ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Hanley Industries, Inc.	)	ASBCA No. 56584
	)	
Under Contract No. W52P1J-05-C-0076	)	

APPEARANCE FOR THE APPELLANT: Ryan K. Manger, Esq.
Manger Law, LLC
St. Louis, MO

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
Brian E. Bentley, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

This appeal is taken from the government's termination for default of a contract to supply gun primers. At issue is the government's motion for summary judgment, which appellant opposes. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

Appellant Hanley Industries, Inc. (Hanley) was awarded fixed-price Contract No. W52P1J-05-C-0076 by the U.S. Army Sustainment Command, Rock Island, Illinois, (Army) on 29 September 2005 to supply electric primers, model MK45-1 (MK-45 primers) (R4, tab 1; app. ex. A). The MK-45 primer initiates the propelling charge for shells fired from U.S. Naval warship guns (compl. and answer ¶ 2). Hanley was the only responsive bidder (app. ex. O, aff. of Jack J. Cook, formerly Hanley's chief financial officer, ¶ 3). The schedule called for delivery of the MK-45 primers from 28 August 2006 to 28 May 2007 (R4, tab 1 at 4; app. ex. A at 4, ex. G, aff. of T. Gaynor Blake, Hanley's president, ¶ 11).

The contract included a number of "LOCAL" clauses and provided a website reference (R4, tab 1; app. ex. A at 8, 14, 15, 23, 26). According to the affidavit of Mr. Ben Altheimer, Hanley's vice president of operations at the time of contract award, a local clause is a Rock Island Arsenal specific clause (app. ex. C, Altheimer aff. ¶ 17). One of the local clauses was 52.245-4537, ACCEPTANCE INSPECTION EQUIPMENT (AIE) (FEB 2002) (R4, tab 1 at 16; app. ex. A at 16). Another was 52.209-4511, FIRST ARTICLE

TEST (GOVERNMENT TESTING) (MAY 1994) (FAT clause), which provided in relevant part:

> c. The first article shall be representative of items to be manufactured using the same processes and procedures as contract production. All parts and materials, including packaging and packing, shall be obtained from the same source of supply as will be used during regular production. All components, subassemblies, and assemblies in the first article sample shall have been produced by the Contractor (including subcontractors) using the technical data package provided by the Government.
>
> ....
>
> e. Notwithstanding the provisions for waiver of first article, an additional first article sample or portion thereof, may be ordered by the Contracting Officer in writing when (i) a major change is made to the technical data, (ii) whenever there is a lapse in production for a period in excess of 90 days, or (iii) whenever a change occurs in the place of performance, manufacturing process, material used, drawing, specification or source supply. When conditions (i), (ii), or (iii) above occurs, the Contractor shall notify the Contracting Officer so that a determination can be made concerning the need for an additional first article sample or portion thereof, and instructions provided concerning the submission, inspection and notification of results. Costs of the first article testing resulting from production process change, change in the place of performance, or material substitution shall be borne by the Contractor.

(R4, tab 1 at 15; app. ex. A at 15)

The record reflects two local clauses identified as 52.246-4550: one version is found as Clause E-7 and is entitled HIGHER-LEVEL CONTRACT QUALITY REQUIREMENT (FEB 2004) and the other is found as Clause E-10 and is entitled CRITICAL CHARACTERISTICS (FEB 2004) (R4, tab 1 at 20, 22). The proposal submitted by Hanley on 28 July 2005 includes the full text of the Critical Characteristics clause (supp. R4, tab 255 at 21-22). Mr. Altheimer avers, however, that the contract executed by Hanley did not include the text of the Critical Characteristics version of 52.246-4550 and that when he requested clarification from the contract specialist on 4 October 2006, he was provided

with a copy of the Higher-Level Contract Quality Requirement version of the clause (app. ex. A at 22, ex. C, Altheimer aff. ¶¶ 15-18).

The Critical Characteristics clause provides that in the event of a Level II critical nonconformance anywhere in the production process, the operation that produced the defective component and any other operations incorporating the component or assembly are to be immediately stopped and the government notified. An investigation is to be conducted to determine the cause of the nonconformance and the required corrective actions and the results of the investigation are to be submitted to the government. A request to restart production must be made to and authorized by the government. (R4, tab 1 at 22-23)

The contract incorporated Federal Acquisition Regulation (FAR) and Department of Defense FAR Supplement (DFARS) clauses and provisions by reference, including the standard FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clause (R4, tab 1 at 36; app. ex. A at 35). The contract also required that Hanley comply with MIL-T-15119A (OS), the military specification for "TUBING, ROUND, SEAMLESS ALLOY STEEL." Section 3.7, "Hydrostatic test (CI)," of the MIL-T-15119A (OS) specification provided that "[t]he tubing shall not break or permanently increase in diameter more than 0.003 inch when subjected to the hydrostatic test of [section] 4.9," "Hydrostatic test" which, in turn, provided that "[f]ailure of the tubing to meet the requirements of [section] 3.7 shall be cause for rejection of the lot." (R4, tab 2 at 88, 92, 94)

Prior to contract award, Mr. Brant Miderhoff of the Defense Security Service (DSS) toured Hanley's facility and expressed some concerns about Building 2, which Hanley intended to use for production of the MK-45 primers. After the tour, Mr. Altheimer was advised that Mr. Miderhoff thought there was a problem meeting the government requirements relating to the closeness of the southern boundary for Building 2; however, no official determination was issued on this matter until after contract award. According to Mr. Altheimer, this was the only occasion on which Building 2 was rejected by the government and Hanley used Building 2 for production of explosive devices similar to the MK-45 primers both before and after the MK-45 primer contract. On 15 November 2005, during the post-award conference, Mr. Altheimer displayed Building 19, which needed extensive repairs and upgrades to be suitable for performance of the MK-45 primer contract, as an alternative to Building 2. On 16 April 2006, the government accepted Hanley's upgrades to Building 19 and it was used for the MK-45 primer contract. (App. ex. C, Altheimer aff. ¶¶ 6-13)

Mr. Ronald G. Jones had been employed by Propellex Corporation (Propellex) for 27 years in various engineering and marketing capacities and joined Hanley as its marketing manager in 1999 (app. ex. E, Jones aff. ¶¶ 2-4). He explained that Propellex had produced MK-45 primers for the Navy under contracts with the Army administered

by Rock Island for over 20 years, the last MK-45 primer contract having been awarded in 1994 (*id.* ¶¶ 6-7, ex. N at 1).

Hanley also employed two other former Propellex people, Mr. Art Arnold and Ms. Charlene Schulte, both of whom had worked on the MK-45 primer contract in the areas of tooling, inspection, equipment design, and quality control (app. ex. C, Altheimer aff. ¶¶ 20-21, ex. E, Jones aff. ¶¶ 3, 9). Mr. Arnold had been the quality manager for Propellex. He and Ms. Schulte were responsible for developing the inspection plan, inspection gages, and quality control procedures for Hanley. (App. ex. C, Altheimer aff. ¶ 20)

Mr. Arnold negotiated Hanley's purchase of the Propellex test inspection gages, most of which he had designed. According to Mr. Jones, the same gages that had been used successfully by Propellex were rejected by Naval Surface Warfare Center (NSWC) in Corona, California, when submitted for use in the Hanley contract and were not conditionally approved until 1 March 2007, nine months later. (App. ex. E, Jones aff. ¶¶ 17, 19) Mr. Altheimer avers that the excessive level of government oversight on tasks routinely performed by Mr. Arnold and Ms. Schulte with a minimum of correction extended the submittal to authorization process to over a year, instead of the normal four to six weeks (app. ex. C, Altheimer aff. ¶ 21).

The contract data requirements list (CDRL) was Exhibit A to the contract (R4, tab 1 at 77-87). Mr. Altheimer avers that according to the CDRLs, Minor characteristic plans, gage design and procedures were to be reviewed (approved) by the government's local Quality Assurance Representative (QAR) and Critical and Major characteristic plans, gage design and procedures were to be submitted through the QAR to NSWC for review but, that in practice, the government required all plans, gage designs and procedures to be submitted to NSWC so that the number of characteristics submitted to NSWC almost tripled and the approval process became very time consuming (app. ex. C, Altheimer aff. ¶¶ 22-24). He characterized the NSWC review as an "extreme level of oversight" (*id.* ¶ 25).

The MK-45 primers use seamless drawn steel tubing (app. ex. G, Blake aff. ¶ 9). Messrs. Arnold and Altheimer negotiated the purchase of the Propellex inventory of steel tubing manufactured by Plymouth Tube (Plymouth) (app. ex. C, Altheimer aff. ¶ 27, ex. E, Jones aff. ¶¶ 9, 16). Hanley intended to purchase the balance of the tubing for the contract directly from Plymouth. The Propellex tubing inventory was partially machined and Hanley contracted with Gormac Machine (Gormac) to complete the machining before the primer tubes were sent to Hanley for assembly and loading. (App. ex. C, Altheimer aff. ¶¶ 27, 28, ex. G, Blake aff. ¶¶ 9, 10)

The steel tubing purchased from Propellex was used for FAT and Lot 1 (app. ex. C, Altheimer aff. ¶ 27, ex. G, Blake aff. ¶ 9). Hanley issued purchase order 6082 to

Plymouth for steel tubing for Lots 2, 3, and 4, which was also to be machined by Gormac before being sent to Hanley for processing (app. ex. C, Altheimer aff. ¶ 28, ex. G, Blake aff. ¶¶ 9, 10). However, deliveries under the Plymouth purchase order were placed on hold because of problems getting the FAT units approved (app. ex. C., Altheimer aff. ¶ 33). While the deliveries were on hold, Plymouth's price increased substantially and its purchase terms changed (app. ex. G, Blake aff. ¶ 11).

The FAT occurred on 1 August 2006. By a letter dated 10 August 2006, the contracting officer addressed areas of concern and provided comments and recommendations for Hanley's use in completing the FAT. The letter stated in relevant part:

> Reference a new supplier of the primer tube:
>
> 12. Have available for inspection the 10+ primer tubes and associated data at the component level from the new supplier as agreed.
>
> 13. Have available for inspection all assemblies and sub assemblies and associated data containing the primer tube as agreed.
>
> 14. Ensure all [certifications] are available for the new primer tube with emphasis on hydrostatic testing [certification] as agreed.

(App. ex. H)

At some point, Hanley contacted Steel Trading Company, Inc. (Steel Trading), a steel broker, to locate an alternate supplier for the steel tubing and was referred to Webco Industries, Inc. (Webco) (app. ex. G, Blake aff. ¶ 12). On 31 May 2007, Hanley issued a purchase order to Webco for Lots 2 and beyond, at which point Hanley had existing steel tubing purchase orders pending with both Plymouth and Webco (app. ex. C, Altheimer aff. ¶¶ 31, 33, ex. G, Blake aff. ¶¶ 12, 13).

Lot 1 was submitted to the Army for testing on 4 September 2007. The first delivery of Webco steel tubing to Gormac for machining occurred on 11 September 2007. (Gov't reply, ex. A at 2) On 1 February 2008, the contracting officer issued unilateral Modification No. P00010, adjusting the delivery schedule to 22 April 2008 through 17 November 2008 (R4, tab 47).

The first primer tubes machined by Gormac using Webco steel tubing were received by Hanley on 4 February 2008 (app. ex. G, Blake aff. ¶ 14). On 15 February 2008, Mr. Blake contacted the contracting officer to clarify the procedure to approve a new vendor (app. ex. G, Blake aff. ¶ 15, ex. J). According to Mr. Blake, the tubes had to be at component level in order for the government to inspect them for a FAT. He explained that this means the tubes had to be hydrostatic pressure tested, fully-machined by Gormac and its subcontractor, ready for assembly, and could not be submitted for FAT until they had been received from Gormac. (App. ex. G, Blake aff. ¶ 16)

Apparently on 25 February 2008, one of the steel tubes burst during hydrostatic pressure testing by Gormac (app. ex. K). Hanley reported the rupture to the government on 26 February 2008 (compl. ¶ 42; R4, tab 169). The government responded that same day, advising that this was a critical failure under the Critical Characteristics clause and that Hanley was required to complete a Failure Analysis (FA) and Corrective Action Report (CAR) for government approval before utilizing any Gormac tubes and was to cease use of any tubes from the same heat of steel (R4, tab 111). On 27 February 2008, Hanley sent an email to an individual at what appears to be an email address at Steel Traders, advising that the steel tube it had supplied had burst and that operations at Hanley and Gormac had been suspended. A copy of this email was sent to the government. (App. ex. K at 3) It is not clear from the record when the government actually learned that Webco was Hanley's new steel vendor (app. resp. to gov't proposed statement of fact No. 8).

On 3 March 2008, Hanley received the burst steel tube from Gormac (R4, tab 143). It provided its inspection report to the government on 5 March 2008 (R4, tab 146). Hanley also advised the government that it had sent the ruptured tube to St. Louis Testing Laboratories for analysis (R4, tab 149; app. ex. G, Blake aff. ¶ 21). The resulting laboratory report is dated 10 March 2008. It stated that the "failure condition was due to the presence of a lap" and explained that a lap was a surface defect and that there was "no evidence of hydrogen embrittlement." (R4, tab 150 at 2)

Hanley submitted a copy of the laboratory report as part of its CAR to the government on 11 March 2008. The CAR stated that no other product was affected and that "[a]ll tubes passed pressure test requirements and are compliant with all requirements." It further stated that Hanley would "[c]ontinue to follow procedure, monitor and test all components per contract requirements." It concluded that "[a]ll processing and operations have been followed" and that "[a]ll tubes are conforming to specifications." It requested a restart for both Hanley and Gormac the following day. (R4, tabs 154-57)

By a letter dated 19 March 2008, the government advised that the CAR was "insufficient in identifying root cause and subsequent corrective action." It nevertheless allowed the restart of production, subject to a number of conditions, including the

requirement that all tubes manufactured by Webco be rejected, that revisions be made in the hydrostatic testing at Gormac and approved by the government, that the AIE used at Gormac be reviewed and approved by the government, that Hanley submit a "'modified' FAT" request for Webco if it wished to change steel suppliers, together with a "detailed root cause analysis" of the prior failure, and that tubing be certified to MIL-T-15119A (OS). (R4, tab 169)

On 26 March 2008, Hanley submitted a root cause FA and CAR report which identified the root cause as a rupture during pressure testing at Gormac and concluded: "All the investigation, evaluation data and reports provided show only one 12 foot section of tubing is non-conforming. Whole Lot is not non-conforming." Among other reported items, it stated that Webco provided the steel "per AMS-T-6736 which has the same chemical composition as the MIL-T-1511-9A." Hanley again requested permission to restart production. (R4, tab 172)

By a letter dated 7 April 2008, the government advised that the submission was still insufficient in identifying the root cause and subsequent corrective action and rejected the entire Webco lot of steel tubing under sections 3.7 and 4.9 of MIL-T-15119A (OS). The government itemized the requirements that Hanley would need to satisfy for a waiver for the rejected lot, including a deviation request to use the Webco steel in Lot 2 that required approval of steel purchased to AMS-T-6736. The government also informed Hanley that it would require a "Modified FAT" to qualify Webco as a supplier, stated that it "would be more extensive than the original FAT performed on tube stock from Plymouth," and identified the steps required for the Modified FAT. (R4, tab 180)

By an email dated 22 April 2008, the government reminded Hanley that a delivery was due and that it would pursue its rights under the contract unless Hanley proposed a revised schedule. Hanley responded with its plan for Lot 2 delivery by 30 May 2008, pending government approval of the additional information Hanley and Webco would provide. (R4, tab 185) The following day the government advised that Hanley would need to submit a "Major (FULL) FAT" to qualify Webco as a supplier (R4, tab 187 at 2). According to Mr. Altheimer, qualification of a new supplier normally required only the testing of affected parts or processes in a modified FAT (app. ex. C, Altheimer aff. ¶ 37).

On 1 May 2008, Hanley submitted a request to the government to use Webco as a supplier along with what the government described as a "partial FAT report" and which was rejected for lack of inspection data reported on a Data Item Description (DID) in accordance with CDRL A010 (R4, tabs 197, 198). Mr. Blake avers that Hanley was not familiar with the DID form and that the government had not previously required Hanley to submit its original FAT on the DID form (app. ex. G, Blake aff. ¶ 24).

On 5 May 2008, Hanley submitted another request to restart production and approve Webco as a supplier. The request stated that the Lot 2 tubes had been 100%

inspected after hydro-test and met the .003 maximum deformation requirement. It included a number of reports, including a FA report dated 28 April 2008 prepared by Webco. (R4, tabs 200-02) The Webco FA report concluded that:

> The preceding analysis indicates the root cause of the failure was the result of a combination of non-metallic inclusions and ID laps. It is [Webco's] conclusion that this combination is an acute anomaly. Failure analysis, quality records, and returned material show no evidence of a pervasive issue with this material. Therefore, this is an isolated incident in the heat lot and was obviously captured by the pressure testing.

(R4, tab 202 at 27) The government rejected the request that same day, finding a number of deficiencies, including the lack of a "FAT plan for Webco FAT" under clause 52.209-4511 (R4, tab 203). On 19 May 2008, Hanley submitted a revised restart package, which it reformatted and further supplemented at the government's request during the following week (R4, tabs 223-34).

On 2 June 2008, the contracting officer issued a Show Cause letter for failure to meet the 22 April 2008 delivery date and to comply with the government's production restart requirements; specifically, the taking of measurements prior to hydrostatic testing in accordance with MIL-T-15119A (OS), the lack of government AIE approval and the failure to obtain government approval of a FAT plan to use Webco as the new steel vendor and to revise procurement procedures to comply with what apparently was the Clause E-7 version of 52.246-4550. The government advised it would exercise its right to terminate the contract under the Default clause if a satisfactory response was not provided in ten days. (App. ex. L)

On 14 June 2008 Hanley responded to the Show Cause. It asserted that it had submitted documentation showing that it satisfied the hydrostatic testing and AIE requirements, had provided a modified FAT plan for Webco and had submitted revised procurement procedures. It also provided additional documentation and explanation in response to the government's concerns. (R4, tab 243)

On 18 June 2008, Hanley submitted a Request for Deviation/Waiver to accept steel tubing certified to AMS-T-6736 that was hydrostatically tested by Gormac (R4, tab 244). Mr. Blake avers that the only difference between AMS-T-6736 and MIL-T-15119A (OS) is the hydrostatic testing requirement and that since Gormac performed hydrostatic testing on the tubes, the standards of MIL-T-15119A (OS) were met and the deviation should have been granted (app. ex. G, Blake aff. ¶ 32). There is some evidence that Plymouth refused to quote its steel to meet the MIL-T-15119A (OS) standard (R4, tab 241).

By a letter dated 16 July 2008, the contracting officer issued a final decision terminating the contract for default under FAR 52.249-8. The letter provided the following reasons:

> The act of failing to deliver in accordance with the contract schedule, provide supplies that conform to the TDP, use of approved vendors, and to meet the criterion for quality in the subject contract which is a failure to meet the following provisions in Hanley Industries [sic] contract:
>
> a. Higher Level Contract Quality Requirement (Government Specified) 52.246-4550 (Feb 2004)
> b. MIL-T-15119A(OS) dated October 20, 1976
> c. Drawings/Specifications (Government Specified) 52.210-4501(March 1988); TDP for the MK-45 Electric Primer, 2434755K
> d. Statement of Work for Statistical Process Control (Government Specified) 52.246-4506 (Feb 1999)
> e. First Article Test (Government Test) (Government Specified) 52.209-4511 (May 1994)
> f. Acceptance Inspection Equipment (AIE) (Government Specified) 52.245-4537 (Feb 2002)
> g. Contract Data Requirements List (CDRL) A010 Test/Inspection Reports, First Article Inspection & Test, Identification Number DI-NDTI-80809B
> h. MIL-P-18714D, 24 January 1994
> i. Section B Delivery Schedule – Modification P00010
> j. MIL-Q-9858A dated March 15, 2004
>
> Hanley Industrie's [sic] failure to meet the criteria listed above violated the terms of their contract and thereby constitutes the default.

(R4, tab 249 at 4) Modification No. P00011, incorporating the 16 July 2008 final decision terminating the contract for default, was issued by the contracting officer on 31 July 2008 (R4, tab 250). A timely appeal was filed with the Board on 6 October 2008.

Mr. Jones states that, on occasion, Propellex experienced a tube burst during hydrostatic testing (app. ex. E, Jones aff. ¶ 13). According to Mr. Jones, this is a manufacturing anomaly that is typically caused by a flaw or weak spot in the tube called a "rolling inclusion" and the purpose of the pressure test is to catch the weak spots and eliminate the defect. He states that Propellex was permitted by the Defense Contract Management Agency (DCMA) to pull a defective tube out of production, scrap it and

continue with production without an investigation or special contractor report, so long as the defective tube was removed from the lot. (*Id.*)

Mr. John Wallis was formerly a DCMA team chief and is now Hanley's quality director. While at DCMA, he had quality assurance responsibilities for at least three of the Propellex MK-45 primer contracts and also inspected tubing. (App. ex. F, Wallis aff. ¶¶ 3, 5, 7, 11) Mr. Wallis states that the government's requirements for submittal and acceptance of Hanley's AIE were excessive. He agrees with Mr. Jones that, unlike Hanley, Propellex had not been required to pull an entire heat lot and perform a failure analysis on a tube that failed the hydrostatic pressure test for burst strength, but was simply permitted to pull the tube out of production and scrap it. (*Id.* ¶¶ 9-12)

DISCUSSION

This is an appeal from the termination of Hanley's contract under the Default clause, FAR 52.249-8. The Default clause does not require the government to terminate a contract upon a finding of default; rather, it gives the contracting officer reasonable discretion to do so. *Matrix Research, Inc.*, ASBCA Nos. 56430, 56431, 11-2 BCA ¶ 34,789 at 171,239; *see Darwin Construction Co. v. United States*, 811 F.2d 593, 596 (Fed. Cir. 1987). We consider a default termination to be a "drastic sanction" which should be imposed only on "good grounds and on solid evidence." *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969).

As the party moving for summary judgment, the government must show that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). Here, it carries the initial burden of establishing that its termination for default of Hanley's contract was reasonable and justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987). As the party opposing the motion, Hanley must set forth sufficient facts showing the existence of genuine factual disputes. *Mingus*, 812 F.2d at 1390-91. We are to accept Hanley's factual evidence as true and draw all reasonable inferences in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The government asserts that its default termination should be upheld because Hanley used a non-approved vendor, Webco, to supply a component in its manufacturing process and demonstrated a repeated inability to follow the procedure required to have a new vendor approved (gov't mot. at 10). It relies upon FAR 52.249-8(a)(1)(iii) which allows the government to terminate for default if "other" terms of the contract deemed to be "significant" or "material," are violated. *See A-Greater New Jersey Movers, Inc.*, ASBCA No. 54754, 06-1 BCA ¶ 33,179 at 164,432. The contract term allegedly violated is the FAT clause, 52.209-4511.

Hanley acknowledges that it purchased raw steel tubing before identifying Webco as a new vendor to the government, but denies that it either violated the FAT clause or that it submitted any production part to the government using Webco tubing. It contends the FAT clause does not require government approval of a particular vendor prior to purchasing materials, but rather requires notification if there is a change, without specifying when that notice must occur. According to Hanley, the government advised that it would be required to submit a modified FAT of the primer tube before Hanley could seek approval of a new vendor, which meant here that the new raw steel tubing had to be machined into the primer tube before Hanley could seek approval of Webco. (App. opp'n at 2)

The FAT clause provides that notice is to be given to the contracting officer whenever a supplier change occurs, so that a determination can be made concerning the need for an additional first article sample or portion thereof. The clause does not specify when that notice is to be given. The government's reply asserts that Hanley was required to provide notice that it had changed vendors on 31 May 2007, when it ordered steel tubing from Webco, and that Hanley compounded this failure when it did not provide notice until after it received the primer tubes using Webco raw steel tubing on 4 February 2008 (gov't reply at 6-7). The reply further asserts, for the first time, that Hanley failed to meet the delivery schedule established by Modification No. P00010 (*id.* at 10).

We are satisfied that the government's motion for summary judgment must be denied for a number of reasons. First, with regard to the government's notice contentions, we have long held that contractual notice provisions will not be mechanically applied. Thus, any failure on the part of Hanley to provide timely notice of its supplier change would not automatically result in a default of its obligations under the contract. *See Central Mechanical Construction*, ASBCA No. 29431 *et al.*, 85-2 BCA ¶ 18,061 at 90,657-59.

Second, and in any event, Hanley has come forward with evidence showing the existence of genuine factual disputes regarding its compliance with the FAT clause. It points to the contracting officer's 10 August 2006 letter, which it believes shows that the government knew Hanley was contemplating a change of the tube supplier and did not want notice of the change until Hanley had 10+ primer tubes available for inspection. Additionally, it has provided the affidavit of Mr. Blake which offers the explanation as to why a new steel tubing supplier could not be approved until the primer tube had been machined.

Third, as to the government's contention that Hanley used a non-approved vendor, Hanley has provided evidence that the Webco steel tubing was procured for Lots 2 and beyond, and that its FAT and Lot 1 used Plymouth steel tubing that Hanley purchased from Propellex and had been submitted to the government before it received the first Webco tubing machined by Gormac on 4 February 2008.

Next, with respect to Hanley's alleged inability to follow the procedure to have a new vendor approved, the record reflects that Hanley submitted a number of FA and CAR reports and requests to have Webco approved in response to requirements imposed by the government. All were rejected. Hanley argues that there are genuine factual disputes concerning the reasonableness of the government's refusals to approve Webco as a supplier and to accept its explanation as to the root cause for the tube burst. It also challenges the reasonableness of the government's insistence upon shutting down production, particularly when there is evidence that Propellex had been permitted to simply scrap burst tubes.

In deciding a motion for summary judgment we are not to resolve factual disputes, but rather to ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851 at 109,931-32. The factual issues here involve matters that are of a highly technical nature. We believe the record should be further developed for us to determine, for example, whether Hanley failed to satisfy reasonable requirements imposed by the government and whether the government's rejections of Hanley's FA and CAR submissions and requests to restart production with Webco as a supplier were unjustifiably harsh. In this regard, determinations of the reasonableness of the acts and conduct of the parties are not ordinarily amenable to summary disposition. *BearingPoint, Inc.*, ASBCA No. 55354, 08-2 BCA ¶ 33,890 at 167,733.

Hanley further asserts there are factual disputes relating to whether the government imposed excessive restrictions on it, beginning with the rejection of its plan to use Building 2 for production and continuing through the submittal review and approval process. The government replies that these matters have no bearing upon whether Hanley either met the delivery schedule (an argument that seems to be incorrect on its face) or provided the required notice of a changed vendor. In any event, we find no cause to address the contentions because there are genuine factual disputes relating to the contractual FAT notice/compliance issues and the reasonableness and justification of the default termination which preclude summary judgment. For the same reason, we have no need to discuss Hanley's remaining contentions, all of which the government dismisses as unfounded; namely, that the defective TDP caused delays, that there were impermissible motives behind the government's termination, that section 4.9 of MIL-T-15119A (OS) is ambiguous, and that the contract price was insufficient to allow Hanley to comply with the government's excessive requirements.

CONCLUSION

For the reasons stated, the government's motion for summary judgment is denied.

Dated: 29 November 2012

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56584, Appeal of Hanley Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFERY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals