

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Pinnacle Armor, Inc.) ASBCA No. 55831
)
Under Contract No. GS-07F-0313J)
Delivery Order No. FA8620-05-F-3735)

APPEARANCE FOR THE APPELLANT: Mr. Murray Neal
President

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
Air Force Chief Trial Attorney
Maj John G. Terra, USAF
Maj Kathleen O'Rourke, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Pinnacle Armor, Inc. (Pinnacle) appeals the government's termination for cause of the captioned delivery order (hereinafter "Delivery Order No. 3735") for Pinnacle's failure to deliver the specified supplies within the specified time. We find the termination justified and deny the appeal.

FINDINGS OF FACT

1. On 1 July 1999, the General Services Administration (GSA) awarded the captioned Federal Supply Schedule (FSS) contract to USA Armoring (hereinafter "the FSS contract"). One of the schedule items in the FSS contract was "Body Armor SOV 2000."¹ (R4, vol. I, tab 1 at 1, 5) Pursuant to a change-of-name agreement, Pinnacle was substituted for US Armoring as the contractor by Modification No. A005, effective 21 August 2001 (R4, vol. I, tab 1 at 187.1-187.8).²

¹ "SOV" is the manufacturer's acronym for "Special Operations Vest" (R4, vol. I, tab 3 at 2)

² Pages 187.1-187.8 were not included in the record copy of R4, vol. I, tab 1, but in a second copy of that tab. Since footnote 1 in the government's Rule 4 file index refers to the name-change agreement on these pages, we consider their omission from the record copy to have been inadvertent, and have inserted them in that copy in their proper sequence.

2. The FSS contract, as amended by Modification No. A001 effective 25 October 1999, included among other provisions the FAR 52.212-4 CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAY 1999) clause. Paragraph (m) of that clause stated in relevant part:

(m) Termination for Cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance....

(R4, vol. I, tab 1 at 88-89, 106-07)

3. On 31 August 2005, the Air Force issued Delivery Order No. 3735 to Pinnacle under the FSS contract, and subject to its terms and conditions, for 590 each “Pinnacle Armor, Level 3, SOV-2000.” The total delivery order price was \$3,009,498. Delivery was specified for nine months after receipt of order. The order was received and accepted by Pinnacle in writing on the date issued. This established a delivery date of 31 May 2006. (R4, vol. II, tab 2 at 1-4, 8, compl. ex. 2)

4. Before issuing the order, the Air Force contracting officer reviewed a Pinnacle brochure in the FSS contract file for the express purpose of “making sure that this was specifically what [the requesting official] wanted and that the level he wanted was available to be purchased under the GSA schedule” (tr. 3/136-41). The Pinnacle brochure described the SOV-2000 body armor as, among other things, “a full Level III protection system” (R4, vol. I, tab 5 at 4).

5. The National Institute of Justice (NIJ) is a component of the Department of Justice. The NIJ’s Law Enforcement and Corrections Standards and Testing Program “determines the technological needs of justice system agencies, sets minimum performance standards for specific devices, tests commercially available equipment against those standards, and disseminates the standards and the test results to criminal justice agencies nationally and internationally” (ex. G-47 at 2). NIJ Standard 0101.04, Revision A, “Ballistic Resistance of Personal Body Armor,” dated June 2001,³ described “Type III” body armor level of protection as follows:

2.5 Type III (Rifles)

³ NIJ Standard 0101.04 was issued after award of the FSS contract, but before award of Delivery Order No. 3735 to Pinnacle. Both parties have offered that document in evidence as the applicable specification for Delivery Order No. 3735. (Exs. A-1, G-47)

This armor protects against 7.62 mm Full Metal Jacketed (FMJ) bullets (U.S. Military designation M80), with nominal masses of 9.6 g (148 gr) impacting at a minimum velocity of 838 m/s (2750 ft/s) or less....

(Ex. G-47 at 1, 3, 14) The parties use the term “Level 3” or “Level III” interchangeably with the term “Type III” that is used in the NIJ Standard. There is no substantive difference between these terms.

6. The SOV-2000 body armor consisted of front and back fabric “carrier” panels with velcro overlaps at the shoulders and sides which when attached together formed a vest. On the inside face of both front and back carrier panels there was a large pocket into which a ballistic resistant panel was inserted. The ballistic resistant panel was shaped to cover both the front and sides or back and sides of the carrier panel, and consisted of small overlapping ceramic discs. (Ex. G-60)

7. The ballistic resistance test for Type III body armor specified in NIJ Standard 0101.04 required two complete sample body armors with six shots on the front panel and six shots on the back panel of both samples at designated locations using a 7.62 mm NATO FMJ (M80) bullet striking the panel at 0 degrees obliquity and at a velocity of 2780 ± 30 ft/s. The panels were to be shot in a wet condition. The pass/fail criteria were (i) zero (0) penetrations through the panels by the bullets or any bullet or armor fragments and (ii) no measured back face signature (BFS) depression depth greater than 44 mm for any tested panel. (Ex. G-47 at 26, 30, 32, 41)

8. Although Delivery Order No. 3735 did not expressly require an NIJ compliance letter, it was commonly understood within the body armor industry that a manufacturer could properly claim that its product was an NIJ Standard 0101.04 Type III body armor “[o]nly if he has a compliance letter from the National Institute of Justice stating that his armor has met the requirements of the standard” (tr. 2/12-14). An NIJ compliance letter could be obtained only by submitting samples of the body armor for testing by an independent laboratory through the National Law Enforcement and Corrections Technology Center (NLECTC). NLECTC was an NIJ grantee that administered the compliance testing program. (Ex. G-47 at 2; tr. 2/16-18)

9. Pinnacle was well aware, both before and after award of Delivery Order No. 3735, of the procedure for obtaining an NIJ compliance letter by submitting body armor through the NLECTC for compliance testing. On 20 November 2002, NLECTC notified Pinnacle that its body armor model MIL3AF01 had completed successfully compliance testing for NIJ Standard 0101.04 Type IIIA. On 3 October 2005, NIJ issued to Pinnacle a Notice of Compliance with NIJ 2005 Interim Requirements for the same model at “Level

IIIA.” (Ex. G-13 at 2-3) Type IIIA was a lesser level of protection than Type III (ex. G-47 at 14).

10. At hearing, an SOV-2000 body armor (serial number 56062) that was delivered to the government under Delivery Order No. 3735 was received in evidence (ex. G-60; tr. 1/239-46). The labels on the front and back ballistic resistant panels inserted in the front and back carrier panels stated, among other things, that the panel was manufactured on 12 December 2005 and that: “The manufacturer certifies that this model of armor has been tested through NLECTC and has been found to comply with Type: 3 Performance in accordance with NIJ Standard-0101.04” (ex. G-60). This certification was false. The SOV-2000 ballistic resistant panels had not been tested through NLECTC and found to comply with the Type III ballistic resistance requirements in NIJ Standard 0101.04 on or before 12 December 2005 or at anytime thereafter (tr. 2/298-300).

11. Pinnacle in its pre-hearing brief states that:

prior to the Air Force ordering the body armor, Pinnacle provided the Air Force’s representatives with test results that showed that the SOV-2000 body armor had been subjected to “modified” and “abbreviated” testing under National Institute of Justice’s (“NIJ”) 0101.04 ballistic performance test, in order to substantiate Pinnacle’s claim that the vests afforded Level 3 protection.

(App. prehearing br. at 3) This statement is followed by portions of two test reports by the United States Test Laboratory, both showing a test date of 18 May 2005. Both test reports state that the “Test Spec.” was “Modified/Abbreviated N.I.J. 0101.04 Level 3.” Both reports show only five shots taken. Both reports show that the shots were taken with the panels in the dry condition, not in the wet condition required by the NIJ Standard. One of the reports shows that the bullet used was a 5.56 mm caliber bullet, not the 7.62 mm NATO FMJ bullet specified for the Type III test in the NIJ Standard. (*Id.*, finding 7)⁴ An “abbreviated level 3” test could be done for research and development purposes by a manufacturer, but any such tests were not performed “through NLECTC” and were not recognized by NLECTC “for official compliance testing purposes” (tr. 3/58-59).

12. From 16 August 1999 through 2 February 2006, Pinnacle and its corporate predecessor contracted directly with an independent laboratory for ballistic resistance testing of the SOV-2000 body armor. These tests were not conducted “through NLECTC.” The records of these tests do not show that the SOV-2000 body armor ever

⁴ These test reports are also included in ex. A-13 at 50, 52. See finding 12.

passed a complete NIJ Standard 0101.04 Type III ballistic resistance test. All of the test reports for that NIJ Standard and type state that the test was a “modified/abbreviated” test. None of those test reports show six straight-on (0° obliquity) shots with a 7.62 mm NATO FMJ bullet at an impact velocity of 2780±30 ft/s on each front and back panel of two sample body armors with no penetrations. (Ex. A-13)

13. Between 28 October 2005 and 19 January 2006, Pinnacle shipped and invoiced a total of 380 SOV-2000 body armors under Delivery Order No. 3735. These body armors were destined for use by Special Agents of the Air Force Office of Special Investigations (AFOSI), many of whom were engaged in counter-terrorism missions outside the confines (“the wire”) of air bases and military posts in Iraq and Afghanistan (tr. 1/139-40). The invoices submitted by Pinnacle for these body armors stated that they were “Level 3” body armors. One hundred twenty (120) were shipped in October-November 2005. Two hundred sixty (260) were shipped in December 2005-January 2006. (R4, vol. II, tabs 3, 5, 6, 7)

14. In November 2005, Pinnacle discovered defective ceramic discs that were produced by a subcontractor for use in the SOV-2000 ballistic resistant panels (R4, vol. II, tab 4). Pinnacle, however, did not at this time recall any of the SOV-2000 shipments already made, and its subsequent conduct shows that it made the December 2005-January 2006 shipments knowing that the discs might be defective. (See finding 21).

15. On 13 February 2006, bilateral Modification No. P00001 to Delivery Order No. 3735 reduced the delivery order quantity of 590 to 581 body armors (R4, vol. II, tab 9).

16. On 16-17 February 2006, AFOSI submitted five of the delivered SOV-2000 body armors for ballistic resistance testing by the Army Test Center (ATC) at Aberdeen Proving Ground. The ATC tests were performed under the Army ISAPI test protocol and not under the NIJ Standard 0101.04 Type III test protocol. Eight tests were performed with no more than three shots on any one test. Six of the tests used 7.62 mm BZ (armor-piercing incendiary) bullets. One test was three shots using the 7.62 mm LPS bullet. One test was three shots using the 7.62 mm PS bullet.⁵ None of the tests was six shots using the 7.62 mm NATO FMJ bullet as specified by the NIJ Standard 0101.04 Type III test protocol. Five of the six tests using the BZ bullets and the one test using the LPS bullet had one or more complete penetrations of the body armor panel being tested. (Ex. G-21)

⁵ The 7.62 mm (PS) bullet test had three shots with no penetrations. However, the strike velocity of these three shots ranged from 2424 to 2463 ft/s, which was substantially below the 7.62 mm NATO FMJ bullet strike (impact) velocity of 2780±30 ft/s that was the NIJ Standard 0101.04 Type III requirement (exs. A-7 at 3, G-47 at 30).

17. The BZ and LPS bullets were used in the ATC tests because, before award of the delivery order, Pinnacle had told an AFOSI representative that its SOV-2000 body armor was capable of defeating those bullets which it characterized as “lower level IV” threats. This representation was of particular interest to AFOSI because the BZ and LPS bullets were among the primary threats to AFOSI personnel in Iraq and Afghanistan. (Tr. 1/33-37) After award, Pinnacle made the same representation to AFOSI in a 7 February 2006 email one week before the ATC tests. This email stated: “Our (Your) Level III+ vest will stop the SS-109 Green Tip 5.56mm (M-855), M-80 ball, BZ, 7.62x54R LPS (mild steel core). These are the lower rounds in Level IV and we stop them with the vests you have.” (R4, vol. II, tab 8; tr. 1/52-55)

18. Pinnacle contends that an after action report by an Air Force officer who witnessed the ATC tests “indicated that the AFOSI could go ahead and begin using the SOV-2000 because it had passed the contract’s written specifications and would afford protection against the requisite threat” (app. prehearing br. at 5). The cited sections of the report are the following:

AFOSI should utilize the Military Small Arms Protective Insert (SAPI, to include ISAPI and ESAPI) purchase description (specification) or a modified SAPI purchase description when purchasing personnel armor.

AFOSI should replace Pinnacle SOV2000 “Dragon Skin” systems only when suitable replacements become available. While the performance is not acceptable against greater threats such as LPS and BZ rounds, the SOV2000 system is effective against lesser, more prevalent threats such as the PS Ball (AK-47). Some protection is better than no protection at all.

(R4, vol. II, tab 10 at 3)

19. We find no statement in the above-cited provisions or elsewhere in the after action report indicating that the SOV-2000 body armor “had passed the contract’s written specifications” (app. prehearing br. at 5). Any such statement, if it did appear, would not be credible. It is clear from the detailed report of the ATC tests that the NIJ Standard 0101.04 Type III test protocol was not followed in any of the ATC tests (ex. G-21 at 1-2).⁶

⁶ Pinnacle also cites a draft press release by AFOSI stating that in the ATC tests, the SOV-2000 body armor “did not fail any written contract specifications with the Air Force” (app. supp. R4, tab 19, *see* app. prehearing br. at 4). That statement

20. The 16-17 February 2006 ATC tests neither proved nor disproved the ability of Pinnacle's SOV-2000 body armor to meet the NIJ Standard 0101.04 Type III test requirements. However, since the bullets that were used in the ATC tests were a significant part of the threat in Iraq and Afghanistan where AFOSI personnel were deployed, AFOSI on 17 February 2006 issued an order to all AFOSI personnel to immediately discontinue wearing the SOV-2000 body armor (ex. G-5).

21. When informed of the ATC test failures, Pinnacle attributed the failures to the supplier of the ceramic discs and stated that it would take back the delivered body armors and correct the problem with new discs "at our expense." (R4, vol. II, tab 11, ex. G-21 at 3). On 2 March 2006, Pinnacle picked up 292 of the 380 delivered SOV-2000 body armors from AFOSI (ex. G-9 at 1).

22. On 10 March 2006, the Air Force notified Pinnacle to "stop work immediately due to defective products delivered to the government" (ex. G-32). Four days later, however, on 14 March 2006, the Air Force rescinded the stop work order and requested Pinnacle to (i) keep the Air Force informed of its body armor testing, (ii) describe the problem with the subcontractor that furnished the defective ceramic discs, (iii) provide copies of all "Certificates of Independent Testing" for each lot delivered under the order, and (iv) provide a sample of the "Vest Label." (R4, vol. II, tab 14).

23. In response to the request for a sample of the vest label, Pinnacle on 16 March 2006 sent "a couple of pictures of the label as they appear on every vest we ship." One of the pictures was the label placed on the ballistic resistant panels inserted in the SOV-2000 body armor (serial no. 56062) described in finding 10 above. The second picture was the label placed on the inside face of the back carrier panel of the same body armor which stated: "This carrier offers no protection without ballistic panels being inserted. See ballistic panel labels for protection level provided in accordance with NIJ Standard 0101.04." (R4, vol. II, tab 15 at 2, 3, ex. G-60)

24. On 24 March 2006, Pinnacle notified the Air Force of a delay in testing the replacement ceramic discs and stated that "[a]t this time, we feel that we can ship all of our body armors and carriers by 9 August" (ex. G-38).

25. At sometime in February or March 2006, Pinnacle contacted NLECTC to arrange for testing of its SOV-2000 body armor for compliance with NIJ Standard 0101.04 Type III ballistic resistance requirements. At that time NLECTC determined that, because of its unique overlapping small ceramic disc armor, the SOV-2000 body

was beside the point. The SOV-2000 body armor was not tested at ATC for compliance with any written contract specifications with the Air Force. See finding 16 above.

armor would have to be tested with oblique shots in addition to straight-on shots to assure that the ceramic discs could not be penetrated where they overlapped. Work on a revised test protocol providing for both oblique and straight-on shots was started by NLECTC in April or May 2006. (Tr. 2/261-66)

26. On 5 May 2006, the Air Force contracting officer requested Pinnacle to provide (i) “any test data you have on the SOV 2000’s ability to defeat the BZ or LPS rounds,” and (ii) “a copy of the certification testing for the NIJ Level 3 for the SOV 2000’s” (R4, vol. II, tab 17). On 9 May 2006, Pinnacle responded with test data on the BZ and LPS rounds, and copies of the NLECTC and NIJ compliance letters for the MIL3AF01 as a Type IIIA body armor (ex. G-13). Pinnacle, however, did not provide a copy of any compliance letter for the SOV-2000 or the MIL3AF01 as a Type III body armor (tr. 3/207-08).

27. Allowing 5 days for the stop work order in effect from 10 to 14 March 2006 (see finding 22 above), delivery of 581 NIJ Standard 0101.04 Type III body armors was due under Delivery Order No. 3735 no later than 5 June 2006. As of that date, no NIJ Standard 0101.04 Type III body armors, either found compliant through the NLECTC testing program or otherwise meeting the Type III ballistic resistance test requirements, had been delivered by Pinnacle to the government.

28. On 13 June 2006, AFOSI had SOV-2000 body armor, serial number 56062, tested to the NIJ Standard 0101.04 Type III ballistic resistance requirements by the H.P. White Laboratory. Both front and back fabric carrier panels with their respective front and back ceramic disc ballistic resistant panels inserted were tested. The tested front and back panels were “the complete ensemble...we would wear...if we were to deploy” (tr. 1/233). For the six shots on the front panel there was one bullet penetration. For the six shots on the back panel there were two bullet penetrations. The tested panels were in evidence at the hearing and show the bullet holes in both the fabric carrier panels and in their ballistic resistant panel inserts. (R4, vol. II, tab 22; ex. G-40 at 2, 5, 6, ex. G-60; tr. 1/229-36, 261-69)

29. On or about 15 June 2006, an AFOSI Special Agent told the contracting officer that Pinnacle was under investigation by the Department of Justice (DOJ) for fraud. He also told the contracting officer to stop conversations with Pinnacle about Delivery Order No. 3735 “because of the investigation.” After that date and up to the termination on 29 December 2006, there were no further communications by the contracting officer to Pinnacle, or by Pinnacle to the contracting officer. (Tr. 3/196, 215, 254-55, 284-86)

30. On 10 July 2006, NLECTC sent its “Test Protocol for Type III Flexible Armor Whole Vest Design” to Pinnacle with a request that it advise “if you wish to proceed with compliance testing or wish to withdraw these models from consideration.”

Under this revised test protocol the front and back panels of two sample body armors were to be each tested with four straight-on shots and two 30° oblique shots, and the front and back panels of a third sample body armor were to be each tested with three 45° and three 60° oblique shots. Pinnacle agreed to the revised test protocol (hereinafter “the Type III flexible armor test protocol”) for its SOV-2000 body armor on the following day. (Exs. G-62, 63, tr. 2/267-68)

31. On 2 August 2006, NIJ Standard 0101.04 Type III compliance testing through NLECTC was conducted on the SOV-2000 body armor at an independent laboratory using the Type III flexible armor test protocol. The samples subject to the four straight-on and two 30° oblique shots passed the test with no penetrations. The front panel of the third sample, however, was penetrated on one of the 45° shots, and this was sufficient to constitute failure of the SOV-2000 body armor under the Type III flexible armor test protocol. (Ex. G-45 at 10-12, 16; tr. 2/306-08) While two sample body armors defeated the four straight-shots on both front and back panels, that cannot be considered as passing the original Type III test protocol which required six straight-on shots on both panels with no penetrations.

32. There is no evidence and no contention by Pinnacle that it performed any work attempting to provide Type III compliant SOV-2000 body armors to the government after the 2 August 2006 tests. The 9 August 2006 completion date stated in Pinnacle’s 24 March 2006 email to the contracting officer came and passed without any further shipments to the government. Pinnacle never returned to the government any of the 292 SOV-2000 body armors that it had retrieved from the government for inspection and correction of defective discs. Nor did it tender or ship any of the balance of 201 SOV-2000 body armors due under the delivery order. (Tr. 3/192)

33. On 13 September and 17 November 2006, Pinnacle submitted its SOV-2000.1 body armor for testing through NLECTC under the Type III flexible armor test protocol. In the SOV-2000.1, the front and back ceramic disc panels were inserted in pockets on the outside of the carrier rather than in pockets on the inside of the carrier and covered only the front and back and not the sides of the carrier (ex. G-61). The SOV-2000.1 sample body armors passed both the straight-on and oblique shot tests with no penetrations. (App. supp. R4, tab 7 at 1, 11, tab 8 at 1, 15) On 20 December 2006, NIJ issued a “Notice of Compliance with NIJ 2005 Interim Requirements Body Armor Model: SOV2000.1/MIL3AF01 Level: III” (ex. G-53). However, seven months later on 3 August 2007, NIJ revoked this compliance notice because Pinnacle had failed to demonstrate that the SOV-2000.1 would maintain its Type III ballistic resistance performance over its declared six-year warranty period (ex. G-54).

34. The Air Force contracting officer was not informed of any Pinnacle attempts to obtain a Type III compliance letter for its body armor after the August 2006 tests (tr. 3/211-12). There is no evidence that Pinnacle unconditionally tendered to the Air Force

its SOV-2000.1 body armor to fulfill its obligation under Delivery Order No. 3735 when that model was found Type III compliant by the NIJ on 20 December 2006.

35. On 29 December 2006, the Air Force contracting officer terminated Delivery Order No. 3735 for cause pursuant to the Termination for Cause provision of the FSS contract and directed Pinnacle to return all payments made by the government under the delivery order. The stated reasons for the termination were (i) non-compliance with the Type III requirement, (ii) failure to disclose knowledge of possible defective material in the shipped items, and (iii) “your track record of misrepresentation.” (R4, vol. II, tab 24) This appeal followed on 27 March 2007.

DECISION

The Termination for Cause provision of the FSS contract under which Delivery Order No. 3735 was issued stated that the government could terminate the delivery order for cause “in the event of any default by the Contractor” (finding 2). The government has established in this appeal the default of Pinnacle in failing to deliver the specified number of SOV-2000 Type III body armors within the time specified by the delivery order. Allowing five days for the government’s 10 March 2006 stop work order, Delivery Order No. 3735 as amended required delivery of 581 SOV-2000 Type III body armors by 5 June 2006 (findings 3, 15, 22). Pinnacle delivered a total of 380 SOV-2000 body armors to the government between October 2005 and January 2006. In March 2006, Pinnacle retrieved 292 of the delivered SOV-2000 body armors for inspection and correction of a suspected material defect. As of the termination for cause on 29 December 2006, Pinnacle had neither returned the 292 body armors retrieved for correction nor delivered the balance of 201 body armors due. (Findings 13, 14, 21, 32)

Each of the 380 delivered body armors included Pinnacle’s certification that the SOV-2000 model had been tested “through NLECTC” and “found to comply with Type: 3 Performance in accordance with NIJ Standard-0101.04.” That certification, however, was false. The SOV-2000 model body armor was never tested through NLECTC and found compliant with the NIJ Standard 0101.04 Type III performance requirements either as specified when the delivery order was issued or as subsequently modified for the SOV-2000 model’s unique flexible armor design. (Findings 10-12, 23, 27-28, 31)

Pinnacle has not submitted a post hearing brief. Its prehearing brief and opening statement at hearing argue that (i) Delivery Order No. 3735 specified only “Level III” and did not require an NIJ Type III compliance letter; (ii) the SOV-2000 in fact met the NIJ Type III performance requirements, (iii) the government tested the SOV-2000 under the more stringent Type IV requirements, and (iv) the government terminated the order because the SOV-2000 failed to pass all of the Type IV requirements. (App. prehearing br. at 3-4, tr. 1/22-25)

Delivery Order No. 3735 did not expressly require an NIJ compliance letter. The evidence, however, shows that within the body armor industry, it was commonly understood that a manufacturer could properly claim that its product was an NIJ Standard 0101.04 Type III body armor only if it had received an NIJ compliance letter after successful completion of the NLECTC compliance testing program (finding 8). Pinnacle itself has confirmed the industry understanding by certifying in all of the SOV-2000 body armors that it shipped to the government under Delivery Order No. 3735, that the ballistic resistant panels had been tested “through NLECTC” and “found to comply with Type 3: Performance in accordance with NIJ Standard-0101.04” (findings 10, 23).

There is no support in the record for the contention that the SOV-2000 in fact met the NIJ Standard 0101.04 Type III performance requirements even through it was not tested through NLECTC. The NIJ Standard 0101.04 Type III performance requirements when the delivery order was issued required six straight-on shots with a 7.62 mm NATO FMJ bullet at an impact velocity of 2780 ± 30 ft/s on each front and back panel of two sample body armors in a wet condition with no penetrations. The records of the tests that Pinnacle had performed on the SOV-2000 from 16 August 1999 through 2 February 2006, including the two cited in its pre-hearing brief, show no successful test meeting all of the NIJ Standard 0101.04 Type III performance requirements. (Findings 7, 11, 12)⁷

Pinnacle’s argument that the government tested the SOV-2000 “under the more stringent Type IV requirements” appears to be a reference to the ATC tests conducted on 16-17 February 2006. Those tests were conducted on the basis of representations by Pinnacle, before and after award of the delivery order, that its SOV-2000 body armor was capable of defeating bullets which it characterized as “lower level IV” threats. (Findings 16, 17) The poor performance of the SOV-2000 in the ATC tests, however, was not the reason for the termination as is clearly evident from the termination notice, and the fact that the termination was not issued until after the SOV-2000 had failed two Type III tests (findings 28, 31, 35).

The appeal is denied.

Dated: 16 July 2009

MONROE E. FREEMAN, JR.

⁷ The two tests cited in Pinnacle’s pre-hearing brief consisted of five shots each, not the six required by the NIJ Standard. The panels in both tests were shot in the dry condition, not in the wet condition required by the NIJ Standard. One of the tests used a 5.56 mm bullet, not the 7.62 mm bullet required by the NIJ Standard. (Finding 11)

Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 55831, Appeal of Pinnacle Armor, Inc., rendered in conformance with the Board's Charter.

Dated:

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