ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Kaman Precision Products, Inc.	)	ASBCA Nos. 56305, 56313
	)	
Under Contract No. DAAA09-96-C-0015	)	

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OPINION BY ADMINISTRATIVE JUDGE WILSON ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT, GOVERNMENT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, AND TO DISMISS APPEAL NO. 56305

These appeals involve a contract for bomb "fuzes" between the United States Army (Army or government) and Kaman Precision Products, Inc. (Kaman or appellant) that was terminated for default. The termination was based upon government revocation of acceptance of previously accepted fuzes, thereby rendering appellant delinquent in meeting the delivery schedule, and the failure to secure government approval to rework fuzes that failed testing. Appellant filed a motion for summary judgment; while the government filed a cross-motion for partial summary judgment and a motion to dismiss ASBCA No. 56305.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. In 1996, the government entered into Contract No. DAAA09-96-C-0015 with the predecessor of Kaman, Dae Shin Enterprises, Inc. d/b/a Dayron, for the production and delivery of FMU-143 fuzes (R4, tab 1). Dae Shin later transferred the assets of its d/b/a Dayron division to Kaman. Through a 2002 novation agreement, the government recognized the transfer of Contract No. DAAA09-96-C-0015 to Kaman. (R4, tab 548)

2. The contract included FAR 52.246-11, HIGHER-LEVEL CONTRACT QUALITY REQUIREMENT (GOVERNMENT SPECIFICATION) (APR 1984). Subsection (b) of this clause provided that Kaman was to "comply with the specification titled MIL-Q-9858 OR ANSI/ASQC Q91, in effect on the contract date, which is hereby incorporated into this contract." (R4, tab 1A at 16) The Document Summary List (R4, tab 1B at 21-24) repeated that appellant was given the option of complying with MIL-Q-9858A (8 March 1985) "Quality Program Requirements" or ANSI/ASQC Q91-1987 (19 June 1987) "Quality Systems – Model for QA in Design/Devel., Prod., Installation & Servicing" (R4, tab 1B at 23).

3. Section 6 of MIL-Q-9858A dealt with "Manufacturing Control." Paragraph 6.5 provided the following.

> 6.5 **Nonconforming Material.** The contractor shall establish and maintain an effective and positive system for controlling nonconforming material, including procedures for its identification, segregation, and disposition. Repair or rework of nonconforming material shall be in accordance with documented procedures acceptable to the Government. The acceptance of nonconforming supplies is a prerogative of and shall be as prescribed by the Government and may involve a monetary adjustment. All nonconforming supplies shall be positively identified to prevent unauthorized use, shipment and intermingling with conforming supplies. Holding areas or procedures mutually agreeable to the contractor and the Government Representative shall be provided by the contractor. The contractor shall make known to the Government upon request the data associated with the costs and losses in connection with scrap and with rework necessary to reprocess nonconforming material to make it conform completely.

(App. mot. dated 26 March 2008, ex. MIL-Q-9858A, ¶ 6.5) In addressing MIL-Q-9858A, the government refers to an exhibit that contains MIL-STD-1520C (27 June 1986) (gov't opp'n dated 1 July 2008 at 4, 6, ex. 8). Kaman contends that MIL-STD-1520C is not called out in the contract (app. reply dated 22 August 2008 at 9 n.5).

4. In pertinent part, the 19 June 1987 version of ANSI/ASQC Q91 provided as follows.

4.13 Control of Nonconforming Product

The supplier shall establish and maintain procedures to ensure that product that does not conform to specified requirements is prevented from inadvertent use or installation. Control shall provide for identification, documentation, evaluation, segregation when practical, disposition of nonconforming product, and for notification to the functions concerned.

4.13.1 Nonconformity Review and Disposition

….

Nonconforming product shall be reviewed in accordance with documented procedures, It [sic] may be:

a) reworked to meet the specified requirements, or
b) accepted with or without repair by concession, or
c) re-graded for alternative applications, or
d) rejected or scraped [sic].

Where required by the contract, the proposed use or repair of product (see 4.13,1 b) which does not conform the specified requirements [sic] shall be reported for concession to the purchaser or the purchaser's representative. The description of nonconformity that has been accepted, and of repairs, shall be recorded to denote the actual condition (see 4.16).

Repaired and reworked product shall be re-inspected in accordance with documented procedures.

(App. mot. dated 26 March 2008, ex. ANSI/ASQC Q91, ¶¶ 14.13, 4.13.1) The government seems to equate ANSI/ASQC Q91 with a different provision also incorporated by reference in the contract, ANSI/ASQ Z1.4 – 1993 (R4, tab 1B at 12). ANSI/ASQ Z1.4 – 1993 is not in the record. The government includes a copy of a 2003 version of that document (gov't opp'n dated 1 July 2008, ex. 7).

5. In its motion papers the government proposes as an undisputed fact that Kaman adopted ISO-9000 quality standards rather than an ANSI/ASQC QMS and references 2006, 2005, and 2001 Kaman Quality Assurance Plans (QAPs) for the FMU-143 fuze program (gov't reply dated 6 October 2008 at 9, 10, 38 n.6, exs. 2, 4; R4, tab 372). The

QAPs referenced other publications including specifications, Kaman operational procedures, processes, and instructions.

6. Appellant's statement of undisputed facts in its motion for summary judgment includes copies of Kaman policies and procedures relating to FMU-143 fuze rework and retest (app. mot. for summary judgment dated 26 March 2008, Cowan aff., exs. 1-13). The policies and procedures include PP8-2 on the Preliminary Review/Material Review Board which stated the following in part (as changed by handwritten marks):

> **3.0 Requirements**
>
> ….
>
> 3.3 Documentation. All deliverable material found to be nonconforming shall be processed as follows.
>
> ….
>
> 3.3.2 Document the nonconformance on the Production Routing Cards (Reference ME2-13, for the FMU-143 Fuze Program). Nonconformances shall be listed in the rework/repair log section and reworked to drawing. Rework to drawing and approved SRPs do not require Quality Engineering or Engineering disposition. If the nonconformances cannot be reworked, it shall be transferred to an MRR (Reference 4.2.1) to disposition.
>
> ….
>
> 3.8 Rework and Repair Dispositions. Rework and repair instructions shall be written by Engineering and approved by Quality Assurance and the Customer Representative and the Customer Representative, (Government Representative is the QAR) Standard Repair Procedures (SRPs) shall be approved by MRB, including customer representative (Reference PP8-9).

(App. mot., Cowan aff., ex. 3)

7. The Kaman policies and procedures also included PP8-3 on Failure Analysis and Reporting, which in part provided the following:

> **3.0 Definitions**
>
> 3.1 Failure – The absence of performance, or performance outside the specifications while being subjected to a valid product acceptance test in accordance with an approved test procedure.
>
> ….
>
> **4.0 Requirements**
>
> 4.1 Failure Analysis Reporting
>
> ….
>
> 4.1.3 Automated FAR. The Safety Device and Electronics Assembly FAR [Failure Analysis Report] Form is automatically generated for each unit that fails in the Automated Test Equipment (ATE) with the out-of-tolerance specification or engineering guard band limits listed.
>
> ....
>
> 4.3 Failure Analysis
>
> 4.3.1 Investigation/Evaluation. Representatives from Engineering and/or Quality are responsible for the evaluation of each failure to determine the level of investigation or analysis required to determine the cause of each failure. The evaluation will be conducted at the lowest level of assembly necessary to identify the cause.
>
> 4.3.2 Analysis. Each failure is analyzed using the failure description, defect/test number

and the test data to determine the cause. Engineering and Quality will enter the required actions (i.e., diagnostic tests, teardown inspections or measurements) necessary to determine the cause and if there is any potential effect of the failure on other components under "Failure Analysis".

….

4.4 Cause and Disposition. Engineering or the Test/QA Technician and Quality will review the failure cause and symptoms, provide disposition instructions, e.g. rework, clean, retest, etc. for the unit in the "Disposition Instruction" on the FAR and sign where indicated. If failure is determined to be a pattern failure, enter the number in the block provided.

….

4.6 Rework Action. Engineering shall complete the action(s) prescribed in the disposition block and sign under "RWK BY".

4.7 Inspection. QA will inspect all rework action(s) and stamp under "INSP BY". Non-repairable piece parts or assemblies less than $100.00 may be scrapped per PP8-8 or returned to supplier with a copy of the FAR. An MRR will be generated when directed by the disposition instruction.

….

4.14 Final Disposition. Upon completion of required action(s) and retest, the unit will be reviewed by QA for final disposition as follows:

4.14.1 If the unit successfully passed test, QA will stamp the "Final Disposition" block and close out the FAR. No approvals

for Engineering or Quality Manager are required.

4.14.2 If the unit fails retest, the word "Failed" will be entered in the Final Disposition block and the new FAR number in the appropriate block. The original FAR closed. No approvals by Engineering or Quality are required.

(App. mot., Cowan aff., ex. 7)

8. The contract incorporated by reference FAR 52.246-2, INSPECTION OF SUPPLIES – FIXED-PRICE (JUL 1985) (R4, tab 1A at 16). The clause provided the following in relevant part.

> (b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering supplies under this contract and shall tender to the Government for acceptance only supplies that have been inspected in accordance with the inspection system and have been found by the Contractor to be in conformity with contract requirements. As part of the system, the Contractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to the Government during contract performance and for as long afterwards as the contract requires. The Government may perform reviews and evaluations as reasonably necessary to ascertain compliance with this paragraph. These reviews and evaluations shall be conducted in a manner that will not unduly delay the contract work. The right of review, whether exercised or not, does not relieve the Contractor of the obligations under the contract.
>
> (c) The Government has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. The Government shall perform inspections and tests in a manner that will not unduly delay the work. The Government assumes no contractual obligation to perform any inspection

and test for the benefit of the Contractor unless specifically set forth elsewhere in this contract

….

(f) The Government has the right either to reject or to require correction of nonconforming supplies. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. The Government may reject nonconforming supplies with or without disposition instructions.

(g) The Contractor shall remove supplies rejected or required to be corrected. However, the Contracting Officer may require or permit correction in place, promptly after notice, by and at the expense of the Contractor. The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and, when required, shall disclose the corrective action taken.

9. The contract incorporated by reference FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) (R4, tab 1A at 32). Subsection (a)(1) of the clause allowed the government to terminate the contract for default if the contractor failed to:

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

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

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

Subsection (a)(2) stated that the right to terminate under subdivisions (a)(1)(ii) and (a)(1)(iii) could be exercised if the contractor failed to cure within 10 days after receiving notice of the failure from the contracting officer.

10. The contract included FAR 52.246-17, WARRANTY OF SUPPLIES OF NONCOMPLEX NATURE (APR 1984) (R4, tab 1A at 33-34). The March 2001 version of that clause was later incorporated by reference into the contract in Modification

No. P00030 dated 11 October 2002. The Modification refers to a May 2001 version but that appears to be a typographical error. (R4, tab 26 at 2) The clause provided in part that notwithstanding "inspection and acceptance by the Government of supplies furnished under this contract,…the Contractor warrants that for 1095 days after acceptance–(i) all supplies furnished under this contract will be free from defects in material or workmanship and will conform with all requirements of this contract;…." (*Id.*; FAR 52.246-17(b)(1)(i))

11. Modification No. P00030 dated 11 October 2002 added FAR 52.246-4528, REWORK AND REPAIR OF NONCONFORMING MATERIAL (MAY 1994) to the contract. This clause provided the following:

a. Rework and Repair are defined as follows:

(1) Rework – The reprocessing of nonconforming material to make it conform completely to the drawings, specifications or contract requirements.

(2) Repair – The reprocessing of nonconforming material in accordance with approved written procedures and operations to reduce, but not completely eliminate, the nonconformance. The purpose of repair is to bring nonconforming material into a usable condition. Repair is distinguished from rework in that the item after repair still does not completely conform to all of the applicable drawings, specifications, or contract requirements.

b. Rework procedures along with the associated inspection procedures shall be documented by the Contractor and submitted to the Government Quality Assurance Representative (QAR) for review prior to implementation. Rework procedures are subject to the QAR's disapproval.

c. Repair procedures shall be documented by the Contractor and submitted on a Request for Deviation/Waiver, DOD Form 1694, to the Contracting Officer for review and written approval prior to implementation.

d. Whenever the Contractor submits a repair or rework procedure for Government review, the submission shall also include a description of the cause for the nonconformance and

a description of the action taken or to be taken to prevent recurrence.

e. The rework or repair procedure shall also contain a provision for reinspection which will take precedence over the Technical Data Package requirements and shall, in addition, provide the Government assurance that the reworked or repaired items have met reprocessing requirements.

(R4, tab 26)

12. As of November 2008, Kaman and its predecessors had produced and tendered to the government over 10,000 fuzes under the Contract (ASBCA No. 56305 (56305) compl., answer ¶ 17, ASBCA No. 56313 (56313) compl., answer ¶ 13). During production, issues arose regarding "bellows motors" and "impact switches" which were components of FMU-143 fuzes.[1]

13. In September 2004, the parties became aware that bellows motors not called for by the contract had been installed in some FMU-143 fuzes (gov't opp'n dated 27 June 2008, Proposed Undisputed Findings of Fact (PUFF), ¶ 6; app. reply dated 22 August 2008, Statement of Genuine Issues of Material Fact, ¶ 6). In December 2004, Kaman informed the government that a supplier had recalled impact switches used in FMU-143 fuzes (R4, tab 89). From September 2004 through August 2005, the parties worked to resolve those issues (R4, tabs 49-164; 56313, amended answer dated 6 November 2008, ¶¶ 51-74; gov't opp'n dated 1 July 2008, PUFF, ¶¶ 6-25; app. reply dated 22 August 2008, Statement of Genuine Issues of Material Fact, ¶¶ 6-25)[2]

14. In August 2005, appellant conducted ATE centrifuge testing on 82 FMU-143 fuzes. Kaman's initial report to the government indicated that there were no impact switch closures above 75 Gs, that no fuzes had stuck impact switches, and that all impact switches reopened after closure. (R4, tab 165) In response, the government requested a

[1] A bellows motor is a mechanism located inside the fuse needed to effectuate the arming process (gov't opp'n dated 27 June 2008 at 7). An impact switch is an internal mechanism that constitutes the connection between the control arrangement and the adjusting arrangement for the explosion delay time and serves for the transmission of the firing current stored in the fuse condenser to the detonator. The switch activates when a pre-set g-level has been exceeded (*id*. at 11).

[2] On 6 November 2009, the government commenced a False Claims Act action against appellant in the United States District Court, Middle District of Florida. The government alleges that Kaman intentionally installed the incorrect bellows motor into fuzes delivered to and accepted by the government.

report on the "failures experienced during ATE" in August 2005 (R4, tab 168). By report sent 21 September 2005, Kaman conceded that the ATE testing had shown that four units failed "due to clock (gag rod) readings below the specification minimum limit," five units had "passed to the limit but gave readings below the factory acceptance" limit, and as a whole the fuzes dropped an average of 0.214 seconds. Appellant nevertheless concluded that the data exonerated "the post-centrifuge fuzes as representatives of production FMU-143 fuzes now in" the government's possession. (R4, tab 170) The government did not agree with Kaman and requested additional testing and analysis (R4, tab 176).

15. On 9 November 2005, appellant submitted its final Failure Analysis Report on the ATE test failures. Appellant said that the root cause of the problem was the migration of lubrication within the fuzes. (R4, tab 186) The government found the Report insufficient and unacceptable. Kaman was directed to prepare a new report addressing listed government concerns. (R4, tab 198) Appellant hired a consultant to help prepare the new report (R4, tab 202). In January 2006, Kaman sent the government new rework procedures for the bellows motors and impact switches (R4, tab 206). Appellant submitted its new Failure Analysis Report on 22 February 2006 (R4, tab 219). The next day, the government gave Kaman approval of its revised rework procedures conditioned on specified changes and resubmission (R4, tab 220). The rework procedures were finally approved and the government instructed appellant to proceed with rework in May 2006 (R4, tab 296).

16. In June and July 2006, Kaman sent the government a number of reports of ATE test failures involving the FMU-143 fuzes (R4, tabs 329-42). Appellant stated that the failures were the result of a test phenomenon and did not "impact fuze functional performance" (R4, tab 355). In Modification No. P00065 dated 27 July 2006, the parties agreed to a monthly schedule for deliveries of reworked fuzes extending through November 2006 (R4, tab 360). By letter dated 7 August 2006, the government complained that appellant had not made the July 2006 delivery of reworked fuzes. The government said that it maintained its rights under the Warranty clause, FAR 52.246-17(c)(4), to take an equitable adjustment to the contract price. (R4, tab 367)

17. In late August 2006, the government sent a team to Kaman's facility to assess the ATE machine and later provided appellant with a report and required actions (R4, tab 423). An undated and unsigned memorandum said that the government team extracted test data from the ATE machine. The data covered 64,126 ATE tests, which was 19,433 more than that reported by Kaman. The memorandum also stated that the data showed approximately 6,800 test failures. (Gov't opp'n dated 6 October 2008, ex. 1A, ¶¶ 10-11) By declaration, a government contracting officer says that the memorandum was prepared by a government technical and quality expert. The contracting officer does not identify the expert or indicate when the memorandum was written. (Gov't opp'n dated 6 October 2008, ex. 1). In October 2006, the government requested serial number logs "for each

fuze lot that has been produced." The government was apparently concerned about being able to trace specific fuzes. (R4, tab 408)

18. Later in October 2006, the government sent Kaman a cure notice under the Warranty clause, FAR 52.246-17. Among other things, the government was concerned about appellant's "failure to make progress on reworking Bellows Motors fuzes" in accordance with the Modification No. P00065 delivery schedule. The government said that it may pursue alternative remedies under the Warranty clause. (R4, tab 415) In responding to the cure notice, appellant indicated that because of ATE test failure issues the delivery of reworked fuzes could not begin until March 2007 (R4, tab 429). By letter dated 27 October 2006, the government stated that it was concerned about recent "admissions" by Kaman regarding a number of issues. The government specifically mentioned "rework to failed fuzes with unapproved rework procedures" and "possible tendering and subsequent acceptance of product with nonconforming parts." Appellant was being placed on notice that it would take time for the government to "process data and research and analyze the ramifications and consequences of these issues" from contractual, legal, and technical perspectives. The government stated further that it retained all of its contract rights and legal remedies. (R4, tab 435)

19. On 13 December 2006, the government again requested serial number log sheets from Kaman (R4, tab 477). On 27 December 2006, the government sent a letter to appellant describing its response to the cure notice as unacceptable. The government notified appellant that it was changing its remedy under the Warranty clause from correction of nonconforming assets to an equitable adjustment in the amount of $6,896,031.80. (R4, tab 480) Over the next five months, appellant responded to the government's 27 December 2006 letter and the government continued to request serial number log sheets (R4, tabs 482, 490).

20. By letter dated 6 June 2007, the government informed Kaman that while it did not see a reason to change the position it took in its 27 December 2006 letter, it was rescinding its request for $6.8 million. The government reserved the right to seek correction of fuzes from another source and said the compensation it was due could not be determined at this time. (R4, tab 493) Later in June 2007, the government sent appellant instructions for shipping defective fuzes to the government facility at China Lake, California (R4, tab 495). The parties exchanged correspondence about the return of defective fuzes with appellant reserving its "rights and remedies, including its right to submit claims, under the contract" and the government indicating that it had not yet determined what costs it may be entitled to (R4, tabs 496-99).

21. On 10 July 2007, the government cited the Inspection clause, FAR 52.246-2, and revoked its acceptance of fuzes identified in lots ACO03H046-004 and ACO03D046-001. The government said that it had discovered that the fuzes had failed

ATE testing and had been reworked without authorization or disclosure. The fuzes were therefore nonconforming under the contract and subject to revocation of acceptance. The government requested documents and data, including serial number log sheets and lot histories. The government also said that it reserved its right to determine all remedies while investigations continued. It did not "release any claims that the Government has or may have against [Kaman] arising from or relating to fraud or false claims…." (R4, tab 500) In mid and late August 2006, Kaman told that government that it was still searching for some of the documents that had been requested (R4, tabs 505, 511).

22. The government sent Kaman a show cause letter on 6 September 2007. The government noted that it had identified nonconforming fuzes and that appellant had not met the delivery schedule. Further, the government contended that appellant was in breach for the following reasons: unauthorized rework of fuzes; failing to notify the government that reworked fuzes had been delivered; failing to provide supplies that met the technical data package (TDP); failing to make progress in rework of fuzes under warranty; and for failing to meet contract quality criteria. (R4, tab 512) Appellant responded on 26 September 2007 indicating that the government's position was based on the assertion that the fuzes at issue contained latent defects due to improper rework which resulted in the failures listed above. Appellant then argued that the fuzes conformed to contract requirements and that the government was fully aware of Kaman's production methods. (56313, compl., attach. F)

23. On 12 October 2007, the government cited the Inspection clause and revoked its acceptance of a large number of additional fuzes. The government requested information and data and reiterated prior requests for information and data. (R4, tab 522) By letter dated 26 October 2007, Kaman notified the government that it was cancelling the contract and rescinding all "previous offers or tentative agreements to resolve pending issues." Appellant listed 16 government actions and inactions that it characterized as material breaches of the contract. Among them were: unreasonable and untimely rejections of rework procedures, corrective action request responses, failure analyses, and other data submissions; improper revocation of fuzes based upon erroneous assertion of latent defects; and unreasonable document production requests. Appellant stated that it would "continue to conform to government directions, including but not limited to completion of production, pending resolution of the merits of relevant disputes by an authorized tribunal." (R4, tab 531)

24. On 9 November 2007, appellant sent the government a letter repeating its assertions that there had been no unauthorized reuse or rework and that the government's revocations of acceptances and large document requests were material breaches of the contract allowing Kaman to stop work. Appellant cited various contract provisions and requested a final decision on the following contract interpretation issues:

1. that the Army has misread the applicable Contract requirements relating to reuse and rework and that Kaman Dayron's practices have been appropriate and authorized;

2. that the Army's revocations of previously accepted fuzes is improper because the alleged defects are not latent;

3. that the Army's associated data requests concerning the accepted lots are improper for the same reasons; and

4. that the Army's revocations and associated document requests are material breaches of contract, permitting Kaman Dayron to stop work.

(R4, tab 536 at 1-2)

25. Referencing its show cause letter and appellant's response, the government contracting officer terminated the contract for default on 18 January 2008. The termination was based on Kaman's failures: (1) to deliver in accordance with the contract schedule as a result of the revocations; (2) to obtain government approval of rework; (3) to notify the government that fuzes had been reworked; (4) to provide supplies meeting the Technical Data Package (TDP); (5) to make progress in rework of fuzes under warranty; and (6) to meet contract quality criteria which was a failure to meet the following contract provisions:

a. Higher Level Contract Quality Requirement (Government Specified) 52.246-11 (APR 1984) – Pre Modification P00030; (JUL 2001) – Post Modification P00030
b. MIL-Q-9858A 08 MAR 85
c. MIL-I-45208 (As reference [sic] MIL-Q-9858)
d. ANSI/ISO/ASQ Q9001-2000 13 DEC 00
e. Inspection of Supplies – Fixed Price 52.246-2 (JUL 1985) – Pre Modification P00030 (AUG 1996) Post Modification P00030
f. Rework and Repair of Nonconforming Material 52.246-4528 (MAY 1995)
g. Contractor Inspection Requirements 52.246-1 (APR 1994) – Post Modification P00030
h. Warranty of Supplies of a Noncomplex Nature 52.246-17 – (JUN 2003).
i. TDP for the FMU-143 E/B Data List, DL9210625

(a) Prime Item Product Fabrication Specification for Fuze System, Bomb FMU-143 E/B and FMU-143 E (D-1)/B, SP9210625

(b) Prime Item Product Fabrication Specification for Fuze System, Bomb FMU-143 B/B and FMU-143 E (D-2)/B Part II of Two Parts, SP8983300 revision A, 15 March, 1994

(c) MIL-A-2550B 24 APR 73.

Additionally, the government stated that the defects it relied on were latent. (R4, tab 546)

26. On 24 January 2008, Kaman filed a notice of appeal and complaint from a deemed denial of its 9 November 2007 request for a final decision on four contract interpretation questions. In its request for relief, appellant seeks:

> 1. a declaratory judgment that:
>
> (a) Kaman Dayron used permissible reuse and rework procedures during production;
>
> (b) The Army's revocations of previously accepted fuzes in its July 10, 2007, and October 12, 2007, letters were improper and not authorized under the Contract's Inspection clause;
>
> (c) The Army's associated documentation requests related to the accepted fuzes and their purported revocation as stated in the Army's July 10, 2007, and October 12, 2007, letters and related correspondence are unreasonable and unauthorized under the Contract; and
>
> (d) The Army's breaches, both individually and in all combinations, are material, such that Kaman Dayron was justified in canceling the Contract....

(Compl. at 16) The appeal was docketed as ASBCA No. 56305. The government subsequently filed its answer.

27. On or about 5 February 2008, appellant filed a notice of appeal and complaint from the government's 18 January 2008 termination of the contract for default. Kaman

sought a decision by the Board declaring the termination and the revocations of acceptances were improper because:

> (a) the revoked fuzes were produced in conformity with the Contract;
>
> (b) any alleged defects in the fuzes were patent, not latent;
>
> (c) any alleged defects were immaterial and Kaman Dayron was in substantial compliance; and
>
> (d) the government waived and is estopped to assert any alleged noncompliances because of its lengthy pattern of acceptance of the alleged defects under the Contract....

(Compl. at 15) Appellant further requested the Board declare that the termination was improper because: (1) default is not a valid remedy under the Inspection clause of the contract and the relevant FAR termination provision (FAR 49.402-3); and (2) Kaman had "previously validly cancelled the Contract due to the Army's material breaches." In the alternative, appellant sought a conversion of the termination for default into a termination for the convenience of the government. The appeal was docketed as ASBCA No. 56313. The government subsequently filed its answer.

28. Appellant filed a motion for summary judgment asking that the default termination be set aside because it had delivered conforming fuzes. Alternatively, Kaman argued that even assuming the fuzes were defective due to unauthorized rework, the defects were patent because the government was aware of what appellant was doing. (App. mot. at 1)

29. The government requested permission to amend its answers to add the defenses of anticipatory repudiation and gross mistake amounting to fraud in June 2008. Appellant opposed the request and later moved for summary judgment on the merits of anticipatory repudiation. In course of briefing the motions, the government stated that it elected not to raise the issue of anticipatory repudiation but asked to amend three existing paragraphs in the answer in ASBCA No. 56313, to add a number of factual allegations, and to add the affirmative defense of fraud.

30. The government filed its opposition to appellant's motion. Specifically, the government moved to dismiss ASBCA No. 56305 contending that it duplicated ASBCA No. 56313 and filed a cross-motion for summary judgment on the rework issue. (Gov't opp'n at 34, 36)

31. Kaman filed an alternative motion for summary judgment arguing that if the government now asserted that the termination was based, even in part, on the bellows motor and impact switch issues, those grounds for termination had been waived (app. reply dated 22 August 2008).

32. In the interim, on 16 July 2009, the Army issued a Demand for Payment in the amount of $15,540,158.01 as a result of the termination, revocation and warranty actions under the above-referenced fuze contract. By letter dated 22 September 2009, appellant filed a notice of appeal of the 16 July 2009 decision with the Board. That appeal was docketed as ASBCA No. 56947.[3]

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, 1390-91 (Fed. Cir. 1987); *Lockheed Martin Aircraft Center*, ASBCA No. 55164, 08-1 BCA ¶ 33,832 at 167,445. There is a genuine issue of material fact if the evidence is such that a reasonable fact finder could find in favor of the nonmovant. We do not resolve factual disputes but determine whether there is a genuine issue of material fact. The moving party must show that there is no such issue while the nonmovant must counter with facts showing that there is one. (*Id.)*

I. Summary Judgment on the Merits of the Termination for Default, Rework, and Waiver

Kaman moved for summary judgment on the termination for default saying that the revocations of acceptance which led to the termination were based on the assertion that the contract did not allow for unauthorized rework of fuzes even if the rework resulted in conforming fuzes. Appellant argued that the contract did not prohibit the delivery of reworked fuzes and did not require government approval for rework and retest in producing conforming components. In the alternative, Kaman asserted that even if its procedures resulted in defective fuzes, the defects were patent. The government was aware of appellant's production and rework procedures and could not base a termination on latent defects. The government opposed Kaman's motion and filed a cross-motion for summary judgment. Its first point was that the termination was based on many grounds, including the bellows motor and impact switch issues, not just unauthorized rework. Relying mainly on the Inspection clause, the government also asserted that the contract required government approval before the implementation of rework procedures. Finally,

[3] The portion of ASBCA No. 56497 relating to an alleged improper substitution of the bellows motor that is the subject of a parallel False Claims Act matter in the United States District Court, Middle District of Florida has been stayed until 15 August 2010.

the government contends that it became aware of the unauthorized rework defects only after a government team had extracted ATE test failure data which meant that those defects were not patent. In further briefing, the parties argued about the applicability of various provisions of the contract, documents referenced in the contract, and Kaman procedures and plans.

Noting that the government had responded in part to the termination for default motion by referring to the bellows motor and impact switch issues, appellant also moved for summary judgment that the government had waived those issues as grounds for termination by not acting on them within a reasonable time. The government stated that the bellows motor and impact switch issues had led it to the unauthorized rework issue but the latter issue did not become apparent until May 2007. It also argued that grounds for termination could be waived only if Kaman delivered conforming goods which it had not done.

In its motion for summary judgment on the termination, Kaman argued that the contract allowed the delivery of reworked fuzes and did not require government approval for rework and retest in the production of conforming components. Appellant cited MIL-Q-9858A, ANSI/ASQC Q91-1987 and Modification No. P00030 in support of its argument. The government, in its reply and cross-motion, argued that the Inspection clause, FAR 52.246-2(g), obliged Kaman to notify the contracting officer of any item that needed correction. On the same point, the government also referred to ANSI/ASQ Z1.4-2003, MIL-STD-1520C, and § 3.8 of PP8-2 on appellant's rework and repair procedure. Appellant contested the applicability of each of those provisions and, in response to the last one, cited instead Kaman's PP8-3 procedures. The government's reply pointed to Kaman Quality Assurance Plans (QAPs) with respect to rework procedures. The government contended the QAPs indicated that appellant had changed from MIL-Q-9858 to an ISO-9000 QMS which required government approval for rework. The parties not only addressed the applicability of the provisions cited above, they also discussed and disputed their meanings.[4]

Although contract interpretation is generally considered a legal question susceptible to summary judgment, there are situations in which it requires the resolution of factual issues. The parties' briefs make it clear that they each see a number of contract and other provisions as relevant to the question raised by appellant's motion. New materials are cited and discussed as late as the government's reply and appellant's surreply. Under those circumstances, we have no confidence that the record has been

[4] We note that the termination for default was based on the failure to meet some of the above provisions as well as additional provisions: MIL-I-45208; FAR 52.246-4528; FAR 52.246-1; FAR 52.246-17; and the TDP for the FMU-143 E/B Data List (SOF ¶ 25).

sufficiently developed and analyzed to allow us to determine which contract terms are pertinent to the motion. *Cf. Advanced Technologies & Testing Laboratories, Inc.*, ASBCA No. 55805, 08-2 BCA ¶ 33,950 at 167,976; *Murson Constructors, Inc.*, ASBCA No. 34538, 88-2 BCA ¶ 20,549 at 103,855. Even if it were clear to us which of the cited contract provisions are relevant here, there are sufficient disagreements about the meaning of those provisions to preclude summary judgment (s*ee, e.g.*, app. mot. dated 26 March 2008 at 5-7; gov't opp'n dated 1 July 2008 at 35-36 and Statement of Genuine Issues of Material Fact at 26-28; app. reply dated 22 August 2008 at 9-16 and Statement of Genuine Issues of Material Fact at 4-8). *Osborne Construction Co.*, ASBCA No. 55030, 09-1 BCA ¶ 34,083.

Alternatively, Kaman avers it is entitled to summary judgment because even assuming appellant's procedures resulted in defective fuzes, the defects were patent not latent. Kaman's point appears to be that since the revocations of acceptance were based on latent defects and the termination for default was based in part on the revocations, a showing that the asserted defects were patent would invalidate the revocations and the termination. In the first place, not only were other grounds cited as justifications for the termination, but we may uphold a termination for default on any ground existing at the time of the termination. *Kirk Brothers Mechanical Contractors, Inc. v. Kelso*, 16 F.3d 1173, 1175 (Fed. Cir. 1994); *United Detection Systems, Inc.*, ASBCA No. 46603, 98-1 BCA ¶ 29,368 at 145,987. At best, then, appellant's motion is for partial summary judgment. More importantly, the motion asks us to rule on a hypothetical situation. We are not obligated to do so and decline Kaman's invitation. There are too many interrelated issues relating to the propriety of the revocations of acceptance, the termination, and appellant's cancellation of the contract, for us to deal with one on a theoretical basis. In any event, it is clear to us that there are genuine issues of material fact with respect to whether the government was or should have been aware of unauthorized rework. (*See, e.g.*, app. mot. dated 26 March 2008 at 9-12; gov't opp'n dated 1 July 2008 at 34-36 and Statement of Genuine Issues of Material Fact at 28-31; app. reply dated 22 August 2008 at 16-20)

Waiver

In the alternative motion for summary judgment, appellant asserts that the government waived the bellows motor and impact switch issues as grounds for termination by not acting on them within a reasonable time. Kaman relies on *DeVito v. United States*, 413 F.2d 1147 (Ct. Cl. 1969), which held that the government may waive otherwise valid grounds for default if it (1) fails to terminate in a reasonable time after default under circumstances that indicate forbearance, and (2) the contractor relies on the failure to terminate and continues to perform under the contract with the government's knowledge and implied or express consent. (*Id.* at 1154) As the

government points out, however, even in that situation a contract is still subject to termination if the contractor subsequently delivers non-conforming goods. *Louisiana Lamps and Shades*, ASBCA No. 45294, 95-1 BCA ¶ 27,577 at 137,435. Under those circumstances, we see no way to rule on appellant's motion without addressing the government's contention that fuzes that had been reworked without government approval were defective, or, for that matter, addressing any other arguments going to their compliance with specifications. Whether the fuzes were defective because of unauthorized rework is the subject of appellant's initial motion for summary judgment and we have already declined to rule on it. We will not rule on the same issue in the context of this motion. Whether the government validly reserved the right to terminate despite continued performance (SOF ¶¶ 18, 21), would also appear to raise factual issues. *Cf. Patten Co.*, ASBCA No. 35319, 89-3 BCA ¶ 21,957 at 110,450-451. Accordingly, appellant's motions and the government's cross-motion are denied.

II. The Government Motion to Dismiss ASBCA No. 56305

The government has moved to dismiss ASBCA No. 56305 initially arguing that it was duplicative of ASBCA No. 56313. We disagree. The claim that resulted in ASBCA No. 56305 was a contractor claim for contract interpretation. In contrast, ASBCA No. 56313 is an appeal from the government's termination of the above-mentioned contract for default. The legal and factual issues in the appeals coincide somewhat, but not completely. In ASBCA No. 56305 appellant seeks a ruling that, based upon the contract, the government materially breached the contract and, as such, appellant's cancellation of the contract was justified. However, in ASBCA No. 56313 appellant's relief involves conversion of the default termination into a termination for the convenience of the government. Thus, the two appeals originate from two separate and distinct claims; one for contract interpretation and the other from a government termination claim.

The government also contends that ASBCA No. 56305 is "essentially a monetary claim cloaked under the guise of [a] request for contract interpretation" (gov't reply dated 6 October 2009 at 48). This contention is also without merit. ASBCA No. 56305 is an appeal from a valid claim for contract interpretation. The Federal Acquisition Regulations define a claim as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." FAR 2.101 (previously codified at FAR 33.201). In *Garrett v. General Electric Company*, 987 F.2d 747, 749 (Fed. Cir. 1993), the Federal Circuit found that a government directive that a contractor correct or replace defective engines was a government claim for "other relief" that could be appealed by the contractor. Relying in part on *Garrett*, the court of appeals later ruled that the assertion that a contracting officer's exercise of an option was ineffective constituted a valid contractor claim for other nonmonetary relief – the interpretation of contract terms. *Alliant Techsystems, Inc.*

v. United States, 178 F.3d 1260 (Fed. Cir.), *reh'g denied*, 186 F.3d 1379 (Fed. Cir. 1999). In ASBCA No. 56305, Kaman clearly submitted a written demand seeking a decision on contract interpretation issues (SOF ¶ 24), and it may appeal the deemed denial of that claim.

The fact that a decision on the claim in ASBCA No. 56305 may later result in a monetary claim does not affect our jurisdiction to hear the appeal before us nor does it lead us to conclude that it would be premature to decide ASBCA No. 56305 at this time. As noted, appellant has stated that it seeks a ruling that its cancellation of the contract was appropriate given the government breaches that it alleges. However, Kaman goes on to say that if the Board rules in its favor, it would be entitled to lost profits although it has not yet submitted such a money claim and monetary relief is not a part of ASBCA No. 56305. In pre-*Alliant* decisions including those cited by the government, the Board stated that it would not hear appeals in which the contractor said that it was asserting a claim for contract interpretation but which was really a claim for monetary relief.

The dispute that led to ASBCA No. 56305 was not primarily about lost profits or other money damages. Kaman wanted to know if the government's revocations of acceptance were valid and if it had to respond to the government's document requests. Discussions between the parties led appellant to conclude that the government had breached the contract and that it had cause to cancel the contract. (SOF ¶¶ 23, 24) As in *Alliant*, there is a live dispute raising the contract interpretation question of whether Kaman was obliged to perform at all. ASBCA No. 56305 is properly before us and it is appropriate for the Board to consider declaratory relief. *SUFI Network Services, Inc.*, ASBCA No. 54503, 04-1 BCA ¶ 32,606 at 161,367 (applying *Alliant* to a non-appropriated fund instrumentality contract). *Weststar Engineering, Inc.*, ASBCA No. 52484, 02-1 BCA ¶ 31,759 at 156,852, is another post-*Alliant* decision. In *Weststar*, the contractor sought a contracting officer's decision on issues relating to the use of equipment rate schedules in previously submitted requests for equitable adjustment seeking additional costs. We recognized that the real issue in *Weststar* was money. In contrast, the issue in ASBCA No. 56305 is whether Kaman has performed in accordance with the requirements of the contract or has not and must now do so. Accordingly, the government's motion is denied.

III. The Government Motion to Amend its Answers and Appellant's Motion for Summary Judgment On Anticipatory Repudiation

By letter, the government moved for permission to amend its answers in ASBCA Nos. 56305 and 56313 to add anticipatory repudiation and gross mistake amounting to fraud as affirmative defenses. Following appellant's opposition to the motion, the government requested that it be allowed to withdraw the motion. The government argued that it had come to the conclusion that anticipatory repudiation and gross mistake

amounting to fraud were not affirmative defenses. They were, in the government's view, defenses that relied on facts connected to appellant's claim and so were matters to be determined on the merits. Kaman then moved for summary judgment on the substance of the defense of anticipatory repudiation. With regards to the government's motion to withdraw the motion to amend, appellant said that the Board should grant the motion but make it "terminal" because the defenses were not raised in a timely manner. Alternatively, the Board should rule against the defenses on the merits in the motion for summary judgment with respect to anticipatory repudiation and in the motion for summary judgment on the merits of the termination for default.

The government then filed a motion to amend its answer under a caption that only referenced ASBCA No. 56313 and a proposed amended answer that also only referenced ASBCA No. 56313. The proposed amendments would modify three existing paragraphs in the answer (¶¶ 1, 38, 46), add a number of new factual allegations (¶¶ 47-125), and add fraud as an affirmative defense (¶ 126). The government went on to say that it was electing not to raise the issue of anticipatory repudiation "on the merits or otherwise" and that it did not believe that appellant's conduct and cancellation letter gave "rise to a claim of anticipatory repudiation." In the government's view, this made appellant's motion for summary judgment with respect to anticipatory repudiation moot. In response, appellant made two points. First, the Board should rule in its favor on the motion for summary judgment on the issue of anticipatory repudiation, at the very least in ASBCA No. 56305. Secondly, the motion to amend should be denied insofar as it sought the addition of fraud as an affirmative defense because fraud had not been raised in the government's initial answers. Kaman also added that it did not oppose the addition of the factual allegations at ¶¶ 47-125 of the amended answer (app. opp'n dated 20 November 2008 at 7 n.2).

The government has categorically stated that it does not and will not assert anticipatory repudiation. In that instance, we see no reason to rule on appellant's motion for summary judgment on the anticipatory repudiation issue. The remaining matter is the government's motion to amend its answer in ASBCA No. 56313. Board Rule 7 states that we may, in our discretion, permit either party to amend its pleading "upon conditions fair to both parties." There is no reason not to allow the proposed changes in ¶¶ 1, 38, and 46 of the amended answer. The motion to amend came less than seven months after the original answer was filed. More importantly, nothing in the proposed changes should come as a surprise to appellant.

Appellant does object to the government's proposed addition of fraud (¶ 126) as an affirmative defense. In large part, Kaman argues that the government's failure to include fraud in its original answer was a permanent waiver of the defense. There is no support for that position. Courts interpreting Federal Rules of Civil Procedure 8 on affirmative defenses and 15 on amended pleadings have said that the district courts should allow defendants to amend their answers to assert omitted affirmative defenses when justice so

requires. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1278 at 676 (3rd ed. 2004). The Court of Claims came to a similar conclusion in interpreting its rules. *Brock & Blevins Company v. United States*, 343 F.2d 951, 955 (Ct. Cl. 1965). We have gone so far as to deem an answer amended to assert an affirmative defense. *Mark Dunning Industries, Inc.*, ASBCA No. 42223, 93-3 BCA ¶ 26,075 at 129,594 n.1.

Accordingly, the government's motion to amend its answer in ASBCA No. 56313 is granted.

IV. Appellant's Motion for a Protective Order

Following briefing of the above dispositive and other motions, Kaman noted that it had received discovery requests from the government and asked that discovery be stayed until decisions were issued on the pending motions. Appellant argued that the decisions on those motions could obviate the need for the requested discovery. The government did not oppose a stay of appellant's discovery responses. It did request that, if the decision on the pending motions did not completely resolve the appeal, Kaman be directed to respond. The appeals have not been resolved by our decisions. In light of this decision, the parties may move forward with discovery. Responses to any outstanding discovery requests shall be provided to the requesting party within 60 days of the date of this decision.

CONCLUSION

For the reasons stated above, the government's motion to dismiss ASBCA No. 56305 is denied, the government's motion to amend its answer in ASBCA No. 56313 is granted, appellant's motion for summary judgment with respect to anticipatory repudiation is denied as moot, appellant's motion for summary judgment and the government's cross-motion for summary judgment on the merits of the termination for default are denied, and appellant's motion for summary judgment regarding waiver is denied.

Dated: 4 August 2010

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

(Signatures continued)

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 Nos. 56305, 56313, Appeals of Kaman Precision Products, Inc., rendered in conformance with the Board's Charter.

Dated:

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