

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Land O'Frost) ASBCA Nos. 52012, 52241
)
Under Contract No. SPO300-94-D-Z151)

APPEARANCE FOR THE APPELLANT: Francis Louis Zarrilli, Esq.
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APPEARANCE FOR THE GOVERNMENT: Kathleen D. Hallam, Esq.
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OPINION BY ADMINISTRATIVE JUDGE KIENLEN

NATURE OF THE CASE

The contract in this case was for the production of chicken breast fillets as part of the Meals Ready to Eat (MRE) program. ASBCA No. 52012 is an equitable adjustment claim in the amount of \$1,316,632.92, for the costs of bulk lot warranty rework, downtime, and production delays. The appellant contends that the specifications were defective for production purposes and that the government had, and withheld, superior knowledge concerning those defects and solutions. ASBCA No. 52241 is a final assembly warranty claim in the amount of \$1,906,206.91, which consists of \$302,995.57 for rework performed by two MRE assemblers and \$1,603,211.34 for rework performed by three government-operated cold storage sites. Only entitlement is at issue. We deny all claims.

FINDINGS OF FACT

1. The contract contained a military specification for the packaging of the chicken breast fillet (CBF), but a commercial item description for the CBF itself. The CBF is inserted into a polymer pouch, sealed, and thermoprocessed (or cooked). It is then assembled into a complete military menu package with side menu items, condiments, and eating accessories. This was the first procurement in which the entree was specified by using a commercial item description.

2. Bulk lots of CBF consisted of a given quantity of chicken breast fillets, each of which was packaged in a thin cardboard box. A CBF MRE consisted of a grilled chicken breast fillet in a thin cardboard box that was placed in a sealed MRE package along with a side dish, dessert, condiments, and utensils (tr. 4-5, 214). The MRE menu sealed package is then placed in a final assembly case (cardboard box) with 11 other MRE entrees or

menus. Each final assembly case consists of 12 MRE menus including one CBF MRE. (Tr. 621-22)

Development of the Commercial Item Description

3. In 1991, the U.S. Army Soldier and Biological Chemical Command, referred to as Natick because it is located in Natick, Massachusetts, initiated a project to increase the variety of individual field rations in the MRE program. Natick surveyed the troops to find out what their preferences were. The troops wanted more whole meat products, as opposed to casserole items. (Tr. 535-37)

4. Natick conducted market research to find out which commercial meat products might be available from the usual MRE contractors. When a likely menu item was found, Natick purchased the product and conducted in-house shelf-life testing. Shelf-life testing was done on an accelerated basis at 120 degrees. The standard rule was if the product can last one month at 120 degrees Fahrenheit, it may last three years at 80 degrees and six months at 100 degrees. Natick also conducted a sensory evaluation for appearance, odor, flavor, texture, and overall quality. If the item passed the shelf-life requirements and the sensory evaluation, it was field tested on the troops. (Tr. 537-40)

5. Shelf Stable Foods, a division of Right Away Food Company (Rafco), sent in a grilled chicken product for evaluation. The product was asymmetrical in shape (an "Africa" or natural chicken breast shape), approximately 4" x 2.5" x 0.05" in size and 2.7 to 2.8 ounces in weight. The product had a grilled odor and flavor. The product was tested for shelf-life and found acceptable. It was approved for the MRE program. (Tr. 541-43)

6. Shelf Stable provided technical information relative to odor, flavor, texture, ingredients, measurements, and net weight. From that information, Natick developed technical data for the Commercial Item Description (CID). (Tr. 542-43)

7. In developing the CID, Natick increased the weight of the chicken product to 4 ounces, in order to accommodate the military's desire for a larger portion. Prior to making this change, Natick conferred with Shelf Stable, and with Shelf Stable's supplier to confirm that a 4-ounce piece of chicken product was available. (Tr. 544)

8. After the CID was drafted, copies were sent for comment to the military services, the Surgeon General, the U.S. Department of Agriculture (USDA), the U.S. Army Veterinary Command (AVI), and industry representatives, including contractors that would likely produce the MRE entree and suppliers of the chicken breast product. A copy of the CID was sent to the appellant, who made no comment. (Tr. 545)

9. In 1993 the CID for the CBF was standardized as A-A-20199. The CID provided that the fillets shall have a natural chicken breast shape, be no more than 3.25 inches at the

greatest width and no more than 4.5 inches at the greatest length, and weigh not less than 4.0 ounces. The CID further required the fillets to be packaged in accordance with Class 3 of MIL-P-44073, Packaging and Thermoprocessing of Foods in Flexible Pouches. (R4-52012, tab 5 at 4-5) Paragraph 3.2 of MIL-P-44073D (applicable revision) required that residual gas in the sealed pouch not exceed 10 cubic centimeters (cc) (R4-52012, tab 4).

The Test Production Contracts

10. The CID developed by Natick was used in two concurrent test production contracts awarded by the Defense Supply Center Philadelphia (DSCP) on 8 March 1994. (The DSCP was then known as the Defense Personnel Support Center (DPSC).) (Tr. 546; R4-52012, tabs 202, 204)

11. On 8 March 1994, Star Food Processing, Inc. (Star Food or Star) was awarded contract SPO300-94-C-9005 for 35,000 CBF at a unit price of \$1.4364. Also on 8 March 1994, AmeriQual Foods, Inc. was awarded contract SPO300-94-C-9004 for 35,000 CBF at a unit price of \$1.34. Delivery was required by 31 and 30 March 1994, respectively. (R4-52012, tabs 202, 204)

12. Both contractors subcontracted with Snowball, Inc. to supply cooked, grilled CBFs delivered to their plants for thermoprocessing and packaging. The CBF product provided by Snowball was essentially an emulsion with chicken pieces suspended in it. During performance of the production test contracts, Star and AmeriQual experienced production problems. (Tr. 708-09; R4-52012, tab 161)

13. AmeriQual encountered high residual gas failures in some samples, such as 20 cc, 19 cc, and 12.6 cc. The levels of eight samples from lot 4146 varied from 2.8 cc to 23.4 cc. (R4-52012, tabs 163 at 3, 167 at 10) AmeriQual attributed the high residual gas levels to the variation in the quantity of the gas trapped during formation of the CBF product itself. AmeriQual also experienced fold over wrinkles, as well as holes and abrasions at the corners of the wrinkle creases. (R4-52012, tab 164 at 3)

14. Star too encountered both wrinkling and residual gas problems. In investigating the residual gas problem, it was discovered that the chicken fillets were varying in length from 5.5 inches to over 6 inches. (R4-52012, tab 164 at 2-3) Because of the size and Africa shape of the chicken breast, excessive air became trapped at the bottom of the pouch (tr. 270). Star concluded that the size and Africa shape of the chicken breasts also contributed to the wrinkling problem. Star believed that the narrow tail of the chicken breast was primarily responsible for the pouch wrinkling. Star believed the wrinkling could be reduced by obtaining a smaller, denser product. (Tr. 579-80; R4-52012, tab 164 at 3)

15. During the test production contracts several changes were made to the CID to facilitate production. In March 1994, the dimensions were deleted to permit any size that

would allow easier filling and sealing of the pouch. (Tr. 546-47; R4-52012, tabs 202 at 5, 204 at 6)

16. After the completion of the test production contracts, further changes were made based upon the lessons learned during the test production contracts. In particular, contractors were prohibited from using finely ground and comminuted meat which trapped excessive air in the CBF product and contributed to residual air problems. The weight was increased to an average minimum drain weight of 4.2 ounces; however, the minimum weight of the fillet was maintained at 4.0 ounces. (Tr. 547-48; R4-52012, tab 17 at 9)

The Solicitation

17. Several Broad Agency Announcements were issued by the DSCP, seeking proposals for MRE production under an Industrial Preparedness Demonstration Program. Depending in part upon its capacity, each supplier was asked to express an interest in producing one or more of the MRE entrees designated under the program. (R4-52012, tabs 9, 168 at 3)

18. The appellant responded on 7 January 1994. It was one of six companies that submitted proposals. The appellant expressed an interest in producing two placeable items: the ham slice and the chicken breast. (Tr. 377-78; R4-52012, tabs 6, 7, 168 at 3)

19. Only Land O’Frost expressed any interest in the CBF. In its Prenegotiation Briefing Memorandum the government acknowledged that the CBF was “better suited to horizontal form fill seal technology.” The government acknowledged that “lessons learned form [sic] the production tests were not incorporated into the requirements and we currently have an item that is costly and difficult if not nearly impossible to produce in a commercial business.” (R4-52012, tab 168 at 2) Nevertheless, the government offered the total CBF requirement to Land O’Frost (tr. 98; R4-52012, tab 168 at 3).

20. On 14 September 1994, a solicitation was issued to Land O’Frost for an indefinite quantity of CBF entrees for a base year and one option year. There was a minimum quantity of 1,703,240 and a maximum quantity of 2,129,050. (R4-52012, tab 17 at 1, 5) The normal lead time between issuance of a solicitation and submission of offers is 30 days (tr. 95). In this case the closing date was 23 September 1994. The award was to be made on or before 30 September 1994, because the availability of budgeted funds for that fiscal year expired at the end of September. (Tr. 615-17; R4-52012, tab 168)

21. The CBFs were to be manufactured in accordance with the modified CID A-A-20199. They were to be packed and placed through the retort process (thermoprocessing) in accordance with MIL-P-44073D, Packing and Thermoprocessing of Foods in Flexible Pouches (6 January 1992). (R4-52012, tab 17 at 4, 13) The solicitation

incorporated a Master Solicitation for Semi-Perishable Subsistence (DPSC Form 3595, Jan 92) (*id.*, at 89).

22. By fax of 20 September 1994, the appellant advised that it needed a number of changes in order to produce the CBF. In particular, the appellant believed that the natural breast shape should be changed to a rectangular patty shape. It wanted the overall size reduced to 3.5 oz. (R4-52012, tab 26 at 1) The appellant requested the changes as a result of its “own research and discussions with others present at the production test runs of this product.” Appellant also noted that the “[r]esults of the production test runs at two locations, this summer, demonstrated the high rate of failure in the areas of residual gas, seal quality and pouch loading. We now know that if a solid chicken piece is desired, it can not be the size and shape used for these test runs.” (*Id.* at 2)

23. The appellant submitted an unqualified offer on 22 September 1994 (R4-52012, tabs 17, 20). At the time the appellant submitted its offer, appellant knew that the CBF was a new item and that it had previously only been produced under two test production contracts (R4-52012, tabs 21 at 1, 26 at 2). The appellant knew that because the CBF was a solid placeable item, it would “run far slower than a pumpable product” and that “achieving the goal of 10 cc [gas] residual [requirement] is not a ‘given.’” The appellant also knew that “rejects are expected to be enormous based upon our studies and the D.P.S.C. production trials.” (R4-52012, tab 21 at 1) The appellant initially offered to produce the CBF at a unit price of \$2.79 (R4-52012, tab 20 at 8). That price was 200% more than the prices bid on the test production contracts. The appellant’s high price was influenced in part by appellant’s understanding that the production tests during the prior summer “did not confirm the viability of the specification. High reject rates were encountered from residual gas and seal defects.” (R4-52012, tab 21 at 1)

24. By letter of 24 September 1994, the appellant advised that it had done costing studies and run various models simulating crew and equipment combinations. All of those studies and models showed that costs were higher than the typical ration, based on their 13 contract years with the ration program. The letter concluded:

This specification still needs developmental work. It is known that the production tests this past summer did not confirm the viability of the specification. High reject rates were encountered from residual gas and seal defects.

Pre formed pouch sealing contamination is always a serious problem when loading solid products. The fillet is too large to be accommodated by the pouch. Certainly, hand placement of the fillet is possible but not commercially realistic!

Obviously, this item will run far slower than a pumpable product; more labor will be needed. And that is where a majority of the costs originate.

....

Rejects are a contributor to the higher costs too. This is a frozen piece of chicken; loading is precarious. High vacuum levels form creases in the pouch body; cuts, tears and holes are a high probability. Wrinkle free seals will be the focus of much engineering work.

Land O'Frost is a responsible bidder. This is why we are alerting D.P.S.C. to this situation. This product still needs development work to be a viable commercial item.

(R4-52012, tab 21) Mr. James A. Lecollier, the contracting officer, testified that he treated this letter merely as a justification for the unit price of \$2.79 (tr. 120). Moreover, Mr. Lecollier was aware that Mr. Koerber of Star Foods had earlier said that its unit price would be in excess of \$5.00 per unit, based on its test production run (tr. 296-97). Mr. Lecollier certainly should have realized that the letter was raising broader production issues. It is difficult to credit Mr. Lecollier's testimony that he merely looked at the 24 September 1994 letter as a price justification.

25. Three days after the government received Land O'Frost's letter of 24 September, the contracting officer issued Amendment No. 0002, which reduced the minimum drain weight requirement to 2.8 oz. (R4-52012, tab 23). The reduction in drain weight was directed by Natick, based upon its review of the results of the production test contracts (tr. 81-82). This action alleviated the appellant's concern that the size of the fillet was too large for the pouch (R4-52012, tab 21 at 1).

26. The appellant's concern relative to the shape of the chicken also became moot because the elimination of the size requirements along with the reduction in weight allowed for greater flexibility in contouring the product (R4-50212, tab 17 at 9). As a result, the appellant substituted an oval or oblong shaped patty of consistent thickness (ex. 1; R4-52012, tab 149 at 2, ¶ 3(a)).

The Contract

27. On 29 September 1994, appellant submitted a best and final offer. The contract was awarded on 30 September 1994 at a unit price of \$2.15. (R4-52012, tabs 28, 31)

28. In accepting the contract, the appellant agreed to the inclusion of a non-standard warranty clause drafted by the Defense Personnel Support Center, Directorate of Subsistence, Defense Logistics Agency (DPSC) and identified as Clause 52.246-9P35 (R4-52012, tabs 30, 31).

29. The Warranty clause reads:

WARRANTY OF SUPPLIES (JAN 1992) DPSC

(a) Definitions.

“Acceptance,” as used in this clause, means the act of an authorized representative of the Government by which the Government assumes for itself, or as an agent of another, ownership of existing supplies, or approves specific services as partial or complete performance of the contract.

“Correction,” as used in this clause, means the elimination of a defect.

“Supplies,” as used in this clause, means the end item furnished by the contractor and related services required under the contract. The word does not include “data.”

(b) Contractor’s Obligations.

(1) Notwithstanding inspection and acceptance by the Government of supplies furnished under this contract, or any condition of this contract concerning the conclusiveness thereof, *the contractor warrants that for 6 months (4 months if the acquisition is for salad dressing) after receipt of supplies at destination:*

(i) All supplies furnished under this contract will be free from defects in material or workmanship and will conform with all requirements of this contract; and

(ii) The preservation, packaging, packing and marking, and the preparation for, and method of, shipment of such supplies will conform with the requirements of this contract.

(2) When return of the supplies to the contractor and redelivery, if applicable, is required, transportation charges and responsibility for the supplies while in transit shall be borne by the contractor. Contractor shall also be liable for:

(i) Handling costs and incidental charges incurred by the Government in the preparation of the above described supplies for return to the contractor and in return of said supplies to storage, after redelivery by the contractor; and

(ii) For cost of Government examination of the corrected or replaced supplies computed and charged at the flat rate of \$49.28 per hour.

(3) Any supplies or parts thereof, corrected or furnished in replacement under this clause, shall also be subject to the terms of this clause to the same extent as supplies initially delivered. The warranty, with respect to supplies or parts thereof, shall be equal in duration to that in paragraph (b)(1) of this clause and shall run from the date of receipt at destination of the corrected or replaced supplies.

(4) All implied warranties of merchantability and “fitness for a particular purpose” are excluded from any obligation contained in this contract.

(c) Remedies Available to the Government.

(1) The contracting officer shall give written notice to the contractor of any breach of warranties in paragraph (b)(1) of this clause within 7 months (5 months if the acquisition is for salad dressing) from receipt of supplies at destination.

(2) Conformance of supplies or parts thereof subject to warranty action shall be determined in accordance with the inspection and acceptance procedures contained in the contract except as provided herein. If the contract provides for sampling, the contracting officer may group any supplies delivered under this contract. *The size of the sample shall be that required by the sampling procedure specified in the contract for the quantity of supplies on which warranty action is proposed, except when projecting sampling results. Warranty*

sampling results may be projected over supplies in the same shipment or other supplies contained in other shipments even though all of such supplies are not present at the point of reinspection and regardless of whether such supplies have been issued or consumed, provided: the supplies from which the samples were drawn are reasonably representative of the quantity on which warranty action is proposed; and the defects found in the sample size are sufficient to reject the quantity of supplies on which warranty action is proposed, even though the sample size may be less than that required for such quantity. The original inspection lots need not be reconstituted, nor shall the contracting officer be required to use the same lot size as on original inspection.

Within a reasonable time after the notice, the contracting officer may exercise one or more of the following options and also, following the exercise of any option, may unilaterally change it to one or more of the other options set forth below:

(i) Require an equitable adjustment in the contract price for any supplies or group of supplies;

(ii) Screen the supplies grouped under this clause at contractor's expense and return all nonconforming supplies to the contractor for correction or replacement;

(iii) Require the contractor to screen the supplies at depots designated by the Government within the continental United States and to correct or replace all nonconforming supplies;

(iv) Return any supplies or group of supplies under this clause to the contractor (irrespective of the F.O.B. point or the point of acceptance) for screening and correction or replacement;

(v) Return or hold for contractor's account any supplies or group of supplies delivered hereunder, whereupon the contractor shall repay the contract price paid therefor. In such event, the Government may reprocure similar supplies upon such terms and in such manner as the contracting

officer may deem appropriate, and charge to the contractor the additional cost occasioned the Government thereby.

(3) When either option three or four of this clause is exercised, the contractor is required to submit in writing and within 30 days after receipt of notice of such invocation a schedule for either:

(i) Correction and/or replacement of all defective supplies and subsequent redelivery of the returned supplies; or,

(ii) Screening defective supplies at each depot involved and subsequent redelivery of all corrected and/or replaced supplies.

Such schedule will become a part of the contract delivery schedule upon agreement thereto by the Government. If the contractor fails to provide an agreeable schedule within the specified period, or any extension agreed to by the Government, the Government may correct the items and charge the contractor's account, or issue a contract for correction of the items and charge the contractor's account, or exercise one or more of the remedies specified in paragraph (5) below.

(4) If the contractor fails to accept return of the nonconforming supplies or fails to make redelivery of the corrected or replaced supplies to the Government within the time established; or, fails to make progress after their return to correct or replace them so as to endanger performance within the time established for redelivery and does not cure such failure within a period of 10 days (or such longer period as the contracting officer may authorize in writing) after receipt of notice from the contracting officer specifying such failure, the contracting officer may exercise one or more of the following remedies:

(i) Retain or have the contractor return the nonconforming supplies and require an equitable adjustment in the contract price.

(ii) Return or hold the nonconforming supplies for contractor's account, or require the return of the

nonconforming supplies and then hold for contractor's account, whereupon the contractor shall repay the contract price therefor. In such event, the Government may reprocur similar supplies upon such terms and in such manner as the contracting officer may deem appropriate, and charge to the contractor the additional costs occasioned the Government thereby.

(iii) If the contractor fails to furnish timely disposition instructions, dispose of the nonconforming supplies for the contractor's account in a reasonable manner, in which case the Government is entitled to reimbursement from the Contractor or from the proceeds for the reasonable expenses of the care and disposition of the nonconforming supplies, as well as for any other costs incurred or to be incurred.

(5) The rights and remedies of the Government provided in this clause are in addition to and do not limit any rights afforded to the Government by any other clause of this contract.

(d) Failure to agree upon any determination to be made under this clause shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause of this contract.

(e) When the contract specifies ultimate delivery of supplies to a location outside the contiguous United States, such location shall be deemed the destination for purposes of this clause. [Emphasis added]

(R4-52012, tab 3 at 18-20, DPSC Master Solicitation for Semi-Perishable Subsistence, DPSC Form 3595, Jan 92)

30. The contract provided for origin inspections and receipt inspections at destination. Receipt inspections were to be no more severe than the origin inspection; but, were to include count, condition, identity, and infestation or foreign material. Grand lotting of more than one production lot was permitted; however, samples had to be drawn from each lot in proportion to its size. Further, any "end item lot rejected by the contractor or Government, or on which warranty action has been taken must be reworked and reoffered within 30 days from date of initial rejection." (R4-52012, tab 17 at 35-36)

31. Modification No. 0001 was issued on 3 November 1994 for the guaranteed minimum quantity of 1,703,240 units. Delivery was divided between two MRE assembly plant locations, with eleven monthly deliveries each between 15 December 1994 and 15 October 1995: to Rafco, Inc., McAllen, TX, a total of 1,115,622 units; to Cinpac, Inc., Cincinnati, OH, a total of 587,618 units. (R4-52012, tab 37 at 2)

Appellant's Manufacturing Process

32. The appellant's manufacturing process began at fill stations where the CBFs were placed into tri-laminate plastic pouches. The pouches were fitted onto the filling machine, an air knife opened the pouches and a fillet was inserted by hand. The open pouches were placed on a conveyer belt which carried the CBFs to the seal machines. (R4-52241, tab 23 at 5)

33. At the seal stations, the filled pouches were picked off the conveyer and positioned in the vacuum sealing machines. The appellant utilized three vacuum seal machines: a Swiss Vac, a Mega Vac I, and a Mega Vac II. The machines drew a vacuum and then sealed the pouches. (R4-52241, tab 23 at 5)

34. After sealing, each pouch was individually examined by the seal operators. If any pouch was rejected by one of the seal operators, it was pulled off line and passed to a secondary inspector for a determination. Acceptable pouches were returned to the conveyer belt. The pouches then went to a check weigher, and a pouch coder prior to the retort (thermoprocessing) operation. (R4-52241, tab 23 at 6)

35. At the retort stations, the pouches were placed onto retort trays, which were placed into "craters," which in turn, were loaded into the retort machines. Appellant utilized steam retort machines. Each retort machine had the capacity to hold 4,500 pouches. (R4-52241, tab 23 at 7)

36. After retorting, the pouches were removed from the trays using a wand with 5 pneumatic suction-cups. The pouches were placed onto a conveyer belt which carried the pouches through a dryer and then onto the cartoning area. As the pouches traveled between the dryer and the cartoning station, a 100% post-retort inspection was performed. (R4-52241, tab 23 at 7-8)

37. The production for each day constituted a separate lot. Each pouch was identified by lot number. The contract provided for the use of a four digit lot number. The first digit of the lot number indicated the year of production and the next three digits indicated the Julian date of the calendar year in which the lot was produced. Thus, lot 5010 would be from production in 1995, on the tenth day of the year, or 10 January 1995. (R4-52012, tab 17 at 18A)

Appellant's Initial Production

38. During the first part of appellant's production run, from 2 November 1994 through 12 January 1995, the appellant ran only one production shift. The average production rate was 8,700 units per day. However, the median rate was 10,350 units and 22 of the 39 production runs had rates in excess of 10,000 units. (Tr. 816; R4-52241, tab 86) The appellant started a second shift on 13 January 1995. The appellant utilized two shifts until 29 March 1995. During this time frame the average daily production was close to 15,000 units. (Tr. 816-17) The median rate was 15,881 units (produced on 3 March 1995). In April, the appellant suspended production. After the appellant resumed production on 25 May 1995, it discontinued its second shift and its average daily production was 8,700 per bulk lot.

Warranty Actions Against Bulk Lots

39. During the period of 15 through 21 March 1995, three leaking chicken breast pouches were discovered at the MRE assembly plants. DPSC's Quality Assurance Specialist, Mr. Arthur Lowry, thought the discovery of three leakers in the same contractor's product within a six-day period to be statistically improbable. The government never expected to find more than three leakers in an entire MRE program for the whole year. (Tr. 710-11)

40. Because of these leakers, warranty inspections were conducted on Land O'Frost bulk lots. Bulk lots are those lots which have not yet been incorporated into MRE menu or meal bags and then packed into final assembly cases of 12 different menu items.

41. Cuts, tears, holes, and abrasions "through one or more layers" in the pouch material are classified as critical defects under Table II of the applicable packaging specifications (R4-52012, tab 4 at 10). Mr. Peter Sherman from Natick clarified, and we so find, that a break had to impact at least the top layer of the pouch in order to be classified as a critical defect. A leaker is a hole resulting in seepage of product juice or liquid. (Tr. 747-48)

42. The packaging standard in the CID (MIL-P-44073D (6 Jan 1992)) required the examination of 200 units from every lot, regardless of the size of the lot. The finding of any critical defect was cause for rejection of the lot. (R4-52012, tab 4 at 9, ¶ 4.2.3)

43. As noted, after the discovery of these defects, warranty inspections were performed on the Land O'Frost bulk lots (*i.e.*, product not yet incorporated into production lots). The warranty inspections revealed additional defects. (Tr. 584)

44. By letter dated 30 March 1995, the contracting officer informed the appellant of the critical and major defects found in bulk lots 5010, 5031, and 5046 and invoked an

option (iv) warranty action against those lots. (R4-52012, tab 50) The critical defects found in the pouches of those lots were:

<u>Lot No.</u>	<u>Critical Defects</u>
5010	2 holes, 3 abrasions
5031	1 abrasion
5046	1 leaker, 1 abrasion

(R4-52012, tabs 50, 153 at 5, 7, 10) As reflected in the Julian dates used for the lot numbers, Lot No. 5010 was produced on 10 January 1995; Lot No. 5031 was produced on 31 January 1995; and Lot No. 5046 was produced on 15 February 1995.

45. On 31 March 1995 the contracting officer advised appellant that four pinholes were found in Lot No. 5052 and invoked an option (iv) warranty action against the lot (R4-52012, tabs 52, 153 at 14). As per the Julian date reflected in the lot number, Lot No. 5052 was produced on 21 February 1995 (the year 1995 and the 52nd day of that year).

46. Thereafter, by letter dated 22 April 1995 the contracting officer invoked an option (iv) warranty action against the following nine additional defective lots which contained the following critical defects:

<u>Lot No.</u>	<u>Critical Defects</u>
5005	3 break/abrasions and 1 abrasion
5013	2 break/abrasions and 1 abrasion
5019	1 hole, 1 abrasion
5023	1 cut, 1 abrasion, 2 break/abrasions
5027	1 leaker
5030	1 cut, 1 abrasion
5034	1 break/abrasion
5037	1 abrasion, 1 tear
5041	1 cut

(R4-52012, tabs 66, 153 at 11-13, 20-22, 25-27) As per the Julian dates reflected in the lot numbers, the defective lots were produced between 5 January 1995 (Lot No. 5005) and 10 February 1995 (Lot No. 5041).

47. Subsequently, by letter dated 31 July 1995, the contracting officer invoked an option (iv) warranty action against Lot No. 5048 due to a pouch hole (R4-52012, tab 101). Per the Julian date reflected in the lot number, Lot No. 5048 was produced on 17 February 1995.

48. As noted above, the government's four warranty notices gave notice to the contractor of the defects contained in specific lots which breached the warranty. The notice also identified the number of units in each lot as follows:

<u>DATE OF NOTICE</u>	<u>LOT NUMBER</u>	<u>NUMBER OF UNITS</u>	<u>LOCATION</u>
30 March 1995	5010	6,408	RAFCO
30 March 1995	5031	15,552	RAFCO
30 March 1995	5046	20,160	RAFCO
31 March 1995	5052	16,848 ¹	CINPAC
22 April 1995	5005	9,864	RAFCO
22 April 1995	5013	3,696	RAFCO
22 April 1995	5019	12,483	RAFCO
22 April 1995	5023	17,856	RAFCO
22 April 1995	5027	11,376	RAFCO
22 April 1995	5030	Unspecified ²	RAFCO
22 April 1995	5034	20,476	RAFCO
22 April 1995	5037	13,248	RAFCO
22 April 1995	5041	15,192	RAFCO
31 July 1995	5048	11,232	RAFCO
TOTALS	14 Lots	174,391 ³	

(R4-52012, tabs 50, 52, 66, 101)

49. In total, warranty inspections on bulk lots resulted in 14 of 22 lots failing for critical defects at Rafco and Cinpac (R4-52012, tab 92; R4-52241, tab 23). This represents a 63.6 % bulk lot failure rate. Thus, of the bulk lots inspected, 36.4 % of the bulk lots passed warranty inspection of the bulk lots.

Evaluation of the Appellant's Quality Control Problems

50. The initial discovery of those critical defects led to representatives from USDA, AVI, Natick, and DPSC visiting the appellant's facility to determine the cause of the appellant's packaging integrity problem. The visit occurred on 5-6 April 1995. (Tr. 871; R4-52241, tab 23)

¹ There is a conflict in the record as to whether the number of units in this lot is 19,070 (R4-52012, tab 77).

² There is a conflict in the record as to whether the number of units in this lot is 11,664 (R4-52012, tab 77).

³ If the numbers in footnotes 2 and 3 are inserted into the chart, the total is 188,277.

51. Prior to the April plant visit, the appellant had already taken a number of corrective actions in response to the warranty actions. Upon arriving for the April plant visit, government personnel observed that Land O'Frost: (1) was in the process of increasing the amount of residual gas contained in the pouch; (2) had gone over the production line, the retort racks, and the cartoning line, with a nylon cloth in order to identify places that might cut or tear pouches; only one spot was found; (3) had discontinued the use of its check weigher; and (4) had discontinued its second shift. (R4-52241, tab 23 at 4-5)

52. During the April plant visit, the appellant was observed using frozen CBF which were placed into the pouches at temperatures between 12 and 30 degrees F, with most in the 20 degree range (tr. 730). When packed in the frozen state, placeables sink into the film material which makes up the pouch and as a result the packaging material is in a particularly fragile state until it goes into the retort. In this condition gentle handling is especially important. (Tr. 873, 882; R4-52012, tab 2, § 7.1) Even more care is needed at this stage if a hard vacuum is also drawn on the item. After the placeable goes into the retort, the product warms up and this relaxes the film and eases the stress on the pouch. (Tr. 873-74)

53. With respect to the appellant's manufacturing processes, government personnel observed that the appellant set one of its Mega Vacs to consistently draw a vacuum of less than 1 cc of residual air and the other Mega Vac was set to consistently draw a vacuum between 2 and 4 cc's (tr. 731-32; R4-52241, tab 23 at 5). The appellant's third vacuum seal machine, a Swiss Vac, ran consistently at 1 cc or less. In the process of drawing such a hard vacuum, a pouch collapses and becomes distorted as it gathers tightly around the contours of the fillet. As a result, the pouches had numerous sharply creased fissures, material folds, and points at bends in the folds and where the folds meet the perimeter of the fillets. Each of the creased fissures, folds, and points created stress points which made simple visual examination not possible on a pouch in this condition. (R4-52241, tab 23 at 5) The stress points also made a pouch susceptible to pouch integrity defects.

54. Government personnel also observed that at the end of the pre-tort conveyer belt, pouches were "catapulted" off the end of the conveyer belt and dropped approximately 8 inches onto a table. The government felt this was a potential source of damage due to the collision of the pre-stressed pouches with the metal table and with other pouches. Mr. Lowry opined that this might account for the thin paper cuts found on the label side of the appellant's pouches, because they always traveled on the conveyer label side up. (Tr. 725, 735-36; R4-52241, tab 23 at 6-7)

55. The government also found the appellant's tray loading techniques to be a potential source of pouch integrity defects. The retort tray contained a quarter diameter hole that went through the tray. The hole had a rough edge. The people loading the retort trays slid the pouches over the hole to position the pouches on the tray. However,

government personnel did not in fact observe any defects occurring during this process. (Tr. 737-38)

56. Government personnel also identified a potential source of pouch damage in connection with the appellant's use of the pneumatic wand to unload the pouches after retorting. Specifically, the government observed that the wand did not function properly on a consistent basis, including some situations where the wand handler would grind the wand into the pouch body when one of the suction cups failed to pick up a pouch; and, other situations where the wand handler would pick up the pouch by hand and toss it onto the conveyer belt. However, government personnel did not observe any defects during this process. (Tr. 739; R4-52241, tab 23 at 7)

57. Mr. Sherman, the technical representative from Natick, had previously attended the first article run at Land O'Frost and observed the appellant's sealing operation during that first article visit. At that time, there was no evidence of hard wrinkles in the pouches or any noticeable problem with rough handling, conveyer belt build-ups, or accumulation of pouches. (Tr. 871, 875)

58. Government personnel observed that there were no personnel solely assigned to pre-retort inspection of the pouches. Rather, this function was performed by the seal operators, who for the most part, confined the inspection to an examination of the seals. Pouches were not turned over by the inspectors and pouch bodies were covered by the inspector's hands during the inspection. (Tr. 733, 740; R4-52241, tab 23 at 6) Whenever they did find a defect they would give the pouch to a secondary inspector who would decide whether there was a defect (tr. 733-34).

59. Government personnel noted that the post retort 100 percent inspection area was poorly lit and that post retort inspectors (1) manipulated the pouches to flatten out points, folds, and fissures, in order to see if defects existed in places that could not be observed without manipulation, (2) did not look at both sides of the pouches, and (3) did not spend a sufficient amount of time to thoroughly inspect the pouch (tr. 740-41; R4-52241, tab 23 at 7-8). The government also noted that it is necessary to conduct a manual examination of the pouch in order to detect defects at the folds and wrinkles; and, that this examination itself may be the cause of the defects (R4-52241, tab 23 at 6).

60. After the review of the appellant's packaging and processing line during the April plant visit, the government team concluded that Land O'Frost had produced a pouch which was intolerant to handling. It judged that the primary cause of the packaging defects was the hard vacuum pulled on the pouch at the time of sealing, where the vacuum was targeted below 1 cc of residual air. The government quality team recorded the following recommendations:

- a. eliminate pouch to pouch contact

- b. train personnel in proper handling techniques
- c. eliminate rough metal edges
- d. eliminate the 8 inch fall from the conveyer belt to the inspection table
- e. consider tempering frozen product
- f. control vacuum level so that pouch material is not overly stressed
- g. institute the industry practice of 100 percent inspection prior to retorting.

These suggestions were discussed orally with Land O’Frost. Notwithstanding these observations, the team of government personnel reported that “no specific cause for holes could be definitively assigned” to any step in the appellant’s process. (Tr. 730, 871-72, 874; R4-52241, tab 23; R4-52012, tabs 56 at 5, 59)

Inspection Variances

61. During the first part of the April plant visit, the appellant and the government had a round table discussion and reviewed a number of pouches that the AVI from Rafco had brought with him (tr. 885). One of the pouches had a break in the middle layer of the tri-laminate film material. The break was obvious from the fact that you could see silver through the paint of the second layer. Since the break did not affect the top layer, the AVI questioned whether it was an abrasion “through one or more layers” as required for a defect. Mr. Sherman agreed that it was not a defect. He explained to the inspectors, and we have found, that in order to be a defect, the break had to impact at least the top layer of the pouch material, hence a break only in the middle layer was not a defect. (Tr. 747-48)

62. By the end of that initial meeting during the April plant visit, Mr. Sherman believed that both the AVI and USDA inspectors understood when a break was properly classified as a defect (tr. 883-84). Nonetheless, on 14 April 1995, the appellant suspended production because it concluded that such action was necessary until the differences between the inspectors were resolved (R4-52012, tab 61). However, there was no credible evidence that a disagreement continued to exist between the AVI and USDA inspectors who were inspecting Land O’Frost’s CBFs, nor that any prior disagreement negatively impacted Land O’Frost. Moreover, the appellant needed to stop work in order to revamp its production process.

63. Because there was a possibility that other AVI and USDA inspectors might be making inconsistent calls in similar circumstances, a Standardization Meeting was held on 19 April 1995. That meeting was attended by several AVIs, various USDA representatives, Mr. Sherman, and Mr. Lowry. (Tr. 886; R4-52012, tab 62) The purpose of the meeting was to ensure that all government inspection activities were in agreement concerning defect classifications and to clarify defect definitions (tr. 771; R4-52012, tab 62). During the

meeting each of the participants was asked to score certain pouches for pouch integrity defects (tr. 772, 774, 886; R4-52012, tab 156). After evaluating the score sheets, it was apparent to Mr. Sherman and Mr. Lowry that everyone was in agreement on how to call the defects (tr. 778-81, 887).

64. On 20 April 1995, one day after the Standardization Meeting, Land O’Frost met with the contracting officer and Mr. Lowry concerning the bulk lot warranty actions. At that time Mr. Lowry advised the appellant of the discussions the previous day and provided the appellant with a summary sheet of the pouch evaluations. Mr. Lowry believed that the appellant understood that to the extent that any discrepancy existed with respect to calling defects, such discrepancy had been resolved. (Tr. 784-86)

Appellant’s Corrective Actions

65. The appellant conducted its own evaluation to identify potential causes of pouch damage, and like Natick, concluded that no single process or procedure stood out as the cause. Land O’Frost did conclude that a number of steps it had taken in 1995 to improve production may have contributed to the quality problems. (R4-52012, tabs 59, 87) For instance, in January 1995, when the appellant began full-scale production, appellant instituted the use of a roller sponge dryer after the retort crate unloading station. This device was intended to automatically dry and convey pouches. However, the appellant concluded that pouch damage could occur if the wheels of the absorbent material are dry, which they typically were at the start up on Mondays. Appellant also concluded that additional pouch damage could also be caused at this station as pouches could slip from the conveyer and fall onto the floor. (R4-52012, tab 87 at 2)

66. The appellant had also begun using a vacuum pick-off wand at the post retort unloading station in an attempt to reduce pouch damage that might be caused by manual abuse. The appellant concluded that this too might cause damage when it was pressed against the pouch body to start the suction lift and also when pouches were dropped from the wand onto the conveyer. (R4-52012, tab 87 at 2)

67. In February 1995, the appellant had installed a secondary seal operation to ensure seal integrity. But the secondary sealers did not operate as quickly as the vacuum sealing; this caused a back-up of pouches which resulted in significant pouch to pouch contact. (R4-52012, tab 87 at 1) But again, there was no evidence that this actually caused any damage to the pouches.

68. In January 1995, the appellant had added a second production shift in order to make up for its initial delay in production. However, the second shift lacked experience. The appellant also realized that the experience level of its entire production crew was relatively junior at the onset of production. (R4-52012, tab 87 at 1; R4-52241, tab 55 at 4)

69. Based upon its own line evaluation and the government's suggestions, the appellant instituted the following changes as it resumed production on 22 May 1995:

1. replaced alligator type belt clips with seamless belts
2. increased residual gas levels to relieve laminate stress
3. inspected retort racks for burrs
4. retrained pouch inspectors
5. improved lighting
6. relocated pouch coding to top of pouch rather than pouch body
7. eliminated the weight check
8. inspected all pouch contact areas for burrs
9. evaluated alternate pouch supplier and patty supplier
10. adjusted conveyer speed to eliminate pouch to pouch contact
11. eliminated use of seal inspection probes
12. inspected retorts for potential causes of pouch damage
13. initiated team to address ongoing corrective action
14. eliminated pouch dryer
15. eliminated wand pick off
16. eliminated pouch accumulation points

(R4-52012, tab 73; tr. 504, 741-42)

70. On 5 May 1995, the appellant resumed production and as a result of the changes the appellant saw a reduction in the number of defects (R4-52012, tab 73; tr. 401, 449). The single most significant change was the attempt to increase the amount of residual gas levels in order to reduce laminate stress (tr. 504-05).

Warranty Action Against Final MRE Cases

71. Due to the potential health problem from the cuts, tears, holes, and abrasions, DSCP considered a recall of all assembled ration lots that incorporated Land O'Frost's CBFs. The DSCP sought an assessment of the problem from the AVI and Natick. (R4-52012, tabs 54, 57)

72. The AVI felt that, given the number of cuts, tears, holes, and abrasions found in the samples selected for inspection, it was not unreasonable to assume that even in some lots in which no critical defects were found, there were probably a number of leaking pouches (R4-52012, tab 58, ¶ 2).

73. The AVI also noted that because the chicken breast is a very dry product, it is difficult to determine whether the pouch is leaking by examining its carton, because unlike

pumpable MRE entrees, the chicken breast does not always stain through the carton when the pouch material is compromised (R4-52012, tab 58, ¶ 1.d.). As with any thermostabilized item, when the primary container is compromised, the item is subject to contamination by microorganisms posing a health hazard (*id.*, ¶ 3). In the instant case, bacterial contamination was subsequently confirmed in four samples of the appellant's product that had been submitted for commercial sterility analysis due to holes in the pouches, although none were pathogens (R4-52012, tab 102 at 2).

74. The AVI concluded in April 1995 that unless a definitive cause for the problem could be identified and a specific range of lots isolated, none of the previously assembled final cases containing CBF from Land O'Frost lots should be used. Natick recommended that lots found to contain or suspected of containing leaking pouches "should be reworked to eliminate defectives." (R4-52012, tab 59 at 3)

75. As of 16 May 1995, the AVI placed a medical hold on all MRE final lots incorporating CBFs from Land O'Frost. The AVI also placed some other final lots on medical hold for other reasons, including two for possibly defective beef stew from Sopakco. As of 22 May 1995, AVI had also placed five assembly lot cases on medical hold due to possibly defective pork with rice. (Tr. 230; R4-52012, tabs 77, 92)

76. Thereafter, by letter dated 23 June 1995, the contracting officer invoked warranty action against the entire quantity of 329,904 final MRE cases containing CBFs. This letter advised Land O'Frost that those MRE cases represented January to March 1995 assembly production; but, the letter did not advise the appellant as to which Land O'Frost lots were implicated. In all, final assembly cases containing CBFs from 17 bulk lots were placed on hold. (R4-52012, tabs 77, 93)

77. Mr. Lecollier did not conduct any warranty inspections on the 329,904 units in final cases, nor had any defects been discovered among any of those units. He gave notice of an intention to invoke a warranty action without finding any defects, solely because he was running out of time to give notice within seven months of receipt of the bulk units. (Tr. 587-88) No inspections after acceptance were conducted until January 1997 (*infra*), nearly two years after initial receipt and at least 18 months after final receipt of the 329,904 units.

Appellant's Performance after Instituting Corrective Actions

78. In the meantime, the appellant had resumed production on a limited basis on 25 May 1995 and resumed full scale production on 1 June 1995 (tr. 401; R4-52012, tab 81). During this time the government made a follow-up site visit to appellant's facility and found that the appellant had completely eliminated the rough handling. Also, although it must be remembered that a hard vacuum was not a violation of the specifications, the appellant had stopped pulling a hard vacuum on the pouches. (Tr. 787-88)

79. After resumption of production, the appellant's cuts, tears, holes, and abrasion problem was much improved. The appellant did however experience lot failures for low drain weight, and residual gas problems. (Tr. 585-86; R4-52012, tabs 114, 128, 131)

Request for Waivers

80. Prior to resuming production after its 14 April 1995 shutdown (R4-52012, tab 61), the appellant requested that it be allowed to add up to 11 cc of water to the pouch to minimize the hard laminate creases (R4-52012, tab 71). This request was renewed a number of times during performance of the contract (tr. 105). Natick denied the request based on the fact that the addition of water would result in no value added to the product or the pouch (R4-52012, tab 99; tr. 107). As Mr. Sherman explained, Natick was also concerned that the addition of water would aggravate a weight problem, which cumulatively would cause a transportation problem (tr. 899-01, 907-09). The government ultimately allowed the follow-on contractor to add 11 cc of water, which the government called an enhancement of an already performable specification.

81. Natick had previously allowed Star to add 11 cc of water under an MRE entree contract for ham (tr. 103-04). The addition of water was allowed even though the ham had been successfully made for years without the addition of water (tr. 112, 892). Star requested the addition of water (20 or 30 cc) to ease the stress. Natick was concerned that the addition of water would result in a pouch full of water after the ham was retorted. (Tr. 890) However, Star argued that since ham was a water added product, they could just add more water to the ham up front and still comply with the specification with the result that after retorting the pouch would also be filled with water. Natick accepted the logic in this argument and allowed the addition of 11 cc of water. (Tr. 891-92)

82. The appellant also requested a waiver of the residual gas requirement for two lots that had twice failed to come within the 10 cc maximum level (R4-52012, tab 121). Natick denied this waiver because according to its studies, elevated residual air levels may cause the fillets to develop an off flavor and discoloration when held for long term storage (*id.*, tab 124). Although this was the position taken by Natick, Mr. Sherman testified that Natick did not have the capability to conduct such studies until approximately 1997 (tr. 897-98, 915).

83. The residual gas requirement had been in the packaging specification since the specification was developed (tr. 894). In 1997, Natick reevaluated the requirement in response to requests made by contractors at a Quality Summit Meeting (tr. 895). In order to conduct proper head space (residual gas) tests, the government needed an ample number of samples of the different MRE entrees with varying amounts of head space. In 1997 the industry had obtained the technology to produce such samples; the technology was not available in 1995 when Land O'Frost requested the specification change. (Tr. 895, 915)

Specifically, contractors had been provided with horizontal form fill seal machines that allowed them to dial in head space levels with a reasonable degree of certainty. Consequently, Natick was able to obtain samples to run tests that ultimately verified that 20 cc's of head space in almost all the products was acceptable. (Tr. 895-96, 898)

The RAFCO and SOPAKCO Rework Contracts

84. With regard to the bulk lots in the final assembly cases, the contracting officer initially anticipated reconstituting the appellant's entree lots and having warranty inspections conducted on each lot. After sending the notice, the government concluded that it was not feasible to reconstitute the original bulk lots for warranty inspection. (Tr. 587; R4-52012, tab 93) First, the lots were incorporated in cases that were stored at five different locations. Second, in order to reconstitute the lots, the government would have to open every case from each of the five locations, and every menu bag in order to look at every pouch to determine to which bulk lot it belonged. This would entail 90 percent of the effort needed to rework the product. (Tr. 588-90) The government apparently never gave any consideration to the alternative of reconstituting similar lots. As permitted by the Warranty clause, the government could have reconstituted lots from among those lots available, because the "original inspection lots need not be reconstituted, nor . . . use the same lot size as on original inspection" (finding 29, Warranty clause, ¶ (c)(2)).

85. Ultimately, instead of reconstituting the original lots and conducting warranty inspections, the government decided to perform screening and rework on a limited number of cases in order to obtain a better understanding of the magnitude of the problem. Approximately 15,000 MRE cases at the Albany Depot were selected for rework by Rafco because the shelf-life of the product was about to expire. (Tr. 218, 222, 590-91)

86. Mr. Frank Bankoff was the contracting officer for the 15,000 MRE's reworked by Rafco (tr. 213; R4-52241, tab 71). He testified that the Warranty clause requires that an option under the clause must be exercised within a reasonable period of time after invocation of warranty (tr. 235). Mr. Lecollier concurred but could not define a reasonable period of time (tr. 629). Mr. Bankoff further testified that the warranty letter of 23 June 1995 (R4-52241, tab 42) is a warranty action that contains a "walking warranty." By that he meant that the selection of an option could be done at a later time. (Tr. 244) He further testified that the shelf-life of the item is three years stored at 70-80 degrees. He did not know the storage conditions of the items during the prior 18 months. (Tr. 256-57)

87. On the other hand, Mr. Alan Koerber, a former contract specialist at DPSC and the vice-president of administration for Star, said he thought "a reasonable man would expect to limit their liability . . . [and] would, as a business man, I would not want to go probably beyond 90 days" (tr. 304).

88. Application of the Julian date conversion to the appellant's lots reworked by Rafco reveals that the inspection and rework were done approximately 25 months from the date of Land O'Frost's production and after 66-2/3 percent consumption of the acceptable shelf-life stored in unknown conditions. There is no evidence as to how and by whom these cases were examined and handled. The records do reflect poor storage, namely the removal of 1 case due to infestation (report of 1/15/97 - Day 3) and the discarding of one case due to damage done on opening the case with a utility knife (report of 1/14/97 - Day 2). Also, damage was done to other items in the MRE package as described by Mr. Bankoff. The damage consisted of broken spoons, torn cocoa, torn beverages, open flaps, missing menus, punctured peanut butter and other defects found on pages 2, 3 & 4 of said report. AVI also destroyed two (2) cases due to foreign odor. (R4-52241, tab 72)

89. Because Mr. Bankoff thought that Land O'Frost would be financially responsible for the rework, he thought that he would have contacted Mr. Henry Strassheim, vice-president and contract administrator for the appellant, to find out if he wanted to handle the arrangements for rework or wanted the Government to make the arrangements. Mr. Bankoff could not recall if he actually did contact Mr. Strassheim prior to contracting for the rework. (Tr. 218, 241)

90. On or about 4-5 September 1996, Mr. Bankoff telephonically contacted three MRE assemblers to obtain quotations on reworking 15,669 MRE cases stored at the Government's depot in Albany, GA (tr. 218). Only the MRE assemblers were contacted for quotations as only assemblers had the equipment, materials, and experience necessary to reseal the menu bags (tr. 219).

91. Two assemblers responded—Rafco or Wornick (these were different names at different times for the same company) and Sopakco. Rafco offered the lowest price. On 4 December 1996, the government (Mr. Bankoff) awarded a contract to Rafco for the inspection and rework of the 15,669 MRE final assembly cases, at a unit price of \$2.104 per case for a total contract price of \$32,967.58. The contract was issued in the form of a bilateral amendment to Rafco's assembly contract. (R4-52241, tab 71)

92. These cases were part of nine Cinpac final assembly case lot numbers. Each Cinpac lot number had multiple cases, varying from 48 to 3,840 cases per lot. Each case contained 12 MREs, one of which was the CBF. The CBF was in Menu #4. The rework was for the Menu #4 CBF only. The Menu #4 contained other items along with the CBF in order to have a complete meal, including utensils and condiments. (R4-52241, tabs 70, 71)

93. The rework contract required RAFCO to:

- 1) pick up and transport the subject cases from Defense Depot Albany, GA to its facility,
- 2) open each case and remove the chicken breast meal

- bag (menu 4),
- 3) remove the chicken breast entree carton from the meal bag,
- 4) identify and segregate the entrees by manufacturer lot number,
- 5) perform a 200 pouch warranty inspection for packaging integrity on each lot, then present the lot to the AVI for verification testing,
- 6) perform a 100 percent open-carton inspection on each lot and screen all defects, and record the results,
- 7) provide all defective entrees to the AVI,
- 8) replace the screened off entrees with government furnished chicken breasts,
- 9) repackage the menu bags and place them back into cases,
- 10) reseal, sleeve, strap and palletize the MRE cases, and
- 11) return the cases to Albany.

(R4-52241, tab 71 at 2-3; tr. 213-15, 217)

94. The Land O’Frost lots subjected to rework under the RAFCO contract were Lot Nos. 4319, 4320, 4321, 4325, 4346, 4357, 4322, 4333, 4343, 4355, 5004, 5011, 5032, and 5033 (R4-52241, tab 74).

95. Rafco first performed a warranty inspection on the lots. Four of those lots failed warranty inspection. (R4-52241, tab 71, ¶ B.3., tab 74)

96. After the warranty inspections were completed, Rafco (Wornick) performed a 100 percent screening of 15,536 cases. (The shortage between 15,669 cases and 15,536 is not explained by the record.) (R4-52241, tab 74) During the screening in late January 1997, Rafco (Wornick) found a total of an additional ten abrasions, one additional leaker and 23 concealed leakers. The overall defect rate was 0.00219. (R4-52241, tabs 73, 74)

97. In addition to defects in the CBF, Wornick recorded other defects found in doing the rework on the Menu #4 bag:

<u>Component Defect</u>	<u>Number of Defects</u>
Broken Spoon	1
Torn Cocoa	14
Torn Beverage	1
Open Flaps (Potato au gratin)	608
Torn Cartons (CBF)	136
Open Flap (CBF)	23

Menu 4 (Odor)	3
Missing Menu 4	4
Menu 4 w/double potato au gratin	1
Torn Meal Bag	13
Missing Potato au gratin	3
Puncture P/B	4
Stained Carton (CBF)	19
CBF Leaker	1
Missing Labeling on carton	6
Menu Bags with glue	106
Torn Orange Beverage	2
Menu 10 (odor)	1
Double Menu 2, missing Menu 3	1
Missing pallet cap	2
Case removed due to infestation	1
CBF, Sweller	1
Double Menu 3, Missing Menu 2	1
Punctured Menu 10	1

Other defects found were missing codes on cases (approximately 1,000 cases were labeled). Nineteen (19) cases were replaced. Some pallet caps and “MSDS” sheets were missing.

(R4-52241, tab 74) The significance of these other defects is that they must be attributed either to the assembler, the transportation, or the storage process. The 608 open flaps on the au gratin potatoes must be attributed to a failure of the potato contractor or rough handling by the assembler. The missing items and other torn items suggests that damage was caused by the assembler. The 136 torn cartons for the CBF indicate rough handling of the CBF carton by the assembler.

98. The rework revealed an average of 15 leakers per 10,000 units reworked (tr. 796; R4-52241, tab 81 at 10). These results did not provide the government with a high level of confidence that there were no more defects (tr. 223, 253). The government decided to perform a second 100 percent screening and rework contract on a larger number of units (tr. 593).

99. On 25 April 1997, the government issued another solicitation for the rework of 54,000 cases of MRE’s located at the Tracy Depot (tr. 656; R4-52012, tab 195). The government initially anticipated making an award to one of the three assemblers, since the rework required a knowledge of MRE construction, sealing, packing and packaging (tr. 658). However, the government opened the solicitation as an unrestricted acquisition in the Commerce Business Daily on 27 February 1997 (tr. 657). As a result, the government

received expressions of interest from two non-assemblers, however, neither of them submitted an offer (tr. 659).

100. Two offers were received, one from Rafco (Wornick) and one from Sopakco. Rafco's (Wornick's) offer of \$4.1667 per case was based on the use of government furnished material. However, this offer was withdrawn due to the limitation of Rafco's (Wornick's) production capacity. (R4-52241, tab 75 at 1, 3; tr. 659, 662)

101. Sopakco submitted an offer with two options. One option, in the amount of \$7.4021 per case, essentially reflected the scope of work set forth in the solicitation; the other option, in the amount of \$5.4359 per case, reflected a relaxed delivery schedule. The government chose the second option because it was less costly. (R4-52241, tab 75; tr. 659-61)

102. On 30 September 1997, a contract was awarded to Sopakco for a lower unit price of \$5.2674. The contracting officer was Mr. John Kennedy. The contract required Sopakco to:

- 1) pick up and transport the subject cases from Defense Depot Tracy, CA to its facility,
- 2) open each case and remove the chicken breast meal bag,
- 3) remove the chicken breast entree carton from the meal bag,
- 4) perform a 100 percent open carton inspection on each lot and screen all defects, and record the results,
- 5) replace the screened off entrees with CFM chicken breasts,
- 6) repackage the menu bags and cases,
- 7) inspect on a moving lot basis.

(R4-52241, tab 76; R4-52012, tab 195)

103. The Land O'Frost lot numbers subject to the Sopakco rework included Nos. 4320, 4326, 4327, 4332, 4337, 4340, 4341, 4342, 4347 (R4-52241, tab 80). The results of the Sopakco rework revealed an average of 13 leakers per 10,000 units reworked (R4 52241, tab 81 at 10). Sopakco had its own inspectors perform the screening. Mr. Lowry testified that Mr. Bob Helgerson, a Sopakco quality assurance employee, told him that qualified pouch inspectors would perform the inspection. Mr. Helgerson was not called to testify. There was no verification of the nature of the qualifications possessed by the Sopakco inspectors. Mr. Lowry had no personal knowledge. In fact, Mr. Lowry did not even know if the Sopakco inspectors were regular inspectors or if new people were hired.

(Tr. 810-11) We do not find this testimony to be credible evidence that inspections by Sopakco met the contract standards.

104. Mr. Kennedy testified that the shelf-life of the chicken patty was three years at 80 degrees F. However, he did not know of his own knowledge whether the items had been properly stored. When the rework contract was awarded, the shelf-life already consumed was 2 years and 8 months. (Tr. 688-89)

105. The Wornick or Rafco work was compared with the Sopakco rework, by Mr. Lowry. His data reflects, and we find, the following to be the results of the combined Rafco and Sopakco rework:

REWORK RESULTS for FIRST TWO REWORK CONTRACTS						
Site of Rework	Final Case Numbers	LOF Lot Numbers	Quantity	Leaker	Abrasion	Leaker Process Average
Wornick		4319	2372	5	0	0.0021
Wornick		4320	2455	0	2	0.0000
Wornick		4321	2713	1	5	0.0004
Wornick		4322	1434	2	3	0.0014
Wornick		4325	1264	4	0	0.0032
Wornick		4333	333	0	0	0.0000
Wornick		4343	313	0	0	0.0000
Wornick		4346	3690	12	0	0.0033
Wornick		4355	653	0	0	0.0000
Wornick		4357	47	0	0	0.0000
Wornick		5004	49	0	0	0.0000
Wornick		5011	1	0	0	0.0000
Wornick		5032	47	0	0	0.0000
Wornick		5033	165	0	0	0.0000
Sopakco	5046	4326	5040	6	28	0.0012
Sopakco	5047		5,894	14	38	0.0024
Sopakco	5048		4,985	4	1	0.0008
Sopakco	5052		6,144	4	22	0.0007
Sopakco	5053	4332	845	0	0	0.0000
Sopakco	5053	4337	827	1	0	0.0012
Sopakco	5053	4340	4,460	6	16	0.0013
Sopakco	5053	4341	7	0	0	0.0000
Sopakco	5054		1,438	2	10	0.0014
Sopakco	5054	4337	3	0	0	0.0000
Sopakco	5054	4340	2,656	1	13	0.0004

Sopakco	5054	4341	2,036	4	5		0.0020
Sopakco	5055		6,136	8	7		0.0013
Sopakco	5058	4327	2	0	0		0.0000
Sopakco	5058	4341	804	1	0		0.0012
Sopakco	5058	4342	5,355	8	7		0.0015
Sopakco	5058	4347	4	0	0		0.0000
Sopakco	5059	4326	1	0	0		0.0000
Sopakco	5059	4327	14	0	3		0.0000
Sopakco	5059	4332	1	0	0		0.0000
Sopakco	5059	4341	72	0	0		0.0000
Sopakco	5059	4342	1,846	9	0		0.0049
Sopakco	5059	4347	2,674	0	1		0.0000
ALL REWORK			66,780	92	165		0.0014
WORNICK REWORK			15,536	24	10		0.0015
SOPAKCO REWORK			51,244	68	155		0.0013

(R4-52241, tab 81 at 10) Of the lots subjected to a 100 percent rework, 51 percent contained no critical defects, although those 19 lots only contained 11.5 percent of the total number of units.

106. Following completion of the rework by Rafco and Sopakco, Mr. Lowry summarized the results for his supervisor, Mr. Chuck Grabowski, and made the following recommendation:

None of the Chicken Breast lots in MRE 15 finals are significantly different form [sic] the Chicken Breast lots which underwent the reworks at Wornick and Sopakco. There are no individual CBF lots worth salvaging, all lots were made by the same process and, in addition, individual CBF lots cannot be segregated because any one lot exists in more than one final. The best course of action is to remove the CBF menus, collect the CBF menus, back-fill the cases so as to save 11/12 of the finals, and then decide what to do with the CBF menus that were removed from the finals. It would not be cost effective to rework the CBF components in order to put them back into the finals.

(R4-52241, tab 81 at 2; tr. 792-93)

AVI Rework

107. Mr. Lowry's recommendation was not followed. Instead, by letter dated 23 January 1998, the contracting officer advised the appellant that due to the high number of defects found in Rafco and Cinpac final assembly cases, the government determined that the 216,139 cases on hold at Carthage, Kansas City, and Roanoke, encompassing Land O'Frost lots 4319 through 5033 were essentially the same in quality. The contracting officer invoked option (iv) of the Warranty clause. However, the contracting officer advised that the government would agree to an option (iii) remedy and allow the appellant to screen the supplies at the depots. Under this option, the appellant was required to open the cases, pull the menu 4 meal bags, back fill the CBF, then reseal the case. The contracting officer advised that regardless of which option the appellant chose, the appellant was responsible for the costs of the Rafco and Sopakco rework, which amounted to \$302,995.57. (R4-52012, tab 142; tr. 597-600)

108. Prior to making his decision on the precise type of rework required, the contracting officer evaluated different scenarios to determine what method would be in the best interest of the government. One of the options explored and rejected was having the product shipped to an assembly plant and back-filled. Alternatively, the government considered replacing just the CBF, which would eliminate the cost of trashing components, but it was very labor intensive and time consuming. (R4-52012, tab 197; tr. 602-04)

109. By letter dated 4 February 1998, the appellant advised that it was reviewing the contracting officer's warranty decision and needed time to discuss the matter with its attorney (R4-52012, tab 143).

110. Because the appellant refused to rework the lots, the government performed the rework at a claimed cost of \$1,603,211.34, or \$7.4175 per case (R4-52012, tab 199). By a final decision dated 27 April 1999, the contracting officer demanded payment of that amount and the costs (\$302,995.57) incurred as a result of the assemblers' rework for a total of \$1,906,206.91 (R4-52241, tab 87; tr. 606). The appellant timely appealed by letter of 28 June 1999. The Board docketed this appeal as ASBCA No. 52241.

Appellant's Claim

111. By letter dated 23 April 1998, the appellant submitted an equitable adjustment claim in the amount of \$1,316,632.92, composed of increased costs incurred as a result of bulk lot warranty rework, downtime, and reduced rates of production. The appellant's claim was based upon allegations of defective specifications, superior government knowledge, and inconsistent inspection standards. The appellant also claimed that the government failed to implement its suggested remedial change, *i.e.*, allowing the addition of water, even though the government had previously allowed the addition of water under a ham MRE contract. (R4-52012, tab 146)

112. By final decision dated 23 December 1998, the contracting officer denied the appellant's claim in its entirety (R4-52012, tab 149). The appellant timely appealed by letter of 1 February 1999. The Board docketed this appeal as ASBCA No. 52012.

DECISION

APPELLANT'S CLAIM – ASBCA No. 52012

The appellant concedes that the government properly invoked warranty actions against bulk lots, as specified in the government's letters of 30 March, 31 March, 22 April, and 31 July 1995, with respect to the procedures for invoking the warranty actions. However, the appellant contends that it is absolved from the warranty actions because the CID was not ready for production and because the government had and withheld superior knowledge about the production process. (ASBCA No. 52241, app. reply br. at 25) The appellant also contends that its production costs were increased after the 25 May 1995 start-up, for the same reasons. Further, the appellant contends that the government was responsible for the shut down between 14 April and 25 May 1995, because the shut down was caused by the dispute between AVI and USDA over the proper inspection standards. The appellant also alleged that the government's conduct in the award and administration of the contract constituted bad faith; we have not found evidence to support that proposition.

Superior Knowledge Claim by the Appellant

In particular, the appellant claims that the government breached its obligations under the contract because the government had superior knowledge concerning known difficulties in producing the chicken breast fillet, and wrongfully withheld that information from the contractor. The government breaches its contractual obligations when it has superior knowledge of information essential to contract performance and wrongfully withholds that information from the contractor. *Helene Curtis Industries, Inc. v. United States*, 312 F.2d 774, 778 (Ct. Cl. 1963); *Hercules, Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994), *aff'd on other grounds*, 516 U.S. 417 (1996).

In order to establish a breach under the superior knowledge doctrine, a contractor must produce specific evidence that: (1) it undertook performance without knowledge of vital information which affected cost or time of performance; (2) the government was aware that the contractor did not have knowledge of that information and had no reason to obtain such information; (3) the contract misled the contractor or did not put the contractor on notice to inquire about such information; and, (4) the government failed to provide the information. *AT&T Communications, Inc. v. Perry*, 296 F.3d 1307, 1312 (Fed. Cir. 2002); *GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 1071 (1992).

Essentially, the appellant complains that it was not furnished information obtained from the test production contractors which detailed the difficulty they had in meeting the contract requirements. The appellant finally obtained that information under the Freedom of Information Act, but only after much difficulty. However, the appellant has not shown that the information was significantly different from what it already knew, and has not shown that the information made or would have made performance of the contract any easier or less costly.

We conclude that the information was simply not vital to the performance of the contract. Nor can we find that the specifications were defective. The appellant was able to perform to the specifications, although with some difficulty. The government may have been unnecessarily insistent on strict compliance with the contract terms, but the government had the right to insist on strict compliance with the specifications. And the appellant was able to meet those requirements after retraining its work force and paying closer attention to quality control. The appellant has failed to establish the first prong of the superior knowledge claim. That claim for an equitable adjustment is denied.

Costs for the Bulk Lot Warranty Rework

The appellant seeks to be reimbursed its costs for performing the bulk lot warranty rework. While accepting that the warranty actions were proper under the Warranty clause, the appellant contends that because the CID was not ready for production and because the government withheld superior knowledge about the production process for the CBF, that the costs of the rework should be borne by the government. Because we have rejected both of those arguments, the appellant's claim is also rejected with respect to its cost of performing the bulk lot warranty rework.

Production Delay

The appellant claimed its delay costs for the shut down period from 14 April 1995 until 25 May 1995. This is an issue of an affirmative compensable delay claim by the appellant. Under such circumstances, the appellant has the burden of proving that the government was the sole cause of the delay and that the appellant did not contribute to or concurrently cause such delay. *E.g., Insulation Specialties, Inc.*, ASBCA No. 52090, slip op. at 38-37 (14 August 2003). We found that the appellant was at least a contributing cause for the shut down between 14 April and 25 May 1995, because the appellant had to revamp its production process and retrain its personnel. The appellant has failed to carry its burden of proof and the claim must be denied.

GOVERNMENT'S CLAIM – ASBCA No. 52241

As to the invocation of warranty actions on the 329,904 units incorporated into MRE final cases, as specified in the government's letter of 23 June 1995, the appellant

contends that no breach of warranty occurred within the warranty period and that no notice of such a breach was properly given to the appellant within the notice period. In particular, the appellant contends that the government never performed a warranty inspection on any of the 329,904 units incorporated into MRE final cases. Further, the appellant contends that the government did not exercise any remedial option, with respect to the 329,904 units, within a reasonable time, as required by the Warranty clause. The appellant also contends that the costs for the rework of the 329,904 units were not reasonable. (ASBCA No. 52241, app. br. at 15-19, 26-28, 34-35)

The terms of the Warranty clause survive final acceptance under the inspection and acceptance clause of the contract. *Vi-Mil, Inc.*, ASBCA Nos. 16820, 18005, 75-2 BCA ¶ 11,435 at 54,481. However, the Government has the burden of proof on its warranty claim and must establish the fundamental facts of liability, causation, and injury. *Phoenix Steel Container Co., Inc.*, ASBCA No. 9987, 66-2 BCA ¶ 5814; *Crescent Baking Company*, ASBCA No. 27467, 84-2 BCA ¶ 17,415; *Shelby's Gourmet Foods*, ASBCA No. 49883, 01-1 BCA ¶ 31,200. We need not and do not decide the issue of the reasonableness of the rework costs.

Were There Critical Defects Which Caused a Breach of Warranty

Under the terms of the Warranty clause in this contract, the chicken breast pouch is warranted to be free of defects for six months after receipt. Within the meaning of the sampling inspection procedures in this contract, that means that a breach of the warranty occurs for an entire lot, if at least one critical defect is found in a 200 unit sample from that lot (finding 42). If no defect is found in the sample, the lot passes warranty inspection.

With respect to the claimed warranty action on 329,904 units, pursuant to the letter of 23 June 1995 by Mr. Lecollier, no critical defect was found within six months of the date of receipt of those units. No inspections after acceptance were conducted until January 1997, nearly two years after initial receipt and at least eighteen months after final receipt of the 329,904 units.

Notice is Required of a Breach of Warranty

Under the clause, if there is a breach of the warranty within the first six months, the government is entitled to its choice of remedies, but only if the government “shall give written notice to the contractor of any breach of warranties” within seven months of receipt of the supplies (Warranty clause at (c)(1)). Thus, the government has at least one month to notify appellant that a defect covered by the warranty has been found.

The notice of 23 June 1995 was not a notice of defects which constituted a breach of the warranty, but was instead merely a notice of the government’s intent to conduct warranty inspections and notice of the government’s intent to invoke the warranty. Of

course, the government did not have the right to invoke the warranty without first providing notice of a breach of warranty with respect to the units in question.

What Mr. Lecollier attempted to do was to provide notice first and then find defects later. This was not permitted by the clause. First the government had to find defects, then it had to provide notice of the defects. Notice that the government was going to look for defects was not sufficient under the Warranty clause. Thus, because notice of warranty defects was not given within seven months of receipt of the units, the government's claim under the Warranty clause fails.

Projection

The government contends in its brief that it was permissible for the government to give notice of a warranty action even though no warranty inspection of the units had been conducted and no warranty defects found within the warranty period. Counsel for the government argues that the warranty action in the 23 June 1995 letter was taken as a result of the contracting officer's projection of previous findings over all of appellant's previously produced lots. The government argues in its brief that "the final case lots were produced under the same circumstances, using the same manufacturing techniques and processes as the bulk lots rejected." (ASBCA No. 52241, gov't br. at 52-53)

It is not as clear, as the government presumes, that the lots from which the samples were drawn are reasonably representative of the 329,904 units from which no samples were drawn. Nor is it clear that the defects found in the sample size are sufficient to reject the 329,904 units.

We begin our discussion by noting that Mr. Lecollier did not project the warranty failures of the bulk lots over the entire previously produced lots of CBF, which had been incorporated into final assembly cases. On the contrary, his letter specifically indicated an intention to conduct warranty inspections. If he had intended to make a projection, there would have been no reason to conduct warranty inspections. Contrary to the assertion by counsel, the government did not attempt to make a projection as authorized by paragraph (c)(2) of the warranty clause.

This projection argument was never made by Mr. Lecollier. In fact, Mr. Lecollier's letter and testimony contradict counsel's argument. Moreover, there is no evidence supporting counsel's contention that a projection of the bulk lot samples to the final case lots would be proper.

It is apparent that at the time of the 23 June 1995 letter, the government was not really making a warranty decision, it was merely trying to find extra time to make a decision with respect to taking some warranty action and trying to decide how to determine if

warranty action was necessary. First in that process was to conduct an inspection to determine if there were defects which necessitated a warranty action.

As of 23 June 1995, the government was in this early stage where the government believed an inspection was warranted to determine whether warranty action was appropriate. At the same time Mr. Lecollier knew that the government was running up against the time limits in the Warranty clause, and so he wrote the letter to the appellant to put appellant on notice of what the government was intending to do. However, this notice did not comply with the Warranty clause. Nor could it. In order to take a warranty action, the government first had to conduct warranty inspections to determine if there were defects, without defects there could not be a warranty action. Defects in those 329,904 units were not discovered until January 1997.

But could Mr. Lecollier have projected the results from the 22 lots onto all the remaining units? Counsel for the government merely asserts that he could, contending that the supplies (the 329,904 units in final cases) are representative of those with known defects (the lots that had failed warranty inspection) (gov't br. at 52). This argument compares dissimilar groups and is thus not valid. What counsel argues is that because 63.6 percent of the inspected lots failed warranty inspection, 100 percent of the lots not inspected, comprising 329,904 units, must be presumed to have failed warranty inspection as well. If we are going to project experience from the lots inspected onto the lots not inspected, the experience is that only 63.6 percent of those not inspected might be expected to fail. We have no experiential basis to expect that because 63.6 percent of the inspected lots failed that 100 percent of the uninspected lots will fail.

Moreover, Mr. Lecollier and the government team were well aware that they could not project 100 percent failure onto the remaining uninspected lots. They knew, understood, and intended that inspections would have to be conducted in order to determine what had to be done with the uninspected lots.

We hold that Mr. Lecollier did not project the warranty defects of the bulk lots onto the prior lots incorporated into the final assembly cases referred to in the letter of 23 June 1995. Mr. Lecollier did not reconstitute the lots and did not make projections.

Warranty Action

Moreover, the Warranty clause requires the government to take warranty action within a reasonable time after notice of the defect. The warranty action was not taken until the government's letter of 23 January 1998. That was 31 months after the letter of 23 June 1995. We do not have to decide what was a reasonable time, but we do decide that 31 months was not a reasonable time. Because the government failed to act within a reasonable time, the government's warranty action fails.

The appellant is entitled to require strict compliance with the terms of the Warranty clause before the government can recover under that clause. The government has failed to strictly comply with the terms of the Warranty clause as to its claims concerning the CBFs in final cases. The government's Warranty claim with respect to the CBFs in final assembly cases fails.

CONCLUSION

The appeal in ASBCA No. 52012, with respect to the appellant's claim for an equitable adjustment, is denied. The government's claim under the Warranty clause is denied and thus the appeal in ASBCA No. 52241 is sustained.

Dated: 7 October 2003

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEPLER
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 Nos. 52012, 52241, Appeals of Land O'Frost, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals