

FIRST ARTICLE DOES NOT REDEFINE CONTRACT SPECIFICATIONS FOR ACCEPTANCE

Copyright Richard D. Lieberman, Consultant & Retired Attorney

In a long and complex case, the Armed Services Board of Contract Appeals (“ASBCA”) recently explained that a First Article Test (“FAT”) does not add product specifications above those detailed in the contract, and that in order to reject production articles, the government must demonstrate that they are unacceptable because they do not meet specifications in the contract. *Ensign-Bickford Aero. & Def. Co., ASBCA No. 57929*, Oct. 20, 2016. The case involved MK 154 detonators procured by the Naval Surface Warfare Center. The MK 154 is used to explode charges from a safe distance. Explosive ordnance disposal personnel use the MK 154 to blow up improvised explosive devices (“IEDs”), suspect items, or unserviceable ammunition under controlled conditions.

Ensign’s contract contained a detailed Technical Data Package (“TDP”) with drawings, specifications, quality assurance requirements and supplemental quality assurance provisions. It also contained a Navy FAT clause that differed from the standard FAR clause, and which read as follows:

The First Article is synonymous with terms “preproduction model(s)” and “preproduction equipment.”

The First Article shall conform in every respect to the requirements of the contract and shall be fully tested by the Contractor at its own expense to determine compliance with said requirements. The production equipment shall be manufactured with tools, material and methods which were used to manufacture the First Article.

The contract also contained a “Notice: First Article as a Manufacturing Standard” which stated “Each first article approved under this contract shall serve as a manufacturing standard for the corresponding production items delivered hereunder.”

In November 2007, all of Ensign’s First Article sample items met the requirements specified. Subsequent to First Article Test, Ensign changed the extrusion rate from 375 feet per minute (“fpm”) to 600 fpm in order to meet increasing demand. Later, for lots 11-14, the COTR recommended that the Contracting Officer not accept the items in these lots because they showed splits and ruptures that she had not observed in the FAT. The Contracting Officer rejected Lots 11-14 because there were increased number of shock tube ruptures, and the 600 fpm shock tube would not hold up as well as the 375 fpm tube. The Contracting Officer refused to approve what she characterized as a retroactive configuration change.

Ensign submitted a claim for additional costs (\$847,968) associated with improper rejection of conforming product. Ensign asserted it had not altered the configuration baseline because run speed (fpm) was not a configuration criterion in the contract, and the government had imposed arbitrary acceptance criteria not embodied in the drawings, designs or specifications in the contract. The Navy denied the claim.

Ensign asserted that the government improperly rejected lots 11-14 because the shock tube vented during lot acceptance testing. The ASBCA stated that

Unless the government proves that it properly rejected these lots, appellant is entitled to an equitable adjustment. When the Government rejects work as not being in compliance with its specifications, the Boards of Contract Appeals have held that the burden is upon the Government to demonstrate that fact.... If the government does not meet that burden, then contractor is entitled to an equitable adjustment under the Changes clause..." [citations omitted]

The ASBCA addressed each of the Government's assertions in its claim denial:

- (1) The Navy said that "The First Article test sets the standard that each lot was required to meet."
 - The Board rejected this "overly-broad and unsupported assertion that the FA somehow redefines the specifications or makes the contract more stringent than its stated requirements..." It noted that FAT and inspection of supplies have distinctly different purposes. The purpose of FAT is to determine whether the contractor can produce the supplies to the specifications. FAR 9.302. By contrast, the purpose of inspection is to determine whether production items should be accepted. FAR Part 46, Quality Assurance, governs inspection of supplies. The Government failed to cite any contract proviso or legal precedent that first article requirements changed or increased the standard in the Technical Data Package. The Board also rejected an undisclosed contract interpretation it first raised in litigation.
- (2) The Navy said that the approved FA did not vent.
 - The Board noted that there was no evidence from the FAT to substantiate whether venting took place, and the evidence was at equipoise, therefore, the government failed to meet its burden (that venting did not take place during the FAT)
- (3) The Navy said that Lots 11-14 vented .
 - The Board pointed to issue (2) above—the issue was not venting.
- (4) The Navy stated that Lots 11-14 failed to meet the standard set by the FAT.
 - The Board said that the Navy's statement that there was nonconformance because of "noise" was based on subjective impressions of the COTR and QAR, and the government offered no objective measurements (The COTR made the impermissible statement "I know it when I hear it").
 - The Board said that although the government asserted that there were "violent ruptures", there was no contractual basis in the TDP for rejecting the product on this basis.
- (5) The Navy said that the contracting Officer's decision to reject Lots 11-14 was reasonable because of safety issues.
 - The Board said that while safety is important, the government must prove that safety was reasonably in question by a preponderance of evidence. Here, the government merely *theorized* that venting could harm the user by expelling toxic gases or igniting the remainder of the shock tube. The proof was insufficient.

The Board concluded that the government failed to meet its burden to prove by a preponderance of evidence that it reasonably rejected lots 11-14, and therefore sustained Ensign's appeal.

TIPS: The case demonstrates an important consideration for all contractors—you are required only to meet specifications, technical data packages and drawings that are in your contract. Even if a contracting officer (or any other government official) seeks to impose a higher standard or different, more difficult specification, you are entitled to an equitable adjustment, just as Ensign was here. And keep in mind, FAT does not change the requirements in the written contract—it's only a first article test. Just because you did something during the FAT, or were required to do it, the determination of acceptability of the final produce are the specifications, TDP and drawings.