

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
PRIDE Industries) ASBCA No. 55771
)
Under Contract No. HDEC08-05-C-0038)

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OPINION BY ADMINISTRATIVE JUDGE TING

PRIDE Industries (PRIDE) entered into a contract with the Defense Commissary Agency (DeCA) to provide shelf stocking, custodial, and receiving/storage/holding area services at the Travis Air Force Base Commissary in California. The contracting officer (CO) deducted \$21,987.19 contending that PRIDE failed to meet the performance standards specified for four performance requirements during the four-month period December 2005 through March 2006. PRIDE timely appealed the decision. Entitlement and quantum are before us for decision. This appeal is subject to the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613.

FINDINGS OF FACT

1. DeCA operates commissaries worldwide. Commissaries are similar to commercial grocery stores. DeCA sells items at cost plus a five percent surcharge. The surcharge is used to build new commissaries and to renovate old ones. (Tr. 1/10)

2. On 18 February 2005, DeCA awarded Contract No. HDEC08-05-C-0038 (Contract 0038 or the contract) to PRIDE (R4, vol. 1, tab 6). The contract incorporated by reference a number of FAR clauses, including, FAR 52.232-1, PAYMENTS (APR 1984), which states that the government will pay the stipulated price for “services rendered and accepted, less any deductions provided in this contract” (*id.* at 34 of 42). At the time of contract award, Stan Davis (Davis), of DeCA West, was CO (tr. 1/12).

3. Under its contract, PRIDE was required “to perform shelf stocking, segregating merchandise, receiving/storage/holding area (RSHA), and custodial tasks in accordance with . . . this contract at the Travis AFB Commissary” (R4, vol. 1, tab 8 at C1-1, ¶ 1.1.1.).

4. Under the contract, the contractor is to establish a quality control plan (¶ 1.4.1), and an inspection system that identifies the areas, methods, frequency of inspection (¶ 1.4.1.1). The contractor is also to establish methods for identifying deficiencies in the quality of services performed “before the level of performance becomes unacceptable” (¶ 1.4.1.2), and to establish and make available to DeCA “checklists for documenting all inspections conducted along with corrective actions taken” (¶ 1.4.1.3). (R4, vol. 1, tab 8 at C1-5)

5. The stated purpose of PRIDE’s 2005 “Travis Air Force Base Commissary Contract Quality Control Plan” (QCP), the quality control plan it established, was to “provide a procedure and method for inspection of services provided to Travis Air Force Base Commissary and to ensure contract requirements are met.” Under the QCP, it was “the responsibility of the Project Manager, Supervisor or designated inspectors of PRIDE Industries to ensure that this Quality Control Plan is being utilized.” Under the QCP, it was “the responsibility of the Project Manager to determine the workload, in order to fulfill the contract requirements.” Under the QCP, PRIDE’s Project Manager (PM) and designated inspectors were “responsible for performing daily inspections to ensure that all tasks are performed to the quality standards.” According to the QCP, “Should the inspectors find deviations from the standards, they will make the employees aware of the problem, and *immediately require them to rework the task* until it meets the standard.” (Emphasis added) (Ex. A at 2) We find that PRIDE’s obligation to correct performance deficiencies stemmed from its own inspections, and not from any notices from government inspections.

6. Under the contract, DeCA would monitor the contractor’s performance using Quality Assurance Evaluator (QAE) inspections. The contract states that “[a]ll surveillance observations will be recorded. Those that indicate defective performance shall be initialed by the PM. If the PM nonconcur[s] with the QAE’s surveillance observations indicating defective performance, the PM shall submit a written response to the Contracting Officer or designated representative within two working days.” (R4, vol. 1, tab 8 at C1-5, -6, ¶ 1.4.2) The contractor’s written response is known as a “Reclama.”

7. Government QAEs are required to record comments on all PRSs and on all observations on a “DEFECT DOCUMENTATION OBSERVATIONS” form (DDOs). This form instructs that the “QAEs shall record comments daily, rather than attempt to reconstruct the surveillance record weekly or monthly.” (R4, vol. 2, tab 5; tr. 1/18) The

contractor's PM is supposed to initial the DDOs next to the item found unsatisfactory. Initialing the DDOs does not mean that the contractor has acknowledged that the QAE's finding was correct; initialing starts the clock running for submission of a "Reclama" through which the contractor could indicate its disagreement with the QAE's rating "within two days of receiving the unsatisfactory rating" (tr. 1/18). If a Contract Discrepancy Report (CDR) is proposed at the end of the month, the CO would consider the Reclama along with the documentations supporting the proposed CDR (tr. 1/21).

Performance Requirements Summary (PRS)

8. Technical Exhibit 1 (TE 1) of the contract sets out its "Performance Requirements Summary" (PRS). PRS indicates "the service outputs of the Contractor that the Government will evaluate to assure the Contractor meets standards of performance." Its purpose is to "identify to the Contractor the levels of performance required to warrant full payment." (R4, vol. 1, tab 8 at TE1-1, ¶ 1.1)

9. TE 1 included a PRS chart. The chart listed, in Column A, the required services considered critical to acceptable contract performance. (R4, vol. 1, tab 8 at TE1-7) Three out of the five required services are in dispute. They are: PRS 1, Perform Shelf Stocking Operations (including PRS 1(a), Cleaning & Dusting, Rotation and Nearest Case Stocking and PRS 1(b), Methods of Stocking and Placement); PRS 2, Returning Merchandise to Appropriate Locations; and PRS 3, Disposal of Cardboard and Waste Materials. (*Id.*)

10. Each of the required or PRS services cross references, in Column B of the PRS chart, the specification paragraphs (*i.e.* the "Standard of Performance") for that service (*id.*). PRS 1(a) (Cleaning & Dusting, Rotation and Nearest Case Stocking) references specification ¶¶ 4.3.3.1, 4.3.3.3 - 4.3.3.3.1 and 4.3.3.2.1.1 (R4, vol. 1, tab 8 at TE1-7). Generally, these performance standards required the contractor to clean and dust merchandise and shelf areas to preclude dust or dirt buildup, to clean up breakage or spills, and to clean and sanitize contaminated (rodent infestation) areas (¶ 4.3.3.1); to rotate merchandise to preclude loss to the government through product deterioration or damage (¶ 4.3.3.3); to remove and refrain from stocking items that have reached their expiration date (¶¶ 4.3.3.3, 4.3.3.3.1); and to stock items to the nearest full case except when otherwise directed by the Store Director. (*Id.* at C4-2, C4-4)

11. PRS 1(b) (Methods of Stocking and Placement) references specification ¶¶ 4.3.3.2 - 4.3.3.2.1, 4.3.3.2.2 - 4.3.3.2.4 (R4, vol. 1, tab 8 at TE1-7). These performance standards required the contractor to "stock all cases available for stocking in the proper shelf locations and within item allocations" (¶ 4.3.3.2.1); to stock the bottom layer aligned along the front edge of the shelf (¶ 4.3.3.2.2); to place the units upright,

directly on top of units in lower layers with each unit label turned to face the front edge of the shelf (¶ 4.3.3.2.3) and to “arrange all Contractor-responsible line items IAW procedures described throughout 4.3.3.2.2 and 4.3.3.2.3, whether or not the Contractor stocked new merchandise in these item locations” (¶ 4.3.3.2.4). (*Id.* at C4-2, -3, -4)

12. PRS 2 (Returning Merchandise to Appropriate Locations) referenced specification ¶ 4.3.3.10. This performance standard requires the contractor to return “all abandoned/misplaced items found throughout the commissary during the Contractor’s day/night operations no later than the end of the Contractor’s night operations.” The specification also required the contractor’s day personnel to “periodically collect abandoned/misplaced non-refrigerated items at the checkout point and elsewhere . . . [and] place any damaged merchandise in a designated damage control location.” (R4, vol. 1, tab 8 at C4-5)

13. PRS 3 (Disposal of Cardboard and Waste Material) references specification ¶¶ 4.3.3.11 - 4.3.3.12. These performance standards require the Contractor during the day to continually remove from throughout the commissary sales area all cardboard generated by sales activity and by contractor stocking and place the cardboard in the baler/compactor. The contractor is required to perform the same service plus cardboard breakdown during night operations. It is, however, “not responsible for collecting or placing in baler/compactor cardboard generated by vendor stockers or by Commissary personnel.” It is to “make a bale whenever the baler is full, tie off the bales, remove bales from baler, and move the bales to a temporary holding location within the RSHA.” (R4, vol. 1, tab 8 at C4-5, -6, ¶ 4.3.3.11) In addition, the contractor is required to remove waste materials from the sales area upon completion of night shift and during day operations at a frequency sufficient to minimize objectionable odors and prevent attracting insects or rodents, and dispose of these waste materials by placing them in dumpsters/waste compactor (*id.* at ¶ 4.3.3.12).

14. TE 1 states that the quality of the contractor’s performance would be measured against the contract requirements and standards by using “the Government’s Quality Assurance Surveillance Plan (QASP) and the Contractor’s Quality Control Plan.” (R4, vol. 1, tab 8 at TE1-1, ¶ 2.1) The PRS chart shows that the surveillance method for PRS 1(a) and 1(b) would be by random sample, and that for PRS 2 and 3 would be by checklist (*id.* at TE1-7). TE 1, ¶ 2.1 states that “[w]hether surveilled by random sampling or by checklist, if the percentage or number of defects in the Contractor’s performance exceeds the AQL for the month, the Contractor shall be required to respond to a Contract Discrepancy Report (CDR) IAW 7.1 of this PRS” (*id.* at TE1-1).

AQL for PRS 1(a) and PRS 1(b)

15. The AQL or “MAXIMUM ALLOWABLE DEGREE OF DEVIATION FROM REQUIREMENT” for each PRS is shown under Column C of the PRS chart (R4, vol. 1, tab 8 at TE1-7). For PRS 1(a) and 1(b), Column C refers to Table 1 for the sample size per day and AQLs, and states that “[t]he sample size is determined by multiplying the daily sample size by the number of days per month the Contractor performs night shelf stocking functions” (*id.*). Table 1 provides as follows:

Comsy Op Days Per Week	Samples Per Stocking Day	Monthly AQL	
		Accept	Reject
5 day	16	7	8
6 day	20	10	11
7 day	27	14	15

A note below Table 1 explains:

“Comsy Op Days per Week” refers to commissary operating schedule. . . . A QAE in a commissary that has a normal operating schedule of seven days per week will randomly sample 27 samples on each day that the Contractor performs shelf stocking. Sample size for a month is the number of samples per day times the number of days that the Contractor performs shelf stocking operations in a month.

(*Id.*) The Travis AFB Commissary operated seven days a week (tr. 1/46). Thus, an AQL of 14 defects (out of 27 random samples) would be scored as an acceptable deviation (“accept”) and 15 defects (out of 27 random samples) would be scored as an unacceptable deviation (“reject”).

AQL for PRS 2 and PRS 3

16. The AQL for PRS 2 is “0 defect.” A defect is defined as “21 or more units misplaced on any day that the Contractor is required to perform.” Column C states that “[t]he lot size is the number of days that the Contractor is required to perform per month,” and “[p]erformance is assessed on a daily basis.” (R4, vol. 1, tab 8 at TE1-7)

17. The AQL for PRS 3 is also “0 defect.” Column C states that “[t]he lot size is the number of days that the Contractor is required to perform per month.” (R4, vol. 1, tab 8 at TE1-7)

Window of Opportunity

18. Modification No. P00002 to the contract, effective 22 August 2005, set out in Section C-1, ¶ 1.2, the commissary operational hours (R4, vol. 1, tab 8 at C1-1). Paragraph 1.2.1 required the contractor to “perform all of the work . . . for night custodial (including RSH custodial), meat custodial, and night stocking operations during the ‘window of opportunity’” indicated in a table that followed (*id.*). As shown in the table, the “window of opportunity” for night stocking was from 9:00 pm to 5:30 am, Monday through Friday, and 7:00 pm to 3:30 am, Saturdays and Sundays (*id.*; tr. 1/17). The CO testified it was important for work to be completed within the “window of opportunity” so that the work would not impact other work (tr. 1/16).

19. The contract did not require DeCA to offer PRIDE the opportunity to re-perform defective services under any circumstances. It was a matter of discretion. (Finding 22, *infra*) We find that in order for re-performance to take place, PRIDE must have completed the services in time for the government QAE to conduct his inspection. Once the QAE completes his inspection, he must have time to communicate to PRIDE the nature of the discrepancy. Most importantly, PRIDE must still have the time and the employees to re-perform. Re-performance was sometimes not offered to PRIDE because re-performance would have had to take place after the “window of opportunity” when PRIDE’s employees would have left the commissary (tr. 1/106-07).

Performance Documentation

20. The Rule 4 file contains the various forms DeCA QAEs used to score PRIDE’s performance. The form used for scoring PRS 1(a) and 1(b) is entitled “COMMISSARY SHELF STOCKING RANDOM SAMPLE SURVEILLANCE CHECKLIST” (random sample surveillance checklist). For each sample selected, PRIDE was scored for three performance standards for PRS 1(a) and three performance standards for PRS 1(b). PRS 1(a) is scored for (1) Dust/Dirt (4.3.3.1), (2) Rotation (4.3.3.3 - 4.3.3.3.1), and (3) Half Case (4.3.3.2.1.1). PRS 1(b) is scored for (1) Location (4.3.3.2.1), (2) Allocation (4.3.3.2.1), and (3) Arranged (4.3.3.2.2 - 4.3.3.2.2.1). (R4, vol. 2, tab 6)

21. The form used for scoring PRS 2 and 3 is entitled “CONTRACT SURVEILLANCE CHECKLIST (PRS 2, 3, 4)” (surveillance checklist). For PRS 2, the form instructs:

PRS (2), Returning Merchandise to Appropriate Locations.
(Reference PARA. 4.3.3.10.) @ 0 defects. A defect is
defined as 21 or more units misplaced on any day that the

Contractor is required to perform. The Lot size is the number of days that the Contractor is required to perform per Month. ENTER IN THE MIDDLE BLOCK LABELED “ITEMS” THE NUMBER OF MISPLACED ITEMS FOUND BY THE QAE.

For PRS 3, the form instructs:

PRS (3), Disposal of Cardboard, Waste Material. (Reference PARA. 4.3.3.11 & 4.3.3.12) @ 0 defects. The Lot size is the number of days task is performed during Month.

(R4, vol. 2, tab 7)

Acceptance of Performance or Late Performance

22. TE 1 specifies the consequences in the event the contractor performs defective or incomplete work disclosed by QAE inspection:

4.1.1. At the sole election of the Government, the Contractor may be required to reperform or perform late . . . any or all defective or incomplete work disclosed by Government inspection. The Government will notify the Contractor promptly after inspection that specified defective services are required to be reperformed or perform late, and completed within a reasonable time as specified by the Government. In such cases, the Government will reinspect work and the Contractor may be held liable for any Government costs or damages associated with the reinspection.

4.1.2. When the Government requires re-performance or late performance because of defective service disclosed by random sampling inspection, the Government will not modify the original results.

4.1.3. When the Government requires reperformance or late performance of any or all defective service in a lot disclosed by checklist inspections, the Contractor shall resubmit the portion reperformed for reinspection. Upon reinspection, the Government will revise the original inspection results to reflect the resubmitted service lot.

4.1.4. If the Government determines that it will not be possible to allow the Contractor to reperform or to perform late, the Contractor will have to bear the consequences of poor performance, even if this might result in the Government issuing a CDR and reducing payment to the Contractor.

(R4, vol. 1, tab 8 at TE1-2)

Deduction Formulas

23. As reflected in Column E of the PRS chart, the maximum payment percentage for meeting the performance requirements is 17% for PRS 1(a), 53% for PRS 1(b), 5% for PRS 2, and 5% for PRS 3 (R4, vol. 1, tab 6 at TE1-7). When defective performance exceeds the level specified in the AQL, the method for calculating the amount of deduction (or the amount of monthly payment) for each PRS is shown in TE 1, ¶¶ 5.1.1 - 5.1.2. A formula is given for when services are surveilled by random sampling and when surveilled by checklist:

5.1. CONTRACTOR PAYMENT. When the AQL is exceeded, payment for services required will be calculated and reduced as follows:

5.1.1. Services Surveilled by Random Sampling. The Government will use the following formula when determining the amount of deduction for exceeding the AQL:

STORE: Camp Swampy Commissary

FOR: Perform Shelf Stocking Operations 1(a) Cleaning & Dusting, Rotation and Nearest Case Stocking (6 operating days per week)

Sample Size = 500 [25 (number of days Contractor is required to perform in a month for a 6 day store) X 20 (number of daily samples specified in Table 1 of the PRS)]

AQL = See the Table 1 for PRS (1)

Acceptance Level: 10 or less per month

Rejection Level: 11 or more per month

1. Contract line item cost per month (# cases stocked X contract unit price per case)	\$35,100.00
2. Maximum payment % for this service (PRS, Column E)	17.00%

3. Maximum payment for this service (Line 1 X Line 2)	\$ 5,967.00
4. Total number of defects found by QAE	18
5. Percentage found unacceptable (Line 4 divided by sample size = .036 or 3.6%)	3.6%
6. Amount of deduction (Line 3 X Line 5)	\$ 214.81
7. Total payment due for the month (Line 3 minus Line 6)	\$ 5,752.19

5.1.2. Services Surveilled by Checklist. The Government will use the following formula when determining the amount of deduction for exceeding the AQL:

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STORE: Camp Swampy Commissary

FOR: Replenishment Stocking and Stock Availability

Lot Size = 25 days (# of days the Contractor is required to perform)

AQL = 1 defect per month

Acceptance Level: 1

Rejection Level: 2

1. Contract line cost item per month (# cases stocked X contract unit price per case)	\$35,100.00
2. Maximum payment % for this service (PRS, Column E)	20.00%
3. Maximum payment for this service (Line 1 X Line 2)	\$ 7,020.00
4. Total number of defects found by the QAE	5
5. Percent found unacceptable (Line 4 divided by lot size = .20 or 20%)	20%
6. Amount of deduction (Line 3 X Line 5)	\$ 1,404.00
7. Total payment due for the month (line 3 minus Line 6)	\$ 5,616.00

(R4, vol. 1, tab 8 at TE1-3,-4)

Summary of Payment Deduction Procedures

24. A flow chart in the QASP (DeCAH 70-7, October 1999) summarizes DeCA's Quality Assurance Process. It shows that a QAE inspection can result in either a satisfactory (SAT) rating or an unsatisfactory (UNSAT) rating. For random sampling PRSs (PRS 1(a) and PRS 1(b)), DeCA can request re-performance but re-performance would not change the original UNSAT rating. For checklist PRSs, DeCA can request re-performance, and re-performance may or may not change the original UNSAT rating. If, as a result of the contractor's re-performance, the QAE determines that the PRS does not exceed the pertinent AQL, the contractor will receive a SAT rating. On the other hand, if the QAE determines that, as a result of the contractor's re-performance, the PRS still exceeds the pertinent AQL, he or she submits a proposed CDR to the CO. If the CO rejects the QAE's proposed CDR, no deduction will be taken. If the CO agrees with the QAE's proposed CDR, the CO will take steps to effect a reduction. (R4, vol. 1, tab 15 at 2-12)

25. The contractor is given an opportunity to rebut the QAE's recommendations. A separate flow chart in the QASP summarizes, in more detail, the CDR process. At the end of a month, the QAE prepares a proposed CDR for all PRSs on which the contractor was found to have exceeded AQL. The CO reviews the proposed CDR. If the CO disapproves the proposed CDR, it is returned to the QAE without action. The CO can forward the proposed CDR to the contractor for response. If the contractor does not respond, the CO can proceed to take steps to effect deduction. If the contractor responds, the CO can either take no action or take steps to effect deduction if he or she is not so persuaded. (R4, vol. 1, tab 15 at 3-2)

PRS 1(a) and PRS 1(b)

26. During the period December 2005 through March 2006, inspections at the commissary were conducted by (1) Romy DeGuzman (QAE DeGuzman), (2) Lester Benton (QAE Benton), and (3) Paul Schultz (QAE Schultz) (tr. 1/167, 219). QAEs went through a week-long training at a Quality Assurance school where they discussed and went through the QASP and the PRSs (tr. 1/264).

27. Surveillance for PRS 1(a) and PRS 1(b) was accomplished by random sampling. Since the Travis AFB Commissary operated seven days a week, a random sample of 27 items was required for each stocking day. To obtain the 27 samples, a computer generated an initial list of 45 items. Out of the 45 items, the QEA would select 27 items to inspect, all of which would be items covered by PRIDE's contract. (Tr. 1/145-46, 214, 255) We find that for PRS 1(a) and PRS 1(b), all items on the shelf in the

commissary with the exception of those items specifically excluded from the contract, could end up being inspected any one night.

28. In inspecting PRS 1(a) and PRS 1(b), the QAEs would go to the randomly selected item, take all of the items off of the shelf, check for dust and dirt, check for the expiration date on the items for rotation, check the shelf for cleanliness, and check to see if product labels were facing the right way. The QAEs would then mark his inspection forms (*i.e.*, the random sample surveillance checklists) with either an “S” or a “U.” (Tr. 1/214-15, 257) Thus, the QAEs findings were contemporaneously recorded on the spot.

29. Lisa Short was PRIDE’s Project Manager (PM Short) during the period DeCA took deductions (tr. 2/215). PM Short testified that she implemented PRIDE’s quality control plan “from the time I got there.” She would document what she saw in her notebook. After she finished for the night, she would enter her observations on an electronic spreadsheet. If she was not at the commissary, a warehouse lead or a custodial lead “would do it for me, put it on my notebook, leave it [in] my office, and then I’d put it into the computer.” (Tr. 2/250-51)

30. PRIDE provided at the hearing its color-coded monthly summaries of the daily inspection results for the months December 2005 to March 2006¹. On these Quality Checklists, a green “S” indicated that work for a line item for that night was determined to have been satisfactorily performed; a red “S” indicated that PRIDE initially determined the work was not satisfactorily performed but the work was re-performed to its satisfaction; and a red “U” indicated that it determined that the work was not satisfactorily performed. (Exs. 1, 2, 3, 4; tr. 2/110) In connection with PRS 1(a) and PRS 1(b), the color-coded Quality Checklist indicated that the PM or her designee checked: (1) Stock merchandise in appropriate location IAW contract; (2) Rotate Merchandise; (3) Dust shelves; (4) Salvage; (5) Reshop; (5) Cardboard Cleanup and (7) Repair Labels. (Exs. 1, 2, 3, 4)

31. At the hearing PRIDE’s counsel asked PM Short “how it came to pass that your inspection didn’t catch the items that the QAES’ inspection found.” She asked “Where’s the disconnect?” To this question, PM Short answered:

A. Well, *my quality inspection consisted of what we*

¹ The non-color-coded monthly Quality Checklist summaries had previously been provided to CO Deborah L. Wiggins (CO Wiggins) before she issued her final decision. At the hearing, PRIDE substituted the color-coded versions for the non-color-coded versions.

were actually stocking. I mean we had over 9,000 line items. So when the cases came in that night, that's why me and my lead would put down what cases were being stocked that night.

I would inspect those items. The QAES' list that they get for their write-on list is a computer-generated list. And it's multiple pages. *They have 27 to do.* They might come across a contract line item that hadn't been stocked or received. And they – *they didn't go by what we were actually stocking. They went by whatever the list gave them.* I think that's where some of the disconnect came from, because we're not the only ones that stocked contractor items. (Emphasis added)

PM Short went on to explain that if no item came into the commissary for three days, PRIDE could end up not looking at a space for three nights unless there was something “way out of the ordinary.” (Tr. 2/251-53)

32. PM Short's testimony was consistent with that of James Monaghan (PM Monaghan) who was PM at the commissary from September 2004 to October 2005 (tr. 2/163-64). PM Monaghan testified that when he was PM, PRIDE did not check all items in the store, but checked only “eight or nine” items. (Tr. 2/196-97) PRIDE did not do so “[b]ecause if that was the case, it would take all night to do an inspection” (tr. 2/198). In selecting the items to inspect, Monaghan acknowledged that he focused on the Store Manager's “hot items” such as dog food, paper and water (tr. 2/199, 203). PM Short testified she would check other items not stocked the same night “on occasions,” “maybe . . . 30, 40 percent of the time.” (Tr. 2/258)

33. Unlike previous contracts with PRIDE, Contract 0038 was based on a new Performance Work Statement (PWS) known as “PWS 2000.” PWS 2000 changed a “spec driven” to a “more performance-based” contract. PWS 2000 went from 42 performance requirements to 7. (Tr. 2/133) According to CO Davis, under the old contracts, the deductions that could be taken were not worth the time to process them. PWS 2000, on the other hand, “had teeth . . . [and] [p]eople . . . paid attention.” (Tr. 2/143, 154) Under its old contracts, QAE inspections were conducted on the basis of what were “stocked that night” (tr. 2/256). In inspecting only what it stocked, we find that PRIDE failed to recognize that the random sampling of PRS 1(a) and PRS 1(b) under Contract 0038 rendered all contractor-responsible items subject to inspection.

PRS 2

34. PRS 2 (Returning Merchandise to Appropriate Locations) permitted an “S” rating if the QAE found less than 21 misplaced items on any one day. On PRS 2, the QAE would go down aisles that were ready for inspection, pick up wayward items and put them in a cart. If the QAE picked up 21 or more wayward items, PRIDE would receive a “U” rating. (Tr. 1/258-59) QAEs would inspect PRS 2 as one of the last inspections before leaving the commissary (tr. 1/162, 220).

35. Returning wayward items to their appropriate locations was assigned to the lead stocker. PM Short testified generally that PRIDE’s lead stocker would go up and down the aisles each night, pick up wayward items, put them in a cart, and return them to their appropriate places. This testimony is too general to refute the QAE inspection reports, made contemporaneously each night. It failed to explain why the QAEs were picking up over 21 wayward items when they went through the commissary on the days on which deductions were taken.

PRS 3

36. PRS 3 (Disposal of Cardboard and Waste Material) permitted “0 defect.” Generally, at the close of PRIDE’s window of opportunity, the QAE would go into the warehouse and walk the commissary floor to see if all of the cardboard had been picked up and properly baled. If there was cardboard found and not baled PRIDE would receive a “U” rating for that night. (Tr. 1/260-61) QAE DeGuzman testified that disposal of cardboard and waste material was supposed to be done continuously during the night as cardboard boxes were emptied. He testified that “[m]ost of the nights and most of the morning[s], cardboards [sic] were still all over the sales floor at the end of the window of opportunity And they were all around the baler at that time they go far beyond six o’clock . . . to 7:30 before they finally done with bailing.” (Tr. 1/164) PRIDE did not address the QAE findings specifically but raised the possibility that the cardboard might have been left by vendor stockers (tr. 2/38-40).

Vendor Stockers

37. In addition to PRIDE stockers, vendor stockers would also be stocking at night. Vendor stockers were stockers from private companies. Their services were not paid for by DeCA. Nor did DeCA inspect their work. (Tr. 1/195) Vendor stockers stocked display items. They did not stock in the same areas as PRIDE’s stockers (tr. 1/250). To the extent vendor stockers were allowed in the commissary, they would be off the floor by 3:00 or 3:30 am. Some vendor stockers would come at 5:30 am.

(Tr. 1/247) Vendor stockers were instructed by the QAE not to interfere with PRIDE's stocking. QAE Benton testified that "if the vendor stocker was in the way by the time Pride got to a certain aisle, I told them they had to pick their stuff up and move out until they [PRIDE] finish[ed]" (tr. 1/249, 268).

38. Mary Flores (Flores), PRIDE's Director of Operation Support, speculated that untrained vendor stockers might have stocked on the same shelves for which PRIDE was responsible (tr. 2/22-35). PM Short blamed vendor stockers for leaving items not where they belonged (tr. 2/249-50). There is no specific evidence that any vendor stockers contributed to the defects found by the QAEs on the days deductions were taken.

Government Personnel

39. Store personnel were government employees. They did not stock at night, they stocked during the day before the commissary opened (tr. 1/206). By contract, government employees were allowed to stock to provide patron support (*see* § C-1, ¶1.9) (R4, vol.1, tab 8 at C1-6; tr. 2/268-69). Store personnel would bring in government supplies, such as meat trays, bags, and "things that you need to run a commissary" (tr. 2/11). Store personnel would sometimes arrive half-an-hour before 5:30 am to change prices. QAE DeGuzman testified that, in changing prices, the store personnel "never touch those products. They only touch the label on the shelf" of those items whose prices needed to be changed (tr. 1/207). There is no specific evidence that any government store personnel contributed to the defects found by the QAEs on the days deductions were taken. In any event, we find that PRIDE's own quality control inspections each night which preceded the QAE inspections should have caught the defects found.

Joint Inspection

40. According to PM Short, each night, a lead stocker would arrive at the commissary half-an-hour early to count cases. When the rest of the stockers arrived, the pallets would be moved out to the floor. Short and the lead stocker would start at opposite ends of the store and assign pallets to the stockers. Upon finishing a pallet, the stocker would put the empty cardboard boxes in the baler, and then return to stock another pallet. (Tr. 2/224)

41. PM Short testified that she would radio the QAEs throughout the night as aisles were finished, and sometimes the QAE would come out and inspect but most of the time the QAE would come out later or when he could (tr. 2/218). According to PM Short, the three QAEs operated differently: QAE DeGuzman "would come out when I released a lane." QAE Benton would not have time to inspect when he was notified. QAE Schultz "didn't do a lot of inspections" because he was a "fill-in," and he would

usually wait until after 5:30 am. (Tr. 2/227-228) None of the QAEs however, would initiate PRS 1(a) and PRS 1(b) inspections before an aisle was released for inspection by PRIDE (tr. 1/190, 242, 256).

42. There was no contract requirement for the QAEs to inspect immediately when PRIDE's PM released each aisle as stocking was done. To do so would require the QAEs to be all over the commissary on numerous occasions during the course of the night. We find it reasonable for the QAEs to wait until PRIDE finished before conducting their inspections. Nor was there a requirement for the QAEs to notify PRIDE before they began their inspections.

43. PM Short testified that the "majority of the time" QAE inspections occurred after 5:30 am even though she "released lanes as they were done." She testified that she would stay beyond her 5:30 am shift 95% of the time because she "wanted to be able to do the inspections with the QAEs, so if there was stuff that they observed as being deficient, I wanted to make sure I was able to see that." (Tr. 2/216-17) PM Short testified that there were "very few occasions" where joint inspections were conducted (tr. 2/219). She testified that not accompanying the QAEs during the inspections was frustrating because:

I wasn't seeing what they were seeing. And I felt it would have been better if we could have done it together versus they do it on their own and me do it on my own.

(Tr. 2/231) If most of the QAE inspections occurred after 5:30 am, and if PM Short stayed beyond her 5:30 am shift so that, as she claimed, she could participate in joint inspections with the QAEs, she did not explain why joint inspections were done only infrequently:

JUDGE TING: Okay. So why couldn't you be together at around 5:30 to do it [inspection] together?

THE WITNESS: Well, that was a lot of the reasons why I stayed past my shift, but that didn't always work as well.

We have done it on occasions, but very few occasions.

(Tr. 2/219) PM Short testified that she did not accompany the QAEs on their inspections either because she was not told about when inspections would take place, or she had already left (tr. 2/221).

44. PRIDE acknowledged “there should be some sort of joint inspection or at least some sort of verification, especially if there are problems in the store” (tr. 2/54). While there was no contract requirement for PRIDE to accompany the QAEs on their inspection rounds, as PRIDE recognized, it was to its advantage to do so. Had PRIDE’s PM been there with the QAEs when the PRS 1(a) and PRS 1(b) inspections took place, PRIDE could have corrected at least some of the deficiencies found right away. Even if PRIDE had to come back to re-perform later, it could have gone directly to the problems and fixed them. PRS 2 (returning wayward merchandise) and PRS 3 (cardboard disposal) were inspected by the QAEs at the close of PRIDE’s “window of opportunity.” We find that a joint inspection of PRS 2 and PRS 3 would also have been to PRIDE’s advantage for the same reason.

45. There is no evidence that the QAEs refused to allow PRIDE to participate in joint inspections when inspections were conducted. The QAEs actually offered PRIDE’s PM to come along during inspections. Although PRIDE did so for a few months at the beginning of the contract, its PM later took the position that PRIDE’s personnel did not have time, and that the QAEs should simply go ahead and let PRIDE know if they found something wrong. (Tr. 1/168, 221, 259) Under PRIDE’s QCP, it was its PM’s responsibility to determine workload in order to fulfill the contract requirements (finding 5). Thus, it was within PM’s power to finish work so that QAE inspections could be accomplished and re-performance of any unsatisfactory work, whether ordered or voluntary, could be completed within the “window of opportunity.” We find that joint inspections would have been the only practical way for PRIDE to reduce the PRS 1(a) and PRS 1(b) defects it failed to catch with its own quality control inspections. Yet, PRIDE did not choose joint inspection as a management tool to correct whatever its own quality control failed to catch.

Late DDOs

46. After their inspections, the QAEs would attempt to write up the DDOs before their shift ended. The DDOs would be given to PRIDE’s PM or its lead stocker if he or she was still at the store. If they had already left, the DDOs would be placed in PRIDE’s box outside the commissary’s administration office. There were occasions when the DDOs were not finished by the time the QAEs’ shift ended. In such cases, the DDOs would be finished later and given to PRIDE. (Tr. 1/174, 177, 240, 262)

47. QAE DeGuzman testified that during the period December 2005 to March 2006, “stocking is still being done and the window of opportunity had passed and there are still cardboard all over the place and . . . the baling of those cardboard [was] late too” (tr. 1/150). He testified that sometimes PRIDE would not finish until 6:00 or 7:00 am

(tr. 1/151-52). To provide PRIDE an opportunity to re-perform when it finished too close to the close of the window of opportunity or after the window of opportunity had closed would interfere with government store personnel's tasks of changing prices and preparing the store to open (tr. 1/192). Also, as early as 6:00 am, the commissary began receiving

products (tr. 2/10-11). QAE Schultz testified he was "nice enough" to let PRIDE re-perform even in situations where PRIDE was "running . . . behind their . . . window of opportunity" (tr. 1/267).

48. By e-mail on 17 May 2005, PM Monaghan asked the commissary store manager to have QAEs DeGuzman and Benton provide the DDOs "on the day they occur [sic]." The e-mail stated that "[b]y waiting a few days to provide this information fails to provide us an opportunity to conduct any reperformance on the unsats." (Ex. F; tr. 2/63-64) The record shows that during June, July, August and September 2005, PM Monaghan continued to ask for late inspection documents (exs. H, I, K, L; tr. 2/65-75). No similar e-mails were provided for the months December 2005 through March 2006, the period during which deductions were taken. According to PRIDE, late submission of inspection forms "remained the practice maybe to a lesser degree" (tr. 2/81).

49. According to PRIDE, the impact of receiving the DDOs too late was that they would not understand or see "in real time" what the QAE was seeing, and consequently would not be able to re-perform unsatisfactory services. PRIDE also claimed that late DDOs took away its ability to refute the QAE's findings through *reclamas*. (Tr. 2/76-77) Short of joint inspections, we find PRIDE would not be able to see what the QAEs were seeing in "real time" or to refute the QAEs' findings, even if the DDOs were provided to PRIDE on the same day.

50. Based on her experience, PM Short knew approximately how long it would take her stockers to finish the cases that came in on any day. If there were too many stockers, she would send some home early. (Tr. 2/225-26) A review of the time sheets (PRIDE's Hours Detail Reports) for the period December 2005 through March 2006 shows that most stockers left or were sent home before 5:30 am (*see* exs. M-1, M-2, M-3, M-4). Thus, even if the QAE's delivered the DDOs at the end of their shift, PRIDE would not have been in a position to re-perform all of the deficiencies noted because most of its stockers would have gone home.

51. We have examined the DDOs written by QAEs DeGuzman, Benton and Schultz for the days for which deductions were taken (Exs. 7, 8, 9, 10). We do not find their descriptions of the defects found to have been unintelligible or uninformative. We find that PRIDE's personnel, who worked in the commissary daily, should have had no

difficulty understanding what the problems were. For someone like CO Wiggins, we find that a sound judgment could have been made by reviewing the DDOs which supported the UNSAT findings in the QAEs' inspection forms.

CDRs for December 2005 and January, February and March 2006

52. By letter dated 13 March 2006, the DeCA West CO Davis forwarded to PRIDE the CDRs for the month of December 2005, for PRS 1(a), 1(b), 2, 3, 5, and 8 (R4, vol. 2, tab 4). Also by letter dated 13 March 2006, CO Davis forwarded to PRIDE the CDRs for the month of January 2006 for PRS 1(a), 1(b), 2, 3, 5 and 8 (*id.* at tab 11). CO Davis proposed a total payment deduction of \$59,533.79 for December 2005 and January 2006. PRIDE furnished its written responses by two separate letters dated 3 April 2006. (*Id.* at tabs 3, 10)

53. By letter dated 27 March 2006, CO Davis forwarded to PRIDE the CDRs for February 2006 for PRS 1(a), 1(b), 2, 3, 5, and 8 (R4, vol. 3, tab 4). CO Davis proposed a payment deduction of \$30,324.18. PRIDE furnished its written response by letter dated 6 April 2006. (*Id.* at tab 3)

54. By letter dated 26 April 2006, CO Davis forwarded to PRIDE the CDRs for March 2006 for PRS 1(a), 1(b), 2, 3, 5 and 8 (R4, vol. 3, tab 10). CO Davis proposed a payment deduction of \$33,380.47. PRIDE furnished its written response by letter dated 9 May 2006. (*Id.* at tab 9) The total amount CO Davis proposed to deduct was \$123,238.44.

55. All three PRIDE responses sounded the same theme. They referred to its 3 August 2005 letter and meeting notes and e-mails dating back to February 2004 regarding what it perceived as “breakdown of inspection process at Travis Commissary.” The letters referred to “historical re-curring issues of DeCA QAE’s not following the inspection process as required by the DeCA Quality Assurance Surveillance Plan (QASP) identified in this contract.” PRIDE stated that it had issued “reclamas” in accordance with ¶ 1.4.2 of the contract as timely as possible “due to the late Documentary Deficiency Observations forms (DDO) received.” (R4, vol. 2, tab 3)

56. PRIDE’s letters identified the following on-going inspection problems which it contended would “continue to negatively impact PRIDE and DeCA working relationship” if not remedied:

- QAE’s do not inspect work timely after we have

completed and asked them to inspect.

- QAE's have refused our calls for inspection stating they do not have time to inspect and then proceed to rate our performance unsatisfactory without timely notice to PRIDE that would allow us to access the facts and take corrective action when deemed appropriate.
- QAE's will, at the end of the month, ask PRIDE to acknowledge inspection findings that are not timely, and given they are "after the fact renderings" of our performance are beyond our ability to determine the validity or not of the QAE's findings. We are not unable [sic] to either confirm or deny the findings and a search of our quality control data simply increases the contract administration workload.
- QAE's have stated they cannot find a PRIDE supervisor to conduct inspections but PRIDE has waited until after 7:30 a.m. on several occasions and have not seen QAE inspections.
- PRIDE has received DDO's day after inspections and has noticed that some days have no inspection ratings. However at the end of the month, the dates previously with no inspection ratings have been filled out.

(R4, vol. 2, tab 3)

57. PRIDE's letters summarized its principal areas of complaint in the following paragraphs:

PRIDE never received notice of unsatisfactory performance on a daily basis at Travis Commissary in December 2005 and January 2006.

DeCA failing to provide specific defective information on DDO forms on a daily basis directly interferes with PRIDE's ability to perform to standards and/or does not avail opportunity to prevent/rework or reclama the deficiency to either bring it to standard or refute the claim as outlined in this contract's Performance Work Statement (PWS). PRIDE has asked for specific clarification during performance

meetings and no specific information could be given, stating that PRIDE should know if they are conducting inspections. PRIDE's quality control has revealed areas of rework that were completed prior to release.

(R4, vol. 2, tab 3)

CO Wiggins' Evaluation

58. In 2005, DeCA underwent a major reorganization. Contracting functions that were performed in the regions were transferred to DeCA's headquarters at Fort Lee, Virginia. DeCA employees in the regions were offered positions at Fort Lee. Most regional employees elected to find other employment. As regional employees left, their duties were transferred to Fort Lee. (Tr. 1/11-12) By Modification No. P00007 issued on 11 May 2006, DeCA West notified PRIDE that effective 14 May 2006 all authority and responsibility for further administration of the Travis AFB Commissary contract would be assumed by CO Wiggins at Fort Lee (R4, vol. 1, tab 13). CO Wiggins was not aware there were outstanding proposed CDRs until late 2005 or early 2006 (tr. 1/114). She received the CDR package from DeCA West in May 2006 (tr. 1/112).

59. CO Wiggins did not accept CO Davis' evaluation. Instead, she went through herself each of the proposed CDRs, all of the surveillance documentation and PRIDE's responses and supporting documentation including the reclaims. (Tr. 1/27-28; 1/29-33, 125) In doing so, CO Wiggins did not find all of the PRSs for which CDRs were proposed to be supportable (tr. 1/34). PRS 5 pertained to warehousing functions. In reviewing the DDOs, CO Wiggins found that the QAEs did not annotate what specific warehousing functions were UNSAT (tr. 1/34-35, 103). PRS 8 pertained to custodial work in the meat processing and wrapping area. While the checklists were completed daily with SAT and UNSAT ratings, the DDOs noted only occasionally the specific defects found. Since she was never told by the Store Manager that the meat area had to be shut down due to any defects found, she concluded that the PRS 8 defects must have been corrected either by PRIDE or by DeCA itself. CO Wiggins decided not to include PRS 5 and PRS 8 with her proposed CDRs. (Tr. 1/35-36)

60. By e-mail on 16 May 2006, CO Wiggins asked PRIDE to provide its Quality Checklists for the months December 2005 through March 2006 (ex. 5, tr. 1/40). Since PRIDE was required to put in place a QCP, CO Wiggins believed that the daily Quality Checklists PRIDE generated under its QCP would tell her if PRIDE conducted daily quality control inspections, whether it considered its own work SAT or UNSAT, and whether it re-performed any of its UNSAT work. (Tr. 1/42-43) PRIDE did not send its daily Quality Checklists. By e-mail on 17 May 2006, it attached the consolidated monthly checklists (Quality Checklists) for the months requested. CO Wiggins testified

that, in the interest of expediting her review, she decided to accept the consolidated monthly checklists. (Ex. 6; tr. 1/40-41)

61. In reviewing PRIDE's Quality Checklists, CO Wiggins noticed that on certain days, PRIDE had commented that government inspection was either delayed or not

performed. CO Wiggins decided that, for PRS 1(a), PRS 1(b), PRS 2, and PRS 3, her CDRs would not propose to deduct for those days that the QAE "either was not available to inspect or delayed inspections when requested by [PRIDE's] Project Manager." (Tr. 1/48-51)

62. After excluding PRS 5 and PRS 8, and the days during December 2005 through March 2006 on which the QAE either delayed or did not inspect, CO Wiggins checked the COMMISSARY SHELF STOCKING RANDOM SAMPLE SURVEILLANCE CHECKLIST forms (for PRS 1(a) and PRS 1(b)) and the CONTRACT SURVEILLANCE CHECKLIST forms (for PRS 2 and PRS 3) against the DDOs, corrected any "miscount[s]," and had another CO in her office verify her count (tr. 1/52-53). Once she eliminated the days on which no deductions would be taken, CO Wiggins calculated the amount of deductions for PRS 1(a), PRS 1(b), PRS 2 and PRS 3 in accordance with the formulas set out in the contract (tr. 1/76).

63. By letter dated 20 June 2006, CO Wiggins advised PRIDE that based upon her review of all of the documentation submitted, including those from PRIDE, she had decided to deduct \$21,987.19 for the period December 2005 through March 2006. (R4, vol. 2, tab 8; vol. 3, tab 8) In response to PRIDE's complaint that DeCA's failure to provide inspection documentation had impeded its ability to comply with the contract performance standards, CO Wiggins provided the following comments:

. . . It should be noted that meeting contract standards is not predicated on the receipt of inspection reports. The tool, which should be utilized to facilitate your ability to meet contract standards, is your Quality Control Plan. It should also be noted that providing contractors with a copy of inspection reports and affording them the ability to initial all unsatisfactory ratings is not a contract requirement, but is encouraged and recommended, if the request to do so has been made specifically by the PM.

CO Wiggins noted that while her review of PRIDE's Quality Control Checklists indicated that the QAE was not available for inspection of completed work on some

occasions, there were “numerous occasions” where such was not the case. (R4, vol. 2, tab 8; vol. 3, tab 8)

64. Giving due consideration to those days in December 2005 (4, 5, 6, 7, 11, 12, 13, 14, 18, 19, 20, 21, 26, 27, 28, and 29 December 2005) where PRIDE’s QC checklist did not indicate that “inspections were refused or not accomplished timely,” CO Wiggins found (a) 99 unsatisfactory ratings for PRS 1(a)² (R4, vol. 2, tab 6); (b) 78 unsatisfactory ratings for PRS 1(b) (*id.*); (c) 16 unsatisfactory ratings for PRS 2 (R4, vol. 2, tab 7 at F-1); and (d) 12 unsatisfactory ratings for PRS 3 (*id.*). The total deduction for December 2005 was \$6,441.68. (R4, vol. 3, tab 8)

65. Giving due consideration to those days in January 2006 (2, 3, 4, 6, 9, 10, 11, 12, 16, 17, 18, 19, 23, 24, 25, 26, 30, and 31 January 2006) where PRIDE’s QC checklist did not indicate that “inspections were refused or not accomplished timely,” CO Wiggins found (a) 128 unsatisfactory ratings for PRS 1(a) (R4, vol. 2, tab 13); (b) 71 unsatisfactory ratings for PRS 1(b) (*id.*); (c) 17 unsatisfactory ratings for PRS 2 (R4, vol. 2, tab 14 at F-1); and (d) 16 unsatisfactory ratings for PRS 3 (*id.*). The total deduction for January 2006 was \$ 6,792.82. (R4, vol. 3, tab 8)

66. Giving due consideration to those days in February 2006 (6, 12, 13, 14, 19, 20, 21, 26, 27 and 28 February 2006) where PRIDE’s QC checklist did not indicate that “inspections were refused or not accomplished timely,” CO Wiggins found (a) 95 unsatisfactory ratings for PRS 1(a) (R4, vol. 3, tab 6); (b) 36 unsatisfactory ratings for PRS 1(b) (*id.*); (c) 8 unsatisfactory ratings for PRS 2 (R4, vol. 3, tab 7 at F-1); and (d) 5 unsatisfactory ratings for PRS 3 (*id.*). The total deduction for February 2006 was \$3,453.11. (R4, vol. 3, tab 8)

67. Giving due consideration to those days in March 2006 (6, 8, 12, 13, 14, 15, 19, 20, 21, 22, 27, 28 and 29 March 2006) where PRIDE’s QC checklist did not indicate that “inspections were refused or not accomplished timely,” CO Wiggins found (a) 136 unsatisfactory ratings for PRS 1(a) (R4, vol. 3, tab 12); (b) 55 unsatisfactory ratings for PRS 1(b) (*id.*); (c) 12 unsatisfactory ratings for PRS 2 (R4, vol. 3, tab 13 at F-1); and (d) 10 unsatisfactory ratings for PRS 3 (*id.*). The total deduction for March 2006 was \$5,299.58. (R4, vol. 3, tab 8)

² In response to the Board’s request to double check the numbers, the government by letter dated 7 September 2007 changed this number to 100. This change would change the amount of deduction from \$1,129.66 to \$1,140.54. (*See* calculations DeCA submitted as a part of Rule 4 by its letter dated 27 April 2007).

68. The deducted amount (\$21,987.19) as originally calculated contained minor errors. DeCA corrected the errors at the hearing. The Board further corrected PRS 1(a) for December 2005 by using 100 UNSAT ratings (finding 64, n.2). These corrections result in a deduction of \$21,996.64 (\$9.45 more), as shown in the table below:

MONTH	PRS	AMOUNT DEDUCTED
December 2005	1(a)	\$ 1,140.54 ³
	1(b)	\$ 2,774.82
	2	\$ 1,449.74
	3	\$ 1,087.37
January 2006	1(a)	\$ 1,421.83
	1(b)	\$ 2,458.46
	2	\$ 1,499.89
	3	\$ 1,411.55
February 2006	1(a)	\$ 1,056.93
	1(b)	\$ 1,247.80
	2	\$ 706.55
	3	\$ 441.69
March 2006	1(a)	\$ 1,494.91
	1(b)	\$ 1,884.31
	2	\$ 1,047.38
	3	\$ 872.87
TOTAL DEDUCTIONS		\$21,996.64

(R4, vol. 3, tab 8; tr. 1/82-85)

69. In a pre-hearing submission dated 27 April 2007, DeCA furnished to the Board and PRIDE its deduction calculations for PRS 1(a), PRS 1(b), PRS 2, and PRS 3 for those days on which deductions were taken. The calculations were based on the deduction/payment formulas set out in the contract (*see* finding 23). PRIDE has not challenged the validity of the formulas nor the calculations based on those formulas.

³ *See* n.2.

Except for the minor adjustment we made to PRS 1(a) for December 2005, we find the calculations as adjusted during the hearing to be in order (ex. 16⁴).

70. PRIDE's 26 June 2006 letter asked for a CO's decision. The letter stated that "DeCA's inspection and acceptance process is flawed and not applied within applicable FAR requirements, the contract terms, conditions and clauses and DeCA's outlined Quality Assurance Surveillance Plan at Travis Commissary." PRIDE stated that it disagreed with the CO's findings because DeCA's "lack of timely inspection and acceptance or timely notice of nonconforming services" "defeats the FAR and contract requirements to . . . provide the contractor an opportunity to correct nonconforming supplies within the scheduled delivery schedule," and "defeats the effective transfer of title based on formal acceptance at the source." (R4, vol. 1, tab 5)

71. CO Wiggins acknowledged receipt of PRIDE's request for a decision and advised by letter dated 7 July 2006 that a decision would be issued 1 September 2006. By letter dated 31 August 2006, the CO notified PRIDE that an additional 60 days would be required to issue a decision "due to the complexity of the material and the need for further review and analysis." (R4, vol. 1, tab 4)

72. CO Wiggins issued her decision by letter dated 31 October 2006. With respect to PRIDE's allegation of lack of timely inspection and acceptance, the CO took the position that "[i]t is the obligation of the contractor to achieve acceptable contract performance and not rely on the government's inspection to alert them to any deficiencies." (R4, vol. 1, tab 1 at 4) With respect to PRIDE's contention that it was not provided the opportunity to correct nonconforming work, the CO pointed out that requiring re-performance was contractually at the sole election of DeCA, and that if DeCA determined it would not be possible to allow the contractor to re-perform or to perform late, the contractor would have to bear the consequences of poor performance. (*Id.* at 5) With respect to PRIDE's contention that the lack of timely inspection and acceptance at the source placed the risk of loss or damage on the contractor for services completed and delivered, the CO pointed out that the "inspection and acceptance clause" of the contract provided that "[t]he inspection and acceptance point for all services performed under this contract will be the Defense Commissary Agency, Travis AFB Commissary, Building 680, 460 Skymaster Drive, Travis AFB, CA 94535-1905, or as otherwise specified in Performance Work Statement (PWS) contained herein" (emphasis in original) (*id.* at 6). The CO stated that based on the information she had and in consideration of the arguments PRIDE presented, it was her final decision that the

⁴ Although not formally introduced, the 27 April 2007 calculations, as adjusted during the hearing, were treated by the parties as in evidence. We hereby assign as exhibit 16 the 27 April 2007 deduction/payment calculations.

\$21,987.19 taken for the months of December 2005 and January through March 2006 were “appropriate and warranted” (*id.* at 7).

73. PRIDE timely appealed the decision by notice dated 9 January 2007 and elected to proceed under Rule 12.3 (Accelerated procedure). Due to difficulties in scheduling witnesses, PRIDE voluntarily removed the appeal from the Rule 12 process. A two-day hearing took place in Sacramento, California, on 28-29 August 2007. DeCA filed a post-hearing brief; PRIDE did not.

DECISION

PRIDE challenged DeCA’s deductions on the grounds that DeCA failed to (1) “inspect work timely after we have completed and asked them to inspect,” and (2) forward DDOs and other inspection documents in a timely manner so that it could correct the deficiencies found by re-performance. (Findings 56, 57, 63)

There was no contract requirement that the QAEs must inspect immediately when PRIDE’s PM released each aisle as stocking was done. We have found to do so would require the QAEs to be all over the commissary on numerous occasions during the course of the night. We have found it was reasonable for the QAEs to wait until PRIDE totally finished before conducting their inspections. (Finding 42)

PRIDE’s argument that satisfactory performance depended upon timely notice of the deficiencies found by the QAEs has no merit. First, the contract required PRIDE to establish a quality control plan (finding 4). PRIDE’s QCP established for this purpose stated that PRIDE’s PM was “responsible for performing daily inspections to ensure that all tasks are performed to the quality standards.” According to the QCP, “[s]hould the inspectors find deviations from the standards, they will make the employees aware of the problem, and *immediately require them to rework the task* until it meets the standard.” We conclude that PRIDE’s obligation to correct performance deficiencies stemmed from its own quality control inspections and not from any notices (DDOs) received from DeCA. (Finding 5) Second, PRIDE had no contract right to re-perform or to perform late any or all defective work found by the QAEs. TE 1, ¶ 4.1.1., provided that re-performance of defective work or performing work late was “[a]t the sole election of the Government,” and it was up to DeCA to specify what defective services were to be re-performed or performed late, when they needed to be completed, and when re-inspection would occur. The contract stated that when DeCA determined it would not be possible for the contractor to re-perform or perform late, the contractor would have to bear the consequences. (Finding 22) Given that the contract unambiguously provided that re-performance of any late or defective work was at the “sole election” of DeCA, we will not rewrite the contract to provide that PRIDE had the right to perform late or to re-

perform defective work, or such right was dependent upon timely notice from DeCA. *George Hyman Constr. Co. v. United States*, 832 F.2d 574, 581 (Fed. Cir. 1987); *Coast Fed. Bank v. United States*, 323 F.3d 1035, 1039 (Fed. Cir. 2003); *American Capital Corp. v. F.D.I.C.*, 472 F.3d 859, 865 (Fed. Cir. 2006).

While the QAEs were not always prompt in forwarding the DDOs and other inspection documents, PRIDE was not without means to reduce or minimize the PRS 1(a) and PRS 1(b) defects. PRIDE acknowledged that if there were problems in the store, some sort of joint inspections should have been implemented. There is no evidence that the QAEs refused to allow PRIDE to participate in joint inspections when inspections were conducted. The QAEs actually offered PRIDE's PM the opportunity to come along during inspections. The evidence shows that although PRIDE did so for a few months at the beginning of the contract, its PM later took the position that PRIDE's personnel did not have time and that the QAEs should simply go ahead and let PRIDE know if they found something wrong. Had PRIDE's PM been there with the QAEs when the PRS 1(a) and PRS 1(b) inspections took place, she could have corrected at least some of the deficiencies found right away. Even if PRIDE had to come back to re-perform, it could have gone directly to the problems. Yet, PRIDE did not choose joint inspections as a management tool to correct whatever its own quality control failed to catch. (Findings 44, 45)

Moreover, consistent with the PM's responsibility to determine workload (finding 5), it was within PRIDE's power to finish stocking sufficiently in advance of the close of its "window of opportunity" so that QAE inspections could be completed and re-performance of any unsatisfactory work, whether ordered or voluntary, could be accomplished.

II.

Proposed CDRs for December 2005, and January through March 2006 were initially issued by CO Davis of DeCA West. After contracting functions were transferred to Fort Lee, CO Wiggins independently reviewed each of the proposed CDRs, all of the surveillance documentation, PRIDE's responses, the reclaims, and PRIDE's Quality Checklist summaries. (Findings 52-54, 58-60) CO Wiggins eliminated PRS 5 and PRS 8 because she believed that the QAEs' documentation was insufficient. Based on PRIDE's Quality Checklist summaries, CO Wiggins also decided not to propose deductions for PRS 1(a), PRS 1(b), PRS 2 and PRS 3 for those days that PRIDE had noted that the QAE "either was not available to inspect or delayed inspection when requested by [PRIDE's] Project Manager." (Finding 61) Based on this analysis, CO Wiggins concluded that she would propose a deduction for PRS 1(a), PRS 1(b), PRS 2 and PRS 3 for 16 days in December 2005, 18 days in January 2006, 10 days in February 2006, and 13 days in March 2006, for a total of \$21,987.19. (Findings 64-67)

In addition to making all of the surveillance documentation available as a part of the Rule 4 file, DeCA called all three QAEs involved in the inspections as witnesses at the hearing. PRIDE asked no questions with respect to the PRSs which formed the bases of DeCA's deductions on the specific days in December 2005 and January through March 2006. We conclude that the QAEs' testimony was credible. PRIDE pointed instead to its color-coded Quality Checklist summaries for the same months as evidence that its PM conducted the quality control inspections before the aisles were released to the QAEs for inspection.

PRS 1(a) and PRS 1(b)

QAE inspection of PRS 1(a) and PRS 1(b) was by random sampling (finding 14). Every night, a computer generated a list of 45 items. From these, the QAE picked 27 items covered by PRIDE's contract for inspection. Thus, for PRS 1(a) and PRS 1(b), all items on the shelf in the commissary with the exception of those items specifically excluded from its contract could end up being inspected that night (finding 27). PRIDE apparently did not understand this. Its PM testified that its "quality inspection consisted of what we were actually stocking" (finding 31). According to PM Monaghan, PRIDE checked only "eight or nine" items because checking all items would take all night. PM Short testified that she would check items not stocked the same night "on occasions," maybe 30-40% of the time. (Finding 32)

Nothing in the specification provisions which were a part of PRS 1(a) and PRS 1(b) limited PRIDE's quality control inspection just to the items stocked during the same night. Paragraph 4.3.3.2.4, relating to "Arranging Stock in Item Locations," in particular, stated that the contractor was required to "arrange all Contractor-responsible line items IAW procedures described throughout 4.3.3.2.2 and 4.3.3.2.3, whether or not the Contractor stocked new merchandise in these item locations." (Findings 11, 12)

We conclude that PRIDE's failure to check all items subject to random sampling inspection contributed significantly to the PRS 1(a) and PRS 1(b) defects the QAEs found, because not all the items it was responsible for received quality control inspections each night.

PRS 2

QAEs would inspect PRS 2 as one of the last inspections before they left the commissary. Inspections for PRS 2 were relatively simple. The QAE would go down the aisles and pick up wayward items and put them in a cart. If a QAE picked up more than 21 wayward items, he would give PRIDE a "U" rating on the surveillance checklist form. (Finding 34) PRIDE did not address the QAEs' PRS 2 ratings specifically. PM

Short testified that generally, her lead stocker would go up and down the aisles each night picking up wayward items, putting them in a cart, and returning them to their appropriate places. We have found this testimony too general to refute the QAEs' findings recorded contemporaneously on their surveillance checklist forms. (Finding 35)

PRS 3

QAE inspection for PRS 3 was also relatively straightforward. At the close of PRIDE's "window of opportunity," the QAE would go into the warehouse and walk the commissary floor to see if all of the cardboard had been picked up and baled. If not, he would give PRIDE a "U" rating on the surveillance checklist form for that night. PRIDE did not address the QAE findings specifically but raised the unsubstantiated possibility that cardboard might have been left by vendor stockers. (Finding 36)

Moreover, with respect to all of the PRSs, PRIDE has failed to show by specific evidence that either the vendor stockers or government store personnel contributed to the specific defects found by the QAEs on the days deductions were taken.

Because PRIDE failed to prove that it properly conducted quality control inspections as a prerequisite to QAE inspections, and because PRIDE failed to rebut specifically the defects the QAE found, we hold that DeCA is entitled to take the PRS 1(a) and PRS 1(b) deductions for the days specified.

Because PRIDE has failed to refute why the QAEs were still picking up over 21 wayward items after it had allegedly gone through and done the same thing on the specific nights that deductions were taken, we hold that DeCA is entitled to take the PRS 2 deductions for the days specified.

Because PRIDE has failed to refute the QAEs' contemporaneous findings that cardboard was not properly disposed of, we hold that DeCA is entitled to take the PRS 3 deductions for the days specified.

CONCLUSION

Because DeCA has proven, by a preponderance of the evidence, that PRIDE's performance on PRS 1(a), PRS 1(b), PRS 2 and PRS 3 exceeded the contract AQLs on the days on which deductions were taken, and because PRIDE has not disputed the deduction calculations, we hold that DeCA is entitled to deduct \$21,996.64 pursuant to the Payment clause.

Dated: 21 December 2007

PETER D. TING
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. 55771, Appeal of PRIDE Industries, rendered in conformance with the Board's Charter.

Dated:

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