

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
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Kaman Precision Products, Inc. ) ASBCA Nos. 56305, 56313, 56947  
formerly dba Kaman Dayron, Inc. )  
 )  
Under Contract No. DAAA09-96-C-0015 )

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APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
MAJ Carla T. Peters, JA  
CPT Marlin D. Paschal, JA  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE WILSON  
ON THE GOVERNMENT'S MOTIONS TO STAY AND TO CONSOLIDATE

These appeals involve a contract for bomb "fuzes" between the United States Army (Army or government) and Kaman Dayron, Inc. (Kaman or appellant) that was terminated for default. The termination was based upon government revocation of acceptance of previously accepted fuzes. The parties have filed several motions. However, prior to the issuance of a decision on those motions, the government filed a motion to stay proceedings until 15 August 2010 while a False Claims Act (FCA) civil lawsuit against Kaman in United States District Court is pending and to consolidate all three appeals. Appellant opposes the motions.

STATEMENT OF FACTS 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 repeated that appellant was given the option of complying with MIL-Q-9858/Rev A Amd 2 (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 21-24).

3. By letter dated 10 July 2007, the government notified appellant that it “discovered numerous and apparent systemic failure modes at the ATE [Automated Test Equipment] step in production.” The government stated:

During this review of production records, the Government could not find evidence that Kaman Dayron followed contract requirements for failures at the ATE step in the production process for the Safety Device & Electronic Assembly (drawing 8983580).

The analysis of the ATE data uncovered that fuzes were nonconforming due to one or more of the following reasons:

1. Failure of Critical and/or Major E characteristics on drawing 8983580 or 929382.
2. Unauthorized reuse and/or rework of Safety Device Assembly (drawing 8983501) and/or Electronics Assembly (drawing 8983580 or 929383) from the Safety Device & electronics Assembly (drawing 893580 or 929382).
3. Repeat use of serial numbers for a Fuze, Safety Device, and/or Electronics assembly with a like component.

(R4, tab 500) Pursuant to FAR 52.246-2 INSPECTION OF SUPPLIES – FIXED PRICE the government revoked acceptance of several fuzes delivered under the contract (*id.* at 5, 8-14). After several communications between the parties, the government, by letter dated 6 September 2007, informed appellant that it was considering terminating the contract for

default. Appellant responded, by letter dated 26 September 2007, contending, *inter alia*, that the revocation of the accepted fuzes was improper (R4, tab 517).

4. On 12 October 2007, the government cited the Inspection clause and revoked its acceptance of a large number of additional fuzes that had been accepted between 1997 and 2004. The government requested information and data and reiterated prior requests for information and data. (R4, tab 522) In late October 2007, Kaman wrote to the government and stated 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. Appellant stated that it would, nevertheless, “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)

5. On 9 November 2007, appellant sent the government a letter repeating its assertions that there had been no unauthorized reuse or rework of the fuzes 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)

6. 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 to: (1) 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)

7. 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....

The appeal was docketed as ASBCA No. 56305.

8. 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" (*id.*, at 16). 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. Discovery in these two appeals has been stayed since 26 February 2009 by mutual agreement of the parties.

9. 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. The contracting officer attributed \$4,121,129.28 of the total payment due to the government to the “bellows motor substitution.” 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.

10. On 6 November 2009 the government, through the United States Department of Justice (DoJ), commenced a False Claims Act action pursuant to 31 U.S.C. §§ 3729 *et seq.* in the United States District Court, Middle District of Florida against Kaman. The complaint alleged, *inter alia*, that Kaman “knowingly submitted false claims to the United States when it requested or demanded payment of 1,081 FMU-143 fuzes shipped between June 5, 2003 and July 25, 2003.” (Gov’t mot., attach. A at 8) On 19 February 2008, DoJ had closed a FCA criminal investigation of Kaman related to two contracts including DAAA09-96-C-0015 and fuzes “allegedly assembled with non-conforming bellows.” The investigation had been ongoing since 18 March 2005. (App. opp’n to amended answer, attach. 1)

11. On 22 December 2009, the government filed a motion to stay proceedings at the Board in ASBCA Nos. 56305 and 56313 until 15 August 2010 (gov’t mot. at 1). In support of its motion, the government provided a copy of the 6 November 2009 civil complaint from the United States District Court action and a declaration dated 9 June 2007 (sic, 9 June 2009) from Bradley Bole, Esq., the DoJ trial attorney handling the FCA litigation. Mr. Bole declared the following:

2. In August 2004, a Government Quality Assurance Representative (QAR) discovered that Kaman Dayron (KD) wrongfully installed the incorrect bellows motor into thousands of fuzes delivered to and accepted by the U.S. military. More specifically, the Government learned that KD had substituted “high energy” bellows motors meant for the FMU-152 fuze line into the FMU-143 fuze line, creating a potentially life-threatening condition. KD subsequently admitted to making the substitution, further suggesting that it was made in order to avoid missing a scheduled delivery date.

....

4. I have reviewed the contracts at issue in Kaman Dayron's ASBCA appeals, and Appellant's underlying claim. It is clear from the information provided, that the civil FCA matter and the appeals before the ASBCA share many of the same legal and factual bases as the contracts at issue in KD's ASBCA appeals. More specifically, Appellant's decision to use improper bellows motor at issue in the subject appeals is also at issue in the Government's FCA case.

(Gov't mot., attach. B) Mr. Bole requested that the appeals be stayed until 8 November 2009.

12. Appellant contests the government's motion, contending that it "has suffered serious competitive harm and stigmatization of its business due to the Army's improper default termination, and that prejudice will continue until the Board rules on the [summary judgment] motions." Also, appellant contends: (1) the District Court FCA matter involves different issues, facts, and witnesses; (2) the proposed stay will severely harm Kaman; and (3) continuing the appeals at the Board will not compromise the civil FCA case. (App. opp'n at 3-16)

13. On 28 December 2009, the government moved to consolidate ASBCA No. 56947 with 56305 and 56313, thereby applying the stay motion to ASBCA No. 56947 as well. Appellant opposes consolidation arguing: (1) the stay should not be granted for the same reasons as put forward in the two earlier appeals; (2) the matters in ASBCA No. 56947 do not substantially overlap; and (3) consolidation risks further delay in a decision on Kaman's pending motion for summary judgment in ASBCA Nos. 56305 and 56313. (ASBCA No. 56947, Bd. corr. ltr. dtd. 5 February 2010)

14. On 4 February 2010, the government submitted a 2 February 2010 Amended Notice of Pendency of Other Actions, in which Mr. Bole certifies, in pertinent part, that the DoJ FCA action is related to ASBCA Nos. 56305 and 56313 which are "regarding the Armed Forces' termination of contracts with Kaman Dayron. The appeal[s] involves several matters, including the dispute that is raised in this lawsuit." (ASBCA Nos. 56305, 56313, Bd. corr. ltr. dtd. 4 February 2010)

15. At the Board's request, the parties further supplemented their positions on 6 May 2010 and 13 May 2010 respectively. Specifically, the Board asked the government whether DoJ still wanted a stay, in view of the fact the relevant declaration only asked for a stay until 8 November 2009, and, if so, what the grounds were. In response, the

government included an email from AUSA Bole still desiring a stay; however, no reason was given as to the grounds to support its position (gov't reply, 6 May 2010, attach. A). The government added that the District Court issued a decision dismissing several counts of the complaint; while retaining the FCA and breach of contract counts for consideration (*id.*, attach. C). Appellant argues that the termination was based on a different ground and was done years after the bellows motor situation that is the subject of the FCA action. As such, appellant avers, the legal and factual issues are disparate, not common, and the District Court has not been asked to address the propriety of the default. (App. reply, 13 May 2010)

### DECISION

We have inherent authority to stay proceedings. *Palm Springs General Trading and Contracting Establishment*, ASBCA No. 56290 *et al.*, 10-1 BCA ¶ 34,406. Exercise of such authority, however, “calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Public Warehousing Co.*, ASBCA No. 56116, 08-1 BCA ¶ 33,787 at 167,225, citing *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936); *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198 (Fed. Cir. 1987). In exercising this authority, we must apply our judgment to weigh the competing interests of the parties and to assess any relevant prejudice. *KiSKA Constr. Corp.-USA and Kajima Engineering and Constr., Inc., A Joint Venture*, ASBCA Nos. 54613, 54614, 05-1 BCA ¶ 32,922.

The movant must show a demonstrable need for the requested suspension that would outweigh the resultant delay to these appeals. In order to assess this need in connection with parallel proceedings, we generally look to the following factors: (1) whether the facts, issues, and witnesses in both proceedings are substantially similar; (2) whether the parallel proceeding would be compromised in going forward with the case; (3) whether the proposed stay could harm the non-moving party; and (4) whether the duration of the requested stay is reasonable. *Public Warehousing*, 08-1 BCA ¶ 33,787 at 167,227.

The government, by comparing the complaint submitted by DoJ in the FCA suit, maintains that there are significant similarities to the appeals at issue here such that a stay is justified. DoJ is suing Kaman for allegedly knowingly substituting non-conforming parts in the FMU-143 fuzes shipped between 5 June and 25 July 2003. In particular, DoJ maintains that the EB 401-2 bellows motor was specified for use in the FMU-143 fuze. DoJ seeks damages alleging that Kaman's materials manager intentionally substituted different bellows motors for the FMU-143 fuzes in order to meet the delivery date. (Gov't mot., FCA compl., attach. A at 3) Upon discovering that appellant had placed the



wrong bellows motors into hundreds of FMU-143 fuzes, the government issued a stop work order on 14 September 2004 (R4, tab 49). On 18 January 2008, more than three years after the stop work order, the government terminated the contract for default, resulting in ASBCA No. 56313. The termination was based on six factors, none of which identified issues with the bellows motors (SOF ¶¶ 6,8). ASBCA No. 56305 also does not concern the bellows motors (SOF ¶¶ 5,7). The government maintains that \$4,121,129.28 of the \$15,540,158.01 demand at issue in ASBCA No. 56947 is for revocation for fuzes with non-conforming bellows motors (SOF ¶ 9), and to that extent the government motion has merit. However, the government fails to show how this portion of the issue in a single appeal should warrant a stay in all three appeals.

The government further argues that continuing with the appeals, particularly discovery, may compromise the FCA litigation, especially given the factual overlap regarding the bellows motors. Appellant contends that it suffers a great prejudice as long as an improper default remains in place. Given the fact that discovery has been stayed (SOF ¶ 8), the government's arguments miss the mark.

In determining whether to grant a stay, the Board must balance the harm to the government to the potential harm to appellant. *TRW, Inc.*, ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407. Appellant maintains that it will suffer great prejudice while the termination for default remains in place and that the CDA's policy of an expeditious Board action will be thwarted. Appellant's argument regarding expeditious Board action is compelling due to the fact that the subject contract was terminated for default, and the associated negative stigma. In weighing the potential hardship to the government in the parallel proceeding against the harm that may result to Kaman if the stay in the matters before the Board is granted, the balance of the scale tips in appellant's favor. The duration of the requested stay, 8 months, is not reasonable in this context.

We conclude, therefore that except as to the demand for payment in ASBCA No. 56947 relating to the bellows motor, the stay should be denied. Insofar as the bellows motor issue is concerned, judicial efficiency counsels granting the stay. *Palm Springs*, 10-1 BCA ¶ 34,406 at 169,867; *Government Business Services Group, LLC*, ASBCA Nos. 54588, 54973, 05-2 BCA ¶ 33,059 at 163,870.

#### The Government's Motion for Consolidation

Consolidation of appeals before the Board is done for the Board's and the parties' convenience. It does not affect the processing of motions such as summary judgment, which may have been filed in the constituent appeals. Accordingly, the government's motion to consolidate is granted.

CONCLUSION

For the foregoing reasons, the government's motion to stay proceedings in the three captioned ASBCA appeals is denied except with respect to the discrete portion of ASBCA No. 56947 relating to the bellows motors, as to which it is granted until 15 August 2010. The motion to consolidate is granted.

Dated: 9 July 2010

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

I concur

I concur

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

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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, 56947, Appeals of Kaman Precision Products, Inc. formerly dba Kaman Dayron, Inc., rendered in conformance with the Board's Charter.

Dated:

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