ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Stemaco Products, Inc.	)	ASBCA No. 51599
	)	
Under Contract No. SP0100-95-D-5098	)	

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OPINION BY ADMINISTRATIVE JUDGE MOED
ON APPELLANT'S MOTION FOR RECONSIDERATION

This is a timely motion by appellant (Stemaco) for reconsideration of our initial decision, dated 20 August 2001 and published at 01-2 BCA ¶ 31,575, denying this appeal in its entirety. References below to numbered findings relate to the initial decision.

Proposed Additional Documents

Stemaco requests the addition to the record of five documents attached to the motion papers. The Government opposes that request.

Our Rule 13(b) provides that "[e]xcept as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing." Several requirements must be met in order to exercise discretion under Rule 13(b) in favor of receiving additional evidence. One such requirement is that the evidence "be something of which the aggrieved party was excusably ignorant." *AEC Corp.*, ASBCA No. 42920, 99-1 BCA ¶ 30,181 at 149,322, *rev'd on other grounds sub nom. Danzig v. AEC Corp.*, 224 F.3d 1333 (Fed. Cir. 2000). None of the documents offered for the record have been shown to be in that category.

Four of the additional documents are extracts from specifications for helmets and helmet liners composed of laminated fabric layers. The extracts contain the portion of each of the specifications requiring the item to contain "not less than" a stated number of fabric layers. Stemaco asserts that it successfully produced these items using only the stated minimum number of layers. These extracts are offered in support of the interpretation that the provision in the instant specification for "not less than 33 layers of fabric" (findings 4,

6) meant that a "properly constructed helmet using the minimum number of layers would comfortably pass the required V_{50} ballistic resistance." (Motion at 3)

The extract from specification SAA MIL-L-2002A (Saudi Arabian Military Specification-Liner, Helmet, Soldier's) identifies the fabric as "laminated coated nylon fabric." This is different from the fabric involved in the present dispute which is aramid ballistic cloth (finding 3). It is possible that fabric type affects ballistic performance, yielding test results which are not comparable. Stemaco has not shown otherwise. For lack of that showing, this extract is excluded, also, as not relevant to the dispute in this appeal. The extract from MIL-L-41800F, Amendment 2 (Military Specification-Liner, Ground Troop's-Parachutist's Helmet) is excluded, also, on that additional basis. The extract does not identify the fabric to be used. The liner is described in § 3.4.2 as a "laminated structure composed of resin coated reinforcing material . . . specified in [§] 3.2.1.1." Section 3.2.1.1, however, is not part of the extract.

The remaining two extracts are from MIL-H-44099 (23 March 1983) (Military Specification-Helmet, Ground Troops'-Parachutists'); and MIL-H-44099A (22 December 1986) (Military Specification-Helmet, Ground Troops-and Parachutists). The addition of these documents to the record is unnecessary. The relevant provisions of MIL-H-44099, repeated word for word in MIL-H-44099A, are already part of the record (R4, tab 51) and are set forth in the findings of the initial decision (finding 10).

The fifth document offered by Stemaco for the record is attached to its reply to the Government's opposition to the motion. The document is a copy of a test report and certification by Lewcott Corp., the coating subcontractor (finding 17), that the resin coating applied to a quantity of Kevlar fabric met the specification requirements. The document is offered to rebut the assertion, made for the first time, in the Government's response to this motion, that the first CVC helmet successfully molded under the present contract (finding 14) "was made from fabric which was coated with an excessive amount of resin" (app. reply at 3; Gov't resp. at 3). The Government's assertion is not substantiated by the document cited therefor (R4, tab 16) and no other supporting record evidence has been found. Since that assertion is not fact, there is no reason to accept evidence from Stemaco rebutting the same.

Merits of the Motion

Stemaco challenges the following fact findings in the initial decision.

Findings 7, 31 - The comments in the motion on these findings do not specify what changes should be made. For lack of these particulars, we are unable to afford reconsideration thereof.

Finding 12 - Stemaco seeks to amplify the description of its experience in this finding based upon four documents attached to the motion. For the reasons stated above, we have excluded this evidence.

Finding 13 - Stemaco argues that it had a reasonable basis for believing that it would be able to meet the specified ballistic limit with a minimum of 33 layers. The motion does not point to any evidence which we did not consider in connection with the PASGT contract, which is the focus of this finding. Stemaco is correct that the record contains evidence supportive of its interpretive position with respect to the 33 layer requirement (*e.g*., tr. 521). It also contains evidence supportive of the Government's position (*e.g., id.* at 521-22).

Findings 16, 35, 36 - These findings relate to Stemaco's requests to the Government for documents and data in aid of its search for an explanation of its initial failure to meet the specified V_{50} ballistic limit. Stemaco cites various letters in the record to show that the Government failed to provide informative responses to these requests (motion at 8-9, 15). The cited documents, however, are merely reports concerning Stemaco's own efforts to solve the problem. None of them seek assistance from the Government in that regard. We, therefore, affirm the present findings and the holding that there was no breach of the Government's implied duty of cooperation relating to these requests.

Finding 21 - Stemaco asserts that "[t]here is no basis for the conclusion in the last sentence of this [finding]" (motion at 9). In that portion of the finding, we stated that it appeared that in its consultations with DuPont prior to the award of the present contract, Stemaco was not informed of DuPont's "substantial prior experience as a prime contractor for the Government in the production of ballistic helmets from Kevlar KM-2 fabric." Significant data and experience relating to production and performance of helmets made from Kevlar KM-2 fabric resulted from the contracts for the PASGT and CVC helmets (findings 22-27). These might have been helpful to Stemaco in the formulation of its proposal for this contract. The omission to inquire of DuPont as to these matters, which is not controverted by Stemaco, is significant because it is indicative of risks which Stemaco was willing to assume in submitting that proposal.

Findings 22, 23, 24 - Based on testimony from Mr. Hudner (tr. 441, 544), we found that data from testing of Kevlar KM-2 PASGT helmets had been the basis of the 33 layer minimum requirement and the 2,150 fps V_{50} ballistic limit in the present contract specification (finding 24). Stemaco questions that finding on the basis that Mr. Hudner later testified that such data were not the basis of those requirements (motion at 11). Stemaco is mistaken in that regard. In the cited testimony, Mr. Hudner stated that the testimony related to data from testing with 2, 4, 16, and 64 grain RCC projectiles (R4, tab 64). Those projectiles are used exclusively for ballistic testing in connection with development and qualification of the helmet design. Testing with 17 grain FSP projectiles is used for establishing a benchmark for acceptance testing of production helmets. (Tr.

409, 411) For that reason, data from testing Kevlar KM-2 PASGT helmets with 17 grain FSP projectiles, rather than data from testing with 2, 4, 16, and 64 grain RCC projectiles, would have been the basis of the 33 layer minimum requirement and the 2,150 fps V_{50} ballistic in the present contract specification (finding 8; tr. 460-61).

The record contains four reports (R4, tab 66) which were the basis of our finding that testing of Kevlar KM-2 PASGT helmets with 17 grain FSP projectiles had yielded V_{50} ballistic results in the range of 2,316-2,395 fps (finding 22). At the outset of his testimony, Mr. Hudner was definite that all four reports related to the Kevlar KM-2 PASGT helmet (tr. 432). Later in his testimony, however, he indicated that it was possible that two reports, dated 2 September 1992 and 25 November 1992, might relate to another type of helmet (tr. 433-37, 439-41). Stemaco notes (motion at 10) that the report dated 25 November 1992 (R4, tab 66 at 4) shows a 35x35 fabric weave count, which is typical of Kevlar KV-29 fabric. Kevlar KM-2 fabric has a 30x30 weave count. (Tr. 194, 508-09)

The report dated 2 September 1992 (R4, tab 66 at 1) describes the tested item as a CVC helmet and identifies the specification for the item as "ML-C-44117A" rather than MIL-H-44099A (the specification for the Kevlar KM-2 PASGT helmet (finding 9)). Mr. Hudner believed that these entries were erroneous. He doubted that the CVC helmet was the item tested inasmuch as the 2 September 1992 date of the report was too soon after the award of the 1992 Kevlar KM-2 CVC contract (28 July 1992) (tr. 434-35). Mr. Howard Stein, Stemaco's president, who had considerable experience in the production of laminated fabric helmets and helmet liners (tr. 107-08; finding 9), testified that he did not believe that any of the reports related to the 1992 Kevlar KM-2 CVC helmets (tr. 193; findings 26, 27).

Mr. Hudner was certain, however, that the other two reports, both dated 11 September 1992 (R4, tab 66 at 2, 3), related to the Kevlar KM-2 PASGT helmet. This was based on references, in the reports, to the specification for that helmet (MIL-H-44099A) and the fact that they showed weights appropriate for that helmet (tr. 437, 439).

The foregoing review of the record, prompted by the present motion, raises the possibility that the reports dated 2 September 1992 and 25 November 1992 might not relate to the Kevlar KM-2 PASGT helmet. In the interests of fairness and accuracy, we now modify Finding 22 to reflect only the V_{50} ballistic results shown on the reports dated 11 September 1992, namely, 2316 and 2384 fps. Accordingly, the last sentence of Finding 22 is changed so as to state that testing of Kevlar KM-2 PASGT helmets "yielded V_{50} ballistic results in the range of 2316-2384 fps." The same change is made to the related text in the "DECISION" section of the initial opinion. 01-2 BCA at 155,925.

Stemaco contests those results in these reports (R4, Tab 66) on the additional ground that they do not identify the type of fabric or the number of layers of fabric employed in the helmets which were tested (motion at 10). These omissions are not

material. Based on other evidence, as found elsewhere, these helmets contained 33 layers of Kevlar KM-2 fabric (finding 23).

The record does not contain ballistic test data relating specifically to Kevlar KM-2 PASGT helmets produced under the combination method. For lack of such test results, Stemaco disputes our finding that the 12 helmets produced by that method met the specified V_{50} ballistic limit (finding 23) (motion at 10). The finding was based on cited testimony, which was not contradicted. This was a sufficient basis for the finding.

Stemaco asserts that the pinwheel method of construction of Kevlar KM-2 PASGT helmets would result in 34-36 fabric layers on the sides of the helmet (motion at 4). That is correct (tr. 109). We found that additional layers of fabric might result in better ballistic performance of those helmets (finding 18).

Finding 27 - Stemaco contends that "[t]here is no evidence" for our finding that the helmets built by the DuPont Co. under the 1992 Kevlar KM-2 CVC contract were produced with 33 layers using both the pinwheel and combination methods of construction (motion at 13). That contention is well-founded to the extent that only the pinwheel method was used for these helmets (tr. 419). Finding 27 is corrected to that extent. The finding that these helmets were produced with 33 layers of fabric, however, is supported by the record (tr. 420).

Stemaco asks for an additional fact finding that "[t]he Government had no basis to include in its CVC specification the admitted inference that using 33 layers of KM-2 would produce a CVC helmet that would consistently pass the required V_{50} ballistic requirement" (motion at 19). We are unable to make this finding. As discussed in connection with findings 22 (as modified), 23 and 24 above, the V_{50} ballistic limit in the present contract was based on ballistic testing of the Kevlar KM-2 PASGT helmet with 17 grain FSP projectiles which yielded V_{50} ballistic results in the range of 2316-2384 fps (finding 22 (as modified)) and on testing of the 12 helmets made with the combination method. We have discussed the evidence relating to the interpretive issue above (finding 13).

Finding 30 - Stemaco is correct in stating (motion at 13) that there is no evidence as to the number of layers of Kevlar KM-2 fabric contained in the first article helmets tested under the 1996 CVC contract. Finding 30 is modified to add that statement.

Findings 33, 34 - Stemaco correctly contests the statement, in finding 33, that Mr. Snyder agreed with the method for counting fabric layers described therein. Mr. Snyder advocated a different method for counting layers whereby the helmet would be cut into a series of two inch squares "like a checkerboard." After identifying the location of each square on the helmet, each square would be peeled apart and the layers counted and identified. (Tr. 380) Finding 33 is hereby modified to that extent.

Prior to the hearing, Stemaco had secured two helmets produced by Specialty Plastics under the 1996 CVC contract and, thus, was in a position to count the number of fabric layers in those helmets using the method advocated by Mr. Snyder. No evidence of such a count was presented. In the absence thereof, we are persuaded that the layer count obtained from the method used by the DLA Product Testing Center-Analytical, as described in the present finding (finding 33, *see* R4, tab 57), is correct. Accordingly, we affirm the finding that the helmets delivered in the production phase of the 1996 CVC contract contained exactly 33 layers of fabric (finding 34).

Additionally, Stemaco argues that the count method was flawed because it did not take into account the overlapping of layers resulting from pinwheel construction. This argument is unpersuasive because the evidence indicates that Specialty Plastics, for the 1996 CVC production contract, used the combination method (tr. 73).

CONCLUSION

We have modified the findings of fact and related text of the "DECISION" section to make needed changes in the initial decision. These changes, however, do not affect our conclusion. Stemaco argues that it reasonably understood that it could manufacture production quantities with 33 layers using the combination method. As the proponent of the claim, Stemaco has the burden of proof. Assuming *arguendo* that Stemaco's interpretation is correct, it must also prove that the specification was defective. It must prove that it was not possible to meet the other requirements of the specification using 33 layers and the combination method. Stemaco has not done so. Rather, the evidence shows, if anything, that another contractor (Specialty Plastics) was able successfully to produce the helmets to the same specification, using the combination method, with 33 layers.

Accordingly, upon reconsideration, we affirm our decision that the appeal is denied.

Dated: 19 March 2002

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
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. 51599, Appeal of Stemaco Products, Inc., rendered in conformance with the Board's Charter.

Dated:

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