ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
DCX-CHOL Enterprises, Inc.	)	ASBCA No. 54707
	)	
Under Contract No. SPO750-00-D-7821	)	

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER

This is an appeal regarding the no-cost termination of delivery orders issued under an indefinite delivery/indefinite quantity contract for electrical control boxes. Respondent urges that it properly rejected nonconforming supplies tendered by appellant DCX-CHOL Enterprises, Inc. (DCX) and that it was entitled to cancel outstanding delivery orders at no cost because it had already ordered more than the contractually specified minimum quantity. DCX contends chiefly that respondent improperly rejected conforming product and unlawfully cancelled when it should have terminated the contract either for default or for the convenience of the government. We deny the appeal.

FINDINGS OF FACT

1. By date of 13 December 2000, respondent awarded Contract No. SPO750-00-D-7821 to DCX for the supply of electrical control boxes for armament systems (R4, tab 1 at 1 of 5, 4 of 5, 5 of 21). Each box had a unit price of $500 and measured approximately nine inches long and approximately three by three inches at the end. Each box contained interconnect switches by which multiple switches and connectors were run together by internal wiring and were attached to a cable to activate a rocket launcher employed in mine clearing equipment. (Tr. 231-32; R4, tab 1 at 3 of 5) Consistent with the boxes' function in mine clearing, the contract identified them as "CRITICAL APPLICATION ITEM[S]" (R4, tab 1 at 2 of 21; ex. G-1, ¶ 10).

2. The contract was an indefinite delivery, indefinite quantity type contract that incorporated various standard clauses contained in the June 1999 version of the Defense Supply Service Columbus (DSSC) Master Solicitation (R4, tab 1 at 1 of 5, 13 of 21). Some of the clauses in the DSCC Master Solicitation became "self-deleting" if not applicable (Bd. corr. ltr. dtd. 3 March 2005 at 1 of 9). We find that, among the standard clauses that were applicable, were: FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SEP 1996); and FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE (APR 1984) (*id*. at 7 of 9).

3. The contract contained other standard clauses, including clause E02, INSPECTION OF SUPPLIES – FIXED PRICE (FAR 52.246-2) (AUG 1996). In addition, the contract included: clause E05, CERTIFICATE OF CONFORMANCE (CoC) (APR 1984) FAR 52.246-15, which provided that inspection based upon DCX's furnishing its own Certificate of Conformance was not authorized; clause I09, INDEFINITE QUANTITY (FAR 52.216-22) (OCT 1995), with insertions not relevant here made to paragraph (d); clause I33a ORDERING (FAR 52.216-18) (OCT 1995), with paragraph (a) adapted to read in part that "[a]ny supplies and services to be furnished under this contract shall be ordered by unilateral delivery orders." (*Id.*, at 4 of 5; 13, 14, 15 of 21)

4. The contract contained clause E18, PRODUCT VERIFICATION TESTING (DLAD 52.246-9004) (JUN 1998), which provided in paragraph (b) that "[t]he contractor is responsible for insuring that supplies are manufactured, produced and subjected to all tests required by applicable material specifications/drawings" (R4, tab 1 at 13 of 21).

5. The contract also included clause I29, CONTRACT LIMITATIONS (DSSC 52.215-9C06) (MAR 1998). It provided in part that "[t]he Government is obligated to order only the minimum quantity" of nine electrical control boxes. (R4, tab 1 at 15 of 21)

6. The electrical control boxes were to be manufactured in accordance with seven drawings, which were part of the contract (R4, tab 1 at 3 of 21). We find that two of these drawings required component parts from a Qualified Products List (QPL), the overall scheme of which is set forth in finding 7, below. Those two drawings requiring QPL parts were as follows:

(a) Drawing No. 82A5052A2112, SELECTOR SWITCH ASSEMBLY, contained a parts list that called out two electrical protective covers with stainless steel chains, part no. MS3181-18CA, COVER, and part no. MS3181-12CA, COVER, respectively, both of which were QPL parts (ex. A-4; ex. G-2, ¶ 4; tr. 286-87). The QPL provided that listed parts "are available through distributors authorized by the manufacturer under military requirements. Manufacturers may be contacted for names and addresses of authorized

distributors." (Ex. G-5 at 1) The QPL designated five manufacturers: Amphenol Aerospace/Amphenol Connectors; Array Connector Corp.; ITT Cannon or ITT Cannon (Mexico); Glenair, Inc.; and Sunbank Electronics, Inc. (ex. G-5 at 2-3);

(b) Drawing No. 82A5052A2115, ASSEMBLY, ELECTRICAL, ENCLOSURE, contained a parts list that called out two flange-mounted connectors, part no. MS3470L18-11S, CONNECTOR, RCPT, and part no. MS3470L12-3P, CONNECTOR, RCPT, respectively, both of which were QPL parts (ex. A-2; ex. G-2, ¶ 4; tr. 104, 125-27, 255-56). Both part no. MS3470L18-11S and part no. MS3470L12-3P were derived from Military Standard MS3470. The drawing for that Military Standard reflected that it in turn was derived from procurement specification MIL-C-26482. That procurement specification contained paragraph 3, REQUIREMENTS, which provided in subparagraph 3.2, QUALIFICATION, that "[t]he connectors furnished under this specification shall be products which are qualified for listing on the applicable qualified products list as of the time set for opening of bids …." (Ex. G-11; tr.177-78) For the connectors depicted, the QPL designated six manufacturers: Aero Electric Connector, Inc.; Amphenol Aerospace/Amphenol Connectors; Amphenol Aerospace/Matrix Connectors; Deutsch; ITT Cannon or ITT Cannon (Mexico); and Souriau (ex. G-5 at 4-5).

7. The general purpose and scheme of the QPL were set forth in DoD 4120.24-M, DSP Policies and Procedures (March 2000), Appendix 2, QUALIFICATION. By its terms, the Appendix implemented both 10 U.S.C. § 2319 and FAR 9.200 – 9.207. The Appendix provided in AP 2.1.2, Purpose of Qualification, that:

> The purpose of qualification is to ensure continued product performance, quality and reliability and provide for the completion of long or highly complex evaluations and tests prior to and independent of any acquisition or contract. Qualification comprises the entire process by which a manufacturer's products (as shown on QPLs) . . . are proven to be in conformance with the requirements set forth in the governing specification.

AP 2 further provided in AP 2.1.2.1, QPL, that

> A QPL focuses on qualifying individual products or families of products. As evidence that those product(s) meet the established qualification requirements, the product(s) shall be listed on a QPL. A QPL will normally be appropriate for items of supply that are stable and will be continually available for an extended period of time, thereby making it

> practicable to qualify individual product(s) without incurring prohibitive testing costs.

AP 2.2.1.5 provided that "[a] requirement to qualify an item can be established to ensure the performance, quality and reliability of an item to substantially reduce risk of failure that could be catastrophic to mission, equipment, safety, or life." In addition, AP 2.5.3 contained procedures for an authorized distributor to be listed on a QPL. It provided for an authorized distributor to qualify a product carrying its own brand designations, and allowed the distributor to rebrand the product, conditioned upon maintaining traceability. AP 2.5.3 provided that "[t]he original manufacturer's identification or the original manufacturer's code symbol shall allow traceability to the original manufacturer for failure analysis, corrective action, and lot identification." (Ex. G-3 at 1 of 20, 2 of 20, 5 of 20)

8. We find that, typically, the QPL designation is only required on items that are "pretty critical to . . . mission performance" (tr. 397; ex. G-4, ¶ 9). The world of QPL products is "a whole different ball game" from the world of commercial products (tr. 211). The record reflects that it would be "surprising" for respondent to "accept[] QPL items as QPL items without full documentation" regarding traceability back to the original manufacturer and its testing processes (tr. 397-98; ex. G-4, ¶ 9). We further find that the electrical control box procured here is "a critical weapons system," in which a malfunction "will result in a failure of the mine clearing equipment [*see* finding 1] to function" (ex. G-1, ¶ 10). The QPL connectors required to be utilized in the boxes were "the highest grade," for which respondent paid a premium "because of the expense of the additional required testing that they go through" (tr. 212; *see also* tr. 30).

9. We find that markings, such as a manufacturer's identifying logo and part number, stamped on parts are not sufficient to establish that a given item is a QPL part (tr. 209, 226, 387-88). This is so because the part number is frequently placed on a part before final testing and inspection, and, "[a]t any time through that process in the manufacturing or even through the testing process . . . , that component could be rejected as failed and thrown out so that part number can be there at any point throughout the process" (tr. 210; *see also* tr. 119-21, 128). Hence, traceability back to the original manufacturer and its testing processes was the "main thing" that respondent relied upon for assurance that it received a QPL item as specified (tr. 210). By traceability, respondent's quality assurance personnel looked for "invoices back to that QPL source" (*id*.), or a "[s]tatement of quality that would attest that the inspection and test records [were] on file for review from the original manufacturer or the authorized distributor" (tr. 108).

10. With respect to authorized distributors (*see* finding 7), a manufacturer typically has "procedures in place to ensure that their authorized distributors are going to

meet the requirement[s], follow the procedures, and ensure that all that traceability and inspection and testing has been completed" (tr. 120; *see also* ex. G-13; tr. 181-82, 351, 367-68).

11. DCX was neither a QPL manufacturer nor an authorized distributor for any of the products at issue (tr. 344). The parties do not dispute that it was DCX's responsibility, as prime contractor, to secure statements of quality from the QPL manufacturers and to make those statements available to respondent (tr. 90-91, 177, 317).

12. While DCX asserts that it was compliant with the requirements of different versions of the ISO system promulgated by the International Organization for Standardization (tr. 338), the ISO system contains requirements that are different from the contract's QPL requirements (tr. 153).

13. We find that the contract did not contain either a standard clause or a specification providing for the supply of surplus material (R4, tab 24 at 1-2; tr. 191, 371-72). We further find that QPL manufacturers typically do not retain inspection and test data for connectors or other QPL parts that are sold to surplus or other unauthorized distributors, and hence the parts lose traceability (tr. 119-21, 351-52; R4, tab 22 at 5; ex. G-13).

14. During performance, in early 2003, respondent became concerned about DCX's quality management system. By letter to DCX dated 19 February 2003, respondent issued a Level III Corrective Action Request to DCX. The record reflects that a Level III Corrective Action Request represents a conclusion by the government that there are serious problems within a contractor's quality program (tr. 39). In the Corrective Action Request, respondent asserted that "[e]vidence exists that the documented quality management system established by [DCX] has neither been fully deployed nor consistently followed" (R4, tab 9 at 1). DCX was requested to supply a written action plan to "correct specific system deficiencies" and to prevent recurrence (*id.* at 2). No one in the DCX organization disagreed with the deficiencies cited (tr. 344-45).

15. By early 2003, respondent had issued ten delivery orders under the contract (prior delivery orders). DCX produced a total of 347 electrical control boxes under the prior delivery orders (tr. 242), thereby exceeding the minimum quantity of nine boxes specified in clause I29 (*see* finding 5).

16. Between 1 April 2003 and 17 August 2003, respondent issued the seven delivery orders that are at issue here (disputed delivery orders). These orders – designated as delivery orders 0008 and 1004 through 1009 – were for a total of 278 electrical control boxes. (R4, tab 2 at 1, tab 3 at 2, tab 4 at 2, tab 5 at 2, tab 6 at 2, tab 7 at 2, tab 8 at 2) With respect to delivery order 0008, DCX had delivered, and respondent

had accepted, a partial shipment of 32 units by 7 August 2003 (tr. 84). Respondent had accepted none of the units called for in the remainder of delivery order 0008, or in the other disputed delivery orders, by the date of cancellation. Hence, the dispute focuses upon the net number of 246 (278 minus 32) electrical control boxes.

17. At "[a]bout the same time" that it was inspecting the second part of delivery order 0008, respondent concluded that DCX had supplied surplus connectors under a contract referred to in the record as the Marine Cable contract, which also designated the connectors as QPL items (tr. 26, 58, 106). As a result of this conclusion, respondent's quality assurance personnel applied greater scrutiny to the documentation accompanying DCX's shipments containing QPL items.

18. In October 2003, when inspecting one of the remaining shipments under delivery order 0008, the government's quality assurance representative asked DCX for documentation regarding the QPL components. She concluded that the documentation accompanying delivery order 0008 shipments "read the same as it did on the Marine Cable contract" (tr. 107; *see also* tr. 26-27). She examined packing slips to DCX from DCX's vendor for dustcaps and connectors purportedly complying with parts nos. MS3181-12CA, MS3181-18CA, MS3470L12-3P and MS3470L18-11S, respectively (*see* findings 6(a), 6(b)). She noticed that packing slip IN90148, which related to DCX purchase order D13383-1, stated: "NEW UNUSED SURPLUS FROM U.S. GOV'T SURPLUS SALES MANUFACTURERS EXCESS STOCK OR VARIOUS OTHER COMMERCIAL SOURCES. WE CANNOT GUARANTEE TRACEABILITY TO ORIGINAL MANUFACTURER, BUT CAN PROVIDE OUR OWN C OF C." Packing slip 90781, which related to DCX purchase order D13486-1, bore the same legend. (Exs. G-2, ¶ 8; G-8 at 1, 3; tr. 27-28) (Capitalization in original) She concluded, and we find, that packing slip IN90781 "didn't provide adequate evidence that the items sent with this met the contract requirements" because they: (a) were surplus; and (b) failed to show traceability. As to the latter, the packing slip lacked a "[s]tatement of quality that would attest that the inspection and test records [were] on file for review from the original manufacturer or the authorized distributor" (tr. 108; *see also* tr. 28-29). DCX's president testified on cross examination, and we further find, that the packing slips for the 246 electrical control boxes at issue did not identify the manufacturer of the connectors (tr. 415).

19. The papers included DCX's purchase orders to its supplier, as well as Certificates of Compliance from the supplier. Respondent's quality assurance representative testified, and we find, that the Certificates of Compliance from the supplier, as well as the accompanying purchase orders, were noncompliant because:

> it doesn't have specification rev[ision] level listed. It doesn't have the drawing rev[ision] level listed. It also says up on the

> top they recertify all material meets the subject purchase order. The problem is the purchase order only contains the part number. It doesn't contain the procurement specs.

(Tr. 112) The record reflects that a certificate of compliance and a certificate of conformance (*see* finding 3) are "[i]n substance" the same (tr. 111).

20. DCX's supplier was Brandex Components, Inc. (Brandex), from whom it purchased all of the connectors for this contract (ex. G-8; tr. 318). We find that Brandex was not a manufacturer of QPL products, nor was it an authorized distributor (*see* finding 7), for QPL manufacturers (tr. 309-10, 344, 348, 410). With respect to the disputed delivery orders, DCX's president testified that Brandex did not provide any test or inspection data from the QPL manufacturer, or a statement of quality, regarding the QPL components in the boxes (tr. 415-16). DCX's general manager testified, and we find, that it would have been a "[p]iece of cake" for Brandex to go back to the manufacturer(s) and obtain the test data for the QPL items at issue, but DCX did not ask Brandex to do so (tr. 309, 312-17; R4, tab 22 at 1).

21. We find no credible evidence that the government personnel who inspected and accepted electrical control boxes under the delivery orders previous to delivery order 0008 did so with any knowledge that DCX had purchased the QPL components from a surplus dealer and could not provide traceability to a QPL manufacturer (exs. G-2, ¶¶ 5, 7; G-6, ¶¶ 4-6; G-7, ¶¶ 2-3; tr. 104-05).

22. We find that, between 3 October 2003 and 19 November 2003, DCX did not present any product for inspection under the contract (tr. 116). During this period, the latest delivery dates for five of the seven disputed delivery orders passed, as follows:

Delivery Order	Latest Delivery Date
0008	28 October 2003
1004	30 September 2003
1005	30 September 2003
1006	31 October 2003
1007	31 July 2003

(R4, tabs 2 at 8, 3 at 3, 4 at 8, 5 at 2, 6 at 3)

23. In November 2003, respondent took two actions regarding DCX's performance. The first was that, by date of 5 November 2003, respondent issued a Corrective Action Request identifying discrepancies in delivery order 0008. In pertinent part, respondent cited packing list IN90148 (*see* finding 18), as well as the accompanying Certificates of Compliance (*see* finding 19), for their failure to:

> include drawing or specification and [to] provide traceability to the original manufacture[r] or provide objective quality evidence that the parts met contractual requirements. One of the certifications includes the following statement[:] 'Connectors were inspected to kind, count and condition, they are surplus parts.' This part (MS3470L18-11S) [*see* finding 6(b)] is a QPL item and must meet the requirements of the procurement specification.

(R4, tab 12 at 1)

24. The second action was to escalate the previously-imposed Level III Corrective Action (*see* finding 14) to a Level IV Corrective Action. We find that a Level IV Corrective Action is "one of the most severe remedies the Government has to try to motivate a contractor to fix their quality management system" (tr. 45). In imposing the Level IV by letter to DCX dated 13 November 2003, respondent asserted that "DCX-CHOL either cannot or does not intend to perform within the requirements of its Government contracts" (R4, tab 14 at 1). Respondent advised DCX that, as a result of the escalation to Level IV, "[a]cceptance of all products ordered under Government prime contracts citing [DCX's facility] as the place of inspection and acceptance is hereby suspended" (*id.* at 2). Product could be accepted, however, by issuance of a waiver. During the pendency of the Level IV, respondent issued 26 waivers to DCX because of the needs of the war in Iraq, but the record is unsettled regarding whether these waivers were related to the present contract (tr. 85-86, 164-66, 193).

25. By 23 January 2004, the 16 December 2003 delivery date for the two remaining disputed delivery orders – nos. 1008 and 1009 – had expired (*see* findings 16, 22) (R4, tabs 7 at 2, 8 at 2).

26. By date of 23 January 2004, the PCO issued seven unilateral modifications regarding each of the seven disputed delivery orders. Each modification by its terms "[c]ancel[led] the [relevant] CLIN(s) [under which the disputed delivery orders were issued] to the extent indicated below at no cost or liability to the Government or the Contractor" (R4, tab 2 at 3-4, tab 3 at 7-8, tab 4 at 4-5, tab 5 at 4-5, tab 6 at 5-6, tab 7 at 5-6, tab 8 at 3-4). None of the modifications contained any notice of appeal rights. The PCO testified that she regarded DCX as in default because "he didn't deliver to the Government on time and the material was nonconforming material" according to information from respondent's quality assurance personnel (tr. 186). She nonetheless cancelled at no cost, rather than terminating for default, because: (a) there was an urgent need for the boxes and she wanted to "go out and buy them again" because of doubt that DCX would ever supply conforming material; (b) respondent had ordered the minimum

quantity under the contract (*see* finding 5); and (c) "I did not want to put a black mark against the contractor," which would result from a default termination (tr. 185-87). In so doing, she waived respondent's right to excess reprocurement costs (tr. 186).

27. The parties had multiple contacts regarding DCX quality issues between October 2003 and June 2004 (R4, tabs 13-16, 18, 22, 24, 26, 28, 30; tr. 116). The record does not reflect that respondent relented in its demand for acceptable documentation regarding inspection and testing on QPL parts. With respect to delivery order 0008 documentation, by e-mail to the DCX general manager dated 6 February 2004, respondent's quality assurance representative stated that the parties:

> agreed that DCX has the following 3 options:
> 1) Receive acceptable certs or actual inspection/test data from vendors
> 2) Re-procure items and obtain acceptable documentation
> 3) Request a waiver from the buying activity to allow the use of items not represented by objective quality evidence[.]

(R4, tab 22 at 1) The record does not reflect that DCX pursued either of the first two options.

28. By date of 25 June 2004, DCX submitted a certified claim to the contracting officer for $193,000 arising from respondent's "refusal to accept goods tendered for [the] seven [disputed delivery] orders that conformed to the Contract" (R4, tab 31 at 1). Thereafter, the contracting officer rendered a final decision denying the claim, stating that she had "cancelled . . . these orders . . . because the delivery date for each had passed and [DCX] had not delivered any conforming product." The contracting officer notified DCX of its appeal rights (*id*., tab 32 at 1, 2). This timely appeal followed.

DECISION

In defending its rejection of the electrical control boxes at issue, and its no-cost cancellation of the disputed delivery orders, respondent advances several straightforward propositions. Respondent urges that the supplies tendered were nonconforming to contract requirements, and that it properly cancelled the delivery orders in issue. Respondent also contends that DCX has failed to establish a prior course of dealing that included accepting QPL components with the same documentation as those in dispute. (Respondent's Post-Hearing Brief (gov't br.) at 6-8). By contrast, in seeking to have the no-cost cancellation of the contract converted to a termination for the convenience of the government, DCX advances three principal arguments. DCX contends that there was no basis for a default termination and that the government improperly refused to accept conforming parts. DCX further asserts that contractors are free under applicable statutory

and regulatory requirements to use QPL parts manufactured by another contractor and that there is no legal basis for respondent's demand of a "chain of traceability" of parts. (Appellant's Post-Hearing Brief (app. br.) at 6-14)

A. *Nonconforming Supplies*

We previously denied the parties' cross motions for summary judgment, concluding that the record presented a triable issue regarding whether DCX tendered conforming product for inspection and acceptance. *DCX-CHOL Enterprises, Inc.*, ASBCA No. 54707, 05-1 BCA ¶ 32,933 at 163,118-19. Now, after trial, the parties' contentions regarding this issue are more sharply in focus.

Respondent urges that it properly rejected the electrical control boxes at issue as nonconforming because DCX failed to demonstrate that it had used QPL parts – particularly connectors – as required by the specifications. Respondent insists that DCX could not show what the markings were on each of the connectors, or who was the manufacturer of each. In addition, respondent contends that it would have required unreasonable government effort to ascertain the provenance of each connector during inspection. Finally, respondent tells us that a manufacturer's markings alone are insufficient to establish specification compliance because QPL manufacturers do not maintain inspection and test data for products that have been declared surplus or sold to non-authorized distributors. (Gov't br. at 6-7) For its part, DCX argues that respondent improperly refused to accept the 246 boxes. DCX stresses that respondent never sought out Brandex (*see* finding 20) to request "objective quality evidence" for these boxes. DCX asserts that it specified the exact part to its vendors and provided a Certificate of Conformance. DCX also submits that "all of the evidence necessary to determine the QPL status of the connectors . . . is available by looking at the imprinted numbers on the actual parts themselves." (App. br. at 9-10)

Independently of the parties' respective contentions, we conclude from our review of the record that DCX failed to deliver conforming product. DCX contracted to supply boxes that were defined in the contract as "CRITICAL APPLICATION ITEM[S]" (finding 1). FAR 46.203(c) provides that "[a] critical application of an item is one in which the failure of the item could injure personnel or jeopardize a vital agency mission," and indeed the record here reflects that a malfunction of the electrical control boxes would "result in a failure of the mine clearing equipment to function" (finding 8). Critical application items frequently must carry with them the assurance of superior quality and reliability. *E.g., Precision Dynamics,* ASBCA No. 50519, 05-2 BCA ¶ 33,071 at 163,910, 163,912 (submarine pump); *Beta Engineering, Inc.*, ASBCA Nos. 53570, 53571, 02-2 BCA ¶ 31,879 at 157,497, *recon. denied*, 02-2 BCA ¶ 31,970 (gun parts); *Master Research & Manufacturing, Inc.*, ASBCA No. 46341, 94-2 BCA ¶ 26,747 at 133,070-71 (helicopter pistons).

Consistent with the critical application categorization, the contract included QPL requirements. Those requirements, which DCX has repeatedly sought to trivialize at trial and in its brief, constitute "a whole different ball game" from the world of commercial products (finding 8). They are rooted in the first instance in statute. The requirements implement 10 U.S.C. § 2319(a) (finding 7), which defines a qualification requirement as "a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract." The cases recognize that "[a] pre-award qualification requirement is not a matter lightly imposed and is aimed at satisfying a particular quality need." *Zeller Zentralheizungsbau GmbH*, ASBCA No. 43109, 94-2 BCA ¶ 26,657 at 132,624. Such a requirement is designed "to ensure product quality, reliability and maintainability." *W.G. Yates & Sons Construction Co., Inc. v. Caldera*, 192 F.3d 987, 990 (Fed. Cir. 1999). These criteria are reflected in AP 2.1.2, and in AP 2.2.1.5, both of which referred to the need for product "performance, quality and reliability" (finding 7).

The evidence of record regarding the delivery order 0008 – one of the disputed delivery orders – establishes that DCX did not adhere to contract requirements. Thus, while respondent paid a premium price for connectors that had been subjected to a rigorous testing regimen and had been found to be "the highest grade" (finding 8), DCX tendered surplus items (finding 18). The contract did not provide for supplying surplus material (finding 13). In addition, while the QPL scheme contemplated "traceability to the original manufacturer for failure analysis, corrective action, and lot identification" (finding 7), and while, in practice, traceability was the "main thing" that respondent relied upon (finding 9), DCX's supplier asserted that it "CANNOT GUARANTEE TRACEABILITY TO ORIGINAL MANUFACTURER" for the QPL items in delivery order 0008 (finding 18). Similarly, while the QPL designated particular manufacturers for both the dustcaps (finding 6(a)) and the connectors (finding 6(b)), the documents that DCX tendered with delivery order 0008 did not – and the DCX supplier could not – identify the "ORIGINAL MANUFACTURER" (finding 18). Finally, although clause E05 expressly disallowed certificates of conformance (finding 3), the delivery order 0008 documents include an ambiguous undertaking by the DCX supplier to "PROVIDE OUR OWN C OF C" (finding 18), which may be read to allude either to what was not permitted under the clause or to certificates of compliance, which are "[i]n substance" the same thing (finding 19). Given the foregoing considerations alone, the supplies were nonconforming. When DCX was afforded further opportunity either to obtain acceptable documentation, or to reprocure and tender new items with acceptable documentation, and failed to do either (finding 27), respondent was entitled under the Inspection clause (*see* finding 3) to reject the supplies tendered.

Turning to the parties' particular contentions, rejection of DCX's major arguments is implicit in what we have said. With respect to DCX's argument that "[t]he parts

tendered to the Government conformed to the requirements of the Contract" (app. br. at 9), the legal bases are not sustainable and the factual bases are not supported by the record. Thus, while DCX points out that a "Certificate of Conformance was provided" (*id*. at 10), such certificates were expressly disallowed by clause E05 (finding 3) and the relevant standard clause, *see* FAR 52.246-15, was not included in the contract.

Similarly, DCX's argument that respondent "never requested" quality evidence from Brandex is both legally and factually meritless. Legally, the argument turns on its head the allocation of burdens under the Inspection clause. The version of the clause in the contract (*see* finding 3) provided in FAR 52.246-2(b) that DCX was to "tender to the Government for acceptance only supplies that have been inspected in accordance with the [contractor's] inspection system and have been found *by the Contractor* to be in conformity with contract requirements." (Emphasis added) Plainly, DCX's argument, which presupposes that respondent should research whether supplies conformed to the contract, turns this provision on its head. The argument also cannot be harmonized with either a contractor's correlative duty under the clause to prepare "records evidencing all inspections made under [the contractor's inspection] system and the outcome," FAR 52.246-2(b), or with the provision that respondent "assumes no contractual obligation to perform any inspection and test for the benefit of [DCX] unless specifically set forth elsewhere in this contract," FAR 52.246-2(c). Factually, the argument cannot be reconciled either with the recognition by both parties that securing evidence of quality was DCX's burden (finding 11), or with the boast of DCX's general manager that such evidence would have been a "[p]iece of cake" for DCX to secure (finding 20).

These considerations largely dispose of DCX's limp contention that it "specified the exact part to its vendors" (app. br. at 10). Contractually, DCX was not a cipher. As prime contractor, DCX's obligation was not simply to specify a part and then wash its hands of the matter. Instead, under the Inspection clause, as already mentioned, DCX was to "tender to the Government for acceptance only supplies that have been inspected in accordance with the [contractor's] inspection system and have been found by the Contractor to be in conformity with contract requirements" FAR 52.246-2(b). In addition, under clause E18(b), DCX was "responsible for insuring that supplies are manufactured, produced and subjected to all tests required by applicable material specifications/drawings" (finding 4).

Finally, DCX tells us that, before rejecting the 246 electrical control boxes at issue, respondent accepted earlier shipments with identical documentation. DCX reasons that, "[i]f the first group of control boxes was 'OK,' the second group should have been 'OK' as well." (App. br. at 15) Absent elaboration by DCX, we understand this argument to invoke prior course of dealing principles. As such, we reject the argument. The missing element is mutuality, *viz*., the "'actual knowledge by both parties of the prior course of dealing and its significance to the contract.'" *Anchor/Darling Valve Co*.,

ASBCA No. 46109, 95-1 BCA ¶ 27,595 at 137,496, quoting *T.L. Roof & Assocs. Constr. Co.*, ASBCA Nos. 38928, 42621, 93-3 BCA ¶ 25,895 at 128,809. As we have found, whatever DCX knew, the government inspectors who accepted boxes under the prior orders did not know that DCX could not provide traceability for the QPL components to a QPL manufacturer (finding 21).

B. *Remedy*

The remaining set of issues may be grouped under the rubric of the appropriate remedy for either DCX or the government, given the state of the record. DCX argues that the government's no-cost cancellation should be treated as an improper default termination. DCX asserts that the only two choices afforded by the contract were termination for convenience or termination for default, and, indeed, the contract contained both such standard clauses (finding 2). DCX stresses that the remedy of cancellation that the contracting officer employed (*see* finding 26) can only be effected bilaterally. DCX urges that the cancellation cannot be treated as a default termination because "the cancellation notice did not give DCX adequate notice of its appeal rights" (app. br. at 8). DCX also insists that, "[m]ore importantly, the default by cancellation was harmful to DCX. It caused delay, confusion and considerable expenditure of DCX's funds, thereby harming it substantially." (*Id.*) DCX further tells us that respondent waived the delivery schedule because, while the due dates under the disputed delivery orders began on 30 September 2003 and ended on 16 December 2003, respondent failed to establish a new schedule, even though it knew that DCX was continuing to perform (app. br. at 9).

We treat the contracting officer's no-cost cancellation as, in reality, a default termination and consider its merits as such. *Cf. Hydraulic Systems Co.*, ASBCA No. 17469, 73-2 BCA ¶ 10,278 at 48,536 (treating the no-cost cancellation of a contract as "in reality a termination for default" and otherwise sustainable but for waiver of the delivery schedule). Despite her choice of the remedy of cancellation, the contracting officer's testimony leaves no doubt that she regarded DCX as being in default, but chose to cancel in part to soften the impact upon DCX (finding 26).

Viewing the no-cost cancellation as a constructive termination for default, we consider it in light of familiar principles. That is, default termination is "'a drastic sanction . . . which should be imposed (or sustained) only for good grounds and on solid evidence.'" *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) quoting *J.D. Hedin Construction Co., Inc. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). The government initially bears the burden of proof with respect to the issue of whether the default termination was justified. If the government carries that burden, then the burden shifts to the contractor to establish that the default was excused by circumstances beyond its control and without its fault or negligence. *E.g.*, *DCX, Inc. v.*

Perry, 79 F.3d 132, 134 (Fed. Cir. 1996); *Laumann Manufacturing Corp.*, ASBCA No. 51249, 01-2 BCA ¶ 31,517 at 155,592.

Respondent has carried its burden on the issue of justification. "A contractor's failure to make timely delivery of agreed-upon goods establishes a prima facie case of default." *General Injectables & Vaccines, Inc. v. Gates*, 519 F.3d 1360, 1363 (Fed. Cir. 2008), *reh. denied*, No. 2007-1119 (Fed. Cir. June 3, 2008). When the contracting officer cancelled the delivery orders, she was confronted with DCX's "failure to make timely delivery" (findings 22, 25). She was also confronted with a situation in which, to the extent that DCX had tendered supplies under the disputed delivery orders, those supplies were not the "agreed-upon goods" (findings 16, 18-20).

We cannot conclude that DCX has carried its burden of showing that the default was excusable. Given the evidence that it would have been a "[p]iece of cake" for DCX to ask Brandex to obtain the requisite test data, but DCX failed to do so (*see* finding 20), it cannot be said that DCX was powerless to prevent the default.

We are unpersuaded by DCX's procedural arguments. Thus, we do not agree that the lack of notice of rights in the modifications cancelling the delivery orders (*see* finding 26) vitiates the default. There is no evidence of detrimental reliance. *Cf. Decker & Co. v. West*, 76 F.3d 1573, 1579 (Fed. Cir. 1996) (holding that, consistent with 41 U.S.C. § 605(a), a contractor was required to show detrimental reliance on erroneous advice of rights in default termination to prevent limitation period from running). In *Range Technology Corp.*, ASBCA No. 51943, 04-1 BCA ¶ 32,456 at 160,544, the termination notice contained a "defective and confusing notice" of appeal rights compounded by incorrect oral advice but the contractor came forward with affidavits establishing detrimental reliance. The record here, by contrast, consists of no affidavit or other showing. In addition, the record is clear that the final decision from which DCX brought this timely appeal contained an advice of rights (finding 28), which is unchallenged.

Apart from the appeal rights argument, we are mystified by the conclusory assertions that cancellation was harmful because it "caused delay, confusion and considerable expenditure of DCX's funds" (app. br. at 8). From all that appears in the record, cancellation accrued to the benefit of DCX, the government having foresworn both reprocurement costs and the "black mark" that a default termination could have on future performance evaluations (finding 26). *See* FAR 42.1500 *et seq.* (setting forth policies and procedures for recording and maintaining contractor performance information); *cf. Konoike Construction Co.*, ASBCA No. 40910, 91-3 BCA ¶ 24,170 (dismissing for lack of jurisdiction appeal challenging contractor's unsatisfactory performance rating).

We also reject DCX's waiver argument, which rests entirely upon *DeVito v. United States*, 413 F.2d 1147 (Ct. Cl. 1969) (app. br. at 9). DCX stresses that respondent was "well aware on October 3, 2004 [2003] of the quality issues that it alleges" but failed to establish a new delivery schedule, although it knew that DCX "was continuing to perform" (app. br. at 9). We have found that respondent did not relent on its demand for inspection and test data for the QPL items (finding 27) and we have been offered no reason to conclude, in the face of respondent's efforts to elicit that data (*see id*.), that the time periods between the due dates for the disputed delivery orders (*see* findings 22, 25) and the 23 January 2004 cancellations (*see* finding 26) were unreasonable.

CONCLUSION

The appeal is denied.

Dated: 18 June 2008

ALEXANDER YOUNGER
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

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. 54707, Appeal of DCX-CHOL Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals