

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Beta Engineering, Inc.) ASBCA Nos. 53570, 53571
)
Under Contract Nos. SPO560-00-C-F017)
SPO560-01-C-F039)

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OPINION BY ADMINISTRATIVE JUDGE TING
UNDER RULE 12.3

Beta Engineering, Inc. (Beta Engineering) had two contracts with Defense Supply Center Philadelphia (DSCP) to supply lock-release levers for aircraft machine guns. Both contracts required delivery and approval of first article test samples (FATS). DSCP terminated both contracts for default when Beta Engineering did not deliver the FATS. These appeals followed. Appellant has elected to proceed pursuant to Board Rule 12.3.

FINDINGS OF FACT

1. On 6 April 2000, DSCP issued a Request for Quotations (RFQ) for a primary quantity of 1,000 and a first alternate quantity of 2,000 lock-release levers. The RFQ required delivery within 210 days after Date of Order, and required delivery of one lot for first article tests within 60 calendar days from the date of contract. (R4 (53570), tab 5)

2. The lock-release lever is also known as the belt-feed lever. It is a part of the ammunition feeding mechanism that fits into the cartridge of the M-2 .50-caliber aircraft machine gun (tr. 55). It is a “complex” part because it has “radiuses [sic] and angles and various other geometrical configurations” (tr. 487, 500).

3. By letter dated 11 May 2000, Beta Engineering, through its Vice President, Steve Austin, submitted the following quote:

Beta Engineering quotes \$79.74 ea. qty of 1013¹] with a delivery of 220 days. This price includes First Article Testing.

(R4 (53570), tab 6)

4. DSCP subsequently issued Purchase Order No. SPO560-00-C-F017 (the F017 contract) on a DD Form 1155, and Steve Austin accepted the order on 20 July 2000. The Procuring Contracting Officer, Paul F. Forline (PCO Forline), signed the contract on 1 August 2000. It required delivery of the production quantity in “220 DAYS ADO [After Date of Order].” Page two of the contract contained the note: “URGENT PLEASE SHIP ASAP.” CLIN 0001 required 500 units to be shipped to New Cumberland, Pennsylvania; CLIN 0002 required 500 units to be shipped to Stockton, California. The contract included a third item -- Item No. 9906 -- which required Beta Engineering to provide FATS, not separately priced. (R4 (53570), tabs 5, 9)

5. The F017 contract contains, as Clause I080, FAR 52.209-4 FIRST ARTICLE APPROVAL-GOVERNMENT TESTING (SEP 1989) ALTERNATE I (JAN 1997). This clause refers to “QAP 1A0001,” and required delivery of one lot of FATS within 60 calendar days from the date of the contract. (R4 (53570), tab 9 at 8) FAR 52.209-4(d) provides:

If the Contractor fails to deliver any first article on time, or the Contracting Officer disapproves any first article, the Contractor shall be deemed to have failed to make delivery within the meaning of the Default clause of this contract.

Since the F017 contract is dated 1 August 2000, we find that Beta Engineering was required to deliver the FATS by no later than 30 September 2000, and the production quantity by no later than 9 March 2001 (tr. 222-23).

6. The F017 contract incorporated by reference FAR 52.249-8² DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984), which provides, in part:

(a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to --

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

(2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

7. Steve Austin overlooked the 60-day first article submission requirement when he submitted his quote. What he intended to quote was submission of the FATS in 220 days, with delivery of the production quantity 90 days after approval of the FATS. When he noticed that the FATS had to be submitted in 60 days, he instructed his secretary to returned the signed contract nonetheless. His intention was to request a time extension for submission of the FATS. (Tr. 465, 476, 481)

8. QAP stands for "Quality Assurance Provision." There are two kinds of QAP. A specific QAP applies to a specific item or stock number. A general QAP applies to no specific item and can be used in contracts generally. (Tr. 162) QAP-1A0001, dated 7 December 1999, was attached to the F017 contract in full text. It is a specific QAP because it applies to NSN 5340-00-556-4278, LEVER LOCK-RELEASE. Paragraph 1 states, "[t]his quality Assurance Provision covers the requirements for First Article Testing of this Lever Lock-Release manufactured to Springfield Armory (19205) drawing 5564278." (R4 (53570), tab 9 at 11)

9. QAP-1A0001 provides, in part, as follows:

2. First Article Requirements:

....

b. DSCP-PCO *authorization* to allow the contractor to *proceed* to the production phase of the contract *is contingent upon submission, inspection and approval* of First Article Test samples.

c. The number of items to be submitted for First Article Testing is five (5) each.

d. *Prior to the submission of First Article Test Samples, the contractor shall perform a preliminary inspection* to assure conformance to all procurement requirements. This inspection shall be performed in the presence of the cognizant DCMC-QAR.

e. First Article Testing will be conducted at a Government Designated Test Laboratory (GDTL). The QAR shall request shipping instructions for the First Article Test samples from DSCP-ILEB, POC:

f. First Article Testing will consist of dimensional inspection for all characteristics coded as major or critical as cited in QAP-EQ002. The presence of one or more defects is sufficient cause for rejection

3. Upon completion of First Article Testing, the Quality Assurance Specialist will evaluate and recommend approval/disapproval. The presence of any nonconformance to the procurement requirements shall be sufficient cause for disapproval of the First Article Test. The DSCP PCO will notify the contractor of the final approval/disapproval decision.

4. Projected lead time for First Article Test and Evaluation:

ACTION	ACTION ACTIVITY	CALENDAR DAYS
Testing	GDTL	30 Days
Evaluation	DSCP-IA	15 Days
Notification	DSCP-IA	15 Days

5. The First Article Test requirement may be waived when supplies identical or similar to those called for have been previously delivered by the offeror and accepted by the Government. If requesting a waiver of the First Article Test on that basis, the contractor must provide specific contract numbers to substantiate the request.

(Emphasis added) (R4 (53570), tab 9 at 11-12) Since performance of preliminary inspection is required prior to submission of FATS (§ 2d), and since the time for testing, evaluation of the FATS and notification of the FATS test results does not begin to run until

submission of the FATS (§ 4), submission for preliminary inspection does not constitute submission or delivery of the FATS under the contract.

10. The F017 contract listed, on page 4, Drawing No. 19205 5564278 REV K as among the “CRITICAL APPLICATION ITEM[S].” This drawing applied to Springfield Armory Part No. 5564278, Lever, Belt Feed. Note 3 of the drawing sets out the heat treat requirement, and Note 4, the final protective finish requirement. The material from which the part is to be manufactured is specified in the drawing as “STEEL, ASTM A322, A331; 4150” or “4150 steel.” (Ex. A-3)

11. Also listed as a “CRITICAL APPLICATION ITEM” is 19200 QAP-D-5564278 REV C, DTD 28 DEC 79. This supplementary QAP, or SQAP, defines in Part II, “INSPECTION PROVISIONS,” major and minor characteristics. Among the major characteristics are 101. Contour profile; 102. Width of bolt cam end; 103. Location of ends; 104. Hub thickness; and 105. Hardness. (R4 (53570), tab 3) One of the general QAPs incorporated into the F017 contract was QAP-EQ002 of 20 March 1998 (R4 (53570), tab 9 at 3) This QAP applies “only to the extent that it is not inconsistent with any other specification requirement of this order/contract.” Section 3B of QAP EQ002 provides:

When the item awarded is described by a drawing which was provided by the government . . . the contractor is responsible for compliance with all technical requirements. Unless otherwise specified, characteristics shall be assigned in accordance with section 4b below.

Section 4, “QUALITY ASSURANCE PROVISIONS” of QAP-EQ002 defines what constitutes a critical, major and minor characteristic for purpose of sampling for quality conformance. For example, “Diametrical and linear dimensions having a total tolerance greater than 0.001 inch (0.025 MM) up to and including 0.005 inch (0.1270 MM)” and “Geometric Tolerance having a tolerance greater than 0.002 inch (0.051 MM) and equal to or less than 0.008 inch (0.2032 MM)” are considered major characteristics. (SR4, tab 40)

12. The belt-feed lever can be made out of (1) bar stock or (2) forging. Beta Engineering chose to make the FATS out of forging which would eliminate “[h]ogging out” or the removal of excessive amount of material, and which would eliminate difficult cutting. In forging, a mold is made. Steel is heated to an appropriate temperature and pounded into the mold. (Tr. 490-92) After forging, the parts have to go through a coining, a clean-up, and an annealing process (tr. 496-97). The forged parts are then sent to a machine shop. After machining, the parts have to go through a heat treating and a phosphate (anti-corrosion) process, and finally, the application of antigalling³ compound. This last step was the only process done at Beta Engineering. (Tr. 498-99, 502)

13. Steve Austin testified that the production of the FATS, including the submission of a first article report incorporating the results of the preliminary inspection and the actual first article test at the laboratory would require all of 220 days (tr. 231, 471, 474). By letter dated 3 August 2000, two days after the date of the F017 contract, Beta Engineering requested a time extension:

The contract requires a First Article Test Report. This report will require the full 220 days to be delivered. From the date of approval to shipment of parts will require 90 additional days. Currently, the contract is listed with a due date of 1/21/01.[⁴]

There was no date listed for a delivery of the First Article Test Report on the contract.[⁵]

(R4 (53570), tab 11)

14. On 14 August 2000, PCO Forline issued Modification No. P00001, extending the delivery date of CLIN 0001 and CLIN 0002 from 9 March 2001 to 30 April 2001. The modification referenced “LETTER DATED AUG 3, 2000 FROM STEVE AUSTIN.” The second page of the modification provided that “DELIVERY (INCLUDING F/A TEST) IS EXTENDED TO BE 04-30-01.” (R4 (53570), tab 12)

15. Because the modification did not mention the third item of the F017 contract – Item No. 9906 concerning the FATS – the Government contends that Modification No. P00001 extended the delivery date of the production quantity only, by 52 days (from 9 March to 30 April 2001). Since the FATS must first be submitted, inspected and approved before Beta Engineering was authorized to proceed to the production phase of the contract (*see* finding 9, QAP-1A0001, ¶ 2b), the Government contends that submission of the FATS and delivery of the production quantity could not fall on the same day (tr. 227-28, 289). Beta Engineering counters that Modification No. P00001 did reference Steve Austin’s 3 August 2000 letter wherein he specifically mentioned that he would require “the full 220 days” to deliver the First Article Test Report, and that “[from] the date of approval to shipment of parts will require 90 additional days.” (R4, tab 11). Since Beta Engineering did not sign Modification No. P00001, we find that it is a unilateral modification wherein PCO Forline unilaterally established 30 April 2001 as the production quantity delivery date. The modification is unclear, however, as to what specific date PCO Forline extended the FATS submission date, if he extended that date at all.

The F039 Contract

16. In February 2001, DSCP decided to issue a second purchase order for belt-feed levers to reduce the increasing back-orders. PCO Cassius Osborne (PCO Osborne) was told that Beta Engineering already had a contract with DSCP. On 14 February 2001, PCO Osborne obtained a verbal quotation of \$99,634.50 from Steve Austin to deliver 1,050 belt-feed levers in 120 days. The price included the submission of FATS. (R4 (53571), tab 5) The Government subsequently sent Purchase Order No. SPO560-01-C-F039 (the F039 contract) to Beta Engineering, and it accepted the contract by returning a signature page (DISC Form 1815, Sep 93), signed by Steve Austin on 15 February 2001. PCO Osborne signed the contract on 20 February 2001, thus establishing that date as the effective date of the F039 contract. (R4 (53571), tab 8; tr. 238)

17. CLIN 0001 of the F039 contract required 550 belt-feed levers to be delivered to New Cumberland, Pennsylvania, and CLIN 0002 required 500 belt-feed levers to be delivered to Stockton, California. Block 10 of the contract (DD Form 1155) required delivery to FOB point “120 DAYS ADO.” (R4 (53571), tab 4) One-hundred-and-twenty days after date of order fell on 20 June 2001. This delivery date was negotiated between Steve Austin and PCO Osborne (tr. 241). The F039 contract incorporated the same QAPs and drawing as the F017 contract (R4 (53571), tab 4 at 2-3). It also included as Clause I080, FAR 52.209-4 FIRST ARTICLE APPROVAL-GOVERNMENT TESTING (SEP 1989) ALTERNATE I (JAN 1997), which required Beta Engineering to deliver five FATS to a GDTL within 75 days from the date of the contract (R4 (53571), tab 10 at 7). Since 20 February 2001 was the effective date of the F039 contract, we find the FATS under that contract had to be submitted by 6 May 2001.

18. PCO Osborne did not waive the first article requirement for the F039 contract because Beta Engineering had not, as of that time, passed the first article tests under the F017 contract. It was PCO Osborne’s intention to waive the first article requirement if Beta Engineering passed the first article tests under the F017 contract. (Tr. 243-44) After the parties entered into the F039 contract, PCO Forline transferred the F017 contract to PCO Osborne (tr. 239).

Forging Defect and Material Non-Conformance

19. After the parties entered into the F039 contract, PCO Osborne became DSCP’s point-man on both the F017 and the F039 contracts. As DSCP’s point-man, PCO Osborne began a dialogue with Steve Austin about when Beta Engineering was going to present the FATS for the F017 contract. PCO Osborne testified that Steve Austin kept promising that the FATS were “going to be available in three weeks, four weeks, two weeks, one week, and on and on from February, . . . up until when they actually presented the first article on May 18 or 17 of 2001” (tr. 245-46). With respect to the F039 contract, we find the parties mutually agreed to suspend the 6 May 2001 FATS submission date until resolution of the

F017 FATS. In the meantime, the belt-feed levers had become the number one back-order item in DSCP's Commodity Business Unit (tr. 247).

20. Beta Engineering had checked the mold before it authorized its forging house – Doncasters, Inc., Storms Forge Division (Storms Forge) – to produce the FATS (tr. 515). In the morning of 6 April 2001, Beta Engineering was notified by its machine shop that it would bring in the FATS. Because he did not anticipate that heat treating and the application of phosphate and antigalling compound would take much time, Steve Austin notified the local cognizant DCMC QAR, Seth E. Smith (QAR Smith) that he was prepared to present the FATS on 12 April 2001. (Ex. G-1; tr. 512)

21. When QAR Smith went out to Beta Engineering in Arlington, Texas, on 12 April 2001, he was told there was a problem with the forging of the FATS, and Beta Engineering was not ready for preliminary inspection (tr. 62). QAR Smith notified the DSCP item manager by FAX on 12 April 2001 that the first article was not presented because there was a problem with the forging (R4 (53570), tab 15; tr. 62). After receiving the same FAX, PCO Osborne asked QAR Smith to go back to Beta Engineering to see whether the FATS should be rejected outright or whether the contractor could proceed with preliminary inspection (tr. 63, 249).

22. QAR Smith went back to Beta Engineering with a DCMC Quality Engineer, James L. Sass on 25 April 2001 (tr. 63). QAR Smith described the forging defects as “some material missing around the center portion of the item” (tr. 67). Sass described what he saw as a “nick” or “void” on one exterior surface of the FATS (tr. 23). Sass noticed, however, that the material out of which the FATS was made did not appear to be 4150 steel as required by the contract drawing (tr. 26). Although the purchase order Beta Engineering issued indicated that it ordered 4150 steel (tr. 38, 48, 66, 517), Storms Forge's material certification,⁶ dated 1 February 2001, showed 4140 steel was used (R4 (53570), tab 44; tr. 48, 65). Storms Forge's forging drawing also showed 4140 steel was used (tr. 49, 516).

23. QAR Smith advised PCO Osborne in a memorandum faxed on 26 April 2001:

The missing material from the raw forging does not appear to present a problem based upon information available.

....

It was pointed out by our engineer that the material specified in the drawing was different than the material supplied by Storms Forgings [sic].

....

A preliminary inspection can be performed, the discrepancies documented, and the samples sent to the laboratory for final evaluation.

(R4 (53570), tab 16; tr. 68) QAR Smith also forwarded a 26 April 2001 memorandum from Sass. This memorandum opined that “the failure to ‘clean up’ problem was caused by either a mislocation of the forging die(s); or, simply not enough material available to be forged.” The memorandum addressed the unauthorized substitution of 4140 steel for the specified 4150 steel. Sass indicated that while the 4140 material “probably will work,” it was “measurably less capable in physical properties.” He suggested that his findings be included in the first article inspection report for DSCP’s review and resolution. Since he did not believe that the discrepancies found would adversely affect the life-cycle of the part, Sass recommended that DSCP’s decision be based on the urgency of need with “significant monetary consideration” from Beta Engineering. (R4 (53570), tab 18; tr. 30-32) We find using the 4140 steel in a FATS would not necessarily require disapproval of the first article since Beta Engineering could easily switch to either 4150 or 4340 steel for the production quantity. PCO Osborne testified that sometime after 26 April 2001, Steve Austin told him that Beta Engineering was switching back to 4150 steel (tr. 301-02). Steve Austin explained at the hearing that Storms Forge advised him that it probably had enough 4150 steel available to produce another lot of FATS (tr. 519).

24. Beta Engineering did not deliver the FATS in 60 days or by 30 September 2000. The evidence does not indicate that PCO Osborne considered 30 September 2000 as the deadline for submission of the FATS under the F017 contract. Throughout his many conversations with Steve Austin after he took over the contract, PCO Osborne never told Austin that Beta Engineering was delinquent in its submission of the FATS under the F017 contract (tr. 293). We find both parties considered 30 April 2001 to be the deadline for submission of the FATS under that contract.

25. Based on the information it received, DSCP contacted its engineering support activity (ESA) to see if the 4140 steel could be used instead of the 4150 steel (tr. 303). DSCP’s ESA did not approve the 4140 steel. Because it understood the 4150 steel was in short supply domestically, the ESA approved 4340 steel as an alternate to the 4150 steel. (Tr. 252-53) PCO Osborne called Steve Austin on or about 12 May 2001 and advised that the 4340 steel could be used as an alternate (tr. 581). On 17 May 2001, PCO Osborne faxed to Beta Engineering changes to Drawing No. 5564278. The material block of the drawing was revised to include the 4340 steel. (Ex. G-3; tr. 402) Steve Austin testified, “immediately upon receiving notification, [he] contacted the forging house to obtain that material [4340 steel] and move forward” (tr. 580).

26. Despite Beta Engineering's failure to present its FATS for preliminary inspection leading to submission of the FATS to the GDTL as of 30 April 2001, PCO Osborne did not take steps to terminate for default the F017 contract. By authorizing Beta Engineering to use 4340 steel, and by allowing Beta Engineering to proceed to preliminary inspection, we find that DSCP had disestablished 30 April 2001 as the deadline for submission of FATS.

Preliminary Inspection Under the F017 Contract

27. A preliminary inspection is performed at the contractor's facility before the FATS are sent to the GDTL for first article testing (tr. 51, 158-59). The purpose of preliminary inspection is for the contractor to demonstrate that it is capable of producing an item conforming to "all procurement requirements" (*see* finding 9, QAP-1A0001, ¶ 2d; tr. 51). Since every dimension specified in the contract drawing was a contract requirement, all such dimensions would be checked at the preliminary inspection (tr. 52, 54). For contract requirements that the QAR has no ability to verify, such as the chemical makeup of the steel, the QAR relies on material certifications (tr. 107).

28. Since the contractor has to demonstrate conformance to all procurement requirements, preliminary inspection is more detailed than first article testing. During first article testing, the GDTL would not check every detail. With respect to dimensions, it would only check those characteristics "coded as major or critical" as defined in QAP-EQ002. The GDTL, however, has the capability to verify the material content of a part. (Tr. 54, 158-59; *see* finding 9, QAP 1A-0001, ¶ 2f) The laboratory would send the results of its testing to the buying activity QAR. Whether to approve or disapprove a first article depends solely on the buying activity, acting through the PCO. (Tr. 39-40, 158-59).

29. To forward the FATS to the GDTL for first article testing, the cognizant DCMC QAR has to sign the contractor's inspection report upon completion of preliminary inspection (tr. 69). In addition, the QAR signs a DD Form 250, entitled "Material Inspection and Receiving Report." On this form, the QAR could accept the items tendered as conforming to the contract, or he could note any exceptions. (*See* SR4, tab 49; tr. 95) Without QAR Smith's signature on Beta Engineering's preliminary inspection report and the DD Form 250, Beta Engineering would not be authorized to send its FATS to the GDTL for first article testing (tr. 69).

30. QAR Smith understood his responsibility was "to make an appointment with the contractor when he's ready to present his first article and witness the preliminary inspection" (tr. 57). He testified there could be instances where he would not authorize the FATS to be sent forward to the laboratory. These instances include the lack of a material certification, failure to complete preliminary inspection, or "some non-conformances that could possibly affect the performance of the item." (Tr. 60, 159) FATS could be sent to

the laboratory if “it’s just a minor flaw” (tr. 161). We find that the QAR could note any deficiencies whatsoever, including an incomplete preliminary inspection, on the DD Form 250. But the Government has not identified any provision of the contracts empowering the QAR to refuse to forward the FATS to the GDTL by refusing to sign the DD Form 250.

31. Beta Engineering’s Quality Manager, Rey Espinosa performed a dry-run inspection on 7 May 2001. The inspection report shows that he measured 98 dimensions using various inspection methods. As a result of this inspection, Espinosa concluded that the FATS were ready for his preliminary inspection to be witnessed by the QAR. (Tr. 520-23; SR4, tab 48)

32. On 16 May 2001, after he received a call from Beta Engineering, QAR Smith went out to witness Beta Engineering’s preliminary inspection. He arrived at 1 p.m. (Tr. 73) Preliminary inspection took place in Beta Engineering’s inspection room. Beta Engineering was represented by Espinosa and Steve Austin. While Espinosa was there the entire time, Steve Austin was there for “about 30 minutes.” (Tr. 74)

33. The FATS Beta Engineering presented were made out of 4140 steel. After Storms Forge told Steve Austin that it had enough 4150 steel to produce another lot of FATS, it called back several days later and said that it could not get them to Beta Engineering “in a timely manner.” (Tr. 578-79) Beta Engineering presented five samples for preliminary inspection, marked F/A # 1 through 5. Some of the samples presented had “machining and tooling marks” on them. (Tr. 92-93) We find the five samples presented for preliminary inspection were the same ones QAR Smith and Sass saw on 25 April 2001.

34. For the purpose of recording the results of the preliminary inspection, Beta Engineering used an identical inspection form it had used in recording the results of its 7 May 2001 dry-run. In addition to other pertinent information (*e.g.*, material, plating, marking, etc.), the form has four columns of data to be filled in by Beta Engineering: (1) SPECIFIED DIMENSION; (2) TOL [tolerance]; (3) INSP. METHOD; and (4) ACTUAL. The form shows Beta Engineering pre-selected 103 dimensions to be measured during preliminary inspection. Each of the dimensions and its tolerance (columns (1) and (2)) was derived from the contract drawing. In column (3), Beta Engineering designated what it considered the most appropriate inspection method (*e.g.*, CMM reflex, radius gauge, pin gauge, protractor, calipers, etc.) to be used for measurement. Each dimension to be measured was numbered by Beta Engineering, and columns (1), (2), and (3) were filled in before preliminary inspection began. Column (4), “ACTUAL,” would be filled in by Beta Engineering, one by one, during preliminary inspection as each measurement was taken. (R4 (53570), tab 22; tr. 75-77)

35. QAR Smith had no role in taking any measurements. Nor did he have any role in recording the actual measurements. After a measurement was taken, QAR Smith would

place his stamp against the dimension being measured if it came within the tolerance specified. No stamp would be applied if a measurement did not come within tolerance. (Tr. 77-78)

36. What measuring device to use depends on the nature of measurement to be taken (tr. 86). A coordinating measuring machine (CMM) is a computerized machine. It consists of a calibrated flat surface, and measurement is computed when the stylus touches the surfaces to be measured (tr. 85, 87, 534-35). A CMM can measure to five decimals and is, therefore, the most accurate (tr. 187, 599). Not all dimensions can be measured by a CMM, however (tr. 86). Measurement can also be taken by calipers, which is a ruler with a fixed jaw on one end and a movable jaw on the other end, and measurement is taken by reading the distance between the jaws (tr. 85). Calipers can measure to four decimal places (tr. 624). A radius gauge is a calibrated template with a known radius that is used to check inner or outer radius (tr. 536). A pin gauge is used to check the size of a hole (tr. 85, 538). A protractor is used to measure angles (tr. 537).

37. At the 16 May 2001 preliminary inspection, measurements were taken by Espinosa. Where Espinosa could not get a measurement, he asked Steve Austin for help. Steve Austin was able to come up with a different measurement using a CMM because he “set the part up different.” (Tr. 82-83) Preliminary inspection on 16 May 2001 lasted for about three hours. QAR Smith left around 4:00 p.m. (Tr. 74)

38. Preliminary inspection resumed the next day, 17 May 2001 (tr. 87). What happened on that day is in sharp dispute. QAR Smith testified that while Espinosa was in the inspection room the entire day, Steve Austin only came in “a time or two” for “about an hour” (tr. 88-89). Steve Austin testified that he was at the inspection the entire time because Espinosa had complained that QAR Smith was “requiring CMM be utilized for all dimensions” because “[i]t’s most accurate” (tr. 540). QAR Smith testified that Espinosa entered all of the dimensional readings (tr. 90), and he did not recall any disagreement about Beta Engineering’s inspection methods or measurements. According to QAR Smith, if a measurement was out of tolerance, he simply did not stamp off that measurement and went on to the next measurement (tr. 89-90). With regard to the measurements Espinosa was recording, QAR Smith testified:

A. Well, they took the measurements and they recorded them; if they were within the limits, I bought them off.

(tr. 166). With regard to how Steve Austin was taking measurements, QAR Smith testified:

A. He was taking the measurements and he can take them any way he wants to as long as he can demonstrate it’s a true accurate reading. I don’t dispute the way they’re taken.

(Tr. 166)

39. Steve Austin testified that he and QAR Smith had a disagreement the entire day on whether to use CMM to take geometrical (as opposed to linear) measurements (tr. 542). He testified that he “might have been a little excited,” and he was “disputing every single dimension we were doing.” Steve Austin instructed Espinosa not to document some of the measurements in “hard ink,” but in pencil “until I could find somebody or get somebody there to accurately perform the first article as we wanted to perform it.” (Tr. 542-43) QAR Smith denied that he ever told Espinosa or Steve Austin to use the CMM on any measurements (tr. 168, 189).

40. The parties blamed each other for terminating the preliminary inspection. QAR Smith testified that, at the end of the day, Espinosa indicated that “he couldn’t check any more dimensions” and asked him to sign the Form DD 250 so that the FATS could be sent to the GDTL for its part of the first article testing (tr. 90, 93). Steve Austin testified that, as inspection progressed, the level of discussion deteriorated and he told QAR Smith that “the dimensions that he was having us do were not measurable by the CMM.” To which QAR Smith was said to reply “if that’s so, then there’s nothing else he could do there, and he was leaving.” (Tr. 572-73) According to Steve Austin, he then went and got his father, Billy Bob Austin, president of the company, who told QAR Smith to write down the dimensions whether he agreed with them or not, and to send the FATS forward and “let the lab finish their job” (tr. 573). QAR Smith was said to have asked Beta Engineering to contact the PCO if it wished to resubmit a second set of FATS (tr. 438, 573). Since preliminary inspection was not completed, QAR Smith did not sign the inspection form (tr. 69-70). He also did not sign the Form DD 250.

41. Immediately after the preliminary inspection ended on 17 May 2001, QAR Smith faxed a report to PCO Osborne. The report stated that only one out of the five FATS (F/A # 1) was partially checked, that while 30 of the 38 dimensions checked were within tolerance, eight dimensions checked were out of tolerance, and that “Beta Engineering could not check the remaining 65 dimensions on this item.” QAR Smith’s report stated that he had concerns that “the subcontractor lacks the capability to manufacture conforming items,” and in view of the non-conformance already known, it would be “a waste of resources” to forward the FATS to the laboratory for first article testing. (R4 (53570), tab 26; tr. 101-02) We find that QAR Smith had concluded that the FATS he witnessed were hopelessly flawed and that presentation of a new set of FATS would be in order.

42. Steve Austin also wrote PCO Osborne. His 17 May 2001 letter sought the PCO’s “authorization to ship parts for inspection with out [sic] QAR signature” due to QAR Smith’s “unwillingness to sign DD250.” The letter explained that its CMM only measured

on the X, Y, Z axis, and thus “the radius and compound dimensions must be measured using other means.” The letter said that the QAR “feels this is not acceptable,” and consequently refused to sign the DD Form 250 releasing the FATS to the GDTL for first article testing. (R4 (53570), tab 25)

43. According to PCO Osborne’s contemporaneous telephone record of 18 May 2001, Steve Austin called and said “they can/will do the 5 samples [sic] parts in 3 weeks” (R4 (53570), tab 27). PCO Osborne testified that he did not comment “one way or another” to Steve Austin’s offer. He testified that, by that time, “what Steve was saying wasn’t credible, whether, in fact, he was going to actually have those five sample first article parts ready in three weeks.” He testified that, “[i]f he would have come back in [sic] three weeks later, I’m quite sure I would have allowed for that preliminary inspection to continue, because, again, we needed the parts.” (Tr. 329) Having disestablished the 30 April 2001 FATS delivery date, we find that the PCO did not reestablish a new FATS due date. The PCO chose not to reestablish a new FATS due date in the face of Steve Austin’s offer to resubmit five new FATS for preliminary inspection. We find that the PCO’s indecision on 18 May 2001 left Beta Engineering in limbo as to whether and when to resubmit five new FATS. During the 18 May 2001 conversation, Steve Austin did not suggest that Beta Engineering would finish the unfinished preliminary inspection. Since he did not obtain PCO Osborne’s permission to by-pass the preliminary inspection, we find Steve Austin had abandoned further testing of the FATS first presented on 16 May 2001, but he did not abandon performance on the F017 contract.

44. On 11 June 2001, Steve Austin wrote PCO Osborne and said that it had come to his attention that “DSCP intends to cancel the above-mentioned contract with out [sic] allowing Beta Engineering the opportunity to correct the problems identified by the field QAR.” The letter mentioned that Beta Engineering had presented two sample parts⁷ to an independent lab for inspection, and “although all 175 dimensions were not to print, over 75% of the dimensions were correct The report also reveals many of the dimensions that did not meet drawing tolerances were off by .002 or less.” The letter stated that Beta Engineering would “challenge” cancellation of its contract and contended that “a second submission is not only warranted but also necessary to fulfill both the government as well as Beta Engineering’s needs.” (R4 (53570), tab 29)

45. PCO Osborne acknowledged that as of June 2001, DSCP still needed the belt-feed levers (tr. 336). When asked what action he took after he received the 11 June 2001 letter from Beta Engineering, PCO Osborne testified “I didn’t take any action” (tr. 335). With respect to Beta Engineering’s request for a second submission, PCO Osborne testified that “I didn’t say yea or nay, or yes or no” (tr. 267). We find that, as of June 2001, DSCP still had not reestablished a new due date for the submission of the FATS under the F017 contract. And by not advising Beta Engineering whether it could submit a second FATS, PCO Osborne again left Beta Engineering in limbo.

Termination of the F017 Contract

46. To evaluate whether to terminate the F017 contract, PCO Osborne asked Daniel Simone, DSCP's in-house QAR (QAR Simone) to review QAR Smith's 17 May 2001 report. On 8 August 2001, QAR Simone submitted eight questions to QAR Smith by e-mail (SR4, tab 46). In response to QAR Simone's inquiry, QAR Smith marked up a copy of the contract drawing indicating the locations of the 38 dimensions taken on F/A # 1 on 16 and 17 May 2001 (R4 (53570), tab 1 at 2; tr. 124-25). He also marked up a copy of the contract drawing indicating the locations of the eight dimensions measured out-of-tolerance at the preliminary inspection (R4 (53570), tab 1 at 3; tr. 126). QAR Smith's response, faxed to QAR Simone on 10 August 2001, expanded on his 17 May 2001 report:

The measurement # 35 indicates that length is too long. This is a major defect per QAP5564278 # 101 "location of ends." Measurement #52 indicates that the arm is too thin. This is a major defect per QAR 5564278 #102. Dimension #54 also checks out of tolerance. This is located at B-7 on the drawing, but it [sic] unclear what affect [sic] this nonconformance would have on performance. Dimension #56 checks out of tolerance. The arm checks too thin and is classified as a major defect per QAP 5564278. Dimension #57 checks out of tolerance. This dimension affects the angle of the contour profile so it is a major defect per QAP 5564278. Dimension #87[⁸] is a radius that checks out of tolerance. This nonconformance should not affect performance and is considered minor. Dimensions #96 and #98 check out of tolerance and is located B-6 on the drawing and is considered a major defect per QAP 5564278 #103.

QAR Smith summarized Beta Engineering's measurement results on 16-17 May 2001 as follows:

Of the 8 dimensions that checked out of tolerance 6 are considered major nonconformances [sic] per QAP 5564278. 1 is considered a minor nonconformance, and the 1 that is located in zone B-6, that is covered by QAP 5564278, is unclear about the affect [sic] it would have on performance of this item.

QAR Smith opined that the poor quality/workmanship of the FATS was due to "lack of attention to detail during the machining." (R4 (53570), tab 31)

47. PCO Osborne terminated Beta Engineering's right to proceed under the F017 contract by letter dated 15 August 2001. The termination was based on the following grounds:

Clause I 080 FAR 52.209-4 FIRST ARTICLE APPROVAL-GOVERNMENT TESTING (SEP 1989) ALTERNATE I (JAN 1997), paragraph (d) states, "If the Contractor fails to deliver any first article on time, or the Contracting Officer disapproves any first article, the Contractor shall be deemed to have failed to make delivery within the meaning of the default clause of this contract. The Contracting Officer has disapproved both of Beta's first article submissions.⁹] Therefore, the contracting officer has determined that Beta Engineering, Inc. has failed to deliver in accordance with the terms of Contract No. SPO560-00-C-F017 and that this failure is not excusable. For this reason you are hereby notified that Beta's right to proceed further under the contract is terminated.

(R4 (53570), tab 32)

48. At the hearing, PCO Osborne explained because he was not trained to interpret technical drawings or to witness preliminary inspections, he relied on the QAR and the in-house QAR on technical issues arising during the preliminary inspection (tr. 263). The factors which influenced his decision to terminate were: (1) Beta Engineering was supposed to present the FATS in 60 calendar days and it took nine months; (2) after Steve Austin repeatedly promised the first article submission, Beta Engineering abandoned and attempted to by-pass the preliminary inspection to go directly to first article testing by the GDTL; (3) the result of the preliminary inspection raised a high probability that the testing laboratory would recommend rejection of the first article; and (4) he had simply lost confidence in Beta Engineering. (Tr. 272-73)

49. In terminating the F017 contract, no show-cause or cure letters¹⁰ were sent. In its post-hearing brief, the Government has taken the position that no show-cause or cure letters was required because it terminated the F017 contract based on paragraph (a)(1)(i) of the Default clause (FAR 52.249-8). (Gov't br. at 20-21; Gov't reply br. at 7-9)

Termination of the F039 Contract

50. Beta Engineering acknowledged that it presented no FATS under the F039 contract at any time (tr. 389, 647). When it failed to deliver the FATS on 6 May 2001, PCO Osborne did not take steps to terminate its contract for default. We have found the

parties mutually agreed to suspend the 6 May 2001 FATS submission date until resolution of the F017 FATS (finding 19). When preliminary inspection under the F017 contract abruptly ended on 17 May 2001, PCO Osborne did not reestablish a FATS submission date for the F039 FATS.

51. PCO Osborne sent Beta Engineering a show-cause letter on the F039 contract on 15 August 2001. The letter stated that the FATS should have been delivered on or before 6 May 2001, and the production quantity should have been tendered on or before 20 June 2001, but Beta Engineering had delivered no acceptable FATS and no conforming items under the contract. Beta Engineering was told that the Government was considering termination of the contract for default, and it had 10 calendar days after receipt of the letter to show that its failure to perform was from causes beyond its control and without its fault or negligence. (R4 (53571), tab 12) In its brief, the Government relied on paragraph (a)(1)(i) of the Default clause as the basis of termination (Gov't br. at 28).

52. Apparently, both the termination letter of the F017 contract and the show-cause letter of the F039 contract were faxed to Beta Engineering on 15 August 2001. After Steve Austin received the letters, he called on the same day and advised PCO Osborne that he would appeal. (R4 (53571), tab 13)

53. PCO Osborne terminated Beta Engineering's right to proceed under the F039 contract by letter dated 28 August 2001. Referring to Steve Austin's 15 August 2001 telephone call, the termination letter stated, "[y]ou did not provide any information then, nor has Beta provided any information since, to establish that Beta's failure to perform Contract No. SPO560-01-C-F039 arose from causes beyond its control and without its fault or negligence." (R4 (53571), tab 14)

54. By notice dated 11 October 2001, Beta Engineering timely appealed the termination of both contracts.

DECISION

"[A] default termination is a drastic sanction" and the Government is held "to strict accountability for its actions in enforcing this sanction." *H. N. Bailey & Associates v. United States*, 449 F.2d 387, 391 (Ct. Cl. 1971). The Government bears the burden of proving that it properly terminated a contract for default. *Cantrill Development Corp.*, ASBCA Nos. 30160, 30693, 30717, 89-2 BCA ¶ 21,635 at 108,849.

Termination of the 017 Contract

The Government contends that "in accordance with both the First Article and Default Clauses, the Appellant's failure to deliver the first article for testing on or before April 30,

2001, (first article due date per the Appellant) constitutes proper grounds to support the termination for default” (Gov’t br. at 20).

The Government’s right to terminate under paragraph (a)(1)(i) of the Default clause may be defeated, however, by its own conduct in condoning the default, in encouraging continued performance, or in failing to set a new delivery schedule after the default occurred. *Kings Point Mfg. Co., Inc.*, ASBCA No. 27201, 85-2 BCA ¶ 18,043 at 90,574. We have held that a termination for default for failure to deliver a first article was improper where “there was no enforceable first article delivery schedule in place at the time the Government terminated the contract for default.” *Aviation Technology, Inc.*, ASBCA No. 48063, 00-2 BCA ¶ 31,046 at 153,315.

In this case, the F017 contract initially gave Beta Engineering 60 days from the date of the contract, or 30 September 2000, to deliver its FATS. After award of the contract, Beta Engineering asked for 220 days to deliver the FATS, and 90 additional days to deliver the production quantity. By Modification No. P00001, PCO Forline unilaterally extended the production quantity delivery date, including the FATS delivery date, to 30 April 2001. Beta Engineering did not deliver its FATS in 60 days or by 30 September 2000. PCO Osborne, who took over the contract from PCO Forline in February 2001, did not consider Beta Engineering delinquent in failing to submit its FATS. We have found that both parties considered 30 April 2001 as the FATS submission deadline.

Under QAP-1A0001, preliminary inspection of five FATS, conducted by Beta Engineering and witnessed by the cognizant QAR, was a prerequisite to first article submission. Due to a forging defect and discovery of non-conforming steel, preliminary inspection did not begin in April 2001, although the FATS were presented as early as 25 April 2001.

When Beta Engineering failed to complete the necessary prerequisite to submit its FATS to the GDTL by 30 April 2001, the Government did not terminate the contract for default. Instead, the Government encouraged Beta Engineering to continue performance by approving the 4340 steel for use if 4150 steel was unavailable domestically, and by proceeding with preliminary inspection on 16 and 17 May 2001. In so doing, we conclude that the Government waived or disestablished 30 April 2001 as the due date for delivery of FATS under the F017 contract.

Once the Government disestablishes a delivery schedule, it must reestablish a delivery schedule if it wants to make time again of the essence. To reestablish a delivery schedule, the Government could either (a) reach an agreement with the contractor on a new delivery schedule, or (b) unilaterally establish a reasonable new delivery schedule. *International T & T Corp., ITT D.C.D. v. United States*, 509 F.2d 541 (Ct. Cl. 1975); *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969); *Lanzen Fabricating, Inc.*,

ASBCA No. 40328, 93-3 BCA ¶ 26,079 at 129,608-09. *See also Louisiana Lamps and Shades*, ASBCA No. 45294, 95-1 BCA ¶ 27,577 at 137,435 (tender of delivery after waiver establishes new delivery date).

In this case, after preliminary inspection came to an abrupt end on 17 May 2001, Steve Austin called PCO Osborne the next day and offered to resubmit five FATS for preliminary inspection in three weeks. PCO Osborne did not respond “one way or another.” Beta Engineering made another appeal for a second submission by letter dated 11 June 2001, less than a month later. PCO Osborne took no action again. Even though Beta Engineering had abandoned the preliminary inspection began on 16 May 2002, it did not abandon performance. The evidence shows immediately upon receiving notification on or about 12 May 2001 that it could use 4340 steel, Beta Engineering made arrangements with its forging house to obtain the material (finding 25). As instructed by QAR Smith, Steve Austin sought to submit a second set of FATS for preliminary inspection. We have found that, as of June 2001, the Government still had not established a new due date for the submission of the FATS under the F017 contract. We have found that by not advising Beta Engineering in May and June 2001 whether it could submit a second set of FATS, and what was the new delivery date, PCO Osborne left Beta Engineering in limbo, and left the Government without an enforceable FATS delivery schedule.

Because the Government disestablished the 30 April 2001 delivery date for the submission of the FATS under the F017 contract, and because the Government failed to reestablish a new delivery date, we hold that the F017 contract was improperly terminated for default.

Termination of the F039 Contract

Under the F039 contract, Beta Engineering was required to deliver the FATS on 6 May 2001, and deliver the production quantity on 20 June 2001. No FATS were delivered on 6 May 2001. With respect to the submission of the FATS under the F039 contract, we have found that the parties mutually agreed to suspend the 6 May 2001 FATS submission date until resolution of the FATS under the F017 contract. After the 17 May 2001 preliminary inspection ended, it should have been obvious to PCO Osborne that the prospect of having the F017 FATS approved had become questionable. PCO Osborne should have reestablished a new FATS delivery date for the F039 contract. He did not do so. Consequently, the Government ended up with no enforceable delivery date for the F039 contract. Since the FATS must first be approved before Beta Engineering could go into production, without an enforceable delivery date on FATS delivery, there could be no enforceable production quantity delivery date.

Because the parties mutually agreed to suspend the FATS submission date under the F039 contract pending resolution of the FATS under the F017 contract, and because the

Government failed to establish a new FATS delivery date for the F039 contract after preliminary inspection under the F017 contract came to a halt and approval of the F017 FATS became questionable, we hold that the F039 contract was improperly terminated for default.

CONCLUSION

The appeals are sustained. The termination for default of the F017 contract is converted to a termination for the convenience of the Government. The termination of the F039 contract is also converted to a termination for the convenience of the Government.

Dated: 3 June 2002

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

NOTES

- ¹ Beta Engineering quoted a quantity of 1,013 based on a call from the PCO who stated that the actual quantity, including the first article test samples (FATS), was 1,013 (tr. 464).

2 This clause was included in the DISC (Defense Industrial Supply Center) Master Document - DISC Form 2500D, DEC 1998 (*see* SR4, tab 42 at 38).

3 The antigalling compound is a coating that allows “parts to pass between each other without grabbing, catching.” (tr. 503).

4 Beta Engineering has not explained how it arrived at this due date. Based on the contract date of 1 August 2000, we have found that the FATS was due 30 September 2000, and the production quantity would have to be delivered by no later than 9 March 2001 (finding 5).

5 The parties are unable to identify what provision of the contract requires a first article test report (tr. 467). They agree that such a report, incorporating the results of preliminary inspection, GDTL testing results, and applicable certifications, is generally sent to the PCO to obtain approval of the FATS (*see e.g.*, SR4, tab 47).

6 A material certification identifies the chemical constituents of a part (tr. 26-27).

7 Of the five FATS presented, F/A # 4 and F/A # 5 were sent to the independent laboratory. F/A # 2 was submitted in evidence as Ex. A-2. The laboratory report was not sent to the PCO or submitted in evidence. (Tr. 509-10)

8 QAR Smith testified that according to his notes, Dimension #87 should be Dimension #81 (tr. 177).

9 It is not clear to what two first article submissions the PCO Osborne was referring.

10 For terminations based on paragraphs (a)(1)(ii) and (a)(1)(iii) of the Default clause, FAR 49.402-3(d) requires that “the contracting officer . . . give the contractor written notice specifying the failure and providing a period of 10 days (or longer period as necessary) in which to cure the failure.”

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 53570, 53571, Appeals of Beta Engineering, Inc., rendered in conformance with the Board's Charter.

Dated:

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

