ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Ensign-Bickford Aerospace & Defense Company	)	ASBCA No. 57929
	)	
Under Contract Nos. N00164-07-D-4259	)	
N00164-08-D-JM15	)	

APPEARANCE FOR THE APPELLANT: John C. Person, Esq.
Person & Craver, LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
Navy Chief Trial Attorney
Russell A. Shultis, Esq.
Senior Trial Attorney
Stephen D. Tobin, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAGE
ON THE GOVERNMENT'S MOTION FOR AN ADVERSE INFERENCE

This appeal arises from Contract Nos. N00164-07-D-4259 and N00164-08-D-JM15 (collectively "the contract"), which called for Ensign-Bickford Aerospace & Defense Company[1] (EBA&D, appellant or the contractor) to provide the Department of the Navy, Naval Surface Warfare Center, Crane Division (NSWC, Navy or government), with MK 154 Delay Detonators (detonators) (R4, tabs 15, 35). EBA&D's 12 July 2011 certified claim totaling $911,293.13 contested the government's disapproval of Lot Acceptance Test (LAT) Reports for detonator Lots 11-14 (R4, tab 95). The government's motion for an adverse inference seeks a dispositive sanction against the contractor for discarding the tested ("functioned") items (gov't mot.). The parties fully briefed the motion (*see* appellant's opposition (app. opp'n) and the government's response (gov't resp.), and supporting documentation).

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. EBA&D prepared an 8 October 2010 "[LAT] and Inspection Report" for Lots 11-12, and on 1 December 2010 for Lots 13-14 (R4, tabs 66, 67, 75, 76). The

[1] The original contracts were issued to Shock Tube Systems, Inc. (R4, tabs 15, 35). On 9 September 2009, the parties entered into novation agreements transferring the interests of that company to EBA&D (R4, tabs 51, 52).

"objective of this inspection and test was to evaluate the submission of 60 [LAT] samples of the Mk 154 Mod 0 Detonator." The reports advised that the detonator "consists of 100 feet of dual 0.118" olive drab shock tube wound on a 3" x 5" black plastic spool with 2 in line initiators at the input end and two detonators at the output end." Each report summary stated that 60 units were selected "to verify that the lot met all applicable drawings and specifications" and concluded that "[a]ll units met the requirements specified." (R4, tab 66 at 1359, tab 67 at 1402, tab 75 at 1472, tab 76 at 1497) Test data sheets for each lot recorded the incidence of venting for each LAT (*see, e.g.,* R4, tab 67 at 1411-12, tab 66 at 1368-69, tab 75 at 1481-82, tab 76 at 1503-04, 1506-07).

2. By letter dated 5 January 2011, contracting officer (CO) Cynthia Dant notified EBA&D that the LAT reports for Lots 11-14 had been reviewed by the government and were disapproved (R4, tab 77). The CO told appellant that the test results contradicted the contractor's 1 October 2010 email which "states that there were no rupture/vents of the 600 fpm shock tube after 14-Day T&H [temperature and humidity], Hot/Cold conditioning and function" (*id.* at 1525). The CO disagreed with the contractor's "manufacturing change" of making shock tubes "at 600 fpm verses [sic] 375 fpm," and noted that "EBA&D has returned to the 375 fpm shock tube production, which is the baseline for both contracts" (*id.*).

3. Appellant's 11 January 2011 response (R4, tab 78), disagreed that the "MK 154 product in these 4 lots represents a physical or performance change to the baseline configuration for the MK 154 or any other lots previously accepted under the" subject contracts. It denied that First Article Testing "was required, or performed" on the subject contracts. EBA&D stated that "[s]hock tube venting during functioning is a common occurrence" and that "there are no requirements in the Navy TDP [Technical Data Package] for the MK 154 that prohibit venting of the shock tube." The contractor pointed out that there was an average of 7.7 vents per lot for Lots 11-14, compared to 6.7 vents per lot in Lots 1-10. (*Id.* at 1528-29) EBA&D defended the "production rate change from 375 fpm to 600 fpm [as] a minor change [in accordance with] EIA649 (does not affect form, fit, or function of the end item, the MK 154)" (*id.* at 1529). Appellant said that it had coordinated this with NSWC Crane beforehand (*id.* at 1529-30). The CO's letter of 14 March 2011 disagreed with EBA&D's response, denied that the government had concurred in the change, and informed the contractor that Lots 11-14 "are not acceptable" (R4, tab 81 at 1549).

4. The date that the functioned detonators were destroyed is not in the record. According to the contractor: "The functioned hardware associated with the LATs for Lots 11-14 was discarded well in advance of the official rejection date of March 14, 2011, and was discarded at a time when EBA&D believed that Lots 11-14 had, in fact, passed" (app. opp'n, tab A, Bartholomew decl. at 2, ¶ 7).

5. EBA&D conducted additional temperature and humidity tests on Lots 13-14 in investigating whether lead azide had affected the subject detonator lots (R4, tab 82). Appellant's email exchange with the government indicated that "They will be ready to shoot on March 22" (*id.* at 1552). The contractor's "TEST DATA SHEET" shows that the "INFO ONLY TESTING" was done 29 March 2011 (gov't mot., attach. 3). Stephen W. Bartholomew, product development manager for EBA&D and program manager for the MK 154 effort, stated in deposition that appellant did not preserve the shock tubes from this testing (gov't mot., attach. 1, Bartholomew dep. 13:4-7, 59:1-7, 62:10-21). The date these tested "in house" detonators were discarded is not in the record.

6. Appellant's letter of 31 March 2011 (R4, tab 84), reiterated that the venting encountered was "normal and expected." Appellant told CO Dant that "[f]or the Government to reject these lots for venting would be to hold EBA&D to a higher standard than currently required by the contract." EBA&D sought a "first article determination (for MK154 lots 11-14 only) for a process change that had occurred." The contractor advised that it had "performed additional in-house testing to validate" the detonators. While maintaining that it had informed the government of the increased speed change from 375 fpm to 600 fpm for manufacturing the shock tubes for Lots 11-14, EBA&D "does agree that we failed to submit the required formal notification of process change" to the CO. (*Id.* at 1559) The CO replied on 19 April 2011 that contract ¶ 3.4.5, Configuration Control, had not been modified "to allow EBA&D to change the configuration baseline from 375 fpm to 600 fpm." She said that "[t]he Government appreciates EBA&D's efforts, but will not retroactively approve the configuration change" and reiterated that Lots 11-14 "are not acceptable." (R4, tab 86)

7. EBA&D's certified claim dated 12 July 2011 (R4, tab 95), alleged a "constructive Change pursuant to Contract Clause FAR 52.243-1, Paragraph (a)(1)" and sought a total of $911,293.13. This amount included "$847,968.00 for the value of the product rejected by the Government without justification" (*id.* at 1688), for Lots EBD10H001-011, EBD10J001-012, EBD10J001-013, and EBD10J001-014 (*id.* at 1685). Appellant also sought "$60,030 for the constructive stop work imposed by the Government between March 10, 2011 and April 17, 2011 and $3,295.13 for severance expenses for three producers laid off as a result of this constructive stop work." The contractor asserted that "the Government has acted to impose arbitrary acceptance criteria for MK154's not embodied in the drawings, designs or specifications cited in the subject contracts." (*Id.* at 1688)

8. EBA&D did not dispute that venting occurred in the functioned shock tubes, which it observed had "existed to one degree or another on all prior lots." The contractor disagreed with the government's rejection of the proffered detonator on that basis. It told the government: "As you are well aware, absence of venting or rupturing is not an acceptance criterion on either Contract." (R4, tab 95 at 1687)

9. The CO by letter dated 5 August 2011 notified EBA&D that she would "make a decision regarding said claim on or before July 12, 2012" (R4, tab 96 at 1723). The contractor on 16 September 2011 (R4, tab 98), informed the CO that this "lengthy period" was "unacceptable to EBA&D" (*id.* at 1730). On 6 January 2012, the Board received the contractor's notice of appeal, predicated upon the CO's deemed denial of its claim due to the CO's failure to render a final decision (COFD) after an "unreasonably long passage of time." The CO issued a COFD on 16 April 2012 denying EBA&D's claim (R4, tab 1).

10. There is no evidence that, during months of discovery, the government sought the spent detonators or questioned their whereabouts before 19 December 2012. During the deposition on that date of EBA&D employee Mr. Bartholomew, the government learned that the contractor had not preserved the functioned shock tubes (gov't mot. at 4, attach. 1, Bartholomew dep. 4:7-8, 12:23-25, 62:11-25). Thereafter, government counsel asked appellant to test remaining shock tube stock, and filed the subject motion for an adverse inference after the contractor refused to do so without compensation and only under limited conditions.

DECISION

The Parties' Positions

The government moves the Board to draw the adverse inference "that the detonators in question failed the lot acceptance tests" because EBA&D intentionally discarded Lots 11-14 spent detonators (gov't mot. at 1). The government does not characterize the motion as dispositive. It is our view that granting the motion would have that effect as the basis for EBA&D's claim is that the government rejected Lots 11-14 "without justification" and "impose[d] arbitrary acceptance criteria" (*see* SOF ¶ 7). A holding that Lots 11-14 failed contract requirements would be tantamount to denial of the appeal.

The government bases its request for sanction upon appellant's discarding of detonators tested in the LAT, followed by its disposal of hardware that EBA&D subsequently tested in-house as it contemplated filing a claim (gov't mot. at 7). The government further criticizes appellant's refusal of a post-appeal request from government counsel that the contractor test remaining shock tube stock from Lots 11-14 unless EBA&D is compensated and then only under certain constraints (gov't mot. at 1, 8; gov't resp. at 9-10). The government asserts:

> EBA&D's destruction of spent detonators has severely prejudiced the Government and EBA&D should not be allowed to benefit from its improper acts. The Navy rejected

> detonators from the Lots 11-14 because of the number and intensity of the vents that arose during the T&H testing. Rule 4, Tab 1, GOV000004. Examination of the spent detonators would allow the fact finder to know, unambiguously, how many vents occurred during the T&H tests. Direct examination of the spent detonators also allows the fact finder to see the precise location of ruptures, which is also an indication of the potential hazard to the war fighter, and it would allow the fact finder to gauge the intensity of each vent by being able to see the size and shape of each rupture. Although some of the test reports recorded the number and location of some of the ruptures, the shape and other physical characteristics of the ruptures are undocumented. By discarding the spent detonators, EBA&D has deprived the Government, as well as the finder of fact, of the best, and most objective, means of determining the probative facts regarding the Government's defense. The Government has clearly been prejudiced.

(Gov't resp. at 4)

EBA&D opposes the motion, maintaining that it disposed of the "functioned shock tube from Lots 11-14 in the ordinary course of business" (app. opp'n at 3-4). It asserts that the disposal occurred at a time when it believed the lots had passed LAT requirements (*id.* at 3), as it threw the items away before the government officially rejected Lots 11-14 (*id.* at 7), and "well in advance of the decision to file a claim and impose a 'litigation hold' to preserve evidence" (*id.* at 9). The contractor denies that it discarded the spent detonators "willfully" or was "motivated by any desire to advantage EBA&D's position or disadvantage the Government's position as to acceptance and payment on those lots" (*id.* at 6-7).

Appellant disagrees that it is obliged to now retest lot samples from the LAT, as the CO has not directed or agreed to pay for it to do so (app. opp'n at 13-14). EBA&D disputes the evidentiary value of the functioned detonators as asserted by the government. The contractor questions whether "a qualified expert–if anyone at all–can extrapolate from vent sizes and locations to a noise level or gaseous discharge associated with any given vent, which is the direct evidence that the Government seeks to adduce here" (*id.* at 6). EBA&D contends that, to the extent that physical evidence is relevant, there exists sufficient facsimile evidence to meet the government's evidentiary needs. It contends that "the same indirect evidence" showing venting location and frequency that could be obtained from the "physical husks of functioned hardware" can "be gleaned from an inspection of the annotations on the test data sheets, the diagrams depicting the vent location and size, and the photographs of the vents themselves" (*id.*).

Analysis

"'[S]poliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.'" *Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1344-45 (Fed. Cir. 2011) (citing *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). A party seeking sanctions for spoliation must prove:

> (1) [T]he party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a "culpable state of mind;" and (3) the evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.

ADT Constr. Group, Inc., ASBCA No. 55358, slip. op. at 58 (30 April 2013) (citing *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 520-21 (D. Md. 2010) and *Jandreau v. Nicholson*, 492 F.3d 1372, 1375 (Fed. Cir. 2007)).

Where spoliation is found, the "least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered" is to be imposed and any sanction must be commensurate with the resulting harm. "Moreover, the presence of bad faith and prejudice, without more, do not justify the imposition of dispositive sanctions." *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311, 1329 (Fed. Cir. 2011).

The Board is empowered to sanction a party for spoliation that occurred before the appeal was filed, as occurred here. "A discovery order need not be in place, as trial forums have the inherent power to control litigation, and the trial forum has broad discretion in imposing sanctions for spoliation." *Northrop Grumman Corp.*, ASBCA No. 52178 *et al.*, 03-2 BCA ¶ 32,278 at 159,704; *see also ADT*, slip op. at 58 n.21 (discussing the Board's inherent authority to control the discovery process). The burden of proof for spoliation is on the party seeking to use the evidence. *Jandreau*, 492 F.3d at 1375.

1. Duty to Preserve Evidence

We begin by assessing whether EBA&D was required to preserve evidence when, on successive occasions, it discarded spent detonators from Lots 11-14 LATs and in-house

testing. This duty attaches when litigation is pending or reasonably foreseeable; from that point on, a party is obliged to preserve, for another's use, property within its control. *ADT*, slip op. at 57. Although precise dates are not in the record, EBA&D first disposed of functioned detonators from October-December 2010 Lots 11-14 LATs prior to 14 March 2011 (SOF ¶ 4); these items are central to EBA&D's challenge to the government's criteria for rejecting these lots. Appellant subsequently discarded detonators, which it had tested in-house on 29 March 2011, about 3½ months prior to filing the claim (SOF ¶¶ 5, 7) that underlies this appeal. Both events occurred after the government had notified appellant that Lots 11-14 exhibited venting which, in the government's view, occurred to an unacceptable degree (SOF ¶ 2), and at a time when instigation of the instant litigation was solely within the contractor's control. We find that, in each instance, EBA&D knew or reasonably should have known of the potential litigation value of these functioned detonators and failed in its duty to preserve evidence.

2. Culpable State of Mind

We next determine whether "the destruction or loss was accompanied by a 'culpable state of mind.'" *ADT*, slip op. at 58 (citations omitted). There has been a "great deal of litigation" about this criterion, as the burden of proof is not fully defined by our appellate court. "This appears to be an open question in the Federal Circuit" as to "whether a showing of bad faith, or something less than that, is required before a tribunal imposes sanctions" for spoliation. *Id.* Although EBA&D wittingly discarded Lots 11-14 spent detonators (SOF ¶¶ 4, 5), when it should have preserved that evidence, we are unable to conclude from the record before us that appellant acted in bad faith or to disadvantage the government.

3. Prejudice Due to Loss of Evidence

Finally, to impose a spoliation sanction, we must find that the lost evidence was relevant to the extent that a "reasonable factfinder" would conclude that it would have supported the government's defenses in this appeal. *ADT*, slip op. at 58. This element "is often cast in terms of prejudice," in that "it must be shown that the requesting party was prejudiced by the loss of evidence." *Id.* at 59.

Despite the contractor's actions, the government has not justified the severe sanction it seeks, as it fails to establish that its defense is prejudiced by the loss of spent detonators from the LAT or in-house testing. "Prejudice to the opposing party requires a showing that the spoliation 'materially affect[s] the substantial rights of the adverse party and is prejudicial to the presentation of his case.'" *Micron*, 645 F.3d at 1328 (citing *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 504 (4th Cir. 1977)). The government has not demonstrated the materiality of viewing in-hand the "precise location" or "size and shape of" ruptures in the spent detonators (*see* gov't resp. at 4), nor has the government tied the allegedly-excessive venting to a contract requirement or a proviso it relied upon in

rejecting Lots 11-14. Further, the government has recourse to other physical evidence of shock tube venting. Photographs, reports and other documentary evidence from the LAT remain extant, and appellant has retained hardware from Lots 11-14 that the government can have tested to demonstrate venting characteristics. The government provided no foundation for its contention that "[t]he suggestion that EBA&D is willing to perform a retest only if done pursuant to the changes clause not only ignores the terms of the Contract, but is an unambiguous attempt by EBA&D to create a new claim, rather than defusing an issue under the current one" (gov't resp. at 10). The government references no contractual obligation for appellant to voluntarily and without recompense retest the detonators, absent a CO's direction, for purposes of litigation as opposed to contract acceptance.

CONCLUSION

We deny the government's motion for an adverse inference, as the government failed to meet its burden of proof in support of the disproportionate sanction it seeks.

Dated: 23 May 2013

REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

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. 57929, Appeal of Ensign-Bickford Aerospace & Defense Company, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals