

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

**BID PROTEST**

_____	)	
SPACE EXPLORATION	)	
TECHNOLOGIES CORP.	)	Civil Action No. 14-354C
	)	
Plaintiff,	)	Judge: Braden
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
UNITED LAUNCH SERVICES, LLC,	)	
	)	
Defendant-Intervenor.	)	
_____	)	

**MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT**

Pursuant to Rule 15 of the Rules of the United States Court of Federal Claims (“RCFC”), Plaintiff Space Exploration Technologies Corp. (“SpaceX”) respectfully requests leave of the Court to file its Second Amended Complaint in the above-captioned matter.<sup>1</sup> SpaceX’s Second Amended Complaint is necessitated by new information learned from a June 20, 2014 letter from U.S. Senator John McCain to Under Secretary of Defense Frank Kendall. Ex. 1.

<sup>1</sup> Because the Second Amended Complaint describes documents that are subject to this Court’s Protective Order, SpaceX has filed it separately under seal. The additional allegations in the Second Amended Complaint are found in paragraphs 79-89 and 109-115. SpaceX has contacted Defendant and Defendant-Intervenor and was not able to obtain written consent for this motion.

Specifically, Senator McCain states that the Russian RD-180 engines that United Launch Alliance (“ULA”)<sup>2</sup> purchases from NPO Energomash through its Russian middleman, RD Amross, are being sold to ULA and the United States Air Force at highly inflated prices. Senator McCain avers that he has information that ULA, and ultimately the Air Force, are buying the RD-180 engines for a price that is significantly higher than the cost at which RD Amross purchases those same engines from NPO Energomash, “resulting in the U.S. taxpayer essentially giving a Russian company” profits of “perhaps more than 200 percent.” Ex. 1 at 2.

Senator McCain asks the Air Force to affirmatively establish that the prices of these Russian rocket engines are both fair and reasonable. In fact, as explained in the Second Amended Complaint, the Air Force was required by law to make this determination *prior* to awarding the December 2013 sole-source contract to ULA. Likewise, ULA was required to provide with its proposal certified cost and pricing information for itself and all of its suppliers. Based on Senator McCain’s letter, it appears that ULA failed to provide certified cost and pricing data for the RD-180 engines and/or the Air Force failed to rationally assess whether it was paying a fair and reasonable price for those engines.

Had ULA complied with its legal obligation to provide certified cost and pricing data for the RD-180 engines and other rocket component parts, it would have been forced to confront the fact that at least one of its suppliers is fleecing the United States taxpayer. Had the Air Force conducted a rational cost and price analysis as required by law, it would have realized that the sole source pricing charged by ULA included exorbitant profits for ULA’s Russian supplier at the expense of the American public. The Air Force would not have been able to determine that ULA’s prices were fair and reasonable, and the Air Force would have rejected ULA’s proposal

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<sup>2</sup> ULA is the parent company of Defendant-Intervenor United Launch Services, LLC. For ease of reference, SpaceX refers here to both companies as ULA.

and not entered into the December 2013 sole source contract. The Air Force then would have turned to SpaceX, which offered to meet the Air Force's needs while saving *billions* of dollars for the U.S. taxpayer.

RCFC Rule 15 provides that "a party may amend its pleading [more than 21 days after service of the pleading or more than 21 days after a responsive pleading or certain motions are filed] only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." RCFC 15(a)(2). The decision to grant leave to amend rests within the Court's sound discretion. *Centech Group, Inc. v. United States*, 78 Fed. Cl. 658, 659 (2007).

As the Federal Circuit has stated, "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Te-Moak Bands of W. Shoshone Indians of Nevada v. United States*, 948 F.2d 1258, 1260 (Fed. Cir. 1991) (quoting Fed. R. Civ. P. 15(a)) (other citations omitted); *see also Martin v. United States*, 96 Fed. Cl. 627, 632 (2011). "In the absence of any apparent or declared reason—such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962) (quoting Fed. R. Civ. P. 15(a)).

None of the reasons to deny leave apply here. SpaceX first learned of the above facts when it obtained a copy of Senator McCain's letter on June 20, 2014. SpaceX could not possibly have included these allegations in its earlier filed initial Complaint. Moreover, the Government

and ULA have not yet responded to SpaceX's Complaint and have not yet produced an Administrative Record that is remotely complete. Thus, Defendants will not be prejudiced by having to respond to the additional allegations. Indeed, the parties do not yet have a schedule for this matter and any subsequent schedule can take the additional Count IV into account.

For the reasons stated above, SpaceX respectfully requests that the Court grant its Motion for Leave to File its Second Amended Complaint.

Dated: June 25, 2014

Respectfully submitted,

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*Counsel of Record for Plaintiff SpaceX*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Plaintiff's Motion for Leave to File a Second Amended Complaint was served on the parties this 25th day of June, 2014, via the Court's electronic filing system.

/s/ Richard J. Vacura  
Richard J. Vacura

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## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

GABRIELLI A. BAIKIN, STAFF DIRECTOR  
KEITH B. ASHDOWN, MANAGER, STAFF DIRECTOR

June 20, 2014

VIA U.S. MAIL & EMAIL ([jeffrey.j.draeger.mil@mail.mil](mailto:jeffrey.j.draeger.mil@mail.mil))

The Honorable Frank Kendall  
Under Secretary of Defense  
Acquisition, Technology, and Logistics  
3010 Defense Pentagon  
Washington, DC 20301-3010

Dear Under Secretary Kendall:

I write to you in furtherance of my continuing oversight interest in the Air Force's Evolved Expendable Launch Vehicle (EELV) program and concern about that program's reliance on Russian sources of supply for the RD-180 engine and to follow-up on the June 10, 2014, letter I received from Secretary of the Air Force James on that issue.

Today, I inquire about the circumstances under which the Air Force has acquired, and may continue to acquire, the RD-180. Also, given the possibility that the Air Force is paying for these engines at highly inflated prices, I am inquiring whether the actual costs associated with their manufacture, which may be baked into those prices, are fair and reasonable—despite that the Air Force is buying them on a firm fixed-price basis.

I am, in particular, interested in learning more about a company called RD Amross, the company from which United Launch Alliance (ULA) actually buys the RD-180 for use in EELV missions. It appears that RD Amross is a joint venture between P&W Power Generation Inc. and International Space Engines, Inc., a Delaware-registered subsidiary of the engine's Russian manufacturer NPO Energomash.

Very little information is publically available on the actual costs to build the Russian RD-180 engine compared to what ULA pays for them. But, I am aware of claims that the engines have been sold by NPO Energomash to RD Amross at a much lower price than RD Amross charges ULA for them.

Such information is particularly troubling given that, by reputation and recent examination by, among others, the World Bank and the Center for International Private Enterprise, the Russian procurement process is rife with inefficiency and corruption that benefits insiders while boosting retail prices.

Given the foregoing and the opacity of costs associated with the procurement of the RD-180, it is important for the Air Force to establish affirmatively the fairness and reasonableness of

how much it (and therefore the U.S. taxpayer) is paying for the RD-180—despite the fact that it procures the RD-180 under a firm fixed-price contract line item.

As you know, the Senate Armed Services Committee passed, as part of the Fiscal Year 15 National Defense Authorization Act, measures that would (1) prohibit the Department of Defense from entering into a new contract or renewing a current contract for space launch supplies, including rocket engines, if they would be provided by Russian suppliers, and (2) provide \$100 million in funding transfer authority for the development of a domestically produced rocket for the EELV program. However, Congress ultimately needs to know more about circumstances under which the Air Force has acquired, and may continue to acquire, the RD-180 to make related policy decisions on a fully informed basis.

In order to address this important issue, please provide responses to the following questions:

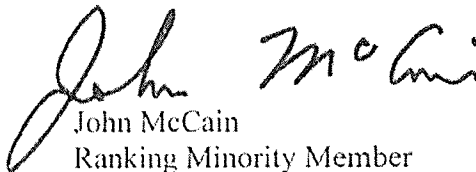
1. Please explain in detail how the RD-180 is procured in support of the EELV program—with references to NPO Energomash and RD Amross as relevant.
2. Please describe to the best of your knowledge the business organizational structure of RD Amross, including identifying all nominal and beneficial owners of that company, as well as the owners (nominal and beneficial) of International Space Engines, Inc.
3. Given that RD Amross does not directly produce the RD-180 engines ultimately used by ULA, what do you understand RD Amross's business purpose to be and what value, if any, does it provide in connection with the manufacture of the RD-180?
4. Please explain the extent to which the Air Force, *i.e.*, the U.S. taxpayer, pays for any service or product supplied by RD Amross—independent of NPO Energomash—in connection with the Air Force's purchase of rocket cores, which includes the RD-180, from ULA?
5. For how much does NPO Energomash sell the RD-180 to RD Amross? For how much does RD Amross subsequently sell the RD-180 to ULA? For how much does ULA sell the RD-180 to the Air Force?
6. On information and belief, ULA—and ultimately the Air Force—buys the RD-180 for a price that is significantly more than how much NPO Energomash sells that same engine to RD Amross, resulting in the U.S. taxpayer essentially giving a Russian company a profit by perhaps more than 200 percent. Is this allegation accurate? Please explain your answer and, if the claim I cite is accurate, tell me if this is (a) a reasonable rate of return and (b) in line with what may be payable under applicable DOD procurement rules and regulations for procurement contracts of this type.



7. Of the cost that ULA pays RD Amross for the RD-180, how much is paid to P&W Power Generation Inc. and NPO Energomash's subsidiary International Space Engines Inc. in their capacities as co-owners of RD Amross? In other words, for whom do the profits (the difference between RD Amross' costs and its sales price to ULA) accrue—P&W Power Generation Inc., International Space Engines, Inc., or others?
8. On June 16, 2014, ULA announced its interest in producing a domestically-produced version the RD-180 or an entirely new launch system. According to its press release, ULA signed contracts with multiple domestic companies to “conduct technical feasibility analysis, develop high fidelity [sic] plans, identify schedule, cost and technical risks, as well as cost estimates to meet aggressive recurring cost targets” for the next generation first stage rocket replacement to support a first launch by 2019. What identified, approved and validated operational requirements, if any, support the development of an entirely new engine for the EELV program?
9. RD Amross CEO Bill Parsons stated in a November 18, 2013, interview with *Space News* that a domestically-produced RD-180 “would definitely increase the price significantly”. What is the Department of Defense's current preliminary estimate of how much it would cost to develop a domestically-produced RD-180 and, separately, an entirely new engine for the EELV program?

Thank you for your attention to this important matter. If you have any questions or concerns, please have your staff contact Jack Thorlin, Counsel to the Minority, Permanent Subcommittee on Investigations, at (202) 224-2224.

Sincerely,

A handwritten signature in black ink that reads "John McCain". The signature is written in a cursive, flowing style.

John McCain  
Ranking Minority Member  
Permanent Subcommittee on Investigations