ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
DCX-CHOL Enterprises, Inc.	)	ASBCA Nos. 56187, 56188, 56189
	)	
Under Contract Nos. SPO740-04-C-4739	)	
SPO750-05-C-3560	)	
SPO750-05-C-3567	)	

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OPINION BY ADMINISTRATIVE JUDGE WILSON
ON THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT

ASBCA Nos. 56187, 56188, and 56189 are appeals from the terminations for default of Contract Nos. SPO740-04-C-4739, SPO750-05-C-3567 and SPO750-05-C-3560. Related appeal ASBCA No. 56086 is an appeal from the denial of a contractor claim under those contracts. The parties have filed motions for summary judgment relating to ASBCA Nos. 56187, 56188, and 56189. For the reasons stated below, the motions are denied.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. The Defense Logistics Agency (DLA or government) awarded Contract No. SPO740-04-C-4739 (Contract No. 4739) to Elecsys Div. DCX-CHOL Enterprises, Inc. (DCX or appellant) on 7 September 2004, Contract No. SPO750-05-C-3560 (Contract No. 3560) on 25 October 2004, and Contract No. SPO750-05-C-3567 (Contract No. 3567) on 12 November 2004. Under CLIN 0001 of the aforementioned

contracts, DCX was to deliver firing lanyards for bomb racks (NSN 1095-00-151-4385). (Joint Statement of Undisputed Facts (JSUF) dated 23 December 2008 at ¶¶ 1-3; R4, tabs 1, 3, 5[1])

2. The delivery dates were as follows: (1) lanyards under Contract No. 4739 were to be delivered by 1 November 2005 (R4, tab 1 at 7-9); (2) lanyards under Contract No. 3560 were to be delivered by 5 October 2005 (R4, tab 3 at 7-9); and (3) lanyards under Contract No. 3567 were to be delivered by 23 October 2005 (R4, tab 5 at 7-9).

3. All contracts required first article testing (FAT) pursuant to CLINs 9906, to be followed by production lot testing (PLT) pursuant to CLINs 9910 (R4, tab 1 at 2, 3, 10, 13; R4, tab 3 at 2, 3, 12,14; R4, tab 5 at 2, 3, 9, 11-12). The FAT CLINs referenced clauses I09A06 and I09D06 in each contract. First article testing was to be completed within 180 days for Contract No. 4739 and within 150 days for Contract Nos. 3560 and 3567. (R4, tab 1 at 10; R4, tab 3 at 12; R4, tab 5 at 9) Production lot testing was to be conducted on 5 units "during production after FAT." The units were to be shipped to "Dayton T. Brown per SQAP" for PLT. (R4, tab 1 at 2; R4, tab 3 at 2,; R4, tab 5 at 2)

4. Clauses I09A06, FAR 52.209-4 FIRST ARTICLE APPROVAL – GOVERNMENT TESTING (SEP 1989) ALT I (JAN 1997), provided for the delivery of 3 units to Dayton T. Brown, Inc. (DTB) within 150 or 180 days of the dates of the contracts for first article tests (R4, tab 1 at 13; R4, tab 3 at 14; R4, tab 5 at 11). Clauses I09D06, DSCC 52.209-9C11 ADDITIONAL REQUIREMENTS - FIRST ARTICLE APPROVAL – GOVERNMENT TESTING (JAN 2001), provided that first article testing would be conducted in accordance with the specifications in Section B of the contracts and that Supplemental Quality Assurance Provision SQAP00-151-4385 applied (R4, tab 1 at 13; R4, tab 3 at 14-15; R4, tab 5 at 11-12).

5. Contract drawings 292AS110 and 292AS114 showed the cable assembly, firing lead and shield assembly, firing lead, and indicated certain contract specifications such as the potting requirement (R4, tab 30). Drawing 292AS110 stated that cavities in the barrel assembly and in the contact assembly were to be filled with molding compound (R4, tab 30 at note 3; *see also*, R4, tab 8 at note 3).

6. The contracts incorporated by reference, Clause I49A15, FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) (R4, tab 1 at 17; R4, tab 3 at 14; R4, tab 5 at 13). The clause allowed the government to terminate the contracts for default if DCX failed to deliver supplies within the time specified in the contract or any extension, or failed to make progress so as to endanger performance, or failed to perform any other provision of the contract. FAR 52.249-8(a)(1)(i)-iii).

[1] The government filed the Rule 4 file under ASBCA No. 56086.

7. In October 2005, Modification No. P00001 to Contract 4739 extended the delivery date of the contract to 1 March 2006 (R4, tab 2). In November 2005, Modification No. P00001 to each of Contract Nos. 3560 and 3567 extended the delivery dates of the contracts to 1 May 2006 (R4, tabs 4, 6). The modifications also indicated that SQAP00-151-4385, Rev. A had been superseded by SQAP00-151-4385, Rev. E (R4, tab 2 at 1-2; R4, tab 4 at 2; R4, tab 6 at 1-2). Among other things, SQAP00-151-4385, Rev. E stated that first article samples and production lot units were to be shipped to DTB for testing. Under both FAT and PLT, the units were to be tested for dimensions, compliance with Drawing (30003) 29AS110 Rev "B", related drawings and specifications, and other contract requirements. (App. supp. R4, tab 2 at 2-5)

8. The general DTB testing procedure was set out in DTB02P84-0907A which included, among other things, a visual inspection to verify compliance with contract drawings, and electrical continuity and dielectric breakdown to ground tests (app. supp. R4, tab 16).

9. Following a successful first article test under Contract No. 4739 (R4, tab 7), DCX submitted firing lead cable assemblies to DTB for production lot testing under all three contracts. In a report to the government, DTB noted three anomalies based upon the "initial receiving inspection": (1) each of the test items had identification bands not called out in the specification drawing; (2) a cavity that was required to be filled with molding compound was not completely filled on all three samples; and (3) the samples did not appear to have a required "continuous circumferential fillet of silver braze joining the steel braid conduit to the spring contact and connector end shield adaptors." (R4, tab 8 at 2) On 9 March 2006, the government notified appellant that its PLT report was unacceptable and that the PLT was not approved. DCX was directed to submit a corrective action plan by 20 March 2006. (R4, tab 8) The government later extended the time for a corrective action plan to 5 April 2006 (R4, tab 9).

10. Appellant submitted a corrective action report (CAR), sometimes referred to as a corrective action plan, and requests for waivers (RFWs) for each of the three contracts on 31 March 2006. The CAR and RFWs appear to address the third issue raised by DTB testing. (R4, tab 10) By letter dated 11 May 2006, the government denied the requests for waivers (R4, tab 11).

11. From early June 2006 through early August 2006, the parties' attorneys discussed whether and under what conditions the government would allow DCX to submit a second corrective action plan. After a number of emails and other correspondence, it appears that the parties agreed that DCX would pay the cost of the evaluation of its new corrective action plans (CAPs) by the government's Engineering Support Activity (ESA). If the CAPs were approved, DCX would also pay the cost of additional production lot testing. Appellant would submit new requests for

deviations/waivers with the new CAPs. If the PLT was successful, a new delivery schedule would be set for each contract which DCX would pay for. Appellant would not receive a third opportunity for corrective action if ESA disapproved the CAPs or if the new units failed PLT. (R4, tab 13)

12. Each of the contracts was modified on 21 August 2006 by Modification No. P00002 to allow DCX a second corrective action. The modifications required that DCX pay $1,200 for the cost of the ESA evaluation, pay the cost of the additional PLT if the CAPs were approved, stated that new delivery schedules would be set for each contract if appellant passed PLT, and stated that DCX would not be allowed another chance for corrective action if the corrective action plans were not approved or if test items failed PLT. (R4, tabs 2, 4, 6)

13. By dates of 8 and 28 August 2006, DCX submitted new requests for deviations/waivers as well as a Corrective Action Report. They were approved by DLA and sent to ESA for evaluation in September 2006. (R4, tab 14) On 30 October 2006, the government informed DCX that its requests for deviations/waivers had been found acceptable under certain conditions. If appellant concurred with the conditions, the deviations/waivers would be approved for Contract Nos. 4739, 3560, and 3567 only. The government stated that Defense Contract Management Agency (DCMA) would select three production samples per contract which would be sent to DTB for production lot testing. The testing was described as follows.

> **Inspection:** Per existing DTB procedure DTB02P84-0907A. Test items may deviate from drawing requirements in regard to potting being flush to .030 inch below flush per your Corrective Action Plan.
>
> **Dimensional:** Inspect threads of part number 292AS116 only, per DTB02P84-0907A. No other Dimensional inspection required.
>
> **Electrical:** Per DTB02P84-0907A Salt Fog, duration 48 hours, per ASTM B117. Items shall be allowed to dry for 24 hours, then visually inspected for corrosion/damage and electrically tested in same manner as performed prior to Salt Fog exposure.
>
> **Metallurgy:** DTB to verify brazing material meets requirements of AWS A5.8, type Bag-3. Test to be performed on one unit only. No other Metallurgy testing required.
>
> Hardness, Fit and Function, and Life tests are not required.

(R4, tab 15) The ASTM B117 standard referenced above sets forth the procedures to create "a controlled corrosive environment...to produce relative corrosion resistance information for specimens of metals and coated metals exposed in a given test chamber" (gov't reply, ex. A, ¶ 3.1).

14. James Wolfley is a mechanical engineer who worked for Raytheon into June 2007. While Mr. Wolfley was with Raytheon, the company did engineering and logistics support for bomb racks and launchers for the Navy. Mr. Wolfley has testified that he recommended use of the salt fog test set out above to the government. He did not recall whether he provided the government with a specific procedure for the salt fog test. (Gov't reply, ex. B, deposition transcript of James Wolfley (Wolfley deposition) at 9-10, 36-37)

15. Theotis Williams was the DTB mechanical engineer who worked on testing for Contract Nos. 4739, 3560, and 3567. The DTB procedure specified above, DTB02P84-0907A, is a general testing procedure. In performing the salt fog test, DTB would have used a specific DTB salt fog procedure as well as the ASTM standard mentioned. The DTB salt fog test procedures were set out in DTB TPO040013 rev. A, which is not in the record. Salt fog testing is used to subject test items to an environment similar to what they would encounter in service on a ship such as ocean water and sea atmosphere. (App. opp'n and mot., attach. A, deposition transcript of Theotis Williams (Williams deposition) at 9-10, 43-45, 51-52)

16. It appears that appellant agreed to the government's conditions. By letter dated 9 December 2006, the government approved the deviations/waivers and stated that the contracts would be modified to extend the delivery schedules, which was done by Modification No. P00003. (R4, tabs 16, 17) It does not appear that the contracts were explicitly modified to add the government's conditions, including salt fog testing. The contracting officer (CO) at the time of second production lot testing and the terminations for default, Michael Steurer, stated that the waiver and deviation requests (or what appellant referred to as its CAR) did not completely substitute for the contract's specifications. The contract specification and the waiver and deviation requests had to be read in conjunction with each other to understand the complete specification. (Gov't reply, ex. D, affidavit of Michael Steurer (Steurer affidavit) ¶ 3)

17. DTB tested three DCX firing lead cable assemblies under Contract No. 4739 in December 2006. DTB made the following description of the test results to the government in a summary entitled Hotline Report.

> 1. Reference photo 06-4966 and note three of the specification drawing, the cavity shown shall be filled with

molding compound. This cavity on all three samples has not been completely filled (serial number 01345 shown).
2. Each test item has been fitted with a black heat shrink identification band that is not called out for on the specification drawing.
3. Reference photo 06-5492 indicate [sic] corrosion taking place in all three of the samples during salt fog testing on brazing and breech cap.
4. Reference photo 06-5101 and note 7 of drawing 292AS110 require a minimum height of 0.12" of identification text where the sample is marked with 0.10" text.
5. SN 01474 failed Dielectric Breakdown and Continuity tests conducted after the Salt Fog test.

The Report further indicates that, as to item 5 above, unit No. 01474 was the only unit that failed the dielectric breakdown and continuity test after salt fog exposure. The other two units were said to have "Met requirements." Based on the report, the government informed appellant that production lot testing under Contract No. 4739 was disapproved and that the contract would be terminated under the contract's default clause. (R4, tab 18) The record does not appear to include the actual test data relating to the Contract No. 4739 items.

18. The record contains what appear to be pages from a DTB logbook relating to production lot testing in December 2006 under Contract No. 3560. Appellant notes (app. opp'n and mot. at 19-20, ¶ 32-33) that it believes the results of electrical characteristics tests on three items following salt fog exposure were positive and that there was no indication of unsatisfactory performance. (R4, tab 30 at 39-41)

19. DTB submitted a further Hotline Report in January 2007. Although it is labeled Contract No. 3560, it may actually be for Contract No. 3567 (*cf.* R4, tab 30, SOF ¶ 18). The report stated that pursuant to the government's direction, DTB had discontinued testing of firing lead cable assemblies. The adapter end of the samples was filled with molding or potting compound, but two barrel assemblies were not completely covered with compound. (R4, tab 21) CO Steurer stated that DTB had determined by visual inspection that Contract 3560 items failed the potting specification and that the Contract 3567 items had the same defect. Mr. Steurer then discontinued testing because it was unnecessary given those failures. (Steurer affidavit ¶ 4)

20. Mr. Wolfley, referring to photographs of the items included with the January 2007 Hotline Report (R4, tab 21), testified that potting compound had to cover the wires entering the adapter side of the firing lead cable assemblies as well as the entire wider

barrel assembly, and that two of the items did not meet the potting requirement. He also stated the requirements set out in the contract drawings had to be read together with the CAR. (Wolfley deposition at 25-33, 51-53) As to the DTB finding that corrosion had occurred during salt fog testing, Mr. Wolfley appeared to agree that what DTB identified as corrosion was probably "flux residue" (Wolfley deposition at 12-14; R4, tab 24). He also stated that following the salt fog test he believed the items would be rinsed off (Wolfley deposition at 38-43).

21. Also looking at photographs of the January 2007 items (R4, tab 21) and based on the CAR, Mr. Williams stated that potting was "addressed to the barrel assembly" and that all three items met the requirements of the CAR. In testing under the CAR, he would visually verify the wires were covered as they entered the barrel assembly and he would not be concerned that all of the area inside the barrel assembly was potted. Taking into account the contract drawings as well, however, Mr. Williams said there was a conflict between the CAR and the contract drawings and that DTB was not aware of the conflict. This appears to be based upon Mr. Williams' view that the CAR allowed potting flush with or .03 inches below the .531 opening of the adapter while contract drawing 292AS110 required that cavities be filled with molding or potting compound. DTB was unaware of a letter indicating that what it had identified as corrosion was caused by flux. He also stated that the test items were not rinsed by DTB following the salt fog test. (Williams deposition at 34-47)

22. Section 13 of ASTM B117 provided that unless otherwise stated in specifications, items being exposed to a salt fog environment should, after exposure, be carefully removed and "may be gently washed or dipped in clean running water" (gov't reply dated 13 April 2009, ex. A, ¶ 13.2).

23. On 26 April 2007, DCX submitted a claim for $16,911.05 and 55 delay days under Contract Nos. 4739, 3560, and 3567. In large part, the claim was based upon the assertions that DTB used a salt fog test that was not required by the contracts and that the government used a specification that had been modified. (R4, tabs 23, 24)

24. The CO denied the claim on 26 June 2007. The CO stated that DCX had agreed to salt fog testing in order to obtain government approval of its corrective action request and that DCX's units had failed a visual inspection for potting even as modified. Because the first two lots had failed testing, the prior CO had decided not to have the third lot tested. (R4, tab 25)

25. DCX filed a timely notice of appeal from the denial of its claim by letter dated 2 July 2007. The appeal was docketed as ASBCA No. 56086.

26. The government terminated for default Contract Nos. 4739, 3560, and 3567 on 12 September 2007. The terminations were based on the failures of the items supplied by DCX to pass production lot testing. As to each contract, the CO stated "[o]ffers to supply nonconforming materials were unacceptable and constitute[d] repudiation" of the contracts. (R4, tabs 27, 28, 29)

27. Appellant filed timely notices of appeal from the terminations for default in September 2007. The Board processed the appeals as follows: (1) the appeal from the termination of Contract No. 4739 was docketed as ASBCA No. 56187; (2) the appeal from the termination of Contract No. 3567 was docketed as ASBCA No. 56188; and (3) the appeal from the termination of Contract No. 3560 was docketed as ASBCA No. 56189.

28. The four appeals were consolidated in November 2007.

29. The government has filed a motion for partial summary judgment relating to the termination of Contract No. 4739 (gov't mot.). DCX opposes the government's motion and has moved for summary judgment regarding the terminations of Contract Nos. 4739, 3560, and 3567 (app. opp'n and mot.). The government then cross-moved for summary judgment as to the terminations of Contract Nos. 3560 and 3567 (gov't reply).

DISCUSSION

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party moving for summary judgment must show, based solely on the existing record, that there is sufficient uncontroverted evidence to meet its evidential obligation as defined by substantive law. *Osborne Construction Co.*, ASBCA No. 55030, 09-1 BCA ¶ 34,083 at 168,512.

The Government's Motion for Partial Summary Judgment Under Contract No. 4739

The government motion is limited to Contract No. 4739. It asserts that the material was properly rejected after it failed a second attempt at PLT. Additionally, the government asserts that the parties agreed to salt fog testing and that one of appellant's Contract No. 4739 units failed dielectric breakdown and continuity testing following salt fog exposure. Thus in the government's view, the lot was properly rejected and the contract properly terminated. (Gov't mot. at 2-3) In response, DCX appears to argue that there is a genuine issue of material fact as to whether salt fog testing was required by Contract No. 4739 (app. opp'n and mot. at 13).

In order to sustain its termination of Contract No. 4739, the government must show that salt fog testing was a valid contract requirement, that the test was properly administered, and that the DCX items failed testing. In support of the motion, the government points to its 30 October 2006 letter, setting out the conditions under which appellant's requests for deviations/waivers would be approved (SOF ¶ 13), as the source for the salt fog testing requirement. There are indications that appellant agreed to it. At the same time, it does not appear that the contract was explicitly modified to require salt fog testing. (SOF ¶ 16) Under those circumstances, we are reluctant to do more than deny the government's motion. The question remains open for the parties to develop and speak to at the hearing in this matter.[2]

We also note that the record references two documents bearing directly on salt fog testing – the DTB procedure for salt fog testing (DTB TPO040013 rev. A) and the ASTM standard on salt fog testing (B117). Only ASTM B117 has been included in the record here. (SOF ¶¶ 13, 15) We are reluctant to rule on the validity of a termination for failure to pass PLT when we have not seen all documents bearing on the test procedure that was used. That would be especially important here because Mr. Williams, the project engineer for the company that tested appellant's items, has stated that the DCX items were not rinsed following salt fog exposure while the engineer that recommended salt fog testing to the government, Mr. Wolfley, said he believed the items would be

[2] The government also says that if the contract was not modified to add salt fog testing, the original contract requirements remained in effect, and DCX has not argued that it met those requirements. Presumably, the government's point is that appellant only received a second chance at production lot testing by agreeing to the conditions that included salt fog testing. The government, however, did not terminate the contract for failure to meet the original testing requirements, and we see no reason to address whether the contract could have been terminated on that basis. The question before us is whether the termination for failing salt fog testing was proper.

rinsed following exposure. (SOF ¶¶ 20, 21) The relevant ASTM B117 provision, Section 13, states that test items may be rinsed following salt fog exposure (SOF ¶ 22). Mr. Wolfley also stated that what DTB had identified as corrosion on the DCX items following salt fog exposure, and a ground for failing appellant, was really flux residue. All of these points bolster our view that the government's motion for summary judgment should be denied.[3]

Appellant's Motion for Summary Judgment Under Contract Nos. 4739, 3560, and 3567

In addition to responding to the government motion, appellant has filed its own motion for summary judgment on all three contracts. With respect to Contract No. 4739, DCX contends that the termination was improper because its units substantially complied with contract requirements (app. opp'n at 15). The basis for the termination included the failure of one Contract No. 4739 item to pass electrical testing after salt fog exposure. Appellant appears to argue that because salt fog testing was not a clear requirement of the contract, the government could not require strict conformance. The government counters that if appellant contends that the contracts were never legally modified to include additional testing and specification deviations, the government is entitled to summary judgment on all three contracts (gov't reply at 15-17). We have, however, already found that it would be premature to rule on whether salt fog testing was required by the contract, and denied the government's motion as to Contract No. 4739. For the same reasons, it would be premature to grant summary judgment as to appellant's Contract No. 4739 motion. Because the applicability of salt fog testing under the contract remains unresolved, we must deny appellant's motion with regard to Contract No. 4739 and the government's contention that it is entitled to summary judgment on all contracts.[4]

Appellant further contends that summary judgment concerning Contract Nos. 3560 and 3567 is appropriate because the government did not complete its inspections as required by the contracts (app. opp'n and mot. at 17). Initially, DCX suggests that the termination of Contract No. 3560 was based on the problems associated with Contract No. 4739. Appellant has not pointed to, and we do not see, evidence of that. There is no

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[3] Finally, we note that the record appears to contain only a summary report indicating that one of three Contract No. 4739 items failed testing after salt fog exposure (SOF ¶ 17). We have not seen any other documentation regarding the Contract No. 4739 tests. At least for purposes of summary judgment, the statement that an item failed, without more, is insufficient.

[4] Since the issues relating to salt fog testing are sufficient to deny this motion, we need not address whether there were testing problems relating to the other three failures cited by DTB or whether the Contract No. 4739 items substantially complied despite the other cited test failures.

reason to doubt the CO's statement that he terminated Contract No. 3560 because DTB had determined that some Contract No. 3560 items failed the potting requirement (SOF ¶ 19). The fact that the determination was based on a visual inspection and that the complete array of DTB tests may not have been done does not concern us at this point. As written, the DTB test procedures specifically included a visual inspection to verify compliance with contract drawings (SOF ¶ 8). And, although DCX argues that DTB did not conduct a "complete inspection," we see nothing that would have required a "complete inspection" once a nonconformity was found. If DCX has more specific concerns and arguments about the inspection done by DTB, it may raise them at the hearing on the merits in this matter.

Appellant also asserts that the termination was invalid because of issues relating to the potting specification.[5] DCX points out that Mr. Williams testified that the original potting requirement conflicted with the requirement as set out in the CAR (app. opp'n and mot. at 20-22). The government questions Mr. Williams' experience or authority to testify in this area, and notes that Mr. Wolfley and the CO stated that the original contract potting requirement had to be read together with the change made in the CAR (gov't reply at 11-12). The status of the potting requirement after the CAR was approved is problematical. It would not be appropriate to decide the matter in the context of the pending motions. Even if there were no questions about the import of the potting requirement as modified, we could not say it was clear appellant had or had not met the requirement. In separate examinations of photographs, Mr. Wolfley said that they did not meet the potting requirement, and Mr. Williams said they did (SOF ¶¶ 20, 21). In addition, even assuming the items failed the potting requirement, we are not prepared to rule, on the basis of the present record, whether the defects were easily correctible for purposes of the substantial compliance doctrine. *See e.g., Brubaker Construction, Inc.*, ASBCA No. 46239, 96-1 BCA ¶ 28,092; *Columbus Jack Corp.*, ASBCA No. 24514, 80-2 BCA ¶ 14,707. There are genuine issues of material fact and we are not persuaded that either party is entitled to judgment as a matter of law. Appellant's motion regarding Contract No. 3560 is denied.[6]

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[5] It appears that the Contract No. 3560 items submitted by DCX passed electrical tests after salt fog exposure (SOF ¶ 18). Thus we need not address, for purposes of the Contract No. 3560 motion, whether salt fog testing was a contract requirement.

[6] Because we have found that the Contract No. 3560 motion should be denied based upon the potting requirement, we do not need to speak to the identification tag and undersized text problems even assuming those problems applied to the Contract No. 3560 items.

Appellant's argument with respect to its third motion is that the government did not test the Contract No. 3567 items, or, if it is assumed they were visually inspected, the government could not have concluded a termination for default was in order because it was likely the doctrine of substantial compliance applied. As with the other DCX motions, there are issues that preclude summary judgment.

As noted above, the CO has stated that Contract No. 3567 was terminated based upon the testing agent's visual inspection of Contract No. 3567 items and the determination that they had the same potting specification defect as the Contract No. 3560 items (SOF ¶ 19). We cannot grant summary judgment that the termination was flawed because we see the same issues here that we did with respect to the Contract No. 3560 motion. The parties dispute whether the visual inspection done by DTB was sufficient. More importantly, the termination here was based on the same potting problems as were asserted in the Contract No. 3560 motion. Accordingly, we have the same genuine issues of material fact and legal questions, and, as such, appellant's motion with regard to Contract No. 3567 is denied.[7]

CONCLUSION

For the reasons set out above, the parties' motions for summary judgment are denied.

Dated: 24 May 2010

OWEN C. WILSON
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman

EUNICE W. THOMAS
Administrative Judge
Vice Chairman

[7] As with the Contract No. 3560 motion, we do not need to address the identification tag and undersized text problems even assuming those problems applied to the Contract No. 3567 items.

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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. 56187, 56188, 56189, Appeals of DCX-CHOL Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

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