

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Dennis Berlin, d/b/a Spectro Sort and as) ASBCA Nos. 51919, 51932, 52400
Spectro Sort Manufacturing Company)
)
Under Contract No. F04606-93-D-0458)

APPEARANCE FOR THE APPELLANT: Mr. Dennis Berlin

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
LT COL Daniel F. Doogan, USAF
CAPT Sky W. Smith, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

In ASBCA No. 51919, Dennis Berlin appeals a default termination. In ASBCA No. 51932, he appeals a demand for return of unliquidated progress payments. In ASBCA No. 52400, he appeals the denial of claims for performing an inventory and for storage of contract material. At hearing Mr. Berlin agreed that the amount of the unliquidated progress payments was as alleged by the Government, and the parties agreed to try both entitlement and quantum on the inventory and storage cost claims (tr. 23-24, 198). We deny the appeals on the default termination, the demand for return of unliquidated progress payments and the claim for preparing the inventory. We sustain the appeal on the storage claim and find Mr. Berlin entitled to recover \$3,300.

FINDINGS OF FACT

1. On 9 September 1993, the Government awarded the captioned contract to "Spectro Sort," one of several fictitious business names under which Mr. Berlin was then transacting business (R4, tab 1 at 1). See *Dennis Berlin, d/b/a Spectro Sort and as Spectro Sort Manufacturing Company*, ASBCA Nos. 51919 *et al.*, 00-2 BCA ¶ 31,096, *aff'd on motion recons.*, 01-1 BCA ¶ 31,225. This was a requirements contract for power distribution panels (PDPs) with an estimated quantity of 8 first article and 5,976 production units. (R4, tab 1 at 16-21)

2. The contract at award included, among other provisions, the FAR 52.212-13 STOP WORK ORDER (AUG 1989) clause, the FAR 52.216-18 ORDERING (APR 1984) clause, the FAR 52.216-21 REQUIREMENTS (APR 1984) clause, and the FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clause (R4, tab 1 at 27, 33, 35). Prior to

award, the contracting officer suspected a mistake in Mr. Berlin's low price offer, and gave him the opportunity to either withdraw or verify. Mr. Berlin verified his offer (R4, tabs 3, 4).

3. On 30 September 1993, the Government issued Delivery Order (DO) 0001 for 8 first article and 2,402 production units (R4, tab 2A). Effective 2 February 1996, bilateral Modification 2 to DO 0001 added the FAR 52.232-16 PROGRESS PAYMENTS (JUL 1991) ALTERNATE I (AUG 1987) clause to the delivery order and amended the production unit delivery schedule to begin in March 1996 and conclude in March 1998 (R4, tab 2C). By 29 July 1997, more than midway through the Modification 2 delivery schedule, Mr. Berlin had delivered and the Government had accepted only 88 of the 1,521 production PDPs required for delivery by that date (R4, tabs 2C, 2D).

4. On 30 July 1997, Mr. Berlin and two Government representatives, Messrs. Smith and Munch, neither of whom was a warranted contracting officer, orally agreed to revise the DO 0001 delivery schedule, reduce the delivery order quantity, and have the Government purchase Mr. Berlin's "excess" or "surplus" material. The agreement for the Government to purchase the excess material did not include price or any other specific terms. (Tr. 522, 524-27, 534-35)

5. Bilateral Modifications 3 and 4 to DO 0001 ratified with changes the oral agreement to revise the delivery schedule and reduce the production quantity. Modification 3, effective 30 July 1997, ratified the actual delivery dates of the 88 production units delivered to date, and set future delivery dates for 1,192 production units in monthly increments beginning in August 1997 and ending in August 1998 at no change in contract price. (R4 tabs 2D, 2E)

6. Modification 4, effective 13 August 1997, terminated at no-cost 1,192 production units (including 70 of the units that had been rescheduled for delivery under Modification 3). We hereinafter refer to the Modification 3 delivery schedule as amended by the terminations in Modification 4 as the "modified delivery schedule". Modification 4 further provided that: "The contractor unconditionally waives any charges against the Government arising under the terminated portion of the contract or by reason of its termination, including, without limitation, all obligations of the Government to make further payments or to carry out further undertakings under the terminated portion of the contract." (R4, tab 2E)

7. The agreement of Messrs. Berlin, Smith and Munch for the Government to purchase Mr. Berlin's "excess" or "surplus" materials was not ratified in writing by the contracting officer. But she did acknowledge at hearing that she had discussions with Mr. Berlin concerning that agreement. Her understanding was that it applied to "items that he had already had on hand . . . or which companies he had committed to" and, that "an inventory would be submitted to the Government so that we could see what was on it in

order to list what we were willing to purchase.” (tr. 847-49). Mr. Berlin did not submit any inventory of specific material he was proposing to sell with cost data and proposed prices until 21 September 1998 (tr. 849-50; app. supp. R4, tab 208).

8. Mr. Berlin failed to meet the 31 August 1997 delivery date for 30 production units under the modified delivery schedule. Those units were not delivered to and accepted by the Government until 16 September 1997 (app. supp. R4, tab 159). Mr. Berlin also failed to deliver the 88 production units due at the end of September. His next submission consisted of 94 units on 21 October 1997. That lot was rejected for failure to comply with a drawing requirement for a one-inch diameter circle of bare (unpainted) metal around the grounding lug. (R4, tab 89) The lot was reinspected on 24 October 1997 and again rejected. The reinspection showed 12 defects, all but one of which were workmanship defects, and one or more of which appeared on each of the sample units inspected. None of the cited defects involved the drawing discrepancies which Mr. Berlin subsequently alleged were a cause for his failure to meet the modified delivery schedule. (App. supp. R4, tabs 165, 166)

9. Mr. Berlin alleges that he was not delinquent in delivery at the end of the October 1997 because 96 units “were ready to go” at that time (app. main br. at 27-28). This allegation is incorrect. Even if 96 units had been accepted at that time, Mr. Berlin’s total deliveries would have been 86 units short of the 300 required by the end of October under the modified delivery schedule (R4, tabs 2D, 2E).

10. On 17 November 1997, Mr. Berlin delivered and the Government accepted 100 production units (app. supp. R4, tab 43). Mr. Berlin alleges that he delivered 120 units and that the Quality Assurance Representative (QAR) arbitrarily refused to accept 20 units “because he wanted the Air Force to correct its red line drawings” (app. main br. at 29). The DFARS 252.246-7000 MATERIAL INSPECTION AND RECEIVING REPORT (DEC 1991) clause of the contract required Mr. Berlin to submit a DD Form 250 with each delivery of supplies for acceptance by the Government (R4, tab 1 at 36). There is no evidence of a DD Form 250 for 120 units being submitted in November 1997. The QAR testified that only 100 units were submitted for acceptance in that month (tr. 603). The allegation that 120 units were submitted is not proven.

11. Mr. Berlin contends that he had 62 production units ready for inspection and acceptance in December 1997, and that they also were not shipped “because Mr. Davis [the QAR] insisted that the drawings needed to be changed” (R4, tab 44; app main br. at 29). The evidence does not show that Mr. Berlin in fact had 62 production units ready for delivery in December. There is no DD Form 250 or other documentary evidence of a tender by Mr. Berlin of any units for delivery in December. Moreover, the allegation that 62 units were ready for delivery in December is inconsistent with the fact that in March 1998, with no intervening deliveries or acceptances, Mr. Berlin offered only 32 units for inspection and acceptance. *See* Finding 16 below.

12. Mr. Berlin was told in November 1997 that, after the November shipment, approved engineering change proposals (ECPs) would be required for the red-line corrections of dimensional discrepancies on the drawings (app. supp. R4, tab 40 at 2; R4, tab 40B). The ECP process was specified in DOD-STD-480 which was incorporated by reference at paragraph 3.1 of Attachment A to the contract (R4, tab 1 at 60). The Government faxed the ECP forms to Mr. Berlin on 13 November 1997 (app. supp. R4, tab 171). At hearing, Mr. Berlin admitted that he knew about the ECP requirement (“We know we didn’t do it right”) and suggested as his excuse for ignoring the requirement the amount of time it would take to obtain approvals. The Government engineer, however, testified that an ECP correcting the dimensional discrepancies could have been approved in “half a day.” (Tr. 680) To the extent that the lack of approved ECPs was a factor in Mr. Berlin’s failure to submit units for acceptance in December, the lack was due to his own fault in failing to comply with the ECP requirement in the contract.

13. As of 1 December 1997, Mr. Berlin had received progress payments in the total amount of \$277,767 (app. supp. R4, tabs 147, 155, 160, 168). In October and November 1997, the Defense Contract Audit Agency (DCAA) audited Mr. Berlin’s progress payment requests and supporting records. The auditor found that Mr. Berlin did not have an accounting system or related internal controls, and that he could not support a claimed incurred cost of \$264,186 on his progress payment request No. 3 (exs. G-5, B-15). At a meeting on 15 December 1997, the Administrative Contracting Officer told Mr. Berlin that based on the audit and his delinquency in deliveries, he did not qualify for further progress payments (R4, tab 40B). At this time Mr. Berlin had delivered and the Government had accepted only 218 production units of the total 393 units then due under the modified delivery schedule. (R4, tabs 2D, 2E)*

14. Mr. Berlin alleges that at the 15 December 1997 meeting he was also told that the Government would not purchase his excess material as promised on 30 July 1997 (app. main br. at 9). This is incorrect. What Mr. Berlin was told was that he could not sell the material to anyone else without the Government’s consent (tr. 945-47). Under paragraph (d) of the Progress Payments clause of the contract, the Government had title to all property acquired for performance of the contract, regardless of the source of the funds by which acquired, until all progress payments were liquidated.

15. On or about 17 December 1997, Mr. Berlin permanently stopped all production labor on the contract (app. supp. R4, tab 235, “Check Register” at 93-96; tr. 187-88).

16. On 16 March 1998, Mr. Berlin tendered 32 production units for acceptance. The QAR, however, was unable to complete the inspection of these units at that time

* The delivered and accepted production units were: 88 before Modification 3, 30 on 16 September 1997, and 100 on 17 November 1997. See Findings 5, 8 and 10.

because the as-built inspection and test records were not available. Reinspection dates set by the parties for 23 and 27 April 1998 were both canceled by Mr. Berlin. Thereafter, the QAR and Mr. Berlin were unable to find a date when they both would be available. The inspection of the 32 units was never completed. (R4, tab 58; app. supp. R4, tab 194; tr. 603-06)

17. On 23 March 1998, Mr. Berlin was requested to show cause why his contract should not be terminated for default (R4, tab 48). At this time, Mr. Berlin had not made any acceptable deliveries since 17 November 1997, and was delinquent on 464 units under the modified delivery schedule (R4, tabs 2D, 2E). In a reply dated 27 March 1998, Mr. Berlin summarized his excuses for the default in delivery as follows:

Our production line was up to speed and working beautifully from August 1997 on. Unfortunately, the government unequivocally stopped us in December by stopping acceptance of units due to the drawing issue and by stopping progress payments.

(R4, tab 49 at 15)

18. The “drawing issue” was described by Mr. Berlin in his 27 March 1998 letter, and in his post-hearing brief, as drawing deficiencies which “were not form, fit, function or safety issues, but external metal cabinet dimensions” (R4, tab 49 at 4; app. main br. at 22). The only significant drawing deficiency involving the external metal cabinet dimensions was an inconsistency between the external height, width and depth of the PDP assembly (cabinet and support frame) indicated on Drawing 8642307 and the dimensions of its component parts shown on other drawings. This inconsistency was resolved by changing the dimensions on Drawing 8642307. The change was initially made by red line on 30 September 1997, and by an engineering change order on 13 November 1997. (Ex. B-8 at 1, 6, 8; app. supp. R4, tab 256 at 1; tr. 652-54, 679-80)

19. There is no credible evidence that the error in the external cabinet/support frame dimensions of the PDP on Drawing 8642307, or any other drawing deficiency, was responsible for Mr. Berlin’s late delivery of the 30 units scheduled for August 1997, or for his failure to deliver the additional 88 units scheduled for September 1997, or for the rejection of the 94 units tendered for delivery in October 1997, or for the delivery of only 100 production units in November 1997, or for his failure to tender any units in December 1997, January 1998, and February 1998, or for his failure to have the as-built inspection and test records available with the 32 units tendered for delivery in March 1998, or for his failure to make himself available for the completion of the inspection of those units thereafter.

20. On 3 June 1998, the contracting officer issued a stop work order to Mr. Berlin “to allow the Government time to prepare and issue the Default Termination” (R4, tab 61). At this time, Mr. Berlin had not delivered any units since November 1997, and was in default on delivery of 728 of the total 946 production units then due under the modified delivery schedule. *See* Footnote 1 and R4, tabs 2D, 2E. On 23 June 1998, the termination contracting officer (TCO) requested Mr. Berlin to provide an inventory of all material allocable to the contract (R4, tab 63). On 21 September 1998, Mr. Berlin provided an inventory showing an alleged total cost of \$502,035.51 and a proposed price to the Government of the same amount (app. supp. R4, tab 208).

21. By unilateral Modification 5, effective 28 September 1998, DO 0001 was terminated for default, and demand was made for repayment of unliquidated progress payments in the amount of \$222,465.60 (R4, tab 2F). On 9 December 1998, Mr. Berlin appealed the termination and repayment demand to the Board (ASBCA Nos. 51919 and 51932). The amount of the unliquidated progress payments, however, is not disputed (tr. 198).

22. By letter dated 16 October 1998, the Government requested Mr. Berlin to make the contract material available for Government inventory and to provide supporting documentation for his claimed cost/proposed price for that material. The request for the supporting documentation specifically requested Mr. Berlin to:

provide to the Inventory Team, for its files, one complete copy of the receipts, invoices, and/or other documentation that supports the costs shown on the SF 430s. The copy you provide will become part of the Government Property Inventory Report provided to the TCO. You should cross-reference your receipt/invoice documentation to the individual entries on the SF 430s, so it is readily verifiable, and so we can perform an accurate accounting. If there is specific individual property for which you have no procurement documentation, please so state, and identify that property.

(R4, tab 68)

23. On 21-22 October 1998, the Government inventory team verified the physical count of the material. By letter to the Government dated 27 October 1998, Mr. Berlin stated that he “was able to supply” a complete set of all receipts/invoices or other documentation showing the price he had paid for the material, and that the inventory team had told him that they were there to “verify parts only.” (App. supp. R4, tab 211; tr. 822-25) At hearing, Mr. Berlin suggested that “the invoices were laid out” at the inventory for Government inspection (tr. 839). There is no evidence that Mr. Berlin provided the Government inventory team with a copy of all supporting documents

cross-referenced to the inventory for easy verification as requested in the Government's letter of 16 October 1998. *See* Findings 22 above and 26 below.

24. On 7 April 1999, Mr. Berlin by his attorney submitted a request for equitable adjustment in the amount of \$47,880.50 for the cost of conducting the inventory of the material and for storage costs (R4, tab 73). Absent evidence of the actual receipt date, we find a putative date of receipt by the contracting officer of 12 April 1999. The contracting officer treated the request as a claim by issuing a final decision on 9 July 1999. The final decision denied the request as to the performance of the inventory on the ground that maintaining current inventory records was part of Mr. Berlin's obligations under the Progress Payments clause. The final decision allowed the request as to the storage costs to the extent of recognizing an obligation to negotiate a settlement for the "reasonable and verifiable" storage costs incurred after the default termination. (R4, tab 74) Mr. Berlin appealed this decision on 28 September 1999 (ASBCA No. 52400).

25. By letter to Mr. Berlin dated 5 August 1999, the TCO confirmed arrangements for the Government to take possession of the contract material. This letter further stated that the value of the material would be determined at a later date "upon submission of invoices, paid bills and any other documents which will support costs," and that payment for the property would be handled "as part of the termination process." (R4, tab 77) Mr. Berlin took no exception to these provisions. On 13 August 1999, the Government took possession of substantially all of the material which Mr. Berlin offered and removed it to a Government facility. (App. supp. R4, tabs 214B, 215, 216; tr. 737)

26. By letter dated 1 September 1999, the TCO noted that the Government had not received the supporting documentation for the claimed cost/price for the material requested in October 1998, and told Mr. Berlin that he needed this documentation "before any negotiations can take place" (R4, tab 79). Mr. Berlin provided the requested documentation on 15 September 1999 with an amended total cost/proposed price for the material of \$615,509.87 (R4, tab 80).

27. A DCAA audit of Mr. Berlin's cost/price proposals for the material, for performing the inventory and for storing the material was requested by the TCO on 1 October 1999. The audit was not completed and the audit report issued until 6 December 2000. The delay in completing the audit was due to the fact that Mr. Berlin had no accounting system, and was "very slow" in providing accounting data requested by the auditor (ex. G-7 at 2; tr. 788). He also increased the claimed amounts during the audit. On 17 December 1999, he increased the material value claim to \$656,407, the storage claim to \$28,800, and the inventory claim to \$30,057. On 31 August 2000, he increased the material value claim to \$677,350. The audit report dated 6 December 2000 questioned \$25,800 of the claimed storage cost, \$29,130 of the claimed cost of performing the inventory and \$396,439 of the claimed material value. (Ex. G-7 at 4)

28. Mr. Berlin's claim for performing the material inventory is for an alleged 842 man-hours at \$35.70 per hour. Mr. Berlin did not identify to the auditor the persons performing the inventory, nor provide any business records substantiating the claimed hours or pay rate. (Ex. G-7 at 6-7; tr. 787-89) The amount not questioned by the auditor (\$927) was based on a man-hour estimate provided by a Government industrial specialist and a regional wage survey showing an hourly rate (with fringes) of \$19.31 for inventory control clerks. At hearing the industrial specialist testified that it took the Government 64 man-hours to inventory the contract material on a sample basis (tr. 822-26).

29. Mr. Berlin's material storage claim is for 16 months at \$1,800 per month. The contract material was stored by Mr. Berlin for 15 months from the date of the stop work order (3 June 1998) until the material was removed by the Government on 13 August 1999. *See* Findings 20-25. For the first 10 months, the material was stored at Mr. Berlin's production shop where the putative rent for the entire shop was \$1,800 per month. For the last five months it was stored at a horse barn owned by his ex-wife. There is no credible evidence, however, as to what portion of the shop was used for storage of the material, or the rent in fact paid for the shop after 28 January 1998, or the rental agreement and rent in fact paid for storage in the horse barn. (App. supp. R4, tab 235, Check Register at 93-95, "Yolo Land Company"; ex. G-7 at 6; tr. 192, 790-93) The auditor determined from the Government personnel who removed the material that it amounted to approximately 3,500 cubic feet. He further determined from a local commercial storage facility that storage of that amount of material would cost approximately \$200 to \$300 per month during the period in question. (Ex. G-7 at 5; tr. 790-93) The auditor's testimony is credible and un rebutted, and the Government admits liability for storage costs in the amount of \$3,300 (Gov't br. at 41).

30. Following the audit report, neither party appears to have made an offer to complete the purchase/sale of the material. Inasmuch as the parties were preparing for the hearing in the present appeals at that time, we do not ascribe bad faith to either party in these circumstances. Following the hearing in these appeals, Mr. Berlin submitted a certified claim for the value of the materials in the amount of \$871,446.73. The contracting officer responded with a decision finding the reasonable value of the materials to be \$261,101.86. Mr. Berlin appealed. That appeal is pending at this time and is not a part of the present proceedings. *See Spectro Sort*, ASBCA No. 53549 (filed 27 September 2001).

DECISION

A. ASBCA Nos. 51919 and 51932

Mr. Berlin was delinquent in all of the monthly deliveries under the modified delivery schedule which was mutually agreed upon in Modifications 3 and 4. He made only two partial deliveries of acceptable units under that schedule. He delivered 30 acceptable

units in September and 100 units in November 1997. At the end of August 1997 he was 30 units short. At the end of September he was 88 units short. At the end of October he was 182 units short. At the end of November he was 175 units short. In December 1997, he stopped production permanently. His delinquency in delivery increased thereafter by the number of units due in each month until it had reached 728 units when the Government issued its stop work order on 3 June 1998 to prepare for the default termination. *See* Findings 8-11, 13, 15, 20.

Mr. Berlin argues that the modified delivery schedule was not binding because the Government failed to purchase his excess material in accordance with his agreement on 30 July 1997 with Messrs. Smith and Munch. The oral agreement with Messrs. Smith and Munch, neither of whom was a warranted contracting officer, did not specify the price, time or any other term of the purchase. As subsequently acknowledged by the responsible contracting officer, this agreement was in substance an agreement to negotiate a purchase of the material on reasonable terms in good faith. *See* Findings 4, 7 and *Aviation Contractor Employees, Inc. v. United States*, 945 F.2d 1568, 1572 (Fed. Cir. 1991).

There is no credible evidence that the Government failed to negotiate in good faith the terms of a purchase of the material either before or after it terminated the contract for default on 28 September 1998. Mr. Berlin did not submit an inventory with prices of the material he proposed to sell until 21 September 1998, seven days before the termination. *See* Findings 20-21. After the termination, the Government conducted an inventory, took possession of the material, and audited Mr. Berlin's price proposal. The delay in completing the purchase was due to (i) Mr. Berlin's failure to provide for 11 months copies of the supporting documentation cross-referenced to his material inventory as requested by the Government in October 1998, (ii) the time required for the audit due to his lack of an accounting system and delay in providing accounting data to the auditor and (iii) the parties' good faith differences as to the value of the material. *See* Findings 22-23, 25-27, 31. These circumstances do not show, and there is otherwise no credible evidence, that the delay in concluding the purchase was due to a specific intent on the part of the Government to injure Mr. Berlin. The allegation that the Government failed to negotiate the purchase of the excess material in good faith is not proven. *See Kalvar Corporation, Inc. v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977).

Mr. Berlin's post-hearing brief contains numerous allegations and arguments that are either unsupported by credible evidence, or have no demonstrated causal relationship to his default on the modified delivery schedule, or otherwise fail to show that the default was beyond his control and without his fault or negligence. Some of his cited excuses refer to events occurring before he agreed to Modification 3 on 31 July 1997. The parties' mutual agreement to the new delivery schedule eliminated from consideration all causes of delay occurring before that agreement. *Custom Blending & Packaging, Inc.*, ASBCA No. 49819, 00-2 BCA ¶ 31,083 at 153,478. Mr. Berlin argues that he was excusably delayed because a sole source supplier of connectors designated on the drawings "could not always provide

the connectors” (app. main br. at 49). There is no evidence of excusable delay affecting the supplier. The failure of a designated sole source supplier to deliver is not by itself an excusable delay. *Federal Television Corp.*, ASBCA No. 9836, 1964 BCA ¶ 4392 at 21,217-18.

Mr. Berlin also attributes his default to “catastrophic price increases” for component parts caused by the Government’s failure to order the full estimated requirement in the contract schedule, and by the reduction in the quantity of DO 0001 by Modification 4 (app. main br. at 12-17). Those price increases were risks assumed by Mr. Berlin when he entered into the contract and when he agreed to the terms of Modification 4. Paragraphs (a) and (b) of the Requirements clause of the contract stated that: “[t]he quantities of supplies . . . specified in the Schedule are estimates only and are not purchased by this contract,” and that “[d]elivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause.” *See* FAR 52.216-21. In Modification 4, Mr. Berlin expressly waived charges “arising under the terminated portion of the contract, or by reason of its termination.” *See* Finding 6.

In his 27 March 1998 reply to the show cause letter, Mr. Berlin stated that “[o]ur production line was up to speed and working beautifully from August 1977 on,” and that “the government unequivocally stopped us in December by stopping acceptance of units due to the drawing issue and by stopping progress payments.” *See* Finding 17. On the basis of this statement we need to consider only the “drawing issue” and the stopping of progress payments as Mr. Berlin’s excuses for the default. We have found that the “drawing issue” could have been avoided by Mr. Berlin complying with the ECP procedure specified in the contract, and that in any event, it was not in fact a cause of his default in delivery under the modified delivery schedule. The QAR did not reject any units in the first three months for failure to follow the ECP procedure. Mr. Berlin did not present any units for inspection and acceptance in the month of December, and even if he had submitted the 62 units he claims were ready, he would still have been delinquent in the required number. *See* Findings 10-12, 18-19.

With respect to the stoppage of progress payments, this also was not beyond the control or without the fault or negligence of Mr. Berlin. The payments were stopped because he was delinquent in delivery, had no accounting system to properly administer progress payments, and could not support on audit the claimed incurred costs of \$264,186 in his Progress Payment Request No. 3. *See* Finding 13. Under paragraphs (c) and (f) of the Progress Payments clause, these were sufficient reasons for the contracting officer to stop further progress payments. *See* FAR 52.232-16.

The appeal in ASBCA No. 51919 from the termination for default is denied. Since the amount of unliquidated progress payments is not disputed, and the Government is entitled to recover those payments under paragraph (h) of the Progress Payments clause, the appeal in ASBCA No. 51932 is also denied. *See* Finding 21.

ASBCA No. 52400

Mr. Berlin's claim for the alleged costs of performing an inventory of the contract material is without merit. Pursuant to paragraph (d) of the Progress Payments clause of the contract, the Government had title to that material until all contract obligations were completed, including the liquidation of the progress payments. Pursuant to paragraphs (f) and (g) of the Progress Payments clause, Mr. Berlin was required to "maintain an accounting system and controls adequate for the proper administration of this clause," and to "promptly furnish reports . . . and other pertinent information reasonably requested by the Contracting Officer for the administration of this clause." *See* FAR 52.232-16. Maintaining and providing to the Government on request a current list with supporting documentation, by part number, nomenclature, quantity and cost, of the contract material to which the Government had title were within Mr. Berlin's obligations under those provisions of the Progress Payments clause. He is not entitled to additional compensation for providing that list with the supporting documentation as requested by the Government.

On the storage claim, the Government admits that Mr. Berlin is entitled to recover \$3,300 for storage of the contract material from the time the stop work order was issued until the material was removed by the Government. Mr. Berlin has failed to prove that he incurred reasonable storage costs in excess of that amount. *See* Finding 29.

The appeal in ASBCA No. 52400 is sustained in the amount of \$3,300. That amount will be set off against the unliquidated progress payments owed by Mr. Berlin to the Government. No interest is due. The appeal is in all other respects denied.

Dated: 7 December 2001

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

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