

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Nomura Enterprise, Inc.) ASBCA No. 50959
)
Under Contract No. DAAA09-95-C-0089)

APPEARANCE FOR THE APPELLANT: Al Weed, Esq.
Milan, IL

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ David Newsome, Jr., JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE ELMORE

Nomura Enterprise, Inc. (NEI or appellant) has appealed the contracting officer's (CO) 21 May 1997 final decision terminating NEI's Contract, No. DAAA09-95-C-0089 (C-0089), for default due to NEI's failure to deliver an acceptable First article (FA).

FINDINGS OF FACT

1. On 5 July 1995, the U.S. Army Armament Munitions and Chemical Command (AMCCOM) awarded NEI a firm fixed-price supply contract, No. DAAA09-95-C-0089, to provide 912 MK 12 MOD 1 (MK 12-1) Steel Pallets including a FA, at a total contract price of \$175,824.48. The contract incorporated by reference the following Federal Acquisition Regulation (FAR) clauses: 52.209-4 FIRST ARTICLE APPROVAL (GOVERNMENT TESTING) - ALTERNATE I (SEP 1989); 52.214-29 ORDER OF PRECEDENCE - SEALED BIDDING (JAN 1986); 52.233-1 DISPUTES (MAR 1994); 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984); 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984). The MK 12-1 pallet, designed to accommodate a 4000-pound load of ordnance items in transit, was successfully tested and approved, in accordance with amended military specification MIL-P-23312C on three prior occasions the last being 9 January 1987. (R4, tabs 1, 58, 62-63)

2. Contract C-0089 at section C, DESCRIPTION/SPECIFICATION/WORK STATEMENT, and section E, INSPECTION AND ACCEPTANCE, stated in pertinent part (R4, tab 1):

C-1 DRAWINGS/SPECIFICATION
52.210-4501 AMCCOM

(MAR 1988)

....

The following drawing(s) and specifications are applicable to this procurement.

Drawings and Specifications in accordance with [e]nclosed Technical Data Package Listing - TDPL 2645217 with revisions in effect as of 05/18/93 (except as follows):

ENGINEERING EXCEPTIONS: THE FOLLOWING ENGINEERING CHANGES APPLY TO THIS PROCUREMENT ACTION(S):

“THE FOLLOWING DRAWINGS, SPECIFICATIONS AND DOCUMENTS ARE APPLICABLE TO THIS PROCUREMENT: AUTOMATED DATA LIST 10001-2645217C, DATED 5-18-93, AND REVISIONS OF DOCUMENTS THEREON [sic]. “IN ADDITION SUPPLEMENTAL QUALITY ASSURANCE PROVISION 402-002 APPLY.”^[1]

....

E-3 FIRST ARTICLE TEST (GOVERNMENT TESTING)
52.209-4511 AMCCOM

(MAY 1994)

a. The first article shall consist of: SEE NOTE 2.8 OF ADL 2645217C which shall be examined and tested in accordance with contract requirements, the item specification(s), the Quality Assurance Provisions (QAPs) and drawings listed in the Technical Data Package.

....

c. The first article shall be representative of items to be manufactured using the same processes and procedures as contract production. . . . All components, subassemblies, and

assemblies in the first article sample shall have been produced by the Contractor (including subcontractors) using the technical data package provided by the Government.

d. Prior to delivery, each of the first article assemblies, subassemblies, and components shall be inspected by the contractor for all contract, drawing, QAP and specification requirements

3. Contract C-0089, drawing No. 2645217, PALLET, MATERIAL HANDLING, MK 12 MOD 1, sheets 1 and 2, instructed NEI to “INTERPRET DRAWINGS IN ACCORDANCE WITH MIL-STD-100.” Drawing sheet 1 referenced ADL (Automated Data List) 2645217 and NOTE 9 stated “PALLET SHALL CONFORM TO THE REQUIREMENTS OF MIL-P-23312.” (R4, tab 75)

4. The Procurement Data Package (PDP), ADL 10001-2645217C, referenced assembly drawing 10001-2645217, revision F, and MIL-P-23312, revision C, as being applicable to MK 12, Mod 1, Material handling pallet (R4, tab 66).

5 Military Specification, MIL-P-23312C, Pallets, Material Handling, Metal (For Ordnance Items) was validated for use by all department and agencies of the Department of Defense in the acquisition of the Mark 3 Mod O, Mark 12 Mod O, and Mark 12 Mod 1 pallets (R4, tab 55).

6. MIL-P-23312C, paragraph 4.2, CLASSIFICATION OF INSPECTION, classified the examination and testing of the pallets as follows (*id*):

(a) First article inspection. First article inspection consists of examinations and tests performed on samples which are representative of the production item after the award of a contract to determine that the production item conforms to the requirements of this specification. (See 3.1, 4.3 and 4.3.1)

(b) Quality conformance inspection. Quality conformance inspection consists of production control tests and examinations performed on individual products or lots to determine conformance of the products or lots with the requirements set forth in this specification (See 4.4 through 4.4.4.3).

7. Set forth in MIL-P-23312C as revised by ADL 10001-2645217C, note 2.8, were the following quality assurance and quality conformance inspection provisions relevant to this appeal (*id.* and R4, tab 66):

4.3 First article inspection. The first article inspection of the pallets shall consist of examinations and tests for all of the requirements of this specification. First article tests shall be accomplished on samples selected as specified in 4.3.1 which are representative of the production of the pallet after the award of the contract to determine that the production meets the requirements of this specification. These tests are detailed in 4.5.1. Acceptance shall be based on no defects in the samples. Failure of the sample to comply with these requirements will result in the rejection of the pallet.

4.3.1 FIRST ARTICLE SAMPLES. THE FIRST ARTICLE SAMPLES WILL CONSIST OF ONE GALVANIZED PALLET, ONE UNGALVANIZED PALLET, THREE BUTT WELD SPECIMENS, THREE CROSSWIRE WELD SPECIMENS COMPRISING OF TWO .2625 DIAMETER WIRES AND THREE CROSSWIRE SPECIMENS COMPRISING OF TWO .3065 DIAMETER WIRES MANUFACTURED BY THE METHODS AND EQUIPMENT PROPOSED FOR THE PRODUCTION OF THE PALLETS. THE SAMPLES SHALL BE SUBMITTED FOR FIRST ARTICLE TESTS TO DETERMINE COMPLIANCE WITH THE REQUIREMENTS OF THE CONTRACT, SPECIFICATIONS AND DRAWINGS. THE FIRST ARTICLE TESTS TO BE PERFORMED ARE INSPECTION, STACKING, REPETITIVE SHOCK (SUPER IMPOSED LOAD), CORNER WISE DROP AND IMPACT TESTING IN ACCORDANCE WITH MIL-STD-1660. FURTHER PRODUCTION OF THE PALLET BY THE SUPPLIER PRIOR TO APPROVAL OF THE FIRST ARTICLE BY THE PROCURING ACTIVITY SHALL BE AT THE SUPPLIER'S RISK. THE FIRST ARTICLE NEED NOT BE REPEATED DURING THE LIFE OF THE CONTRACT UNLESS A CHANGE IS MADE IN WORKMANSHIP, DESIGN, MATERIAL OR METHOD OF PRODUCTION.

.....

4.4.2 Sampling for production control tests.

....

4.4.2.2. Production control samples. Sampling for production control shall consist of one cross wire production control coupon and five butt welds taken at the beginning and end of each shift and whenever the electrodes are changed or dressed, or when any changes are made in the control of the machine. Additional samples may be taken by the supplier during the shift to insure against rejection of production pallets.

4.4.2.2.1 Shear test samples. Five shear test specimens shall be selected at random from multiple welding cross wire coupons containing not less than eight consecutive welds. The coupons shall be of the same material and gage combinations which are to be used in the production of the pallets and shall be welded as required in production. The welding machine settings for these coupons shall be recorded.

4.4.2.2.2 Tensile test samples. Two tensile test specimens shall be selected at random from the butt weld samples prepared of the same material and gage combinations which are to be used in the production of the pallets and shall be welded as required in production. The welding machine settings shall be recorded

8. MIL-P-23312C set forth the following performance requirements and product characteristics relevant to first article (FA) testing (FAT) (R4, tab 55):

3.4 Performance requirements and product characteristics.

The pallets shall meet the following performance requirements and product characteristics:

....

3.4.4 Overload test. When tested as specified in 4.5.1.2 the pallets shall be free from any permanent deformation or weld failures.

3.4.5 Push-pull test. When tested as specified in 4.5.1.3, the pallets shall show no weld failure or damage which would affect usability of pallet, and the skids shall not be damaged other than minor scratching or scoring.

3.4.6 Vibration test. When tested as specified in 4.5.1.4 the pallets shall show no permanent deformation or weld failure.

3.4.7 Edgewise-drop (rotational) test. When tested as specified in 4.5.1.5, the pallets shall show no failures or damage which would affect usability of the pallet.

3.4.8 Cornerwise-drop (rotational) test. When tested as specified in 4.5.1.6, the pallets shall show no weld failures or damage which would affect usability of the pallet.

3.4.9 Impact test. When tested as specified in 4.5.1.7 the pallets shall show no weld failures or damage which would affect usability of pallet.

9. MIL-P-23312C, section 4.5, Test Methods, stated (*id.*):

4.5.1 First article tests.

4.5.1.1 Preparation for testing. All tests shall be performed with the pallet assembled with containers and metal strapping to form a palletized unit load. The containers used shall provide a uniformly distributed load of 4000 pounds covering the entire pallet. The unit load containers may extend beyond the edges of the pallet a distance not exceeding 2 inches.

4.5.1.2 Overload tests. The palletized unit load shall be placed on a level surface and an equally distributed load of 16,000 pounds placed on the unit load. After 2^[2] hours, the pallet shall meet the requirements of 3.4.4.

4.5.1.3 Push-pull test. The palletized unit load shall be pushed and towed a distance of 5 feet parallel to the axis of the pallet runner and 5 feet perpendicular to the axis of the pallet runner. After being subjected to this test, the pallet shall meet the requirements of 3.4.5.

4.5.1.4 Vibration test. The palletized unit load shall be placed on a vibration platform. The motion of the platform shall be such that any point on the platform moves in a vertical linear path with a total excursion of 1 inch. The frequency of the motion shall result in the pallet leaving the platform as determined by withdrawal of a paper sheet from under the runners of the pallet, approximately 250 to 270 revolutions per minute. After vibrating for 2 hours, the pallet shall meet the requirements of 3.4.6.

4.5.1.5 Edgewise-drop (rotational) test. The palletized unit load shall be placed with one end of the pallet supported on a sill nominally 6 inches high. The unsupported end of the pallet shall then be raised to a height of 12 inches and allowed to fall freely to the concrete pavement or similarly unyielding surface. This test shall be applied once to each end of the pallet. After repeating this test on all ends the pallet shall meet the requirements of 3.4.7.

4.5.1.6 Cornerwise-drop (rotational) test. The palletized unit load shall be subjected to four drop tests. One corner of the pallet shall be supported on a block nominally 6 inches in height and a block nominally 12 inches in height shall be placed under the other corner of the same end. The unsupported end of the pallet shall be raised so that the lower corner of that end reaches a height of 18 inches and then allowed to fall freely to the concrete pavement or similarly [sic] unyielding surface. After repeating this test on all four corners the pallet shall meet the requirements of 3.4.8.

4.5.1.7 Impact test. The palletized unit load shall be impacted at a velocity of 10 feet per second against a rugged unyielding surface. This test may be performed by pendulum impact, incline impact, or any applicable method. After impacting the unit load on all four normally vertical faces, the pallet shall meet the requirements of 3.4.9.

10. MIL-STD-1660 (DESIGN CRITERIA FOR AMMUNITION UNIT LOADS) referenced by ADL 10001-2645217C's note 2.8, establishes the standard minimum design and evaluation procedures for unit loads of ammunition. The standard defined a unit load as ammunition items, packaged or unpackaged, combined into a larger assemblage that were

moved from one place to another and easily and safely handled by mechanized equipment, *e.g.* a forklift truck, and stated that a physical test was to be used to verify whether a unit load met all strength and handling requirements. A pallet was defined as a low portable platform of wood, metal or other suitable material used as the base of a unit load to facilitate handling, stowage and transportation of materials as a unit by mechanical equipment. The scope of MIL-STD-1660 was stated to be the establishment of “minimum design criteria and associated tests for ammunition unit loads.” MIL-STD-1660 listed MIL-P-23312 as an applicable standard federal specification for the MK 12-1 pallet. (R4, tab 54 at iii, 1, 4, 11; finding 7 *supra*)

11. MIL-STD-1660, paragraph 5.2, detailing the requirements for satisfactory performance criteria applicable to a unit load as a whole, required that the unit load remain intact and be capable of continued safe handling and tiering; the assembly structure (the pallet, structural or protective members, strapping, etc.) would not fail or permit individual parts of the unit load assembly to become unattached or separated; and the load configuration shall protect each item from damage beyond usefulness. Paragraph 5.2 further stated the criteria listed applied “only to the unit load as a whole unit”; that the ability of the component packages, the internal ammunition items and “the pallet” to withstand the hazards of transportation and storage was to “be determined by a separate evaluation process.” MIL-STD-1660 did not include any performance criteria potentially failing the MK 12 pallet solely on the basis of weld failures. (R4, tab 54 at 11)

12. MIL-STD-1660, SECTION 5.3, TEST PROCEDURES, stated the unit loads would be inspected for damage after being subjected, in the order given, to each of the following tests (R4, tab 54):

5.4.1. Stacking test. The unit load shall be loaded to simulate a stack of identical unit loads, stacked approximately 16 feet high, for a period of 1 hour minimum.

....

5.4.2.1 Repetitive shock test (superimposed load). An alternative test which may be used when specifically required, the repetitive shock test shall be performed in its most severe transportation configurations (*e.g.* if the unit loads may reasonably be expected to be shipped by truck or rail three layers high, they should be tested in a configuration which simulates that condition). In this case the 1/16” feeler gauge shall be used between the top unit load and the one beneath.

....

5.4.3.2 Cornerwise drop (rotational) test. This test shall be conducted by using the procedures of Method 5005, FED -STD-101. The drop test shall be applied once on each bottom corner. The height of drop shall be selected from the following tabulation:

<u>Gross Wt. of Unit Load (Lbs.)</u>	<u>Ht. of Drop</u>
500 or less	24"
over 500 to 4000	18"
4000 and up	12"

5.4.4 Impact test. This test shall be conducted by using either the procedures of Method 5023 (Incline-Impact Test), or Method 5012 (Pendulum-Impact Test) of FED-STD-101. The velocity just prior to impact shall be 7 feet per second, except that Fleet Issue Unit Loads shall be impacted at 10 feet per second. The test shall be performed once on each of the four sides of the unit load. If the incline-impact procedure [sic] is used, an optional timber shall be employed which extends approximately 9" above the surface of the carriage.

13. On 26 February 1996 NEI submitted the first FAs for testing. Initial visual inspection of the FAs, test report number 96013, revealed three minor and two major discrepancies which were subsequently addressed to the satisfaction of the Government. On 20 May 1996³ the same pallets were then subjected to the physical testing conducted by R. E. Plummer, the Government's mechanical engineering technician. Mr. Plummer recorded on the DD FORM 1222, RESULTS OF TEST #96019, the requirements and results of eight different FA tests as follows (R4, tabs 10, 18; tr. 143, 155-173, 233):

Inspection/Test	Requirement	Results	Defect Class	Remarks

<p><u>Overload Test</u> in accordance with ADL 10001-2645217C, and MIL-P-23312C, para 4.5.1.2</p>	<p>The palletized unit load shall be placed on a level surface and an equally distributed load of 16,000 pounds placed on the unit load for 2 hours. The pallet shall be free from any permanent deformation or weld failures.</p>	<p>Conforms</p>		
<p><u>Push-Pull Test</u> in accordance with ADL 10001-2645217C and MIL-P-23312C, para 4.5.1.3</p>	<p>The palletized unit load shall be pushed and towed a distance of 5 feet parallel to the axis of the pallet runners and 5 feet perpendicular to the axis of the pallet runner. The pallet shall show no weld failure or damage which would affect usability of pallet, and the skids shall not be damaged other than minor scratching or scoring.</p>	<p>Conforms</p>		
<p><u>Vibration Test (Compressed Load)</u>^[4] in accordance with ADL 10001-2645217C and MIL-P-23312C, para 4.5.1.4</p>	<p>The palletized unit load shall be placed on a vibration platform with a superimposed load. The motion of the platform shall be such that any point on the platform moves in a vertical linear path with a total excursion of 1 inch. After vibrating for 2 hours, the pallet shall show no permanent deformation or weld failure.</p>	<p>*Does not conform[.] A total of 10 weld failures were found. These failures could not be found until all rough handling testing was completed and the unit load was disassembled.</p>	<p>Major</p>	

<p><u>Edgewise Drop (Rotational) Test</u> in accordance with ADL 10001-2645217C and MIL-P-23312C, para 4.5.1.5</p>	<p>The palletized unit load shall be placed with one end of the pallet supported on a block 6 inches high. The unsupported end of the pallet shall then be raised to a height of 12 inches and allowed to fall freely to unyielding surface. This test was performed on all four edges of the pallet. The pallet shall show no failures or damage which would affect the usability of the pallet.</p>	<p>*</p>		
<p><u>Cornerwise Drop (Rotational) Test</u> in accordance with ADL 10001-2645217C and MIL-P-23312C, para 4.5.1.6</p>	<p>One corner of the unit load shall be placed on a 12-inch block and the adjacent corner on a 6-inch block. The corner opposite the 12-inch block shall then be raised to a height of 18 inches and allowed to fall onto an unyielding surface. All four corners shall be dropped in this manner. The pallet shall show no signs of weld failures, permanent deformation, or damage which would affect usability.</p>	<p>*</p>		

<p><u>Impact Test (Without Timber)</u> in accordance with ADL 10001-2645217C and MIL-P-23312C, para 4.5.1.7</p>	<p>The unit load shall be placed on a[n] impact table and raised to a predetermined height equal to an impact velocity of 10 ft/s. The table shall be released and the load allowed to strike an unyielding surface. All four sides of the pallet were impacted. The pallet shall show no signs of weld failures, permanent deformation, or damage which would affect usability.</p>	<p>*</p>		
<p><u>Shear Test</u> in accordance with ADL 10001-2645217C and MIL-P-23312C, para 4.5.2.1 and Drawing 564200, Sheet 1 of 2, Note 12</p>	<p>The weld specimens shall be loaded to place the welds in shear as specified on Drawing 564200. Weld shear strength shall be 2,580 pounds minimum for 0.3065 diameter wire and 1,890 pounds for 0.2625 diameter wire.</p>	<p>Does not conform[.] For 0.2625 samples: A. 1,636 pounds B. 1,613 pounds C. 1,935 pounds Conforms For 0.3065 samples: A. 3,082 pounds B. 3,728 pounds C. 2,727 pounds</p>	<p>Major</p>	
<p><u>Tensile Test</u> in accordance with ADL 10001-2645217C and MIL-P-23312C, para 4.5.2.2</p>	<p>The weld specimens shall be loaded to place the welds in tension as specified on Drawing 564200. Weld tension strength shall be 3,500 pounds for 0.3065 diameter wire.</p>	<p>Conforms A. 6,500 pounds B. 7,620 pounds C. 5,600 pounds</p>		

14. Mr. Plummer testified that neither prior to nor during FA testing did he see, or have in his possession, ADL 10001-2645217C and he could not explain how or why his report stated the FA testing was performed in accordance with this ADL. Mr. Plummer's testimony on this point can best be described as confusing, illogical and evasive. Mr. Plummer testified he conducted the third, fourth, fifth and sixth FA tests (the vibration, edgewise drop, cornerwise drop, and impact tests) in accordance with drawing 2645217 Rev F and MIL-P-23312C; the vibration test was done with a superimposed load

(two 4000-pound unit loads, one atop of another, on the one pallet being vibrated) after which a unit load was subjected to the following three FA tests prior to disassembling the unit load and inspecting the pallet; that during the inspection ten weld failures, considered major defects, were observed on the pallet; he opined the weld failures occurred during the vibration test although he also testified he was unable to identify the point during the third through sixth FA tests that any of the weld failures occurred; that based on the ten weld failures the third through sixth FA tests were considered failures and the FA was disapproved. (R4, tabs 18, 55, finding 13 *supra*; tr. 151-155, 158-160, 242-51, 287-93)

15. Documentary evidence proffered by the Government established that under earlier contracts the MK 12-1 FA submittals were tested, evaluated, and accepted pursuant to MIL-P-23312C (R4, tabs 62-63; finding 1 *supra*).

16. On 13 June 1996 the procuring contracting officer (PCO) informed NEI that a Corrective Action Plan (CAP) addressing the deficiencies identified in test report 96019 must be submitted. NEI was instructed to (1) identify the failures in both the production process and inspection system which allowed the defects to be produced; (2) define the action being taken to correct the process/system failures to prevent future shipment of defective products; and (3) provide a time schedule for implementing corrective action. NEI was further informed that the Government required a \$4,600 payment to conduct a second FAT. (R4, tab 20)

17. On 25 June 1996 NEI, responding to the Government's FAT results, stated the FA tests were performed in accordance to MIL-P-23312C vice the contract required MIL-STD-1660, as stated in ADL 10001-2645217C; MIL-STD-1660 required only stacking, repetitive shock, conerwise drop and impact FA tests be performed vice the more stringent overload, push-pull, vibration, edgewise drop and conerwise drop tests called out in MIL-P-23312C; and since the pallet was not evaluated after each test it was not possible to determine if the weld failures resulted from a contractually required FAT or the more stringent and nonessential test performed under MIL-P-23312C (R4, tabs 21, 25, 27, 36, and 39).

18. In a 12 July 1996 internal memorandum the Government's Product Quality Manager, Mr. Bernard R. Sundeen, recommended the test requirements be clarified; if additional testing was required, NEI be allowed to witness it; it would have been beneficial if NEI had requested clarification regarding the FA test requirements at the time the solicitation was reviewed; and it is only after problems arise that he receives notice of possible ambiguities in the technical package (R4, tab 22).

19. In his letter of 29 July 1996 the PCO, responding to NEI's 25 June 1996 letter, stated (R4, tab 24):

The above referenced contract requires first article testing in accordance with MIL-P-23312C and MIL-STD-1660. The contract specifies first article testing be conducted in accordance with ADL 10001-2645217C dated May 18, 1993 (Section E-3, p. 15 of 75 of above referenced contract). Drawing 2645217; Pallet, Material Handling MK 12 Mod 1 Assembly, line 9 states “Pallet shall conform to the requirements of MIL-P-23312.” Sheet 2 of 5 of the Scope of Work lists MIL-P-23312 REV C for Pallets Material Handling Metal (for ordinance items); MK 3 Mod 0, MK 12 Mod 0, and MK 12 Mod 1. Sheet 4 of 5 of the Scope of Work states that “The samples shall be submitted for first article test to determine compliance with the requirements of the contract, specifications and drawings”. [sic] MIL-STD-1660 is referenced in this paragraph for the following tests: inspection, stacking, repetitive shock (super-imposed load), cornerwise drop, and impact testing.

The contract and referenced Automated Data List (ADL) indicate that both sets of tests are required. The testing performed by the Government covers the requirements of both MIL-P-23312C and MIL-STD-1660. . . .

20. In its 14 and 26 August 1996 response to the Government’s 29 July 1996 response NEI argued that it did not find the FA test requirements ambiguous; that contract clause E-3 specified that FA tests are to be conducted in accordance with ADL 10001-2645217C; and that ADL 10001-2645217C explicitly stated in paragraph 4.3.1 that FA testing would be performed in accordance with four enumerated MIL-STD 1660 tests. NEI contends that in lieu of the four tests called out in note 2.8 of ADL 10001-2645217C the Government performed the tests called out in section 4.5 of MIL-P-23312C which were greater in number and accordingly more stringent. (Findings 7, 9, 12, *supra*) NEI further argued that although ADL 10001-2645217C does call for submission of weld samples there is no FAT specified; that MIL-P-23312C requires shear and tensile tests only on a production lot basis; that the Government’s QAR, in accordance with paragraph 4.5.2.1 of MIL-P-23312C, pulled weld samples to be sent to Anamet Laboratories, Inc. (Anamet) for testing; and that the weld samples passed. NEI further argued the pallets were manufactured in accordance with a design specification; that the FA tests performed were for a performance specification item; that the Government imposed requirements beyond those explicitly called out in the contract; and that in any event the Government failed to conduct the test in accordance with the contract since the pallet was not inspected after each test. (R4, tabs 25, 27)

21. On 24 September 1996 NEI proposed a new FA schedule of 15 November 1996 which the Government by letter dated 27 September 1996 conditionally accepted (R4, tabs 30, 31).

22. On 30 October 1996 Weapons Station, Earle, NJ (WPNSTA), the respondent's testing facility for the pallets, responding to a request from respondent regarding FA testing and the intent of paragraph 2.8 of ADL 2645217C stated the intent of the ADL change was to provide information concerning the FA samples to be submitted; the sentence concerning the MIL-STD-1660 testing in note 2.8 does appear to be out of place; but since all of the MIL-STD-1660 tests were already included in MIL-P-23312, its presence does not add or take away from the existing tests specified in MIL-P-23312. It was WPNSTA's position that if the contractor believed the one statement in paragraph 2.8 of the ADL was meant to replace all other testing, then a change would also be expected elsewhere in MIL-P-23312, such as 4.5 Test Methods, but no such change took place. (R4, tab 34)

23. After an exchange of letters between AMCCOM and WPNSTA, and AMCCOM and NEI, the parties agreed there would be no need for NEI to submit new weld samples as required in the first submission; the FA pallets would be presented to the QAR on 2 January 1997; the tests would be performed at WPNSTA on 15 January 1997; and NEI would be allowed to witness all tests (R4, tabs 41-42).

24. On 16 January 1997 WPNSTA conducted a "Visual and Dimensional Inspection" and issued Test Report 97004 rejecting NEI's third FA submittal as non-conforming due to weld failure at two wire intersections and spot weld failure at three locations, all classified as major defects. We are unable to ascertain from the evidence if these failures resulted from defective workmanship or from improper handling while being shipped or while in the hands of the Government. (R4, tabs 44, 74)

25. On 29 January 1997 the PCO informed NEI of the failure of its third FA submission and suggested "both parties walk away from this contract on a no cost termination by mutual agreement basis" (R4, tab 45).

26. NEI on 27 February 1997 informed the Government the no cost termination offer was unacceptable; that it was NEI's belief the failures experienced in the "two" sets of FA samples were due to poor design, faulty technical data package (TDP), and Government misinterpretation of testing requirements. NEI suggested the deficiencies experienced in the second (Government's third) submittal resulted from dimensional call outs on the TDP which resulted from undue pressure on the welds caused by unacceptable gaps between the deck and the vertical supports. NEI submitted an Engineering Change Proposal (ECP) correcting the alleged defect and proposed another FA submittal and production schedule. (R4, tab 46)

27. The PCO on 11 March 1997 issued a cure notice informing NEI that due to its failure to perform, *i.e.*, submit an acceptable FA, the Government was considering terminating the contract for default. NEI was informed that pending a final decision it had ten days from the receipt of the notice to present written facts bearing on whether the failure to perform arose from causes beyond its control. (R4, tab 47)

28. On 22 March 1997 NEI, responding to the Government's 11 March 1997 cure notice, stated the pallets were built to a set of design specifications but were tested as if built to a set of performance specifications and the pallets as designed could not meet the performance requirements specified; NEI's contention the pallets could not perform the functions they were designed to perform was supported by the first set of pallets' sustaining greater damage than can be accounted for during performance tests and the second set of pallets' arriving at the test facility with weld failures experienced during shipment; and the Government tested the first set of pallets to a different and more stringent set of FA tests then called out in the contract. NEI contended the number of FA tests performed pursuant to section 4.5 of MIL-P-23312C being greater than the four called for under note 2.8 of ADL 10001-26452175 constituted a constructive contract change; and absent evidence the FA pallets were not built to specifications, the logical conclusion must be that the design is the cause of the failure. Addressing the shear testing failure, it was NEI's position this was not a FA test but a production test. (R4, tabs 48, 49)

29. The Government on 28 April 1997, and by certified letter dated 21 May 1997, notified NEI that contract C-0089 was terminated for default due to NEI's failure to make progress, *i.e.*, failure to make delivery of an acceptable FA. On 26 June 1997 the Government issued unilateral Modification No. P00002 terminating the contract for default. (R4, tabs 1 at 37, 51-53; tr. 31)

30. On 14 August 1997, NEI timely appealed the default termination (Board corres. file).

DECISION⁵

The Government bears the burden of justifying, and will be held to strict accountability, for its decision to terminate a contract for default. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987); *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424 (Ct. Cl. 1969); *Schlesinger v. United States*, 390 F.2d 702, 709 (Ct. Cl. 1968). NEI's termination was based on the Government's determination that NEI failed to deliver an acceptable FA and that the failure did not arise from causes beyond NEI's control or without its fault or negligence (finding 29). NEI contends the

FA testing was done to a more stringent set of criteria than required by the contract and accordingly, the disapproval of the FA was invalid and the termination should be converted to one for the convenience of the Government.

Before we can decide if the termination was valid or invalid it is incumbent upon us to first identify which FA testing procedure, that called out in section 4.5 of MIL-P-23312C or MIL-STD-1660, as listed in paragraph 4.3.1 of MIL-P-23312C as revised by note 2.8, was applicable.

MIL-STD-1660 stated its purpose is to verify that a “unit load” (defined as ammunition items, packaged or unpackaged, combined into a larger assemblage for easy and safe movement by mechanized equipment) meets all strength and handling requirements (findings 10-12). MIL-STD-1660 defined satisfactory performance as the “unit load” remaining intact during testing; and the assembled structure (the pallet, structural or protective members, strapping, etc.) and the individual parts of the unit load remaining attached (*id.*). MIL-STD-1660 stated the criteria listed applied “only to the unit load as a whole unit” and the ability of the individual items making up the unit load (*i.e.*, the internal ammunition items, the pallet, banding, etc.) to withstand the hazards of transportation and storage was to “be determined by a separate evaluation process” (*id.*).

Contract C-0089, section C, Description/Specification/Work Statement, identified ADL 10001-2645217C and revisions of documents listed thereon as applicable (finding 2). ADL 10001-2645217C stated assembly drawing 10001-2645217F, and MIL-P-23312C were applicable to contract C-0089 (finding 4). Assembly drawing 10001-2645217F, sheet 1 at NOTE 9, stated “PALLET SHALL CONFORM TO THE REQUIREMENTS OF MIL-P-23312” (finding 3). MIL-P-23312C, the military specification applicable to the manufacture of MK 12-1 steel pallets, unlike MIL-STD 1660, speaks specifically to the pallet alone and at sections 3.4 and 4.5, delineates FA performance requirements and test methods for the MK 12-1 pallet (findings 5, 8, 9).

At this juncture we note that the Government’s contention that both MIL-STD 1660 and section 4.5 of MIL-P-23312C were applicable to NEI’s contract is at best specious. As discussed above the two referenced authorities called for FA testing to establish dispositions for different end products. The Government has failed to offer proof and we are not aware of any which would have us conclude that a “unit load” FAT was a requirement under NEI’s contract. The criteria for the FAT called out in section 4.5 of MIL-P-23312C were not the same as those called out in MIL-STD 1660 (see discussion below) and the bases for disapproval of the FA were different inasmuch as MIL-STD 1660 did not provide for failing a FA due to weld failures (finding 11).

Based on our interpretation of the purposes for MIL-STD 1660 and MIL-P-23312C we find that the testing criteria applicable for FA testing of NEI’s pallets was section 4.5

of MIL-P-23312. It is also undisputed by the Government that Mr. Plummer conducted his FA tests in compliance with section 4.5 of MIL-P-23312 (findings 13, 14). It follows that we now address whether the testing performed by Mr. Plummer was done in accordance with the criteria set out in section 4.5 of MIL-P-23312.

It is undisputed that FA testing was performed without the unit load being disassembled after each test to ascertain the condition of the pallet and Mr. Plummer testified he could not state when a weld failure occurred except to say it was during or after the vibration testing (finding 14). The best evidence available on this point is a comparison of the tests conducted by Mr. Plummer, as described in test report No. 96019, and the criteria called out in section 4.5 of MIL-P-23312.

At the outset we note that Mr. Plummer's test report inaccurately reported the tests were conducted in accordance with ADL 10001-2645217C and Mr. Plummer was unable to explain this inconsistency (finding 14). As a result of this inconsistency we carefully examined the report to ascertain its credibility.

After performing this examination, we conclude that Mr. Plummer conducted the first two FA tests, the Overload and the Push-Pull tests, in compliance with the testing requirements set out in section 4.5 of MIL-P-23312C (finding 13). The third test conducted by Mr. Plummer, the Vibration Test (Compressed Load), was performed with a "superimposed load", *i.e.*, a load of 8,000 pounds, which was a requirement of MIL-STD-1660 and not a requirement under section 4.5 of MIL-P-23312C, which only called for the vibration test to be performed with a "unit load," *i.e.*, a load of 4,000 pounds (findings 8-9, 12-14). Undeniably, Mr. Plummer used the incorrect criteria for his FA vibration test. The extent of the stress exerted on the FA pallet by this non-contractual superimposed vibration test is unknown. Suffice it to say that common sense dictates that the extra 4,000-pounds would have a negative impact on NEI's FA pallets being tested. By conducting this more stringent vibration test and failing to immediately inspect the FA pallets thereafter, the results of the following three tests, as recorded by Mr. Plummer on the DD-1222, and the conclusion the FA pallets did not conform to the requirements of the specifications, are at best supposition. We have continually held that generalized, conclusive, unsupported opinion testimony and evidence command very little weight when they are little more than self-serving conclusions. *AGH Industries, Inc.*, ASBCA Nos. 27960, 31150, 89-2 BCA ¶ 21,637 at 108,864.

As part of FA testing, the Government conducted two additional tests, a Shear Test and a Tensile Test. FA tests requirements do not include either of these tests. Shear tests and tensile tests are production control and not FA tests and, accordingly, the results of either of these two tests cannot be the basis for rejection of a FA. (Finding 6(b), 7)

The Government's additional argument that the same tests have been performed on prior contracts is not relevant. The evidence supplied by the Government indicates that the prior accepted MK 12 FA samples were tested and evaluated in accordance with MIL-P-23312C, not that they were tested in accordance with MIL-STD-1660 and evaluated in accordance with MIL-P-23312C.

We also find the third FA submittal and disapproval to be immaterial since those items never reached the physical testing stage. Although weld failures were a major defect, we were unable to ascertain from the testimony adduced during the hearing if the weld failures resulted from defective workmanship or from improper handling while being shipped or while in the hands of the Government. (Finding 24)

Based on the discussion above we see no reason to address the remaining arguments and defenses raised by NEI. We find that the FA vibration test performed by Mr. Plummer was not in accordance with the specifications and, accordingly, the Government has not met its burden of proof that the FA weld failures resulted from defectively manufactured items or that the default termination was justified.

NEI requests that in addition to sustaining the appeal with respect to the termination for default, the Board also sustain the appeal as to entitlement with respect to Government delay and breach of contract (app. reply br. at 53). These issues are not before us since the appeal was taken from the contracting officer's decision terminating the contract for default.

The appeal is sustained and the default termination is converted to one for convenience of the Government.

Dated: 15 November 2000

ALLAN F. ELMORE
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

¹ This paragraph was inserted into Clause C-1 by letter dated 21 May 1993 from Commander, Crane Division, Naval Surface Warfare Center to Commander, U.S. Army Armament Research, Development and Engineering Center; Subj: PROCUREMENT DATA PACKAGE (AUTOMATED DATA LIST 10001-2645217C) FOR PALLET, MATERIAL HANDLING, MK 12 MOD 1 FOR FY 94, NSN 81140-00-566-2472. (R4, tab 66)

² The document states “12 hours”; however, the evidence (R4, tab 56 at 5) indicates that the proper amount of time is 2 hours and that the 12 is a typographical error.

³ Government documents refer to three FATs. However, only two FA sets of pallets were provided, the first set being used for both the visual inspection, which the Government calls the first FAT, and subsequently for physical testing, which the Government calls the second FAT (tr. 371; finding 23 *infra*). To avoid confusion we reference the test as they are referred to in the documents.

⁴ Mr. Plummer testified the vibration test (compressed load) was essentially a repetitive shock test (superimposed load) found in MIL-STD-1660 and 8,000 pounds of weight were used during the test (tr. 157-159).

⁵ At the outset we must state the specification is not a paragon of clarity but rather a hodgepodge of revisions and changes resulting in a burdensome, confusing and equivocal set of instructions for the pallets.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 50959, Appeal of Nomura Enterprise, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals