**

15. In Response, HAF reluctantly agreed to a new form and fit camera design and enhanced specifications; however, HAF emphasized the need for the U.S. GOVERNMENT to protect HAF’s interests regarding this new design and timely deliver operational cameras by the original delivery date of June 2001. (Ex. 5)

16. In an effort to accomplish the objectives of the GR-D-QBM contract, the HAF met with the U.S. GOVERNMENT and Recon/Optical several times and engaged in substantial correspondence in an attempt to resolve outstanding issues. (Ex. 6,7)

17. Throughout these communications, the HAF was repeatedly assured by the U.S. GOVERNMENT that it would fulfill its procurement obligations under the contract and protect the HAF’s interests in a timely fashion. (Ex. 6,7)

18. In the year of 2000-2001, Recon/Optical continued to have design compatibility issues with the KS-127 cameras. Recon/Optical additionally would not ensure the Time Compliance Technical Order (“TCTO”) certification of airworthiness, which verifies that the camera system can be safely maintained and operated.

19. Unfortunately, the HAF did not receive the KS-127 Cameras and/or additional items as were contractually due by June 2001 because Recon/Optical still had not reached a compatible design and configuration of the KS-127 cameras for the aircrafts. Recon/Optical was still updating the camera system design as of August 2001. (Ex.8).

20. In April 2002, the DSCA of the U.S. GOVERNMENT requested the HAF procure a delinquent payment on case GR-D-QBM. (Ex. 9)

21. On or about October 22, 2002, curiously, Recon/Optical requested equitable adjustment (REA) for additional design effort from specification changes and installation design changes that caused a delay in the original delivery date. (Ex. 10)

22. On or about October 2002, the HAF disputed the merits of the REA claim and the U.S. Defense Contract Audit Agency of the U.S. Department of Defense began an investigation into the validity of the REA.

23. From October 2002 to January 2003, Recon/Optical continued to reconfigure the camera systems to comply with the necessary specifications and proposed a shipment of the KS- 127 Camera from Recon/Optical for March 28, 2003.

24. On March 17, 2003, the Defense Security Audit Agency approved the REA to Recon/Optical from HAF for an additional \$1,710,890.00.

25. By December 2004, the HAF still did not have operational cameras.

26. The engineering Red Team, sponsored by the U.S. GOVERNMENT, complied to completed an assessment of GR-D-QBM matter and to determine the status of the KS-127 cameras, (two film upgrades and other items), and whether they could integrate them into HAF's RF-4 aircraft as contracted. The Red Team found significant issues with the KS-127 cameras in critical areas including system engineering, design, and integration.

The Red Team considered the program high risk. The camera that the U.S. GOVERNMENT delivered to the HAF had severe technical problems in installation and operation and produced photos with unacceptable quality. (Ex. 11, 12, 13)

27. Over the ensuing years, the HAF sent the U.S. GOVERNMENT numerous Supply Discrepancy Reports (SDR's) documenting the problems with the expected goods under the contract and goods never received under GR-D-QBM. (Ex. 14, 15)

28. Despite such defects and assurances that the U.S. GOVERNMENT would fulfill its procurement obligations, on or about July 2015, HAF became aware via review of the Security Cooperation Information Portal that the GR-D-QBM case was termed "Closed," or "X Coded," in violation of numerous Foreign Acquisition Regulations.

29. In an attempt to amicably resolve the GR-D-QBM case, HAF initially requested United States/U.S. GOVERNMENT to simply reopen the GR-D-QBM case so to allow United States an opportunity to deliver working cameras and further fulfill its obligations under GR-D- QBM.

30. To that end, on July 31, 2015, the HAF submitted a letter to the Contracting Officer requesting GR-D-QBM be reopened because of the defective and missing items as prescribed in the line items of LOA.

31. On or about May 24, 2016, the U.S Government, via Defense Security Cooperation Agency (DSCA) denied the HAF's request to reopen the case.

32. Consequently, HAF appealed this final decision to the Armed Services Board of Contract Appeals ("ASBCA") on October 14, 2016. (*See Appeal of Hellenic Air Force, ASBCA No. 60802*).

33. Nevertheless, the HAF's attempt to reach a diplomatic resolution by asking only for injunctive relief (reopen the GR-D-QBM case) resulted in ASBCA

dismissing the case for lack of jurisdiction as ASBCA does not possess jurisdiction to entertain a matter that seeks only injunctive relief.

34. Thereafter, the HAF submitted a second certified claim to the Contracting Officer, requesting a sum certain in the amount of \$21,745,394.71, plus interest, on August 20, 2018.

35. No response was provided and thus the certified claim was deemed denied 60 days after receipt.

36. At present, HAF still has yet to receive working surveillance camera and a majority of the items agreed upon by the U. S. GOVERNMENT via the LOA.

37. Unfortunately, HAF was forced to bring this action.

### **JURISDICTION**

38. Plaintiff, is the Hellenic Air Force (HAF) country of Greece. At all times relevant hereto, HAF has been engaged in national defense and air superiority in Greece and has been a member in good standing under the FMS program.

39. The United States of America (“U.S. GOVERNMENT”) is acting through the United States Air Force (USAF), and Defense Security Cooperation Agency (“DSCA”), an entity created by the Department of Defense (“DoD”) whom provides financial and technical assistance, transfer of defense material, training and services to allies, and promotes military-to- military contacts.

40. This Court has jurisdiction over this matter pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1). The underlying statutory basis for invoking jurisdiction is by the Contract Disputes Act, 41 U.S.C. § 7101-7109.

41. Further, United States Court of Federal Claims has jurisdiction and venue over this action pursuant to 28 USC § 1491(a) inasmuch as this is a claim against the United States funded in an Act of Congress and for damages in a case not sounding in tort.

42. The Hellenic Air Force entered into a written contract entitled GR-D-QBM with the U.S. GOVERNMENT for procurement of certain military grade surveillance cameras via FMS program for an amount in excess of \$21,745,394.71. (See Exhibit 1)

43. The U.S. GOVERNMENT failed to deliver items listed in the LOA captioned GR-D-QBM in a conforming manner or condition under the terms of the LOA.

44. On August 17, 2018, the HAF submitted a properly certified claim for a sum certain to the Contracting Officer in the amount of \$21,745,394.71, plus interest.

45. The Contracting Officer nor DSCA failed to issue a decision within the required time period under the Contract Dispute Act (CDA) and thus the claim was deemed denied.

## **CLAIMS FOR RELIEF**

### **COUNT I**

#### **(BREACH OF CONTRACT)**

##### **A. Failure to provide conforming goods**

46. The HAF restates, re-alleges, and incorporates by reference herein the allegations set forth in paragraphs 1 through 44, inclusive.

47. The parties entered into a binding contract through the LOA captioned GR-D-QBM. (See Ex. 1)

48. The LOA required the U.S. GOVERNMENT to procure all goods and perform all obligations under the FMS program, consistent with DoD regulations and

procedures. *See* DoD 5105.38-M.

49. The U.S. GOVERNMENT breached LOA § 1.2 by failing to provide HAF with operational and functional KS-127 cameras and a majority of items listed in the GR-D-QBM case.

50. As a direct result of the U.S. GOVERNMENT'S material breach under the LOA, HAF was damaged in lost funds in excess of \$21,745,394.71, plus interest and attorney fees.

**B. Breach of contractual duty to protect HAF's interest.**

51. The HAF restates, re-alleges, and incorporates by reference herein the allegations set forth in paragraphs 1 through 49, inclusive.

52. Per the GR-D-QBM LOA § 1.2 the U. S. Government was required to employ the same quality in procurement for the HAF (purchaser), as would be used in procuring for itself (DoD). (See Ex. 1.)

53. The U.S. GOVERNMENT provided HAF with items and equipment riddle with latent defects, non- conforming goods, items not in working condition, and/or missing items.

54. Upon information and belief, the U.S. GOVERNMENT would not have allowed the GR-D-QBM to be terminated had U.S. GOVERNMENT received KS-127 cameras with latent defects and/or failed to receive other items detailed in the LOA.

55. As a direct result of U.S. GOVERNMENT failure to protect HAF's interests under the GR-D-QBM contract, HAF was damaged in excess of \$21,745,394.71, plus interest and attorney fees.

**COUNT II**

**(VIOLATION OF FEDERAL PROCUREMENT LAW)**

61. The HAF restates, re-alleges, and incorporates by reference herein the allegations set forth in paragraphs 1 through 60, inclusive.

62. The LOA provides that disputes shall be subject to U.S. Federal procurement law, which includes U.S. Department of Defense directives (“DoD”) and the Security Assistance Management Manual (“SAMM”).

63. The SAMM is a DoD compilation of policy and instructions to direct agency personnel in carrying out their responsibilities under FMS programs, pursuant to delegation of presidential authority under the AECA. *See* DoD 5105.38-M; SAMM (1988) ¶ 20202(B)(1).

64. The LOA states that the terms of sale are explained in the SAMM, DoD 5105.38-M.

65. Under LOA § 1.2, the U.S. GOVERNMENT is obligated to procure goods in a manner consistent with DoD regulations and procedures.

66. Through the U.S. GOVERNMENT’s breach of multiple terms of the GR-D-QBM contract, the U.S. GOVERNMENT violated numerous DoD directives when it subsequently placed case GR-D-QBM in closure status, despite GR-D-QBM ineligibility for closure as GR-D- QBM was not Supply and/or Services Complete (“SSC”) eligible.

67. More alarming, the U.S GOVERNMENT wrongly place GR-D-QBM in closure status unbeknownst to HAF.

68. In closing case GR-D-QBM, the U.S. GOVERNMENT violated SAMM C5.4.17, which requires that an implemented FMS case be effective until all offered articles

are delivered and all services have been performed.

69. The U.S. GOVERNMENT failed to transfer cameras and related equipment titles to HAF, violating DoD 5105.65 and SAMM C2.16.1, which require all items to be delivered and title to be transferred.

70. The U.S. GOVERNMENT failed to conduct a final meeting with HAF and ignored obvious issues regarding installation and performance of the cameras, violating DoD 5105.65 and SAMM C2.16.5.2, which require the completion of FMS programs to be confirmed of logistical actions with the purchaser.

71. The U.S. GOVERNMENT provided latently defective cameras and HAF did not accept ground exploitation station and major items on GR-D-QBM, violating DoD 5105.65 and SAMM C2.16.6, which require all services to be performed prior to case closure.

72. The U.S. GOVERNMENT provided latently defective cameras and HAF did not accept ground exploitation station and major items on GR-D-QBM, violating of DoD 5105.65 and SAMM C2.16.7, which require all notes on the LOA to be satisfied.

73. The U.S. GOVERNMENT provided latently defective cameras and HAF did not accept ground exploitation station and major items on GR-D-QBM, violating DoD 5105.65 and SAMM C2.16.7.1, which require LOA conditions and/or requirements to be met prior to case closure.

74. The U.S. GOVERNMENT closed case GR-D-QBM, notwithstanding the pending SDR's from the HAF and the HAF's request for the case to remain open, violating DoD 5105.65 and SAMM C2.16.7.2.

75. The U.S. GOVERNMENT violated DoD 5105.65 *M et seq*, by failing to meet, confer, and resolve outstanding GR-D-QBM issues prior to case closure.

76. The U.S. GOVERNMENT violated reconciliation provisions prior to the

wrongful closure of GR-D-QBM.

77. The U.S. GOVERNMENT violated DoD 5105.65 M by ignoring HAF's request to have GR-D-QBM remain open.

78. Finally, even though U.S. GOVERNMENT had charge the HAF approximately Five hundred and Seventy thousand dollars (\$570,000) in administrative costs and failed to provide conforming goods under the LOA, the U.S. GOVERNMENT asserted that it would not reopen or reinstate GR-D-QBM maintaining it was impractical to do so. (Ex. 16)

79. By virtue of the acts set forth above in the U.S. GOVERNMENT's breach of GR- D-QBM Terms and Conditions and its obligations in compliance with SAMM and DoD Directives under Federal Procurement Law, the HAF has been deprived from enjoying the benefits of its bargained-for agreement under GR-D-QB.

80. Additionally, as a direct and proximate result of the U.S. GOVERNMENT's breach of GR-D-QBM Terms and Conditions and its obligations in compliance with SAMM and DoD Directives under Federal Procurement Law, the HAF has had loss of funds, costs not reimbursed to the HAF associated with termination of GR-D-QBM, and loss of bargained-for use of goods from delayed and omitted delivery.

81. Additionally, as a direct and proximate result of U.S. GOVERNMENT's breach of GR-D-QBM Terms and Conditions and its obligations in compliance with SAMM and DoD Directives under Federal Procurement Law, the HAF has been damaged in excess of \$21,745,394.71, plus interest and attorney fees.

**COUNT III**

**(BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING)**

82. The HAF restates, re-alleges, and incorporates by reference herein the allegations set forth in paragraphs 1 through 81, inclusive.

83. The U.S. GOVERNMENT owed HAF an implied duty of good faith and fair dealing arising from the contract, including providing accurate and timely information regarding the status of the procurement.

84. Good faith and fair dealing is an element of every contract and imposes upon the U.S. GOVERNMENT a duty of good faith and fair dealing in the performance of the contract.

85. The implied covenant requires the U.S. GOVERNMENT exercise good faith toward Plaintiff when making decisions for the procurement of the contractual obligations and requires for substantial compliance with the spirit of the contract, not just the letter of the contracts.

86. The U.S. GOVERNMENT's duty of good faith and fair dealing required it to act fairly to HAF to allow them to receive the benefits of the contract between U.S. GOVERNMENT and HAF. This duty required the U.S. GOVERNMENT to act to preserve the reasonable expectations of the HAF under the GR-D-QBM regarding the sales of goods due to the HAF by the U.S. GOVERNMENT.

87. The U.S. GOVERNMENT, pursuant to DoD regulations, and the standard terms and conditions incorporated into the LOA to use best efforts in delivering the defense items on schedule and for the amount set forth in the LOA. (LOA Standard Terms and Conditions § 1 and § 3) As stated in the LOA, the U.S. GOVERNMENT obligated itself to deliver the cameras in approximately eighteen (18) months. It has been nearly fifteen (15) years from the inception of GR-D-QBM and the U.S. GOVERNMENT has yet to adhere to its

obligations. This cannot be considered the best efforts of the U.S. GOVERNMENT.

88. Additionally, as alleged supra., the U.S. GOVERNMENT closed case GR-D-QBM, without notifying the HAF, even though the case was not SSC eligible to be closed.

89. Notwithstanding GR-D-QBM being closed, and for reasons unknown, U.S. GOVERNMENT continued sending the HAF assurances that it was working on resolving the SDR issues.

90. These deliberate actions on the part of the U.S. GOVERNMENT, at minimum, constituted a breach of its obligation to execute GR-D-QBM in good faith.

91. The breach by U.S. GOVERNMENT prevented the HAF from taking steps to safeguard its own interests against the uncertainty regarding whether HAF would ever receive the goods under the contract.

92. Additionally, the U.S. GOVERNMENT via DSCA approved an equitable adjustment, despite the fact that the HAF had yet to receive their goods and did not know with certainty when the contractor would determine an effective camera integration design.

93. The U.S. GOVERNMENT's material breaches have caused the HAF damages that include loss of HAF's bargained for goods under the contract, loss of investment in the upgrades, costs associated with the contract termination and injuries to the HAF's military defense.

94. The HAF seeks damages in the amount of \$21,745,394.71, plus interest, as a result of U.S. GOVERNMENT's breach of duty of good faith and fair dealing.

**Count IV**

**(UNJUST ENRICHMENT)**

95. The HAF restates, re-alleges, and incorporates by reference herein the allegations set forth in paragraphs 1 through 94, inclusive.

96. The HAF contracted for and requested goods with U.S. GOVERNMENT under the FMS program knowing HAF would spend a significant amount for the contract.

97. The U.S. GOVERNMENT failed to provide conforming items listed in the GR-D- QBM case and line items.

98. The U.S. GOVERNMENT has had an unreasonable delayed in delivering conforming items under the GR-D-QBM case.

99. The HAF was unable to recoup the benefit of the procurement, yet the U.S. GOVERNMENT received compensation and equitable adjustments.

100. Additionally, the U.S. GOVERNMENT subsequently closed case GR-D-QBM, despite not fulfilling the contract nor disclosing it to the HAF.

101. Having received the benefit of compensation, yet not fulfilling its contractual obligations, equity and good conscious require the U.S. GOVERNMENT to make restitution to the HAF in the amount of amount of \$21,745,394.71, plus interest and attorney fees.

**PRAYER FOR RELIEF**

**WHEREFORE**, the HAF prays that this Court:

- A. Enter judgment in favor of the Government of Greece, Hellenic Air Force and against the United States Government on all claims alleged in this Complaint;
- B. Award HAF actual damages in excess of \$21,745,394.71 as a result of United States Government's material breaches of its legal obligations, failure to negotiate in good faith and fair dealing, and unjust enrichment.
- C. Award HAF prejudgment and post-judgment interest, plus costs, including attorneys' fees; and,
- D. Grant HAF such other legal and equitable relief as may be just and proper.

Respectfully submitted,

*/s/ Thomas M. Kollin*

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**CERTIFICATE OF SERVICE**

Pursuant to Rules of the United States Court of Federal Claims, Rule 4, service of this complaint on the United States will be effectuated by the clerk of the court.

*/s/ Thomas M. Kollin*

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THOMAS M. KOLLIN #0066964

**Index of Exhibits (Confidential Filings)**

<b>Exhibits</b>	<b>Title</b>
1	Letter of Offer and Acceptance (LOA) of GR-D-QBM
2	Letter of Offer and Acceptance Modification 1 (LOA-1)
3	Letter of Offer and Acceptance Modification 2 (LOA-2)
4	Letter of Offer and Acceptance Modification 3 (LOA-3)
5	Mazarakis Fax, September 27, 2000
6	Carter Letter, January 15, 2002
7	Riemer Letter Sept 3, 2002
8	Lucas Letter, August 24, 2001
9	Gaddy Letter, April 19, 2002
10	Memorandum for Hellenic Air Force, October 24, 2002
11	Basoulis Letter, March 16, 2004
12	Caton Memorandum, Dec 8, 2004
13	Deficiency Report
14	Supply Discrepancy Report
15	Supply Discrepancy Report
16	Rixey Letter, May 24, 2016