

# VIRGINIA LAWYERS WEEKLY

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## Device to jam detonation of roadside bombs subject of suit

### \$2,100,000 Settlement

In early 2007, ADI signed a teaming agreement with general contractor EMW to bid on a contract with NATO to supply 48 remote-controlled improvised explosive device jammers, known as the MILJAM-350, for NATO's use in Afghanistan.

The jammers have the ability to prevent the remote detonation of road side bombs. EMW submitted a proposal to NATO to build the jammers, but before doing so, was unable to share with ADI any of the classified information contained in a secret annex to NATO's request for proposal. In August of 2007, NATO indicated to EMW that a contract award of 48 jammers was likely. However, EMW would have had to deliver the jammers to NATO on a very tight schedule.

Due to the perceived quick manufacturing schedule, EMW decided to order the jammers prior to any contract award by NATO. EMW, by e-mail, authorized ADI to start manufacturing, on Aug. 16, 2007, and later followed up by providing ADI with a draft subcontract agreement and purchase order for 48 jammers at a contract price of \$4.089 million. ADI agreed to the terms of the purchase order. ADI and EMW never signed the subcontract agreement because EMW agreed to revise it for ADI's review. The subcontract agreement was then forgotten.

Thereafter, ADI subcontracted the actual manufacturing of the jammers to co-plaintiff ISS. ISS purchased the technology from an Israeli vendor, Wireless Avionics, for a variable price dependent on sales, and began making the jammers.

NATO required EMW to demonstrate the jammers' effectiveness at a proof of concept test in Turkey in October 2007. ADI and ISS participated in the test. The test revealed that the jammers worked, but NATO indicated that the jammers needed some modifications to fully comply with the requirements in the secret annex to NATO's request for proposal.

The parties disputed whether ADI's jammers had to meet the requirements of the secret annex, because EMW's purchase order only listed 48 jammers and ADI still did not know the secret requirements. Nevertheless, anticipating future orders of jammers, ADI agreed to try to modify the original 48 jammers, but made no specific promises that the jammers could comply with NATO's secret requirements.

Despite the perceived need to modify the jammers, after the proof of concept test, NATO

signed a contract with EMW ordering the 48 jammers from EMW, contingent upon the jammers passing a second test, known as the Verification Test.

After EMW signed the contract with NATO in February 2008, EMW then requested that ADI sign a subcontract agreement. The subcontract agreement's terms would have required ADI to meet NATO's requirements or EMW could have canceled the order.

On March 3, 2008, EMW's independent expert reported to EMW that the MILJAM 350's were able to carry out their intended mission. However, on that same day, the U.S. government denied EMW's application for an export license to NATO. Ultimately, the U.S. government explained that the jammers had to pass an interoperability test, but the U.S. government had not yet designed any such test. Eventually, it was determined that the interoperability testing would cost approximately \$1 million, though the exact amount was not known by the parties at the time.

After the U.S. government denied EMW an export license, the parties were unable to reach agreement on a number of issues. EMW wanted ADI to ensure the jammers performed to NATO specifications, which were somewhat subjective, and for ADI to bear the risk if EMW could not get an export license. ADI refused to take these risks and refused to sign the subcontract agreement. By this time, ISS had hired an expert engineer who informed ADI, ISS and EMW that the jammers were ready for the Verification Test and he saw no "show stoppers."

By mid-April 2008, EMW knew it had two hurdles to overcome to sell the jammers to NATO, 1) the export license and 2) the Verification Test. At this time, EMW informed ADI that it was terminating the still unsigned subcontract agreement and proceeded to order jammers from a foreign supplier. EMW later clarified that it was also purporting to terminate the purchase order as well.

ADI sued EMW for the contract price \$4.089 million. EMW counterclaimed for breach of contract, claiming damages in the amount of \$3.3 million for having to hire another subcontractor to build the jammers for NATO. Wireless Avionics sued ISS in New Jersey.

ISS settled Wireless Avionics' \$1.0 million claim by allowing Wireless Avionics to have 20 of the 48 jammers, which Wireless Avionics took possession of at ISS' New Jersey factory. Wireless Avionics has been unable so far to ship the



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**Type of Action:** Breach of contract for sale of goods

**Injuries Alleged:** Contract price of goods

**Name of Case:** ADI Technologies, Inc., et al v. EMW, Inc

**Court:** Fairfax County Circuit Court

**Case No.:** 2008-6279

**Date:** April 17, 2009

**Tried Before:** Mediation

**Name of Mediator:** Alfred Swersky

**Verdict/Settlement:** Settlement

**Amount:** \$2,100,000

**Plaintiff's Attorneys:** Raighne C. Delaney and David Temeles, Arlington

jammers out of the country. EMW was also entitled to a credit for \$700,000 in advance payments that it made to ADI.

ADI, ISS and EMW settled ADI and ISS' remaining claims by EMW paying \$2.1 million ten days before a jury trial would have taken place in the Fairfax County Circuit Court. The complaint and EMW's counterclaim were dismissed with prejudice. ISS retained possession of the remaining 28 jammers. The value of the remaining 28 jammers is uncertain, as there is presently no market in the United States for them. [09-T-083]



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