ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
D. A. Services, Inc.	)	ASBCA Nos. 52755, 52756
	)	52994, 53138
Under Contract Nos. N00104-96-C-7755	)	
N00104-96-C-7767	)	
N00104-96-C-7769	)	

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OPINION BY ADMINISTRATIVE JUDGE GRUGGEL

D. A. Services, Inc. appeals (ASBCA Nos. 52755, 52994, 53138) three contracting officer final decisions that, respectively, default terminated the captioned contracts for failure to deliver (tr. 9). In ASBCA No. 52756, the government seeks payment from appellant in the amount of $295,104 for unliquidated progress payments under Contract No. N00104-96-C-7755 (*id.*). Both entitlement and quantum are before us for decision in ASBCA No. 52756 (*id.*). The government submitted tabs 1-236 pursuant to Board Rule 4 as documents pertaining to the matters involved in ASBCA Nos. 52755 and 52756.[1] Appellant's supplemental tabs 237-364, submitted pursuant to Board Rule 4, are applicable to all three of the captioned contracts.[2] The government also submitted tabs 1 – 18 pursuant to Board Rule 4 as documents pertaining only to ASBCA No. 52994[3] and

[1] These documents are hereinafter referenced as R4, tabs 1-236, as applicable.

[2] These documents are hereinafter referenced as R4, tabs 237–364, as applicable.

[3] These documents are hereinafter referenced as R4 (ASBCA No. 52994), tabs 1-18, as applicable.

tabs 1 – 19 as documents pertaining only to ASBCA No. 53138.[4] The evidentiary record also contains various exhibits submitted by either appellant or the government and the transcript of the hearing.

FINDINGS OF FACT
THE CONTRACTS

1. On 22 May 1996, the U.S. Naval Inventory Control Point (NAVICP), Mechanicsburg, PA, awarded firm fixed-price Contract No. N00104-96-C-7755 (hereinafter "contract 7755") to appellant in the amount of $1,914,895.02 for the manufacture and delivery of 49,428 boxes of 24" x 24" polyvinyl chloride (PVC) contamination bags as set forth in Contract Line Nos. (hereinafter "CLIN" or "CLINs") 0001AA (24,714 boxes at a box/unit price of $37.28 for a total line item price of $921,337.92), 0001AB (3,453 boxes at a box/unit price of $39.60 for a total line item price of $136,738.80) and 0001AC (21,261 boxes at a box/unit price of $40.30 for a total line item price of $856,818.30) (R4, tab 10 at Std. Form 26 and Individual Repair Part Ordering Data (hereinafter "IRPOD") at 1). Each box was to consist of fifty (50) contamination bags with a film thickness of 0.008 inches (*id*. at IRPOD, at 2-3; R4, tab 5). The contract required appellant to fabricate the contamination bags in accordance with the applicable provisions of Procurement Specification SS-481, Revision 2 (hereinafter "SS-481"), "Polyvinylchloride Bags, Tubing and Sheet; Clear and Yellow" and Federal Specification L-P-375C, "Plastic Film, Flexible, Vinyl Chloride" ("L-P-375") and Military Standard MIL-STD-105E, "Sampling Procedures and Tables For Inspection by Attributes" ("MIL-STD-105") to the extent they are made applicable by SS-481 (R4, tabs 3, 10 at IRPOD, at 2-3; ex. G-1; tr. 86). CLIN 0001AE of the contract required appellant to submit ten bags that satisfied all applicable requirements of SS-481 for destructive First Article Test (FAT) by the government (*id*. at Std. Form 26, at 2, IRPOD, at 3 and Part I, § E.4.2; tr. 71-8). CLIN 000AF required appellant to submit ten bags from each production lot for destructive Production Lot Test by the government prior to delivery of each production lot (R4, tab 10 at Std. Form 26, at 2, IRPOD at 3; tr. 71-8). No unit or line item price is stated as being attributable to CLINs 0001AE or 000AF (*id*.).

2. Contract No. N00104-96-C-7767 (hereinafter "contract 7767") was awarded to appellant by NAVICP, Mechanicsburg on 19 September 1996 in the firm fixed-price amount of $161,978.00 for the manufacture and delivery of 7,994 boxes (100 bags each) of 8" x 10" PVC contamination bags with a material thickness of 0.008 inches, plus or minus ten percent (R4, tab 5; R4 (ASBCA No. 52994), tab 2 at Std. Form 26 and IRPOD,

[4] These documents are hereinafter referred to as R4 (ASBCA No. 53138), tabs 1–19, as applicable.

at 2-3). Said contamination bags were required to be fabricated in accordance with applicable provisions of SS-481, L-P-375 and MIL-STD-105, *supra*, and appellant was also required to submit ten bags for First Article Testing and ten bags from each production lot for destructive testing (*id*. at Std. Form 26, at 2 and IRPOD, at 3; R4, tab 3; ex. G-1; tr. 86).

3. Contract No. N00104-96-C-7769 (hereinafter "7769") was awarded to appellant by NAVICP, Mechanicsburg on 19 September 1996 in the firm fixed-price amount of $402,320.00 for the manufacture and delivery of 8,366 boxes (100 bags each) of 12" x 24" PVC contamination bags with a material thickness of 0.008 inches (R4, tab 5; R4 (ASBCA No. 53138), tab 2 at Std. Form 26 and IRPOD, at 2-3). Said contamination bags were also required to be fabricated in accordance with applicable provisions of SS-481, L-P-375, and MIL-STD-105, *supra*, and appellant again was required to submit ten bags for First Article Testing and ten bags from each production lot for destructive testing (*id*. at Std. Form 26, at 2 and IRPOD, at 3; R4, tab 3; ex. G-1; tr. 86).

4. The above-described contamination bags are used to control radiological contamination in the form of fluids and materials that are either radiologically contaminated, or which might be. Said bags are used throughout the Navy wherever there are nuclear reactors, both on ships and land-based (tr. 78-80). Other than the difference in sizes of the bags being bought under the contracts, the bags are the same, all made from yellow translucent PVC film, 0.008 inches in thickness, fabricated in accordance with SS-481, L-P-375 and MIL-STD-105, *infra*, and subject to a quality assurance/inspection system that conformed to the requirements of MIL-I-45208 (tr. 59-60, 80-81, 86, 114-7, 350-8, 794-7; R4, tabs 3, 10 at IRPOD, at 2-3; R4 (ASBCA No. 52994), tab 2 at IRPOD, at 2-3; R4 (ASBCA No. 53138), tab 2 at IRPOD, at 2-3; ex. G-1).

5. The contracts, *inter alia*, contained the following standard clauses: FAR 52.209-4, FIRST ARTICLE APPROVAL-GOVERNMENT TESTING (SEP 1989) – ALTERNATE I (SEP 1989) and incorporated by reference the following standard clauses: FAR 52.232-16, PROGRESS PAYMENTS (JUL 1991) - ALTERNATE I (AUG 1987); FAR 52.233-1, DISPUTES (MAR 1994); FAR 52.246-2, INSPECTION OF SUPPLIES-FIXED PRICE (JUL 1985); FAR 52.246-16, RESPONSIBILITY FOR SUPPLIES (APR 1984); FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984); FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) (R4, tabs 10, 233; R4 (ASBCA No. 52994), tab 2; R4 (ASBCA No. 53138), tab 2).

6. SS-481, *supra*, incorporates by reference L-P-375 through amendment 3, dated 10 January 1979 and MIL-STD-105E (R4, tabs 3, 10, 237; Ex. G-1; tr. 58-61, 86). SS-481 provides, *inter alia:*

3.3 Construction of bags.

3.3.1 Bags Bags covered by this document shall be furnished as individual bags. Bags shall be fabricated from a section of tubing (or equal feed stock) and sealed at one end of the tubing section, forming the bottom of the bag. Bags shall have a maximum of one longitudinal seam when the width across flats is less than or equal to 24 inches and a maximum of two longitudinal seams when the width across flats is greater than 24 inches. For bags with one longitudinal seam, the seam shall intersect the bottom seam at approximately the midpoint of the bag width. The longitudinal seam(s) shall also be perpendicular to the bottom seam. The open end shall be along a short side. All sealing shall be by means of electronic, thermal impulse, flux, rotary, or band-type sealers.

3.3.2 Seal seams of bags. Seal seam width shall be 3/8 inch +/- 1/8 inch. The longitudinal seam shall be of a lap type design. The bottom seam shall be of a butt type design. See Figure 1 for a representation of lap and butt type seam designs. Seal seams and the material directly adjacent to the seam shall be straight and continuous, free from wrinkles, creases, gaps, or pleats. Excess material beyond the seam shall not exceed ¼ inch.

. . . .

3.3.4 Dimensional tolerances of bags. Bags shall be supplied with dimensional tolerances in accordance with tolerances in Table I[5]. . . . the film thickness shall be 0.008 inches.

. . . .

3.7 Workmanship. The bags, tubing, and sheet shall be uniform in color, texture, finish, and other physical

[5] Table I (Tolerances) provides that the thickness tolerance for bags is “plus or minus 10 percent.”

properties and shall be free from gels, streaks, tears, holes, blisters, fish eyes, scratches, mottling, wrinkling, folds, particles of foreign matter including color which rubs off, powders, coatings, and unmelted material. Edges shall be free of nicks and cuts.

3.8 Pinholes and cracks. The film shall have no pinholes or cracks.

. . . .

4.1 Responsibility for inspection. Unless otherwise specified in the contract or purchase order, the supplier is responsible for the performance of all inspection requirements as specified herein . . . . The Government reserves the right to perform any of the inspections set forth in the specification where such inspections are deemed necessary to assure supplies and services conform to prescribed requirements.

4.1.1 Performance of inspections. The performance of the inspections or tests in the specification does not relieve the supplier of the responsibility to provide a product which meets all the requirements of this specification.

4.1.1.1 First Article Inspection. When specified (see 6.2) the vendor shall submit a determined quantity of bags/tubing/sheet as applicable . . . for first article inspection and approval.

4.1.2 Examinations on material. All applicable examinations and tests required by this specification shall be performed on the raw material or final product as indicated in Table II.[6]

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[6] Table II of SS-481 provides, *inter alia*, that the ¶ 3.7 workmanship examination/tests methodology is "visual" and that said examinations/tests are to be performed on the final product *vice* the raw material. Table II further provides that all examinations/tests designated to be performed on "raw material" including, *inter alia*, "thickness," "may be performed on the final product."

4.1.3 Certification of quality conformance. It shall be the responsibility of the manufacturer, supplier or distributor to provide the following data required for the certification of quality conformance:

(a) Certification of compliance to the requirements of L-P-375.

. . . .

(c) Certification of construction.
(d) Certification of seam strength for bags.
(e) Certification of width and length dimensions for bags.

. . . .

(m) Certification of workmanship

. . . .

4.1.4.1 Partial or incremental delivery. When bags, tubing or sheet are offered for inspection in a partial or incremental manner (i.e., 500 rolls of tubing out of a contract total of 5000 rolls) the vendor shall provide certification of quality conformance for the [sic] each partial or incremental delivery. Certification for the raw material need not be forwarded after the first delivery provided that the same lot of raw material is being used to manufacture the bag/tubing/sheet. The vendor need only provide a statement of same. Final product testing, however, must be conducted on each partial or incremental delivery based on the size of the delivery.

4.2 Lot definition. A lot shall consist of bags, tubing or sheet of the same class produced from the same L-P-375 lot and submitted for inspection at the same time. Unless otherwise indicated, the lot size shall be expressed in units of rolls of sheet or tubing of the same size, or total bags of the same size where individual bags are specified, as applicable.

. . . .

4.3.1 Sample unit quantity. Except where otherwise indicated, the sample unit quantity for bags shall be an individual bag randomly selected from a lot of individual bags . . . .

. . . .

4.3.5 Sampling for visual color and transparency inspection. Sampling for construction, dimensions, workmanship, color, transparency and visibility in water shall be in accordance with MIL-STD-105 and Table IV.[7]

. . . .

4.4 Inspection procedures and acceptance criteria.

4.4.1 Physical tests.

4.4.1.1 Procedure. Testing for the physical requirements specified by this specification and L-P-375, with the exception of seam strength testing of the final product, shall be performed in accordance with the procedures provided in L-P-375. Testing for final product seam strength shall be performed as follows:

(a) Specimens shall be taken from randomly selected locations of the seams of the final product.

(b) For bags, both the longitudinal and bottom seams shall be tested. Five test specimens from each sample shall be

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[7] Table IV. Inspection levels provides:

Examination	Individual bags	Rolls, tubing	Rolls, sheet	AQL
Visual	S-3	S-3	S-3	2.5
Color and transparency	S-3	S-3	S-3	2.5
Preparation for delivery	S-1	S-1	S-1	2.5

from the longitudinal seam and five test specimens shall be from the bottom seam. . . . For bags/tubing with two longitudinal seams, five test specimens shall be taken from each longitudinal seam.

(c) Specimens that are tested shall be one inch wide at the seam and shall be tested in a manner such that the seam shall be in the center of the specimen and perpendicular to the separation direction during testing.

(d) Specimens shall be tested in accordance with ASTM D-882 as modified in paragraphs (a) through (c) above. Test results for the longitudinal seam specimens shall be averaged and will represent the seam strength for the longitudinal seam of the sample bag and/or tubing. For bags/tubing with two longitudinal seams, an average seam strength will be determined for each longitudinal seam. Test results for the bottom seam specimens shall be averaged and will represent the seam strength for the bottom seam for the sample bags.

4.4.1.2 Acceptance criteria. If any sample fails to meet the minimum requirements of 3.3.3, 3.4.3 and L-P-375 as modified by 3.8, the lot represented by the sample shall be rejected.

. . . .

4.4.3 Visual examination.

4.4.3.1 Procedure. The illumination for these examinations shall be tungsten (incandescent) light at a level of a minimum of 100 foot candles. The examination shall

be performed by an inspector with 20/20 vision or vision corrected to 20/20. . . .

4.4.3.2 Acceptance criteria. The AQL expressed in defects per 100 units is provided in Table IV. Any dimension not within the tolerances specified by Table I constitutes a defect. If examination shows that the material is not in conformance with the Table IV AQL, the lot shall be rejected.

(R4, tabs 3, 10)

7. Federal Specification L-P-375C, *supra*, provides in pertinent part:

3. REQUIREMENTS

3.1 Standard sample. When specified, the finished item shall be equal to or better than the standard sample with respect to all characteristics for which the standard is referenced (see 3.6, 3.7, 6.2, and 6.4).

3.3 Physical requirements.

3.6 Color.

3.6.2 Type I and Type II, class 2. The film shall be pigmented to produce the color specified in the contract or order. The color shall be uniform (see 3.1 and 6.4).

. . . .

3.9 Workmanship. The film shall be clean, well finished and free from dirt, oil, foreign matter, rough or sharp edges, scratches, scuffs, cracks, creases, blisters, bubbles, pimples, undispersed resin, pits, tears, cuts, holes (other than allowable pinholes.)

4. QUALITY ASSURANCE PROVISIONS

4.1 Responsibility for inspection. Unless otherwise specified in the contract or purchase order, the supplier is responsible for the performance of all inspection

requirements as specified herein. Except as otherwise specified in the contract or order, the supplier may use his own or any other facilities suitable for the performance of the inspection requirements specified herein, unless disapproved by the government. The government reserves the right to perform any of the inspections set forth in the specification where such inspections are deemed necessary to assure supplies and services conform to prescribed requirements.

4.1.1 Certificates of compliance. A certificate of compliance shall be furnished by the supplier to the contracting officer stating that the film supplied complies with the requirements specified . . . .Where certificates of compliance are submitted, the Government reserves the right to check test such items to determine the validity of the certification.

4.2 Inspection. Sampling for inspection shall be performed in accordance with MIL-STD-105, except where otherwise indicated hereinafter.

. . . .

4.3 Inspection of the end item.

4.3.1 Examination of the end item. The end item shall be examined for the defects in the applicable subparagraphs at the inspection levels and acceptable quality levels (AQL's) set forth in 4.3.1.7. The lot shall be expressed in units of rolls, packages of sheets, or flat cuts randomly selected for examinations in 4.3.1.1, 4.3.1.2, 4.3.1.3, 4.3.1.4, and in 4.3.1.5 and in units of pallets for the examination in 4.3.1.6.

4.3.1.1 Examination of the end item for defects in appearance, construction, assembly, and workmanship. The sample unit shall be eight (8) consecutive yards full roll width for the examination for defects within rolls. The sample unit shall not be taken from the first or last convolutions of the roll. The sample unit shall be five sheets randomly selected from a package for the examination for defects in sheets (flat cuts). No more

than three sample units shall be examined from any one roll or one package of sheets, as applicable. Both sides of the material shall be examined. Defects of each type other than workmanship (serviceability) type shall be scored only once within each sample unit for rolls and for flat cuts. Defects of the workmanship serviceability type shall be scored once for each yard or sheet in which they appear.

Examine	Defect
. . . .	. . . .
Color	
. . . .	. . . .
(b) Class 2	Other than as specified.
	. . . .
	Nonuniformity
. . . .	. . . .
Workmanship	
Appearance	Any dirt, oil, spot, stain, discoloration and foreign matter affecting appearance.
Serviceability	Any deep gouge or scratch. Any holes (other than allowable pinholes). Any rough or sharp edges. Any cuts, blisters, bubbles, tears, cuts, scuffs, cracks or creases. Any area having a number or type of pimples or pits, undispersed resin, which does not compare favorably with the standard sample. Any chipping.

. . . .

4.3.1.7 Inspection levels and acceptable quality levels (AQL's) for examinations. The inspection levels, for determining the sample size, and the acceptable quality

levels (AQL's) expressed in defects per one hundred units shall be as follows:

Examination paragraph [1/]	Inspection levels	AQL's
4.3.1.1	I	2.5

. . . .

[1/] The same rolls or packages of sheet or sheets as applicable of the specified material shall be used for examination under 4.3.1.2 through 4.3.1.4 inclusive and shall be within the rolls or packages of sheets randomly selected for examination under 4.3.1.1.

. . . .

6. NOTES

6.1 Intended use. The flexible plastic vinyl film covered by this specification is intended for use in general application in waterproof covers, containers, equipage, and packaging materials.

. . . .

6.4 For access to standard sample for color and finish, address the procuring office issuing the invitation for bids.

(R4, tab 237; tr. 59-62, 159, 794-7). The evidentiary record herein is otherwise silent with respect to whether a "standard sample" was utilized by the government with respect to contracts 7755, 7767 and 7769.

8. MIL-STD-105E, *supra*, provides, in pertinent part:

3.1 Acceptable Quality Level (AQL). When a continuous series of lots is considered, the AQL is the quality level which, for the purposes of sampling inspection, is the limit of a satisfactory process average (See 3.19).

NOTE: A sampling plan and an AQL are chosen in accordance with the risk assumed. Use of a value of AQL for

a certain defect or group of defects indicates that the sampling plan will accept the great majority of the lots or batches provided the process average level of percent defective (or defects per hundred units) in these lots or batches be no greater than the designated value of AQL. Thus, the AQL is a designated value of percent defective (or defects per hundred units) for which lots will be accepted most of the time by the sampling procedure being used. The sampling plans provided herein are so arranged that the probability of acceptance at the designated AQL value depends upon the sample size, being generally higher for large samples than for small ones, for a given AQL. The AQL alone does not identify the chances of accepting or rejecting individual lots or batches but more directly relates to what might be expected from a series of lots or batches, provided the steps indicated in this publication are taken. It is necessary to refer to the operating characteristic curve of the plan to determine the relative risks.

. . . .

3.7 Defect. A defect is any nonconformance of the unit of product with specified requirements.

. . . .

3.10 Inspection. Inspection is the process of measuring, examining, testing, or otherwise comparing the unit of product with the requirements.

3.11 Inspection by Attributes. Inspection by attributes is inspection whereby either the unit of product is classified simply as defective or non-defective, or the number of defects in the unit of product is counted, with respect to a given requirement or set or [sic] requirements.

3.12 Lot or Batch. The term lot or batch shall mean "inspection lot" or "inspection batch," i.e., a collection of units of product from which a sample is to be drawn and inspected and may differ from a collection of units designated as a lot or batch for other purposes (e.g., production, shipment, etc.).

3.13 Lot or Batch Size. The lot or batch size is the number of units of product in a lot or batch.

. . . .

3.19 Process Average. The process average is the average percent defective or average number of defects per hundred units (whichever is applicable) of product submitted by the supplier for original inspection. Original inspection is the first inspection of a particular quantity of product as distinguished from the inspection of product which has been resubmitted after prior rejection.

3.20 Sample. A sample consists of one or more units of product drawn from a lot or batch, the units of the sample being selected at random without regard to their quality. The number of units of product in the sample is the sample size.

3.21 Sample Size Code Letter. The sample size code letter is a device used along with the AQL for locating a sampling plan on a table of sampling plans.

3.22 Sampling Plan. A sampling plan indicates the number of units of product from each lot or batch which are to be inspected (sample size or series of sample sizes) and the criteria for determining the acceptability of the lot or batch (acceptance and rejection numbers).

3.23 Unit of Product. The unit of product is the thing inspected in order to determine its classification as defective or non-defective or to count the number of defects. It may be a single article, a pair, a set, a length, an area, an operation, a volume, a component of an end product, or the end product itself. The unit of product may or may not be the same as the unit of purchase, supply, production or shipment.

. . . .

4.4 AQL

4.4.1 AQL Use. The AQL, together with the Sample Size Code Letter, is used for indexing the sampling plans provided herein.

4.4.2 Limitation. The selection or use of an AQL shall not imply that the contractor has the right to supply any defective unit of product.

4.4.3 Choosing AQLs. Different AQLs may be chosen for groups of defects considered collectively, or for individual defects. An AQL for a group of defects may be chosen in addition to AQLs for individual defects, or subgroups, within that group. AQL values of 10.0 or less may be expressed either in percent defective or in defects per hundred units; those over 10.0 shall be expressed in defects per hundred units only.

. . . .

(Ex. G-1; tr. 60-2)

9. Under the foregoing contracts, the producer of the raw material (flexible PVC film) was required to test the film under L-P-375C, using the sampling criteria appearing in MIL-STD-105E, and appellant was similarly required to test its finished bags under SS-481 using the sampling criteria appearing in MIL-STD-105E. (R4, tabs 3, 10, 237; ex. G-1, tr. 62-72)

FIRST ARTICLE AND PRODUCTION LOT TESTING UNDER CONTRACTS 7755, 7767 AND 7769

10. Appellant submitted ten 24" x 24" contamination bags for inspection as First Article samples under contract 7755 on 4 September 1996 (R4, tabs 16-21; ex. G-2). These samples were tested by Mr. Kent Howard of Intermediate Maintenance Activity Nuclear Planning Yard (IMANPY) in accordance with the applicable provisions of SS-481, *supra*, on or about 12 September 1996 (R4, tab 20; tr. 51-3, 373-75). Appellant was notified that its First Article samples for contract 7755 were acceptable by letter dated 17 October 1996 from the contracting officer (Ms. Springborn) (R4, tabs 22-23; ex. G-2; tr. 92, 527).

11. (a) On or about 23 January 1997, appellant submitted ten 8" x 10" contamination bags for inspection as First Article samples under contract 7767 and ten 12" x 24" contamination bags as First Article samples under contract 7769 (R4, tab 32; ex. G-2). These samples for contracts 7767 and 7769 were tested by Mr. Wallace Jack of IMANPY (tr. 369-76).

(b) The First Article samples submitted by appellant for contract 7767 were deemed unacceptable due to the following defects: (1) areas in the longitudinal seams of all ten bags were wider than as prescribed by ¶ 3.3.2 of SS-481; (2) all ten bags were wider than as prescribed by ¶ 3.3.4 of SS-481; and, (3) all of "the longitudinal seams appeared to have been sealed with a die that had multiple imperfections of 1/8 to ¼ inches across, causing areas of thicker material or incomplete sealing. All of the bags had a depression . . . . These variances in the width and thickness of the seam could cause a weak area in the bag." (R4, tab 32 at encl. 1; *see*, tr. 375-377)

(c) The First Article samples submitted by appellant for contract 7769 were deemed unacceptable by Mr. Jack due to the presence of the following defects: (1) a two-inch gap/opening in the longitudinal seam of one bag contrary to ¶¶ 3.3.1 and 3.3.2 of SS-481; (2) the areas in the longitudinal seams of six bags were wider than as prescribed by ¶ 3.3.2 of SS-481, and all of the longitudinal seams appeared to have been sealed with a die that had multiple imperfections of 1/8 to ¼ inches across; (3) excessive PVC film extending below the bottom seams of seven bags contrary to ¶ 3.3.2 of SS-481; and, (4) "particles, [just under] 1/32 inch, of foreign matter embedded in the film" of three bags contrary to ¶ 3.7 of SS-481 (tr. 113, 377; R4, tab 32 at encl. 2). With respect to the aforementioned "particles," Mr. Jack was visually inspecting the bags when he noticed that the three bags each had a "black spot" embedded therein (tr. 377). Mr. Jack testified that he characterized the black spots as "foreign matter" because "that seemed to be the best way to describe what I was seeing" (tr. 377-79; R4, tab 32 at encl. 2; *see*, tr. 113). The government concedes that the "visual" examination only prescribed by SS-481 does not enable the examiner to validly determine "what the black speck is" (tr. 237-38). The evidentiary record herein does not establish or otherwise explain the scientific basis of or the validity of using a "visual examination" to reasonably ascertain, in all instances, that something described as a "black spot" embedded in PVC film constitutes foreign material (*passim*). Nor does the evidentiary record herein reflect that additional scientific analyses were performed by the government on the above-described "three black spots" for the singular purpose of ascertaining whether or not Mr. Jack's "spots" were, in fact, comprised of foreign material (tr. 128-32, 230-1). No other inspection of any of appellant's contamination bags produced under contracts 7755, 7767 and 7769 disclosed the existence of "particles" or "black spots" similar, or otherwise comparable to the three particles (hereinafter "black specks") noticed by Mr. Jack during his visual inspection of the First Article samples submitted by appellant under contract 7769 (tr. 113-14).

(d) By letter dated 13 March 1997, the contracting officer (Ms. Springborn) informed appellant that the First Article samples for contracts 7767 and 7769 were, respectively, "not acceptable" due, *inter alia*, to the presence of the above-described defects separately noted with respect to each First Article sample (tr. 94; R4, tab 32; ex. G-2). Ms. Springborn also advised appellant that inspection of the data reports submitted in connection with the samples for contracts 7767 and 7769 revealed curable omissions:

> It is also suggested that you may also be able to fix the data problems by making sure you report on all the required SS-481 tests and inspections and test / inspect enough samples. Except for the width problem, nothing failed, you just didn't perform/report on all the required tests and didn't perform/report enough samples.

(R4, tab 32).

12. (a) Appellant submitted ten 24" x 24" contamination bags (bag lot #1) for inspection as production lot samples under contract 7755 on 18 February 1997 and ten more 24" x 24" contamination bags (bag lot #2) for inspection as production lot samples under contract 7755 on 10 March 1997 (R4, tabs 35-38; ex. G-2). Bag lots 1 and 2 were inspected by IMANPY's Mr. Jack and both of these production lot samples were rejected (tr. 101-04, 744-52; R4, tab 38; ex. G-2).

(b) The following defects associated with bag lot #1 were detected: (1) one bag had a "pinhole leak" in "thinned" film along the bottom seam thereof contrary to ¶¶ 3.7 and 3.8 of SS-481; (2) one bag was not "sealed along the longitudinal seam for a length of 2 ½" above the bottom seam" contrary to ¶ 3.3.1 of SS-481 which "requires the bag to be fabricated from a section of tubing or equal feed stock"; (3) five bags had longitudinal seams that were too wide (*i.e.*, 9/16" to 5/8" *vice* 3/8" +/- 1/8") contrary to ¶ 3.3.2, SS-481 and two bags "had a depression where the end of the die was located when the bag was sealed" during appellant's "multiple sealing operations"; (4) six bags were either too wide or too long contrary to the applicable tolerances set forth in SS-481, Rev. 2; (5) one bag had "a 1" long crack in it's [sic] internal film layer" contrary to ¶ 3.8, SS-481; and, (6) four bags had "uneven or torn edges along the top of the bag" contrary to ¶ 3.7, SS-481 (tr. 382-89; R4, tabs 35-38).

(c) The following defects associated with production bag lot #2 were detected: (1) one bag had a 1/16" "opening in the bag about 2" above the bottom seam" contrary to ¶ 3.3.1 of SS-481 which "requires the bag to be fabricated from a section of tubing or feed stock"; (2) four bags had portions of the longitudinal seam that were too wide (9/16" to 11/16" *vice* 3/8" +/- 1/8") contrary to ¶ 3.3.2, SS-481; (3) all ten bags had "excess material" beyond the longitudinal seam (5/16" to ¾" *vice* 1/4") contrary to

¶ 3.3.2 of SS-481; (4) the longitudinal seams of all ten bags "had multiple, usually over twenty, areas of uneven width and thickness. It appears the seams were sealed with a pitted die" contrary to ¶ 3.7, SS-481; and, (5) seven bags had "wrinkling in the longitudinal seam where it meets the bottom seam" contrary to ¶ 3.7, SS-481 (*id*.).

(d) By issuance of a Product Quality Deficiency Report (PQDR), dated 3 April 1997, the government informed appellant that both production lot samples submitted under contract 7755 were rejected due to the presence of the above-described defects therein (tr. 101-04, 382-89; R4, tabs 37-38; ex. G-2).

13. (a) On 28 March 1997, appellant submitted ten 8" x 10" contamination bags for inspection as replacement First Article samples under contract 7767 and ten 12" x 24" contamination bags as replacement First Article samples under contract 7769 (ex. G-2). IMANPY's Mr. Jack again performed the testing of these replacement First Article samples (tr. 374-75, 379-82).

(b) The replacement First Article samples submitted by appellant for contract 7767 were deemed unacceptable due to the following defects: (1) all ten bags "had a thin area [0.006 to 0.007 inches thick *vice* 0.0072"] in the longitudinal seam . . . approximately 3 inches from the bottom of the bag, where the end of the die was located during sealing of the longitudinal seam" contrary to ¶ 3.3.4, SS-481; (2) six bags had "5/16 to 3/8 inches of film extending beyond the longitudinal seam" *vice* the ¼ inch mandated by ¶ 3.3.2, SS-481; and, (3) five bags had "nicks on the top and/or bottom edges of the bag" contrary to ¶ 3.7, SS-481 (tr. 379-80; R4, tab 39 at encl. 1).

(c) The replacement First Article samples submitted by appellant for contract 7769 were deemed unacceptable due to the following defects: (1) all ten bags had the same "thin area" in the longitudinal seam described, *supra*, at finding 13(b); (2) three bags had "5/16 to 3/8 inches of film extending beyond the longitudinal seam" contrary to ¶ 3.3.2, SS-481; and, (3) five of the bags had "black or dark blue scuff marks on the outside of the bags . . . 1 to 3 inches long and the width of the longitudinal seam" contrary to ¶ 3.7, SS-481 (tr. 381-82; R4, tab 39 at encl. 2).

(d) On or about 9 April 1997, the contracting officer (Ms. Springborn) informed appellant that its replacement First Article samples for contracts 7767 and 7769 were deemed unacceptable due, *inter alia*, to the presence of the above-described defects (tr. 99-100; R4, tab 39; ex. G-2). Appellant's Mr. Walleck disputed Mr. Jack's conclusion that the seams were too thin contending that the finished bag is not required to be of any specified thickness even though the raw PVC film must satisfy the .008", plus or minus ten percent standard, *supra* (tr. 745-52; ex. A-3). According to Mr. Walleck, as long as any material, however thin, remained after appellant's converting process, the bag should have passed "unless it's a pinhole" (tr. 751-52). We address this meeting further at finding 27, *infra.*

14. On or about 24 November 1997, appellant submitted ten 8" x 10" replacement contamination bags for inspection as its third First Article samples under contract 7767 (R4 (ASBCA No. 52994), tab 13; ex. G-2). Once again, IMANPY's Mr. Jack performed the testing of this third First Article samples submission under contract 7767 (tr. 416-17). Mr. Jack deemed appellant's said third submission to be acceptable (*id*.; tr. 139-41; R4 (ASBCA No. 52994), tab 13; ex. G-2). The contracting officer (Ms. Springborn) notified appellant that said third submission under contract 7767 was acceptable by letter dated 22 December 1997 (R4 (ASBCA No. 52994), tab 13; ex. G-2).

15. By letter dated 18 December 1997, the government formally advised appellant that appellant's responses to the PDQR on contract 7755 were acceptable for the purposes of future production thereunder (R4, tabs 112, 115, 228). Appellant was also advised that its PDQR responses (*i.e.*, lack of proposed corrective actions) were "unacceptable for use in either repair or reinspection of the two rejected production lots" and "detailed corrective action(s) on the two lots of rejected material" were requested from appellant (*id*.; tr. 143-45). The evidentiary record does not reflect that appellant subsequently re-initiated its production of new PVC contamination bags under contracts 7755, 7767 and 7769 (*passim*).

16. By letter dated 12 January 1998, appellant described its "draft" PDQR response of 17 April 1997, its "revised" PDQR response of 8 May 1997, the "reopen[ed]" PDQR of 24 June 1997 and appellant's 14 October 1997 response thereto (R4, tab 118). Appellant stated that it had consistently indicated to the government that "reinspection, reconstitution and resubmittal of [samples from the two failed production] lots will be performed prior to shipment" (*id*.). Appellant attributed its failure to submit a detailed reinspection plan to the government's failure to provide "an outstanding written request from NAVICP for a detailed reinspection plan" (*id*.). Appellant also asked for "technical clarification" of issues it described as "uneven thickness (BDI's) [*i.e.*, brass die imperfections]" in terms of "tolerances on size and quantity, criticality of defect type," "wrinkling," "dimensional instability" in terms of tolerance conflict between bag size tolerances and LP-375 dimensional stability tolerance, "black specks" in terms of size, frequency and inspection method and "uneven edge (nicks)" in terms of "tolerances on size & quantity [and] criticality of the defect type" (*id*. at 4).

17. By letter dated 6 February 1998, the government informed appellant that the "dimensional instability and depressions" issues "were resolved to the mutual satisfaction of both parties in the October 1997 meeting," that "the Navy finds the Black Spec[sic]/overcured PVC issue fully clarified" and "the remaining three items satisfied . . ." (R4, tab 124). The government also asked appellant to explain how it planned to "reconstitute" the two failed production lots—*i.e.*, "just a one or two line

narrative stating if [appellant] plans a 100% inspection, partial screening, or scrapping both lots" (*id*.).

18. By letter dated 2 March 1998, appellant proffered its reinspection plan for the two failed production lots (R4, tab 131). Appellant proposed, *inter alia*, that defects classified by it as "critical"—*i.e.*, pinhole; not sealed, gap, break in seal; crack—were assigned a tolerance of "none, any visible." Defects that appellant classified as "major"—*i.e.*, seal width; bag length; bag width—were assigned specific maximum and minimum tolerances (*id*.). Defects that appellant classified as minor were assigned the following tolerances—*i.e.*, uneven, torn, nicked edge (none, any visible); wrinkle (maximum of 1 per seal); excess material (3/8" maximum); uneven texture (maximum of 1 per bag) (*id*.). Appellant's proposed reinspection plan provided that "[b]ags will be considered to have passed inspection if they have no critical or major defects and a maximum of one minor defect" (*id*.). Appellant's proposed reinspection plan called for a relaxation of many of the requirements of SS-481/L-P-375 and did not include the 0.008 inch material thickness plus or minus ten percent requirement (R4, tabs 140-42). Appellant never requested either that the reinspection include intermingled samples from previously accepted and rejected submittals or that Mr. Jack be precluded from conducting the reinspection (*id*.; R4, tabs 10 at mod. P00006, 143-46, 149, 152, 159). Appellant mistakenly misaddressed and sent its reinspection proposal directly to RADM Ginman *vice* Mr. Hunter (NAVICP, Mechanicsburg), who received said plan on 11 March 1998 (*id*.; R4, tabs 134-35, 137, 139).

19. During the period 18 March 1998-21 May 1998, the parties successfully exchanged correspondence for the purpose of negotiating the extent to which applicable SS-481/L-P-375 defect requirements would be applied solely for purposes of the proposed reinspection of the two failed production bag lots under contract 7755 (R4, tabs 140-46, 149).

20. (a) Bilateral contract modification No. P00006, effective 22 June 1998, provided for a one-time only reinspection of production lots 1 and 2 under contract 7755 confined to defects identified in the PQDR, *supra*, dated 3 April 1997 (tr. 160-64, 596-97; R4, tabs 10, 152, 159; ex. G-2; findings 12 (b-d)). The mutually agreed-upon list of potential defects subject to reinspection included, *inter alia*: (1) free from any "wrinkle or fold—a wrinkle or fold in a seal caused by the manufacturing process . . ." as proscribed by ¶ 3.7, SS-481 and also "the seams and the material directly adjacent to the seams to be free from wrinkles, creases and pleats" as proscribed by ¶ 3.3.2, SS-481; and, (2) bags weakened by seam depression—minimum thickness of "90 per cent of the 0.008" thickness [*i.e.*, 0.0072"]" as prescribed by ¶ 3.3.4 of SS-481 (R4, tab 10). Since "black specks" had not been found during the initial inspection of the two production lots previously submitted under contract 7755, the presence, *vel non*, of black specks was not an area subject to the reinspection (*id*.). Appellant was afforded the opportunity to conduct its own internal 100 percent reinspection of the two failed production lots to cull

out any defective units (*id*.; tr.160-64). As a consequence thereof, appellant apparently removed 53 percent of the contamination bags from production lot one and 13 percent of the contamination bags from production lot 2 "which they believed would not meet the reinspection requirements of [modification No. P00006] . . . ." (R4, tabs 178, 180, 184-85; *see*, tr. 596-97).

(b) Pursuant to the "Reinspection Plan" set forth in modification No. P00006, *supra*, the government's Quality Assurance Representative (QAR), DCMA, Hartford, Connecticut chose ten bags from each of production lots 1 and 2 and submitted them to Fleet Radiological Support Division ("FRSD")[8] on 14 October 1998 for the performance of the reinspection (R4, tabs 184-86; ex. G-2). During October 1998, Mr. Jack performed the reinspection of production lots 1 and 2 on appellant's premises (tr. 432-39; R4, tabs 184-86; ex. G-2). Appellant was afforded the opportunity to be present during this re-inspection but "declined to observe" (R4, tabs 184, 202, 204; tr. 433-35).

(c) The production lot 1 bags that were reinspected by Mr. Jack were deemed unacceptable due to the presence of the following defects: (1) three bags had depressions in a seam resulting in a thickness of "0.0065" *vice* "0.0072" contrary to the modification No. P00006 Reinspection Plan and ¶ 3.3.4, SS-481; and, (2) two bags had "wrinkles or folds in the seams caused by the manufacturing process" contrary to the modification No. P00006 Reinspection Plan and ¶ 3.7, SS-481 (*id*.; tr. 436-37, 727; R4, tab 186).

(d) The production lot 2 contamination bags that were reinspected by Mr. Jack were deemed unacceptable due to presence of the following defects: (1) six bags had "wrinkles or folds in the seams caused by the manufacturing process"; and, (2) two bags "had depressions in a seam resulting in the thickness of the PVC to be 0.0055" or less" *vice* 0.0072" (*id*.).

(e) Appellant was shown the contamination bags from each production lot sample that contained the above-described defects (tr. 601).

(f) By letter dated 29 October 1998, appellant was notified that the production lot 1 and 2 bags submitted for reinspection pursuant to the mutually agreed-upon provisions of bilateral contract modification No. P00006, *supra*, were deemed unacceptable due to the presence therein of the defects described hereinabove (R4, tabs 186, 202).

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[8] The organization known as IMANPY, *supra*, had been re-designated as the Fleet Radiological Support Division earlier in 1998 (tr. 370-71).

(g) At trial, appellant's president (Mr. Davidson) testified both that appellant's own subsequent "tests on the seam thickness . . . did not concur with the Navy's finding on the seam thickness" shortcoming and that "wrinkles were not supposed to be a show stopper" (tr. 727-28; *see*, R4, tab 204). Appellant has continued to maintain that it has the right to "present a portion of Lots 001 and 002 for shipment in the future" since, in appellant's view, "[t]he defect identified as the cause for rejection is minor and does not effect [sic] form, fit or function . . ." (R4, tab 207). The evidentiary record does not establish that appellant's own "tests on the seam thickness" were performed on the same twenty bags which were actually re-inspected by Mr. Jack (*id*.; tr. 727-30). Moreover, Mr. Davidson acknowledged that the bilaterally executed modification No. P00006 (the Reinspection Plan) to contract 7755 specifically stated that "wrinkles were a defect . . . that warranted the rejection of [production] lots 1 and 2" (*id*.).

(h) Appellant's Mr. Davidson also testified that the government's Mr. Ford told him on 12 August 1998 that it was a foregone conclusion that appellant would fail the upcoming reinspection of bag lots 1 and 2 (tr. 719-21). This statement, according to appellant, when coupled with Mr. Ford's announced desire to "terminate these contracts and get away from each other for a while," leads appellant to conclude that Mr. Jack's reinspection effort was tainted by bad faith (*id*.; tr. 624-25; R4, tabs 165, 167, 169, 174, 331). The government's Mr. Huber, the contracting officer who executed bilateral modification No. P00006, testified that both he and Mr. Ford were "convinced" that appellant would pass the reinspection and were "shocked" when the material failed the second inspection (tr. 598-99, 623). He further testified that he never believed that "Mr. Ford's desire and objective was to get these contracts terminated" by wrongfully influencing the reinspection of bag lots 1 and 2 under contract 7755 (tr. 623-25). We find Mr. Huber's testimony to be credible.

21. Appellant's president, Mr. Davidson, testified that his opinion of Mr. Jack's character (*e.g.*, honesty and conscientiousness) was: "I think he's tall enough . . . ," "honest, because I don't know him well enough to tell you no," "conscientious" and "a good Boy Scout" (tr. 730).

DELIVERY DATES, AS MODIFIED, FOR CONTRACTS 7755, 7767 AND 7767

22. (a) Contract 7755 originally required that FAT samples were to be submitted by 21 July 1996. FAT sample approval/disapproval was to occur by 4 September 1996. The initial ROTIs [Reports of Test Inspections]/Production Lot samples were to be submitted by 19 October 1996. The first batch (item 0001AA) of contamination bags was to be delivered by 18 November 1996. The second batch of contamination bags (item 0001AB) was to be delivered by 18 December 1996. The third (and last) batch of contamination bags (item 0001AC) was to be delivered by 17 January 1997. (R4, tab 10 at Std. Form 26, at 2-3 of 10; ex. G-2)

(b) Contract 7767 originally required that FAT samples were to be submitted by 18 November 1996. FAT sample approval/disapproval was to occur by 2 January 1997. The initial ROTIs/Production Lot samples were to be submitted by 3 March 1997. The first batch (item 0001AA) of contamination bags was to be delivered by 2 April 1997. The second batch of contamination bags (item 0001AB) was to be delivered by 2 May 1997. The third (and last) batch of contamination bags (item 0001AC) was to be delivered by 1 June 1997. (R4 (ASBCA No. 52994), tab 2; ex. G-2)

(c) Contract 7769 required that FAT samples were to be submitted by 18 November 1996. FAT sample approval/disapproval was to occur by 2 January 1997. The initial ROTIs/Production Lot samples were to be submitted either by 16 February 1997 or by 3 March 1997. The first batch (item 0001AA) of contamination bags was to be delivered either by 18 March 1997 or by 2 April 1997. The second batch of contamination bags (item 0001AB) was to be delivered either by 17 April 1997 or by 2 May 1997. The third (and last) batch of contamination bags (item 0001AC) was to be delivered either by 19 May 1997 or by 1 June 1997.[9] (R4 (ASBCA No. 53138), tab 2; ex. G-2)

23. (a) Bilateral modification No. P00002, dated 24 June 1996, contract 7755, "corrected" the original due dates by requiring that FAT samples were to be submitted by 23 August 1996. FAT sample approval/disapproval was to occur by 7 October 1996. ROTIs/Production Lot samples were to be submitted by 21 November 1996. The first batch (item 0001AA) of contamination bags was to be delivered by 21 December 1996. The second batch of contamination bags (item 0001AB) was to be delivered by 22 January 1997. The third (and last) batch of contamination bags (item 0001AC) was to be delivered by 19 February 1997. (R4, tab 10; ex. G-2)

(b) Bilateral modification No. P00001, dated 26 November 1996, contract 7767, "corrected" the original due dates by requiring that FAT samples were to be submitted by 25 January 1997. FAT sample approval/disapproval was to occur by 11 March 1997. ROTIs/Production Lot samples were to be submitted by 10 May 1997. The first batch (item 0001AA) of contamination bags was to be delivered by 9 June 1997. The second batch of contamination bags (item 0001AB) was to be delivered by 9 July

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[9] Alternative due dates are given hereinabove due to the apparent disparity between the dates set forth in the referenced contract and the dates set forth on ex. G-2, the government-prepared synopsis of pertinent contract deadlines associated with the contracts involved herein. We note that appellant was afforded the opportunity to "identify incorrect data on said Exhibit [G-]2" but did not subsequently identify any incorrect data on ex. G-2 (tr. 90; ex. G-2). This discrepancy is immaterial in view of bilateral modification No. P00001, *infra.*

1997. The third (and last) batch of contamination bags (item 0001AC) was to be delivered by 8 August 1997. (R4 (ASBCA No. 52994), tab 2; ex. G-2)

(c) Bilateral modification No. P00001, dated 26 November 1996, contract 7769, apparently[10] required that FAT samples were to be submitted by 25 January 1997. FAT sample approval/disapproval was to occur by 11 March 1997. ROTIs/Production Lot samples were to be submitted by 10 May 1997. The first batch (item 0001AA) of contamination bags was to be delivered by 9 June 1997. The second batch of contamination bags (item 0001AB) was to be delivered by 9 July 1997. The third (and last) batch of contamination bags (item 0001AC) was to be delivered by 8 August 1997. (R4 (ASBCA No. 53138), tab 2; ex. G-2)

24. Bilateral modification No. P00004, dated 2 January 1997, contract 7755, "extended" the delivery dates, as follows: (a) the first batch (item 0001AA) of contamination bags was to be delivered by 15 March 1997; (b) the second batch of contamination bags (item 0001AB) was to be delivered by 15 April 1997; and, (c) the third (and last) batch of contamination bags (item 0001AC) was to be delivered by 15 May 1997 (tr. 530-31; R4, tab 10; ex. G-2). As consideration for the government's agreement to an extension of said delivery dates, appellant's unit prices were reduced by $.10 per unit (*id*.; *see*, R4, tabs 26-28, 34).

25. (a) By letter dated 30 June 1997, appellant advised the government that "[p]roduction for [contract 7755, 7767 and 7769] will be completed 180 days after: Receipt, inspection and acceptance of PVC material [and f]ully trained re-staffing is completed. Resubmittal of FAT samples--[w]ithin one week of receipt, inspection and acceptance of PVC material. Consideration--D A. Services seeks consideration of $9.5 million, as of 6/20/97, due to government caused delay . . . [consisting of lost production, cost of research, retraining cost, lost opportunities, cost of money, damage to reputation, and late production lot results]." (R4, tab 77) The evidentiary record herein does not reflect that appellant thereafter asserted a claim for an equitable adjustment for the above-described costs caused by said alleged government caused delay.

(b) By letter dated 4 August 1997, the contracting officer responded to appellant's 30 June 1997 letter, stating *inter alia*: (1) appellant's request for additional consideration did not "contain sufficient detail" to permit "commencing a full and comprehensive analysis"; and, (2) appellant was obligated to "continue performing on all

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[10] The Board's R4 file does not contain a complete version of said contract modification No. P00001. However, ex. G-2 (the synopsis of contract due dates provided by the government at trial) does set forth the adjusted due dates with respect to said modification.

contracts through the claim process" pursuant to "FAR clause 33.213 'Obligation to Continue Performance'." The contracting officer also enclosed proposed contract modifications that contained, *inter alia*, new delivery schedules for each of contracts 7755, 7767 and 7769. Said modifications were to be signed and returned within ten days of receipt thereof or the government would "unilaterally" establish the delivery schedules (R4, tab 81 at 1-2). The proposed modifications provided for a slight reduction in the unit price(s) of the bags to cover the government's costs in issuing the modifications and, in the cases of contracts 7767 and 7769, an additional unit price deduction to cover the charges involved with "resubmittal of the First Article Units as authorized in FAR Clause 52.209.4(c)" (*id*. at 2). The evidentiary record does not reflect that appellant acted with respect to the proposed contract modifications within the requested 10-day reply period.

(c) Unilateral modification No. P00005, dated 12 September 1997, contract 7755, "extended" the delivery dates, as follows: (1) the first batch (item 0001AA) of contamination bags was to be delivered by 26 November 1997, 75 days after the date of modification No. P00005; (2) the second batch of contamination bags (item 0001AB) was to be delivered by 26 December 1997; and, (3) the third (and last) batch of contamination bags (item 0001AC) was to be delivered by 25 January 1998 (tr. 535-36; R4, tab 10; ex. G-2). The government did not unilaterally reduce the unit prices to cover its costs of issuing the modification.

(d) Unilateral modification No. P00002, dated 12 September 1997, contract 7767, "extended" the delivery dates, as follows: (1) FAT samples were to be submitted by 11 November 1997; (2) the first batch (item 0001AA) of contamination bags was to be delivered by 26 March 1998, 195 days after the date of modification No. P00002; (3) the second batch of contamination bags (item 0001AB) was to be delivered by 25 April 1998; and, (4) the third (and last) batch of contamination bags (item 0001AC) was to be delivered by 25 May 1998. (R4 (ASBCA No. 52994), tab 2; ex. G-2). The government did not unilaterally reduce the unit price to either cover its costs of issuing the modification or to cover the costs associated with resubmission of the First Article samples (*id*.).

(e) Unilateral modification No. P00002, dated 12 September 1997, contract 7769, "extended" the delivery dates, as follows: (1) FAT samples were to be submitted by 11 November 1997; (2) the first batch (item 0001AA) of contamination bags was to be delivered by 11 March 1998, 180 days after the date of modification No. P00002; (3) the second batch of contamination bags (item 0001AB) was to be delivered by 10 April 1998; and, (4) the third (and last) batch of contamination bags (item 0001AC) was to be delivered by 10 May 1998. (R4 (ASBCA No. 53138), tab 2; ex. G-2) The government did not unilaterally reduce the unit price to either cover its costs of issuing the modification or to cover the costs associated with resubmission of the First Article samples (*id*.).

26. (a) By letter dated 20 November 1998, the government, *inter alia*, provided appellant with proposed modifications to the delivery schedules for contracts 7755, 7767 and 7769. Each modification included "a four week period which will allow [appellant] to hire and retrain employees, purchase raw material and begin production. Each revised delivery schedule reflects the originally contracted delivery schedule" (R4, tabs 189, 203; tr. 540-45). Each proposed modification reflects a "minimal offer of consideration" in the form of a slight decrease in the unit price (*id*.). The contracts were run "sequentially instead of at the same time" (*id*.). Appellant's Mr. Davidson testified that the government's delivery dates appeared to be "reasonable" if he could have obtained the PVC material (tr. 725-7).

(b) During the period from 20 November 1998-13 May 1999, the parties communicated in writing and at several meetings with respect, *inter alia*, to the reinspection of production lots 1 and 2 under contract 7755 and possible resolution(s) of the so-called "black speck" issue (R4, tabs 190, 192-94, 196-97, 199; tr. 497-99, 513-14, 517-21, 717-18, 725).

(c) By letter dated 13 May 1999, the government proposed, *inter alia*, to "reestablish the . . . delivery schedules as listed in our November 20, 1998 letter to you . . ." (R4, tab 202). These revised delivery schedules did not include Lots 001 and 002 under contract 7755 "because they failed production lot testing in both March 1997 and October 1998" (*id*.). By letter dated 21 May 1999, appellant responded to the government's 13 May 1999 proposal by stating, *inter alia*, that while it "remains ready, willing and able to move forward with new bag production," the government's alleged refusal "for over two years to resolve the 'black speck' issue . . . has made and continues to make it impossible for [appellant] to obtain, from any material supplier, the necessary PVC film to resume production" (R4, tab 204).

(d) By letter dated 24 June 1999, the government forwarded proposed modifications to contracts 7755, 7767 and 7769 that contained revised delivery schedules (R4, tab 206). The government noted that the proposed delivery schedules, as revised included a four-week period for appellant to "hire and retrain employees, purchase raw material and begin production" and offered appellant "the opportunity to complete production on one contract prior to beginning production on the next contract" (*id*.). The government also stated, *inter alia*, "sufficient clarification has been provided on the 'black speck' issue" and that "PVC material compliant with SS 481 Rev 2 [sic] was currently available" (*id*.). These proposed modifications do not reflect any consideration in the form of reductions in the unit price(s) (*id*.). By letter dated 1 July 1999, appellant took umbrage with the government's statement's regarding "clarification" and availability of "compliant" PVC material. Appellant did not execute the government-proffered delivery schedule modifications (R4, tab 207).

(e) Unilateral modification No. P00007, dated 14 July 1999, contract 7755, established new delivery dates, as follows: (1) the first batch (item 0001AA) of contamination bags was to be delivered by 27 October 1999, 105 days after the date of modification No. P00007; (2) the second batch of contamination bags (item 0001AB) was to be delivered by 26 November 1999; and, (3) the third (and last) batch of contamination bags (item 0001AC) was to be delivered by 26 December 1999 (tr. 542; R4, tabs 10, 206, 210; ex. G-2). The government did not unilaterally reduce the unit price(s) as consideration for establishing the new delivery dates (*id*.).

(f) Unilateral modification No. P00003, dated 14 July 1999, contract 7767, established new delivery dates, as follows: (1) the first batch (item 0001AA) of contamination bags was to be delivered by 24 February 2000, 225 days after the date of modification No. P00003; (3) the second batch of contamination bags (item 0001AB) was to be delivered by 24 April 2000 and, (4) the third (and last) batch of contamination bags (item 0001AC) was to be delivered by 3 June 2000 (tr. 542-43; R4 (ASBCA No. 52994), tab 2; R4, tab 206; ex. G-2). The government did not unilaterally reduce the unit price(s) as consideration for establishing the new delivery dates (*id*.).

(g) Unilateral modification No. P00003, dated 14 July 1999, contract 7769, established new delivery dates, as follows: (1) the first article test report was due by 2 August 2000, 385 days after the date of modification No. P00003; (2) the first batch (item 0001AA) of contamination bags was to be delivered by 30 November 2000, 505 days after the date of modification No. P00003; (3) the second batch of contamination bags (item 0001AB) was to be delivered by 30 December 2000; and, (4) the third (and last) batch of contamination bags (item 0001AC) was to be delivered by 29 January 2001 (tr. 543-45; R4 (ASBCA No. 53138), tab 2; R4, tabs 203, 206; ex. G-2). The government did not unilaterally reduce the unit price(s) as consideration for the new delivery dates (*id*.).

(h) By letter to the government dated 23 July 1999, appellant accused the government of acting in "bad faith" when it unilaterally established revised delivery schedules for contracts 7755, 7767 and 7769 (R4, tab 213, *see*, finding 57). Appellant stated it was "ready, willing and able to continue in good faith to help the Navy work through its technical challenges" (*id*.). The government's issuance of the unilateral, revised delivery schedules for contracts 7755, 7767 and 7769 occurred only after appellant's "failure to respond or to provide an alternative" to the delivery schedules provided to appellant by the government on or about 24 June 1999 (R4, tab 217; finding 26(d)).

THE BLACK SPECK PROBLEM

27. During 9-10 April 1997, the parties met at appellant's production facility to discuss the failures, *supra*, of appellant's First Article Test (FAT) samples and

Production Lot Test submittals under the contracts involved herein (tr. 108-12, 224-25, 581, 600; 744, 754-6; R4, tabs 38, 40-44). Despite a hostile and unprofessional confrontation between appellant's Mr. Walleck and the government's Mr. McFarland on 9 April 1997, the parties contemporaneously felt that the meeting satisfactorily began the process of effectively addressing both the existing manufacturing problems and the black speck situation (tr. 109-12, 190-2, 222-25, 446-7, 482, 582, 664-65, 734-35, 752-55; R4, tabs 40-44). During this meeting, appellant stated, *inter alia*, that the black "spots" or black "specks" embedded in the PVC bags that failed the FAT under contract 7769 (finding 11(c), *supra*) were either "overheated vinyl" or "overcured vinyl"—*i.e.*, "discolored particulate produced at the heating element" which was "indigenous to the [PVC production] process" on an industry-wide basis (tr. 110-11, 208, 225-26, 460-61, 750-55; R4, tabs 40-41, 73). The parties inspected other samples of yellow PVC provided by appellant and detected the presence of more black specks (tr. 111, 662-63, 754-55; R4, tabs 43, 73, 87). The government asked appellant to provide a PVC manufacturing industry-sponsored document that stated that the black specks involved herein were "harmless, basically" and "inherent to the industry" (tr. 112, 222, 734-35; R4, tab 40). The government representatives opined that the black speck problem was "only a DAS problem; possibly because of DAS buying defective new material" (tr. 111; R4, tab 40).

28. During an intra-government conference held during the 14-18 April 1997 period, the government (*i.e.*, IMANPY) incorrectly stated that the only "vendor" experiencing the black speck problem was appellant, as far as the government was then aware (tr. 206-12, 264, 267, 422, 461-62; R4, tabs 87, 261, 263, 305, 363). The evidentiary record does not reflect that faulty communication affected appellant in any meaningful way (*id*).

29. By letter dated 17 April 1997, appellant provided the government with the results of its investigation of the black speck problem (tr. 228; R4, tab 44). Appellant stated that it inspected, "with a white background," two shipments of PVC material from its PVC material vendor and found "very small particles" in each of said shipments (*id*.). Appellant also stated that it inspected PVC material (*i.e.*, double polished clear, translucent and opaque) of various thicknesses (*i.e.*, .008, .010, .012 and .020 inches) and colors (*i.e.*, uncolored, yellow, green and white) from seven PVC material producers (*i.e.*, O'Sullivan Corp., Plascal, Robeco, Ross and Roberts, Inc., Vernon Plastics, Vycal and Wiman Plastics). All variations of said PVC materials contained "specs [sic]," according to appellant (*id*.). One of appellant's vendors, Ross and Roberts, Inc., tested the translucent yellow, 0.008 gauge PVC that it had produced for appellant and determined in an unsigned draft document:

> The over cured vinyl particles are created by sheer under heat in the Banbury process as well as the strainer process. A major portion of these particles are screened out . . . however,

> some squeeze through and are processed into the film. A typical count of over cured vinyl particles in [a] 6 yard sampling taken on the most recent production ranged from 3 to 39 averaging approximately 19 in 6 yards.

(*Id*. at 4). Another of appellant's vendors, O'Sullivan Corporation, analyzed "the dark specks in the clear material we submitted to you [*sic*] for evaluation. As expected, the analysis suggests a carbonized particle of PVC compound. The FT-IR spectrum . . . is indicative of a plasticized compound" (*id*.; *see*, tr. 685-96). O'Sullivan Corp.'s Mr. Urena opined that ". . . producing a 100% particle-free material is not practically feasible" (tr. 697; R4, tab 44). With respect to the "plasticized compound," O'Sullivan Corp.'s analysis stated "[t]he black specks appear to contain plasticizer. Please check tanks for plasticizer burning/contamination" (R4, tab 44). Mr. Urena testified that he did not believe that it was possible "to make PVC film with not more than four particles per linear foot, none of them to be larger than 64th of an inch" (tr. 698-99). According to Mr. Urena, the distribution of over cured vinyl is random throughout the PVC product—*i.e.*, "a glut where you have a little smattering altogether and then have yards and yards of clear, or it could be . . . anywhere through the roll" (tr. 711). On cross-examination, Mr. Urena stated that O'Sullivan Corp. did not supply any of the PVC film used by appellant in connection with the three contracts involved herein (tr. 701-02). The evidentiary record does not establish that any of the various PVC materials described hereinabove were inspected in accordance with the visual inspection guidelines set forth in L-P-375/SS-481 *vice* a more stringent standard (*passim*).

30. On or about 25 April 1997, IMANPY's Mr. Jack re-inspected[11] "some" 24" x 40" PVC bags that had been submitted by Humphrys Textile Products and a "sample of a 50 foot lay-flat tubing, 36 inch lay-flat, which meant that it was six feet of material rolled over and seamed to itself to make a tube that when flattened out would have been 36 inches wide by 50 feet long" (tr. 390-91, 398, 463: R4, tabs 263, 271). Mr. Jack did not find any black specks on the 24" x 40" PVC bags during his re-inspection thereof (tr. 390-91). He did, however, locate 10 specks that were smaller than 1/64 inch[12] on the lay-flat tubing during his reinspection (tr. 391-99; R4, tabs 263, 271). Two of the ten specks were located with the aid of a microscope (*id*.). Mr. Jack's re-examination of the tubing was conducted with "much more scrutiny than [he employed during his earlier

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[11] Mr. Jack had previously inspected, in accordance with the visual inspection procedures set forth in SS-481, the bags and lay-flat tubing produced by Humphrys under a separate contract without detecting the presence of any black specks (tr. 399, 463).

[12] One 64th of an inch equates to "just a little less than 16/1000ths of an inch" (tr. 399).

visual examination that had been conducted in accordance with SS-481]"—*i.e.*, "extremely close, taking a lot of time . . . to look for very small spots" *vice* "just looking over the material more like you would read a book" or "just passing your eyes over the entire product" (tr. 398-400; 419-20). Mr. Jack's re-examination of the lay-flat tubing was performed by laying "some white plastic material . . . down on [the black-top] table" as a background *vice* laying out the lay-flat material directly on the black-top table as he had during his initial inspection of said material (tr. 401). Mr. Jack testified that none of these ten specks "would count as defects that would fail that first article [inspection]" because "they were very difficult to locate" (tr. 400). Moreover, one of the specks fell off during reexamination; two were embedded in the material; and, the remaining seven specks were embedded in the seam (tr. 394-97). As to these latter seven specks found in the seam area, an area 3/8 inches wide by 50 feet long, Mr. Jack testified that he "didn't know whether [the specks were] trapped between the two layers when the seam was made or if [they] were in the film originally" (tr. 395). Mr. Jack contemporaneously showed or told his superior, Mr. McFarland, about the ten specks he had discovered during his re-examination (tr. 189-90, 214-15, 324-5, 467-68). He may have also contemporaneously told the government's Messrs. Smith and Hunter of his discovery (*id*.; *but see*, R4, tab 352). He did not report his findings regarding the ten specks to anyone else (tr. 469, 477-79, 517).

31. During a 12 May 1997 conference call between the parties, the government participants stated that the black spots were forbidden by L-P-375 and SS-481 regardless of whether they constituted foreign material (tr. 118-21, 159, 235, 244-48, 404-05, 669, 757-59; R4, tabs 264 at 1-2, 267). Several representatives (Messrs. Vujs, Picard and Wilson) of DCMC, Hartford, were present at the offices of DAS during this conference call and were examining a sheet of translucent yellow 0.008 inch PVC film that had been manufactured by Vernon Plastics (tr. 760-74; ex. A-4). That sample contained numerous (approximately 11) black specks of sizes smaller than (9) and larger than (2) $1/64^{th}$ of an inch (*id*.). The government suggested modifying the inspection procedure by measuring every speck discovered during the visual inspection under L-P-375 and SS-481. If the speck was smaller than 1/64 inch, it would be disregarded and not considered to be a defect (tr. 121, 405-06, 669-70, 760; R4, tabs 264, 267). The government's rationale for picking 1/64 inch as the benchmark for establishing that a speck constituted a defect was that, under the visual inspection standard in L-P-375 and SS-481, specks smaller than 1/64 inch are very difficult to detect, would be less likely to develop into pinholes and, due to the very small size thereof (less than 16 thousandths of an inch) would be less likely to alarm the end-users of the bags (tr. 124-28).

32. By letter dated 19 May 1997, the government responded to appellant's 17 April 1997 submission, *supra*, stating, *inter alia*:

> [t]he specification does not allow dark spots/specs [sic]; therefore, your problem is not what the foreign material is,

> but that it exists at all . . . . Dark spots in the film are defects if they are the result of 'any dirt, oil, spot, stain, discoloration and foreign matter affecting appearance' or 'any . . . undispersed resin' affecting the serviceability of the film per L-P-375 . . . .

(R4, tab 49; tr. 159, 235, 244-48). The government, *inter alia*, questioned the practical value of an unsigned, draft document (the Ross & Roberts, Inc. determination, *supra*), the failure to correlate the data presented to the requirements of L-P-375 and SS-481 and the failure to provide a proposal with respect to the specification requirements (*id*.; see, tr. 640-41).

33. Shortly following the May 1997 conference call, appellant asked three PVC manufacturers (Vernon Plastics, O'Sullivan and Plascal Corporation) if they could satisfy the proposed 1/64" threshold. By letter dated May 28, 1997, a copy of which was forwarded to the government, Vernon Plastics stated:

1. a percentage of all translucent films will contain particulate matter.
2. Particle size seems to vary; however, 1/40" or .024" seem to be the maximum.

(R4, tabs 218, 273; tr. 774-79). Appellant received and forwarded to the government a letter from O'Sullivan dated 15 May 1997, responding to appellant's inquiry concerning the 1/64" threshold:

> The statement "free from foreign material or specks in the film greater than 1/64" diameter" is too general and exclusive, based on the sampling specified in SS-481, Rev. 2. Though foreign matter is typically controlled to acceptable levels, the calendering [sic] process of a translucent material may produce occasional darkened particles that may be deemed "specks." The constraint of 1 particle greater than 1/64" in twenty, 8 linear yard samples would seem to be unattainable for any semi-transparent material that was closely inspected.

(*Id*.). Plascal Corporation's response dated May 14, 1997 to appellant's inquiry concerning the viability of the 1/64" threshold, a copy of which was forwarded to the government, stated:

> Plascal Corporation uses the highest quality raw materials, and has a quality inspection program in place. We can manufacture P.V.C. film meeting your specifications, with the

> exception of not being able to guarantee "no contaminents"[sic] greater than 1/64" of an inch.

(*Id*.).

34. By letter dated 28 May 1997, appellant responded to the government's 19 May 1997 letter (R4, tab 56). Appellant stated that although it had "no contractual requirement to pursue the speck problem," it had researched the issue before and after receipt of the government's 19 May 1997 letter and concluded that "the problem is not just ours and not just a current phenomenon, but is universal and has been accepted by the Navy for a long period of time" (*id*.). Appellant further stated:

> The resolution of the speck problem must precede the submittal of a schedule. We have sent an RFQ for material for these contracts to four material vendors. No vendors were able to quote on the proposal from Wally Jack that the specks be limited to 1/64". At our own expense, we have visited several PVC mills, and had discussions with technical people at PVC manufacturers. The result is that we have no mill that will supply PVC.

(*Id*.).

35. By letter dated 5 June 1997, U.S. Representative Kennelly asked the Secretary of the Navy for assistance in resolving appellant's "three outstanding issues involved with the fulfillment" of the three contracts involved herein: (1) failure of the government to provide "instructions on how the product [$500,000 of product in the warehouse] should be and to where the product should be delivered"; (2) inconsistency in interpretation of contract requirement by IMANPY; and, (3) IMANPY's rejection, "based on the paperwork, not the data," of appellant's time consuming and costly research into locating "foreign free material" (R4, tab 63).

36. By letter dated 17 June 1997 to U.S. Representative Kennelly, appellant proffered solutions to the self-styled problems described as "properties inherent in the material [the government] selected for the product" and "the contrast between working with the NAVICP/IMANPY staff and those at DCMC Hartford" (R4, tab 66; *see*, tr. 627). The solution to the "material" problem was replace the PVC film with Poly Urethane (PU) film because PU film was "stronger," may not have an inherent problem with black specks and would save the government money (*id*.; *see*, tr. 804-05, R4, tab 174). Appellant's solution to the "organizational" problem was to modify the contracts to have DCMC perform the NAVICP/IMANPY functions (*id*.).

37. By letter dated 19 June 1997, the government responded to appellant's 28 May 1997 letter stating, in part:

> The main issue is not that specks exist, but if they can be produced within the allowances of SS-481/L-P-375. . . Our experience is that they can be produced within these allowances [citing the speck-free FAT and production lot samples submitted by appellant under the three contracts involved herein as well as] the samples submitted for contract N00104-93-C-7047, item 0002, for 12x24 PVC bags. . . .

(R4, tab 69 at 1). The government stated further that if appellant desired "to pursue a waiver to the [SS-481 and L-P-375] specification, the burden of proof lies with [appellant]." (*Id*.)

38. During the summer of 1997, IMANPY's Mr. Jack performed an analysis of black specks that were present on a piece of PVC film which appellant had given the Navy at the April 1997 vendor assist meeting (tr. 409). Mr. Jack dissected three separate black specks to analyze their composition and concluded that black specks may fall into two categories: ones which are crystalline in nature and not made of material like the surrounding film and ones which are merely a discoloration of the plastic film (tr. 410-11). Mr. Jack further concluded that the crystalline black specks also exhibited a different physical size and were slightly bigger than the surrounding film, leading to a bulge (tr. 410-13).

39. Mr. Jack briefed one of his superiors at IMANPY, Mr. Doug Smith, regarding his analysis, and Mr. Smith took pictures of the dissected specks to a meeting with appellant on 9 October 1997 (tr. 137, 412-13, 780-81; R4, tab 105). At that meeting Mr. Smith displayed the pictures and explained that the crystalline black specks posed a greater risk to the integrity of the bags, as these specks were more likely to form pinholes (tr. 154; R4, tab 105). Mr. Smith proposed that the parties utilize what became known as the touch test to distinguish potentially harmful crystalline specks, which could be felt, from harmless discoloration of the film (tr. 413, 671; R4, tab 105). Appellant's Mr. Davidson felt that that the touch test was too subjective in the sense that "your finger may not be a highly educated finger" (tr. 672).

40. During the 9 October 1997 meeting, the government had agreed to investigate the possibility of Government Source Inspection (GSI) on the PVC raw material prior to appellant's acceptance thereof from its supplier (tr. 282, 548-49, 562-63, 586, 588, 782-84; R4, tabs 95, 100, 105, 111, 130). The parties disagree as to whether the GSI proposal advanced by appellant's Mr. Walleck was either for the government to perform a binding inspection and acceptance of the raw PVC material prior to appellant's converting of said PVC material into contamination bags or for the government to perform said inspection on an advisory basis only without relieving appellant of the ultimate responsibility of providing contamination bags made of conforming materials

(tr. 282, 285, 518, 548-50, 562-63, 585-88, 619-20, 622, 648-49, 782-84; R4, tabs 83, 97, 111, 130). The contracts involved herein, however, did not require that the government perform GSI with respect to the raw PVC material as either an advisory procedure or a binding determination of acceptability (*id.*; R4, tab 10; R4 (ASBCA No. 52994), tab 2; R4 (ASBCA No. 53138), tab 2). Instead, ¶¶ 4.1-4.1.3, 4.2, 4.3.1, 4.3.5, 4.4.1-4.4.1.2 and 4.4.3-4.4.3.2 of SS-481, ¶¶ 4-4.2, 4.3-4.3.1 and 4.3.1.7 of L-P-375 and ¶¶ 3.1, 3.10-3.11, 4.4-4.4.3 of MIL-STD-105 place primary responsibility upon appellant to insure that the contamination bags conformed to the applicable requirements of said standards (findings 1-9, *supra*). By letter dated 2 December 1997, the government rejected the utilization of GSI under contracts 7755, 7767 and 7769 stating, *inter alia*, that "GSI was not in the best interest of the government" (tr. 588-89; R4, tab 111; ex. A-1; *see*, tr. 284, 646-47, 782-83).

41. At the October 1997 meeting, Mr. Jack displayed photomicrography of black specks found in appellant's material and in another vendor's material (tr. 183). Photomicrography, or the use of a microscope, is neither required nor utilized in carrying out the visual inspection contemplated by SS-481 (tr. 183-84; *see*, findings 6-7).

42. As we found above (finding 39), at the October 1997 meeting, IMANPY's Mr. Smith described a so-called "touch test" as a possible solution to the black speck problem. The touch test consisted of the inspector rubbing specks initially detected by visual inspection in order to differentiate between specks that had texture and specks that did not have texture (tr. 546, 671-72). Mr. Smith's presentation at the October 1997 meeting was the first time that a touch test approach for dealing with the problem posed by the presence of black specks in flexible PVC film was broached by either side (tr. 138-39). Mr. Smith did not forewarn NAVICP's Mr. Hunter, who was in attendance at the October 1997 meeting (R4, tab 94), that he intended to propose the touch test (tr. 192). Appellant did not have advance notice of the touch test proposal (tr. 672-73). Appellant's personnel thought that the test proposed was overly subjective (tr. 672). Appellant felt that Mr. Smith did not describe his touch test proposal well enough to enable the contractor to perform such a test at its facility (tr. 784).

43. Immediately following the October 1997 meeting, a number of government attendees, including Messrs. Hunter, Smith, Wenger, Springborn, Lowrey and Huber, visited appellant's facility in nearby Windsor, Connecticut (tr. 278-79). Messrs. Davidson and Walleck were present at appellant's facility as well (tr. 279). While at appellant's facility, the government representatives were given a tour (tr. 785). During the tour of the facility, appellant showed them a number of rolls of PVC stored in its warehouse (tr. 280). This PVC material, supplied by Ross & Roberts and previously examined during a March 1997 meeting among appellant, Mr. Picard of DCMC, Hartford and a Ross & Roberts' representative, had been rejected by appellant (tr. 785). Mr. Wenger of NAVICP expressed interest in the raw material that DAS had on hand and inquired whether 8" x 10" bags, apparently the item for which the Navy had the most

immediate need, could be made from it (tr. 785-86). Appellant's response was "yes, if we could get through this black speck issue, yes, we could." (tr. 786).

44. During the Navy personnel's visit of DAS's facility, eight yards of the Ross & Roberts material were taken out and examined, and black specks were found (tr. 785). Appellant requested Mr. Smith to perform an impromptu trial of the touch test, the same test that he had demonstrated earlier that day (tr. 785). After rubbing the speck, Mr. Smith was asked by appellant whether the material was acceptable or not (*id.*). His answer was, "I don't know, I would need more data." (Tr. 785)

45. The contracting officer, Ms. Springborn, and the vendor quality supervisor, Mr. Hunter, both testified that black specks consisting of over-cured vinyl and other varieties of specks or particulate matter cannot be reliably differentiated solely by rubbing them (tr. 49-50, 366-67, 546).

46. The government's Mr. Huber (a contracting officer for contracts 7755, 7767 and 7769), acknowledged that, if the touch test became part of the contracts, two potential problems could arise: (1) a quality issue (*i.e.*, that a subjective test would be used to determine the acceptability of products intended for the containment of radioactive waste); and, (2) a contract administration issue, posing a risk of disputes with other PVC-bag contractors (tr. 579-81, 638-39).

47. As of 24 February 1998 the government had no proposal "on the table" to differentiate among specks based on size, texture, or other characteristics – "over-cured PVC," in the Navy's view, was "foreign material." Nor, as of 24 February 1998, does there appear in the pre-meeting materials for a meeting on 26 February 1998 (finding 48), any evidence of its intent to revive the touch test concept presented orally by Mr. Smith at the October 1997 meeting. Thus a draft "STATUS OF D. A. SERVICES' CONTRACTS FOR RADIOACTIVE CONTAINMENT BAGS" states:

> Foreign material is defined in the specification as follows: Dark spots in the film are defects if they are the result of "any dirt, oil, spot, stain, discoloration and foreign matter affecting appearance" or "any. . .undispersed resin" affecting the serviceability of the film per L-P-375. In addition, the dark spots in the film are defects if they are the result of gels, blisters, fish eyes, particles of foreign matter, or unmelted material detectable by visual examination. Over-cured PVC is foreign material.

(R4, tab 127 at 7)

48. On 26 February 1998, there was a meeting and conference call among representatives from appellant, several government activities, and the office of Sen. Joseph Lieberman (tr. 145-46). Participants included RADM Ginman and Mr. Ford (both from the Office of the Assistant Secretary of the Navy, Research Development & Acquisition ("ASN/RD&A"), Mr. Glas, an engineer from NAVSEA 08H, Ms. Fraser, from the Navy's Office of Legislative Affairs, Mr. Hunter, and LCDR Matt Dolan, a Legislative Fellow to Sen. Lieberman. Also participating were appellant's Messrs. Davidson and Walleck and Mr. Dagliere from Senator Lieberman's staff (*id*.; ex. G-3). During this conference call, the government, in the person of RADM Ginman, advised appellant that over-cured vinyl was not foreign material and agreed to provide appellant with amplifying language to use in purchasing PVC film (ex. G –3; tr. 146-47, 788; R4, tab 130). That language would seek to implement the touch test Mr. Smith had earlier proposed in October 1997 differentiating between those black specks with texture and which might therefore present a risk of developing into a pinhole and other benign black specks which posed no risk of producing pinholes (tr. 147-49).

49. By letter dated 22 March 1998, appellant expressed severe reservations with the Navy's proposed touch test (R4, tab 141). Appellant was concerned, *inter alia*, that "texture is not an indicator limited to foreign matter, therefore it is not a reliable inspection method for determining whether a particle is an OCV [over cured vinyl] or foreign matter" (*id*.). Appellant followed up with a 3 April 1998 letter again expressing its dissatisfaction with the touch test proposal, advising that it was too subjective and that film suppliers were not "confident" that they would be able to produce material that would consistently satisfy the touch test criteria (R4, tab 144).

50. By letter dated 11 May 1998, the government proposed a revised version of the touch test, which it forwarded for appellant's "information/clarification." The revised provision provided, in pertinent part:

> During the Government's inspection process for completed bags, foreign material is allowed to be visible on the bags as long as it is within the acceptable quality level (AQL) specified in contract specification SS-481, Revision 2. The AQL allows the bags to contain foreign material of a size which is visible by an inspector with 20/20 vision and a light level of 100 foot candles so long as the number of foreign material defects do not exceed 2.5 defects per one hundred bags.
>
> The workmanship paragraph of the material specification states that the material shall be uniform in color, texture, finish and other physical properties, and be free from gels, streaks, tears, holes, blisters, fish eyes, scratches, mottling,

> wrinkling, folds, powders, coatings, unmelted material, and particles of foreign matter including color which rubs off. Foreign matter is defined as any material not formulated from chlorine-based vinyl resin, plasticizers of phosphate or phthalate, and additives used for pigmentation of film. Material which is potentially identified as containing a physical defect (e.g. foreign matter), via the visual inspection, is confirmed to be a physical defect by lightly rubbing the potential defect by touch. If the potential defect has any texture different from that of plastic in surrounding areas, (that is, potential defect caused by a solid particle of foreign matter embedded in the material), it is considered a physical defect. This method of inspection discerns the difference between physical defects in the plastic (e.g. foreign material) and discoloration of the material caused by over-cured vinyl in the plastic. Indications of over-cured vinyl in the plastic are not considered defects unless the indication has texture. Over-cured vinyl indications that have texture do not meet the uniform texture requirement and are therefore considered defects.

(R4, tab 147; tr. 157-8, 590-92). The government termed the proposed language a clarification rather than a contract change because although it regarded the proposal as a permissible "relaxation" of the SS-481 inspection requirement that did not necessitate payment of consideration, it did not wish to "get too far out on that limb contractually, or we're just going to create other issues with other contractors" (*id.*; tr. 153-54, 590-92, 626-30). The touch test allowed the presence of black specks, regardless of size and frequency, so long as they could not be felt (R4, tab 147). Neither the 1/64th inch size test nor the touch test were ever either bilaterally agreed upon by the parties or unilaterally imposed by the government (tr. 617, 673; *passim*).

51. According to Mr. Hunter of NAVICP, the government's contemporaneous procurement records show that the government had procured PVC "bags, tubing, sheet and containment" under SS-481, without noting the presence of black specks in the form of over-cured vinyl, on thirty-five occasions through mid-1998 from various entities, including appellant (tr. 169-74; R4, tab 317). Mr. Hunter testified that he reviewed roughly twenty samples of PVC bags produced by appellant under a 1993 contract without seeing any black specks in the form of over-cured vinyl (tr. 174, 209). Mr. Jack re-evaluated at least 10 to 20 of the 8" x 10" bags which appellant had delivered under one of its 1993 contracts without finding any black specks in the form of over-cured vinyl (tr. 423-24). None of the bags described hereinabove by Messrs. Hunter and Jack were produced by the government at the hearing (*passim*). By letter to the government dated 11 August 1998, Vernon Plastics described its experience with respect to producing PVC

film that complied with the requirements of SS-481 stating that it "has manufactured flexible PVC to meet specification L-P-375 for twenty years and to meet SS-481 since 1993 . . . . Vernon has produced close to a million full width yards of SS-481 8 mil Trans. Yellow vinyl film . . . . This is a complicated issue however, years of producing a quality sheet that in turn produces a quality bag, have proven that it is possible to manufacture this product." Vernon Plastics noted that all PVC resin contains some "gels or fisheyes that may be noticeable . . . under close examination" and recommended that "PVC gels and fisheyes should be eliminated from the spec unless a viewing distance is specified along with a size and frequency specification" since such gels or fisheyes "when not excessive in number, do not interfere with the dielectric seal and the functionality of the bag" (R4, tab 171; *see*, tr. 714-16).

52. During the pendency of the black speck problem between the appellant and the government, the Navy was involved in performing ongoing inspections of SS-481 material being delivered for testing under other contracts. On bags manufactured by Humphrys, Mr. Jack conducted at least 10 production lot inspections of 10 bags each and perhaps some first article inspections as well and did not find any black specks (tr. 419-20). He also inspected at least 10 glove bags made by Lancs without finding any black specks nor did he see any black specks on SS-481 material he looked at on a visit to the Lancs plant outside Seattle (tr. 421-22). Mr. Jack testified that a co-worker of his had inspected bags manufactured by Rich Industries and had not reported finding any black specks (tr. 422-23). In fact, Mr. Jack was only one of several workers in his branch who were conducting inspections under SS-481, and none ever reported finding black specks (tr. 424-25).

CONTRACT NON-PERFORMANCE

53. By letter dated 5 November 1998, appellant expressed its willingness and ability to move forward with production on Contract 7755 but declined to do so until the government resolved the black speck issue (R4, tab 187).

54. By letter dated 13 May 1999, the government advised the appellant that it was in the best interest of both parties "to move forward with restarting new bag production under these three contracts," and proposed to use the delivery schedules which had been included in the government's 20 November 1998 letter (R4, tab 202; finding 26(a)). By letter dated 21 May 1999, appellant refused the government's request, advising in part that it was "ready, willing and able to move forward" but that the failure to have resolved the black speck issue made it "impossible . . . to obtain . . . the necessary PVC film to resume production" (R4, tab 204; tr. 724-26; finding 26(c)). At trial, appellant's president testified that "[t]here was only one consideration and that is: We had equipment; we had the facility . . . . The main consideration was availability of material" (tr. 720-21; *see*, tr. 786-87). He further testified that the need to "rehire some people"

was "not a major impediment" and that the proposed schedules were otherwise "reasonable" (*id*.; tr. 725-26).

55. By letter dated 24 June 1999, the government sent appellant proposed bilateral modifications incorporating revised delivery schedules to the three contracts. The government opined that it had provided "sufficient clarification" on the black speck issue, stated that at least two vendors were currently providing "PVC material compliant with SS 481, Rev. 2" and "reminded [appellant] that Lots 001 and 002" constituted rejected lots under contract 7755 "and are not suitable for their critical intended purpose." The letter requested appellant's signature on the proposed contract modifications, but advised that appellant's failure to sign would result in the Contracting Officer's establishing new schedules unilaterally (R4, tab 206). No monetary consideration was requested by the government in connection with these proposed modifications (*id*.; *see*, R4, tab 202). Ms. Springborn had developed these revised schedules through an analysis of the original contract deadlines, appellant's past requirements and appellant's current production status. The revised schedules used the original contract schedules but incorporated an additional four-week/30-day timeframe for the hiring and training of new personnel as had been done in the delivery schedules the government had proposed on 20 November 1998. In addition, the delivery dates for the three contracts were calculated to be consecutive, and not concurrent, to ensure that appellant would not be overwhelmed by the delivery date requirements (R4, tab 203; tr. 540-45). Thus, the first delivery under these revised schedules was in 105 days under Contract 7755; the final scheduled delivery was in 565 days under Contract 7769 (R4, tab 206).

56. By letter dated 1 July 1999, appellant refused to accept the proposed delivery dates again insisting that the government's "clarification" on the black speck problem was "inadequate, impractical and non-objective" (R4, tab 207). With respect to one of the government's vendors (*i.e.*, Vernon Plastics), appellant stated that samples provided to the government by appellant taken from "a Vernon Plastics lot that is traceable to a NAVICP contract . . . contained black specks far in excess of the requirements [of SS-481, Rev. 2]" and, further, that "no PVC mill has agreed to work within your clarification" (*id*.). With respect to production lots 1 and 2 under contract 7755, appellant reiterated its position that the Government's rejection thereof was improper since "the defect identified as the cause of the rejection [was] minor and does not affect form, fit or function" (*id*.). Using the same schedules it had proposed on 24 June, the government then unilaterally established delivery dates for the three contracts on 14 July 1999 (R4, tabs 10 at P00007, 210; R4 (ASBCA No. 52994), tab 2 at P00003; R4 (ASBCA No. 53138), tab 2 at P00003; findings 26(e-g)).

57. On 23 July 1999, appellant responded to the government's unilateral imposition of new delivery dates by declaring that the government was acting in "bad faith" and that it "cannot agree to or accept your unilateral decision to establish new delivery dates" (R4, tab 213). The "bad faith" exhibited by the government was

comprised of (1) the government's alleged breach of its written agreement "to negotiate a new production agreement only after completion of our research with the PVC manufacturers . . . [to determine] their ability to comply with [the government's] latest specifications and the availability of material"; (2) allegedly unreasonable and inaccurate revised delivery dates that "fail[ed] to allow adequate time to receive raw material, re-staff and re-train"; (3) violation of the government's alleged agreement "that the technical corrections would be made part of the specifications for all vendors"; (4) the government's failure to include appellant's alleged 9 April 1997 agreement to "restart production" of the 8" x 10" bags; and, (5) the government's failure to "renegotiate the unit prices reflecting changes caused by the Navy's two year delay" in violation of its agreement with appellant (*id.*). By letter dated 11 August 1999, the contracting officer sent a ten-day cure notice covering all three contracts which required appellant to provide adequate assurances that appellant was taking steps to comply with the new contract delivery schedules (R4, tab 217; tr. 602). The contracting officer cited the Disputes clause requirement that appellant "shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer" (*id.*). The contracting officer defined "adequate assurances" as identifying what steps appellant was taking to comply with the current delivery schedules, including, at a minimum: to submit a separate critical path analysis (milestone chart) for each contract; to provide copies of all subcontracts or purchase orders placed with suppliers; and, to identify all hiring actions for production staff (*id.*).

58. By letter dated 20 August 1999, appellant responded to the cure notice stating that it had been and was taking all possible steps to comply with the delivery schedules but that the delivery schedules were unreasonable, not contractually binding and that the Navy's actions had made it impossible to perform the contract (R4, tab 218; tr. 603). Appellant proposed new delivery schedules for the three contracts involved herein with delivery dates ranging between180 days and 565 days (R4, tab 218 at 3). Appellant's proposed delivery schedules were expressly subject to satisfaction of the following conditions, in apparent contravention of the previously agreed-upon inspection criteria set forth in bilateral modification No. P00006, contract 7755:

> 1. Objective technical resolution of the material issues within the specifications resulting in the acceptance of material for production. Specifically, paragraphs 3.6.1.2 [yellow color requirement], 3.7 [workmanship requirements], 3.8 [disallowance of pinholes and cracks] and 4.4.3.1 [visual examination procedure requirements] of SS-481, Rev.2. Additionally, paragraphs 3.6.2 [uniformity of color], 3.8 [free of objectionable odors], 3.9 [workmanship requirements] and 4.3.1.1 [examination for appearance, construction, assembly and workmanship defects] of LP-375C am. 3.

> 2. Objective technical resolution of the other remaining issues within the specifications. Specifically, paragraphs 3.3.2 [bag seal seam width, design, workmanship and excess material requirements], 3.3.4 [dimensional tolerances of bags], 3.7, 3.8, 4.4.3.1 and Table I [bag tolerances in terms of length, width and thickness] of SS-481, Rev. 2.
>
> 3. Resolution of the status of Lots 001& 002.

(*Id*.; R4, tab 219; findings 18-20(a)). Appellant supplied critical path and milestone charts as requested. Appellant also provided copies of correspondence from the following PVC material suppliers wherein each responded to appellant's 29 June 1999 request[13] for quotations for the PVC raw material involved herein: Robeco (6/29/99—"sorry unable to quote"—no further explanation); Vernon (7/9/99--$.29 per linear yard subject to "approval of a 3,500LB trial lot," a refusal to "guarantee that the product will be free from foreign matter as outlined in [as written in by appellant on the form it provided] SS-481, Rev. 2, Paragraph 3.7" and "acceptance of Vernon's position on particle size" that "a percentage of all translucent films will contain particulate matter . . . [of varying sizes up to a maximum of 1/40"]"); GenCorp (7/2/99—"we must decline quoting on this opportunity . . . because of the nature of the manufacturing process, there would always be some level of contamination or other objectionable flaws within the run"—"the original version of LP375C outlined limits that were reasonable and attainable. Our suggestion would be to revert back to that specification while generating statistical data on actual performance, then revise the limits permitted based on the data"); O'Sullivan Corporation (7/19/99—"We have produced and certified LP375C, Type I, Class II in various gauges for numerous applications, however, we decline to quote this business due to the AQL parameters stated in your [request] . . . . The statement 'free from foreign material specks in the film greater than 1/64" diameter is too general and exclusive, based on the sampling specified in SS-481, Rev. 2 . . . . The constraint of 1 particle greater than 1/64' in twenty, 8 linear yard samples would seem to be unattainable for any semi-transparent material that was closely inspected.") (R4,

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[13] Appellant's request for quotations contained language that clarified SS-481 requirements "to be applied to material which is potentially identified as containing a physical defect (e.g. foreign material or black specks) via the visual inspection is confirmed to be a physical defect by lightly rubbing the potential defect by touch. If the potential defect has any texture different from that of plastic in surrounding areas, it is considered a physical defect" (R4, tabs 209, 219 at 5; tr. 798-803). The evidentiary record does not reflect that the requirements of SS-481 were ever amended to reflect to adopt said language (tr. 569).

tabs 209, 218; tr. 614-16; 640-41; 798-803). It is not apparent why the 19 July 1999 response from O'Sullivan Corporation addresses a 1/64" requirement (*passim*). Appellant's 29 June 1999 request for quotations also elicited at least three responses from PVC material vendors (*i.e.*, Achilles, HPG and Ronald Mark) which constituted bids, without exceptions or qualifications, to furnish the PVC material in accordance with the conditions described in the footnote herein, *supra* (R4, tab 209; tr. 798-803; *see*, also, R4, tab 145; tr. 154-56). The evidentiary record, however, does not reflect the bid prices associated with said offers (*id*.). By letter to appellant dated 28 September 1999, the contracting officer stated that the status of lots 1 and 2 under contract 7755 was already resolved—*i.e.*, the bags were "not suitable for their intended purpose and shall not be re-tendered for acceptance by the Navy" (R4, tab 221; tr. 603-04). The contracting officer stated that appellant's "non-performance on [contracts 7755, 7767 and 7769] is not excused" and directed appellant "to proceed immediately with performance [of the contracts] to ensure timely delivery of the supplies required" (*id*.).

59. By letter dated 28 October 1999 to the contracting officer, appellant stated that it was continuing to proceed with performance of the contracts. It reiterated its positions as to the propriety of the Government's rejection of lots 1 and 2 under contract 7755 based upon the presence of "wrinkles" in the bags (*i.e.*, the wrinkles in question are "minor in nature" and "do not effect [*sic*] the seal strength, visual inspection of wrinkles is impermissibly subjective and, in the absence of a government-provided objective definition, appellant was forced to re-inspect with its own criteria and with the oversight of DCMC, Hartford"). (R4, tabs 222-23) Appellant also reiterated its position that rejection of the lots 1 and 2 bags based upon thinness of the seam was improper because thinness of seam "is not in the specification" and was (1) "inserted into the reinspection modification after our strong objection"; and, (2) the government's measurements of thinness in the sample bags was contradicted by appellant's "and others independent review of the sample bags for thinness of seam" (*id*.). Appellant also stated that the lot 1 and 2 bags were suitable for their intended purpose "to provide general protection to the contents of a bag from dust or liquid" as required by ¶ 6.1, SS-481, Rev. 2 (*id*.). Finally, appellant stated that it would "continue to work with suppliers on the Navy's behalf, attempting to find an objective technical criteria that will allow raw material manufacturers to produce material that is 'free from' the defects referenced in the specifications" despite the government's continuing failure to provide said objective technical criteria for the "free from" defect types that were detected "when sampled and visually inspected in accordance with the specification" (*id*.).

60. Pursuant to modification No. P00007 of contract 7755, delivery of Contract Line Item Number 0001AA was due within 105 days after the effective date of the modification, or by 27 October 1999 (R4, tab 10 (mod. P00007); finding 26(e)). When appellant failed to make delivery by that date, the Navy sent appellant a 10 November 1999 show cause letter wherein appellant was given the opportunity to present any facts relating to whether appellant's non-performance arose out of causes beyond its control

and without its fault or negligence in accordance with its rights under the Default clause (R4, tab 224; tr. 604). Appellant requested an extension to the letter's ten-day response date, which the Navy granted (R4, tabs 225, 227).

61. By letter of 29 November 1999, appellant presented its reasons for failing to deliver contamination bags by the delivery date, declaring that the government had failed to remove impediments to performance which were solely under government control, thereby making it impossible to deliver on time. Appellant contended that all manufacturing issues which could affect restart of bag production had been mutually resolved by the parties as of 18 December 1997 therefore leaving the black speck material issue and the improper rejection of lots 1 and 2 issue as condition precedent issues that had to be resolved by the government to appellant's satisfaction prior to appellant's restart of bag production under the contract (R4, tab 228; tr. 605). By letter dated 13 January 2000, the government reiterated that the lots 1 and 2 bag samples had been reinspected and tested in accordance with mutually agreed upon requirements and that said samples had overwhelmingly failed to pass the agreed upon standards even though appellant had removed a "significant" number of defective bags from lots 1 and 2 prior to tendering the bags for sampling/reinspection (R4, tab 229 at 1; tr. 604-05; *see*, findings 20(a-f)). In this regard, the government noted that appellant had been afforded the opportunity to "observe the re-inspection as well as to discuss the details of the bag failures" but that appellant had declined to either "observe or discuss the failures" (*id*. at 2). The government noted further that its position *vis a vis* the black speck problem remained the same (*id*.).

62. On 13 January 2000, Ms. Springborn prepared a memorandum with respect to a proposed default termination of contract 7755 (R4, tab 230; tr. 605). The memorandum appropriately addressed the pertinent portions of FAR 49.402-3(f) citing, *inter alia*, appellant's failure to make timely delivery and appellant's failure to provide appropriate evidence in its 29 November 1999 response to the government's 10 November 1999 show cause letter that its failure to deliver was excusable (*id*.). Said memorandum was reviewed, discussed and approved between 13 January 2000 and 9 February 2000 by the NAVICP Contract Review Board consisting of Ms. Springborn, Mr. Patno (Branch Head), Mr. Huber (Division Director) and Mr. Barnhart (Deputy Director, Contracting Directorate) (*id*.) The NAVICP Contract Review Board consists of a panel of senior contracting personnel whose review and approval is required before a contracting officer can properly execute a default termination action (tr. 503-05). At trial, the senior member of the Contract Review Board, Mr. Barnhart, testified that, during the period of his involvement with contracts 7755, 7767 and 7769, he participated in numerous discussions regarding the so-called black speck problem but that he was not aware of Mr. Jack's discovery, *supra*, of 10 black specks in or on the Humphrys lay-flat tubing material when he terminated appellant for default (tr. 513-21; *see*, finding 30). Ms. Springborn also testified that she was not aware, during the October, 1997 time frame when the parties were discussing possible use of Government Source Inspection

procedures, that Mr. Jack had earlier discovered black specks in or on the Humphrys material (tr. 545-53). By modification No. P00008 dated 9 February 2000, contract 7755 was terminated for default based upon appellant's unexcused failure to timely deliver the contamination bags when due (R4, tab 231). By letter dated 2 May 2000, appellant timely filed its notice of appeal from said default termination decision, and the Board docketed the appeal as ASBCA No. 52755.

63. Pursuant to modification No. P00003 of contract 7767, delivery of CLIN 0001AA was due within 225 days after the effective date of the modification, or by 24 February 2000 (R4 (ASBCA No. 52994), tab 2 (mod. P00003); finding 26(f)). When appellant failed to make delivery by that date, the government, by letter dated 3 April 2000, afforded appellant the opportunity to present any facts relating to whether appellant's non-performance arose out of causes beyond appellant's control and without fault or negligence on appellant's part (R4 (ASBCA No. 52994), tab 15; tr. 607). Appellant responded on 13 April 2000 with similar assertions to those which had been contained in its 29 November 1999 letter on contract 7755—*i.e.*, that the government had established "unrealistic" delivery dates under contract 7767 that did not account for the impossibility of timely performance thereunder that was caused by the government's "failure to provide objective criteria for black specks," that "all PVC film reviewed by [appellant] has been found to contain more specks than allowed" and that "all PVC vendors solicited by [appellant], including the Government's preferred suppliers, have been unable to provide material that conforms to the 'free from' requirements contained in the specification" (R4 (ASBCA No. 52994), tab 16; R4, tab 228; tr. 608).

64. On 19 April 2000, Ms. Springborn prepared a memorandum with respect to a proposed default termination of contract 7767 (R4 (ASBCA No. 52994), tab 17; tr. 608). The memorandum appropriately addressed the pertinent portions of FAR 49.402-3(f) citing, *inter alia*, appellant's failure to make timely delivery and appellant's failure to demonstrate in its 10 April 2000 response to the government's 3 April 2000 "show cause" letter that its failure to deliver was excusable (*id*.). Between 19 April 2000 and 3 May 2000, the government convened a NAVICP Contract Review Board comprised of Ms. Springborn and Messrs. Patno, Huber and Barnhart, *supra*, to review and discuss the proposed default termination action (*id*.). By modification No. P00004 of 15 May 2000, the government terminated contract 7767 for default due to appellant's unexcused failure to timely deliver the contamination bags when due thereunder (R4 (ASBCA No. 52994), tab 18; tr. 608). By letter to the Board, dated 31 July 2000, appellant timely filed its notice of appeal from said default termination final decision, and the Board docketed the appeal as ASBCA No. 52994.

65. Pursuant to modification No. P00003 of contract 7769, delivery of the first article test report was due within 385 days after the effective date of the modification, or by 2 August 2000 (R4 (ASBCA No. 53138), tab 2 (mod. P00003); finding 26(g)). When appellant failed to make delivery by that date, the government, by letter dated

26 September 2000, afforded appellant the opportunity to present any facts relating to whether appellant's nonperformance arose out of facts beyond appellant's control and without fault or negligence on appellant's part (R4 (ASBCA No. 53138), tab 16; tr. 608-09). Appellant responded on 4 October 2000 with similar assertions to those which had been contained in its prior responses to similar letters under Contracts 7755 and 7767 (R4 (ASBCA No. 53138), tab 17; tr. 608-09; findings 59, 61, 63).

66. On 26 October 2000, Ms. Springborn prepared a memorandum with respect to a proposed default termination of contract 7769 (R4 (ASBCA No. 53138), tab 18; tr. 609). The memorandum appropriately addressed the pertinent portions of FAR 49.402-3(f) citing, *inter alia*, appellant's failure to make timely delivery and appellant's failure to demonstrate in its 4 October 2000 response to the government's 26 September 2000 "show cause" letter that its failure to deliver was excusable (*id*.). Between 26 October 2000 and 2 November 2000, the government convened a NAVICP Contract Review Board comprised of Ms. Springborn and Messrs. Patno, Huber and Barnhart, *supra*, to review and discuss the proposed default termination action (*id*.; finding 62). By modification No. P00004 of 3 November 2000, the government terminated contract 7769 for default due to appellant's unexcused failure to timely deliver the contamination bags when due thereunder (R4 (ASBCA No. 53138), tab 19). By letter to the Board dated 9 November 2000, appellant timely filed its notice of appeal from said default termination decision, and the Board docketed the appeal as ASBCA No. 53138.

67. By letter of 3 April 2000, the government issued the contracting officer's final decision demanding the return of $295,104.00 in unliquidated progress payments under the 7755 contract and informing appellant that it could submit a proposal for deferment of collection "if the amount is disputed" (R4, tab 233). By letter dated 11 April 2000, appellant requested that the government defer collection of said unliquidated progress payments under contract 7755 in accordance with the terms of the final decision stating "the termination of the contract is being appealed, therefore the payment and the amount are disputed" (*id*.; R4, tab 234). Appellant, however, did not subsequently dispute the "amount" of the unliquidated progress payments claimed by the government (tr. 19-47; *passim*). The evidentiary record is silent as to whether or not the government granted appellant's said request to defer collection (*passim*). Appellant had requested this amount in its first progress payment request in March 1997 after which it was paid that amount (R4, tabs 33, 82, 202, 204; tr. 506-07, 570). The government contends that it had never accepted any contract deliverables and, thus, is entitled to return of the entire amount of progress payments pursuant to subparagraph (h) ("Special Terms Regarding Default") of the FAR 52.232-16 PROGRESS PAYMENTS (JUL 1991) contract clause (tr. 570-1; R4, tab 233-34; finding 5). The government had accepted the contract 7755 First Article samples but had never accepted any production lot items deliverable under CLINs 0001AA, 0001AB or 0001AC (R4, tab 10; findings 10, 12(a-d), 15, 20(a-f), 55-61). By letter dated 2 May 2000, appellant timely filed its notice of appeal from said final decision demand for repayment of unliquidated progress payments

under contract 7755 (Bd. corr. file). Said appeal was docketed as ASBCA No. 52756. Appellant states in its Complaint filed in ASBCA No. 52756 that the government's demand for repayment of unliquidated progress payments should be denied because the default termination of contract 7755 was invalid in view of the government's improper rejection of production lots 1 and 2 and its improper establishment of a new delivery schedule on 14 July 1999 under contract 7755 (Complaint at ¶¶ 5-21). The government denied appellant's allegations in its Answer, filed in response to appellant's Complaint (Answer at ¶¶ 5-21). Neither party directly addressed the propriety of the government's demand for repayment of the unliquidated progress payment amount claimed by the government in ASBCA No. 52756 either by way of sworn testimony or by citations to the evidentiary record in their main and reply briefs filed herein (*passim*).

68. Pursuant to Senator Lieberman's request which was "based on allegations made by . . . [appellant]," the DOD Inspector General (IG) audited the performance of contracts 7755, 7767 and 7769 to ascertain whether "in order to hide procurement mistakes, the Navy caused unjustified and inordinate delays, repeatedly attempted to terminate [contracts 7755, 7767 and 7769], and exhibited prejudicial treatment against [appellant]" (R4, tabs 209, 215, 232 at Exec. Summary at 4). The IG issued its audit report on 22 March 2000 (R4, tab 232 at 3). The audit effort conducted by the IG included interviewing "individuals and organizations within DoD and three private companies" and reviewing "all NAVICP contracts for PVC bags . . . [including] contract actions and correspondence dated from January 1993 through February 2000" (*id*. at 7, 6). The IG concluded, *inter alia*, that the government administered the contracts properly, did not "attempt to intentionally cause delays or terminate the . . . contracts because of procurement mistakes," did not treat appellant any "differently than another PVC bag manufacturer in terms of quality assurance and PVC bag inspection procedures" and did not prevent appellant from "restarting production of PVC bags" (*id*. at 3; tr. 609-10).

DECISION

Appellant seeks conversion of the default terminations of its contracts 7755 (ASBCA No. 52755), 7767 (ASBCA No. 52994) and 7769 (ASBCA No. 53138) into convenience terminations on many grounds. Appellant argues that the government's action(s) and inaction(s) with respect to the so-called black speck problem under all three contracts and the reinspection of bag lots 1 and 2 under contract 7755 constitute breaches of the government's duties to cooperate and not impede or interfere with contract performance as well as constituting breaches of the government's duty to act in good faith *vice* bad faith. These same government action(s) and inaction(s), according to appellant, caused the delay of appellant's performance and constituted cardinal changes in the contract-mandated scope of performance. Finally, appellant contends that its failure to deliver under the three contracts is excusable under the doctrines of impossibility or commercial impracticability.

The government insists that appellant's performance under the three contracts was inadequate and that appellant inexcusably failed to make timely delivery in accordance with the reasonable delivery schedules unilaterally imposed by the government. The government denies that its action(s) and inaction(s) with respect to either the black speck problem or the reinspection of bag lots 1 and 2 constituted either breaches of any of the implied contractual duties cited by appellant or equate to a cardinal change in the performance requirements of contracts 7755, 7767 and 7769. Finally, the government contends that contract performance was both possible and commercially practicable regardless of appellant's perceived black speck problem.

In ASBCA No. 52756, the government seeks return of unliquidated progress payments under contract 7755 in the amount of $295,104.00. Both entitlement and quantum are before us for decision in ASBCA No. 52756 (tr. 9).

ASBCA Nos. 52755, 52994 and 53138

A "default termination is a drastic sanction," and the government is held "to strict accountability for its actions in enforcing this sanction." *H. N. Bailey & Associates v. United States*, 449 F.2d 387, 391 (Ct. Cl. 1971). We have recently stated:

> The Government has the burden of proving that its default termination herein was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987). Once this requirement is satisfied, the burden shifts to appellant to establish that its failure and refusal to perform was due to excusable causes beyond its . . . control and without its . . . fault or negligence, was caused by the Government's material breach or that the contracting officer's exercise of discretion was unreasonable or arbitrary and capricious. *Lisbon Contractors, Inc., supra*; *Brenner Metal Products Corporation*, ASBCA No. 25294, 82-1 BCA ¶ 15,462; *Darwin Construction Co., Inc. v. United States*, 811 F.2d 593, 596-97 (Fed. Cir. 1987).

Dae Shin Enterprises, Inc., d/b/a Dayron, ASBCA No. 50533, 03-1 BCA ¶ 32,096 at 158,646.

We have examined the government's unilateral establishment of new delivery dates for contracts 7755, 7767 and 7769 in light of the standard enunciated in *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1019 (Fed. Cir. 2003):

> If the government opts to act unilaterally, the new date that it sets must be "both reasonable and specific from the

> standpoint of the performance capabilities of the contractor at the time the notice is given". . . . The reasonableness of the action turns on what the government "knew or should have known" at the time it imposed the new schedule.

We conclude that the government's unilateral schedules were both reasonable and specific as contemplated by the Federal Circuit. Ms. Springborn methodically conducted an in-depth analysis taking into account all of the issues and information then available to her and unilaterally issued the new delivery schedules only after appellant's failure to provide an alternative to the proposed delivery schedules (findings 26 (a-h), 53-66). Ms. Springborn's new delivery schedules, *inter alia*, each reflected a four-week period to hire and retrain employees, purchase raw material and begin production as well as letting appellant complete production on one contract prior to beginning production on the next contract (*id*.).

Appellant failed to deliver in accordance with the new delivery schedules in effect under contracts 7755, 7767 and 7769 (findings 60-61, 63-66). It expressly and unequivocally refused to resume production under all three contracts until the government agreed to resolve the black speck problem to appellant's satisfaction and also, under contract 7755, to re-inspect production lots 1 and 2 in a manner satisfactory to appellant (findings 56-59, 61, 63, 65). Each of the contracts contained a Disputes clause that required appellant to proceed with performance, pending resolution of disputes, in accordance with the directions of the contracting officer (findings 5, 57-58; *see*, findings 25(b-e), 26(d-h), 53-56, 59, 61). The exercises of discretion by the contracting officers herein to terminate contracts 7755, 7767 and 7769 for default were neither unreasonable nor arbitrary and capricious (*id*.; 62-66, 68). Appellant's failures to deliver under contracts 7755, 7767 and 7769 and its refusal to proceed with contract performances unless the government acceded to its demands (*i.e.*, resolution of the black speck problem and also another reinspection of lots 1 and 2 with respect to contract 7755) amount to breaches of contract justifying terminations thereof for default unless said failures and refusals to deliver were excusable within the meaning of the Default clause or were caused by a material breach of the contract. *See, Dae Shin Enterprises, Inc. d/b/a Dayron, supra*, 03-1 BCA at 158,646, 158,649 and cases cited therein.

We have considered appellant's allegations that the government's reinspection of lots 1 and 2 under contract 7755 was tainted by bad faith which led to the wrongful finding that the reinspected bags were defective. We conclude that the government's actions with respect to the reinspection were proper and in accordance with the bargained-for terms of bilateral contract modification No. P00006.

The two types of defects found by Mr. Jack – *i.e.*, wrinkles/folds in the seams and thin seams --- were specifically included by the parties as part of the agreed-upon list of defects set forth in the arms-length, bargained-for provisions of the bilateral modification

agreed to by the parties (findings 16-20 (g), 59). Appellant's earlier objections to the "subjective" nature of the list of defects, as well as its renewal thereof after it failed the reinspection (findings 13(d), 16-18, 20(a-g), 56, 58-59, 61) are rendered nugatory by the negotiated terms of bilateral contract modification No. P00006 (finding 20(a)).

With respect to the thin seams defect, our findings clearly establish that contracts 7755, 7767 and 7769 required that the contamination bags have a film thickness of 0.008 inches plus or minus ten percent (findings 1-4, 6 at ¶ 3.3.4 and Table 1). Although appellant questions the accuracy of the government's measurements of thinness, it has failed to adduce proof that its own measurements were performed upon the same twenty bags that were re-inspected by Mr. Jack (findings 20(g), 59) and, indeed, declined the opportunity to be present during Mr. Jack's reinspection (findings 20(b), 61).

With respect to the wrinkles/folds in seams defect, appellant's president admitted that said wrinkles constituted an agreed upon re-inspection defect that warranted rejection of production lots 1 and 2 (finding 20(g)).

As to appellant's allegations that the reinspection was tainted by bad faith, the evidence adduced by appellant with respect to Mr. Ford's alleged machinations is directly contradicted by the government's Mr. Huber (finding 20(h)). Moreover, appellant declined the opportunity to be present during the reinspection, and its own president testified that he regarded the inspector, Mr. Jack, as "conscientious" and "a good Boy Scout" (findings 20(b), 21, 61).

Appellant's reliance on our decision in *Chelan Packing Co.*, ASBCA No. 14419, 72-1 BCA ¶ 9290 as establishing the invalidity of the reinspection of bag lots 1 and 2 because Mr. Jack knew that the material had been previously rejected and no other previously rejected and accepted bags from other PVC suppliers were mixed in to provide an independent control sample for reference purposes is simply misplaced. The inspection standard involved in the *Chelan* appeal was a "reasonably free" requirement that was tied only to a determination that "the appearance or edibility of the product is not adversely affected" (*id*. at 43,046). We stated, in pertinent part:

> In view of the demonstrated high subjectivity of reasonably free determinations not based on objective criteria, little weight can be given to the purely subjective reasonably free determination made by a person who has knowledge that the product has already been . . . inspected and rejected . . . . [W]e are influenced by the failure of the Government to conduct any comparison tests on rejected lots and previously accepted stock utilizing objective criteria . . . on the inspection . . . .

(*Id*. at 43,047). The "thin seams" (*i.e.*, 0.008" minus ten percent, or, less than 0.0072") and "wrinkles/folds in seam" defects involved herein are simply not reasonably susceptible to the concerns that were present in the "high subjectivity" inspection standard situation described in *Chelan Packing Co.*, *supra*. Instead, these defects, as defined in the reinspection requirements, constitute bargained for, objective criteria (findings 16-21, 59). In this regard, we stated that "[w]e would be inclined to accept as conclusive the results of the re-inspection . . . despite the participation of the original [inspector], if it had been conducted substantially in accordance with [an objective standard]" (*id*. at 43,047).

In summary, the government's actions with respect to the reinspection of production lots 1 and 2 of contract 7755 were proper and do not constitute either an excusable cause under the Default clause or a material breach justifying appellant's failure to deliver and refusal to perform.

We have also considered the evidentiary record herein insofar as it pertains to the so-called "black speck" problem. We conclude that the three spots detected by Mr. Jack during his inspection of the FAT samples submitted by appellant in connection with contract 7769 violated the uniformity of color and spot requirements of SS-481, L-P-375 and MIL-STD-105 rather than the foreign matter/material requirements set forth in said standards.

Paragraph 3.7 ("Workmanship") of SS-481 requires that the finished PVC bags produced under contracts 7755, 7767 and 7769 "shall be free from . . . particles of foreign matter including color which rubs off, powders, coating and unmelted material" (findings 1-4, 6). Paragraph 4.1.2 and Table II of SS-481 prescribe the utilization of only a "visual" examination to detect the presence of said "workmanship" defect classified as "foreign matter" (finding 6). The visual examination procedure as described in paragraph 4.4.3.1 is an examination performed "by an inspector with 20/20 vision or vision corrected to 20/20" under "tungsten (incandescent) light at a level of a minimum of 100-foot candles" conditions (*id*.). Paragraph 3.9 ("Workmanship") of L-P-375 requires that sheets of raw PVC involved herein "shall be . . . free from . . . foreign matter . . ." (finding 7). Paragraph 4.3.1.1 of L-P-375 requires that said PVC bag material be "examined" for ". . . foreign material affecting appearance" (*id*.).

The government's 13 March 1997 rejection of the first article samples submitted by appellant under contract 7769 was invalid only insofar as it was based upon Mr. Jack's preemptory conclusion that the three "black spot[s]" which he saw during his "visual" examination were comprised of "foreign matter" (finding 11(c)). Nothing in the evidentiary record before us explains, or otherwise justifies, why and how the visual examination prescribed by SS-481 for ascertaining the presence of foreign material can validly determine, without additional testing, that the three black spots were "foreign material" (*passim*). In fact, no testing with respect to the composition of those three

black spots was ever performed (finding 11(c)). Moreover, the government's RADM Ginman expressly acknowledged that black specks consisting of overcured vinyl were not foreign material (finding 48; *see*, findings 29, 41, 44-45).

The contract, however, prohibits the presence of the black specks regardless of whether the black specks constitute foreign material. The presence of the original black spots, detected by Mr. Jack's routine SS-481 visual examination, violates the ¶ 3.7, SS-481 requirement that "the bags . . . shall be uniform in color . . . and other physical properties . . . ," and the ¶ 4.3.1.1, L-P-375 prohibitions against: (1) "Nonuniformity" in the "color" of the PVC material; and, (2) "any . . . spot, stain, discoloration . . . affecting appearance" (findings 6-7, 31-32, 47). Appellant rejects this position asserting that the government effectively abandoned this argument after 19 May 1997 and that the black specks involved herein are too small to "affect appearance" (app. reply br. at 7-8, 51-56).

We conclude that the above-cited contract requirements of uniformity of color and prohibition of spot(s) or discoloration(s) afford a valid basis for the government's rejection of appellant's FAT submission under contract 7769 that contained the three black spots detected by Mr. Jack's visual examination. The three black spots most certainly violated the uniformity and "affecting appearance" requirements since they were readily detected by Mr. Jack during his visual only examination pursuant to SS-481 (findings 11(c), 30). As to the government's alleged abandonment of these bases of rejection under SS-481 and L-P-375 after 19 May 1997, we note, initially, that the basis of the government's position regarding uniformity of color and spots/discolorations was clearly communicated to appellant on several occasions (findings 31-32). No other black specks had been detected with respect to any of appellant's other submissions under contracts 7755, 7767 and 7769 (findings 10-11(b), 12(a-d), 13(a-c), 14, 20(c-d)). Moreover, appellant did not attempt to produce additional PVC bags under any of the contracts involved herein after 18 December 1997 (findings 15, 53-54, 57-66). There simply was no subsequent submission of bags under contracts 7755, 7767 and 7769 that merited the application of these portions of the standards. In short, we are not aware of any government acts or inactions that can be reasonably construed as constituting an effective waiver of these contractually binding requirements. In this regard, we note that the government's "greater than 1/64 inch" and touch test proposals, whether they are regarded as relaxing either the uniformity of color requirements or the spot/discoloration affecting appearance prohibition, were never, in fact, accepted by appellant or unilaterally imposed by the government (findings 31, 39, 42, 46-50).

The foregoing circumstances with respect to production lots 1 and 2, the black specks and other matters do not support a conclusion that appellant's refusal to perform was due to excusable causes beyond its control or was caused by a material breach on the part of the government. Moreover, these governmental actions do not equate to violations of the government's duty to cooperate and not impede or interfere with

contract performance. The government's actions were proper and did not amount to a cardinal change in the contract 7755, 7767 and 7769 requirements.

Even assuming, *arguendo,* that the nature of the government's actions herein constitutes a breach, appellant must still "establish [t]he seriousness of the 'impact' of the breach 'on the contractor's ability to perform'" in order to prevail herein. *Dae Shin Enterprises, Inc., d/b/a Dayron, supra*, 03-1 BCA at 158,649 and cases cited therein.

Appellant consistently represented that it was ready, willing and able to perform the contracts involved herein contingent upon its satisfaction with the government's resolution of the black speck/availability of PVC material issue (findings 15, 26(c, h), 53-54, 58-59, 61, 63, 65). We reject appellant's arguments that performance of contracts 7755, 7767 and 7769 was either impossible or commercially impracticable. Simply stated, appellant has failed to carry its burden with respect to proving facts which establish the existence of either impossibility or commercial impracticability of performance.

Appellant's argument, that the Acceptable Quality Levels (AQLs) imposed by the government rendered contract performance impossible, flies in the face of the clear requirements set forth in these competitively bid, firm fixed-price contracts that all FAT and production lot samples were to consist of ten bags each and that the testing/inspection thereof was to be conducted in accordance with the provisions of SS-481, L-P-375 and MIL-STD-105E (findings 1-4, 6-8). Moreover, the results of the FAT and production lot sample tests, coupled with appellant's satisfactory response regarding corrective actions for future production in response to the PDQR issued in conjunction with production lots 1 and 2 under contract 7755 (findings 12(a-d), 15), confirm that appellant was capable of satisfying the AQL requirements (findings 10, 14-15). In those instances when appellant's submissions failed, the actual number of fabrication and material defects far exceeded the minimum amount of defects that would result in failure (findings 11(b-c), 12(a-d), 13(b-d), 20(a-f)). Appellant's AQL impossibility argument is thus both speculative and inapplicable herein.

We reject appellant's argument that it was impossible to obtain raw PVC material that did not contain excessive amounts of black specks/over-cured vinyl. Appellant's initial submissions of letters from various raw PVC material suppliers as well as the results of its own inspections fail to persuasively establish that the examinations described therein were conducted in accordance with the visual only inspection guidelines set forth in the applicable standards *vice* a more stringent standard (findings 29, 31-32). Mr. Jack's various inspections (not including the first FAT inspection under contract 7769) either did not detect a sufficient presence of black specks to fail the PVC material or did detect an unacceptable number of black specks by dint only of an inspection that was much more stringent than the visual only inspection mandated by the standards (findings 10-11(b), 12-13(c), 14, 30, 38-39, 41, 51-52).

Appellant's subsequent submissions of letters from suppliers do not definitively establish the impossibility of obtaining compliant PVC material with respect to the requirements of the extant standards (findings 33-34, 49, 56, 58). In fact, at least three producers of PVC material indicated an unqualified willingness to bid upon and furnish PVC material that would comply with the revised requirements contained in appellant's 29 June 1999 request for quotations to furnish PVC material (finding 58). Moreover, the evidentiary record contains evidence that appellant, as well as its competitors, had successfully provided PVC bags that did not contain black specks which violated the visual only inspection requirements of the standards both before and after the black speck problem arose under contract 7769 (findings 10, 11(a-c), 12(a-c), 13(a-c), 14, 30-31, 51-52). Under these circumstances, we cannot conclude that it was impossible for appellant to obtain compliant PVC material that did not contain excessive amounts of black specks detectable under the visual examination only standard. In this regard, any insinuation that the government knowingly and intentionally accepted non-conforming PVC bags that contained excessive amounts of black specks is speculative at best.

We further conclude that appellant has failed to satisfy its burden of proving that its performance of contracts 7755, 7767 and 7769 was rendered commercially impracticable by the purported black speck problem. Appellant never attempted to produce new bags after 18 December 1997, the date when the government advised appellant that the PDQR responses on contract 7755 were acceptable for purposes of future production thereunder (findings 15, 53-54, 57-66). The evidentiary record reflects that appellant received responses to its 29 June 1999 request for quotations to provide raw PVC material from three separate manufacturers of raw PVC material who offered, without exception or qualification, to provide said PVC material (finding 58). The evidentiary record, however, does not contain the bid prices for said material (*id*.). Appellant has not directed our attention to the specific portions of the evidentiary record which it contends forms the basis for its assertion in its brief that appellant:

> could have successfully performed *only* by means of an immensely expensive and time-consuming inspection regimen. This would have had to include a close examination of the film before used in the manufacture of the bags, trimming non-compliant raw material by hand, and a close inspection of 100% of the bags. In essence, DAS would have had to make something approaching a handmade product, a procedure prohibitive under the time constraints of the Contracts and "at an excessive, unreasonable and uncontemplated expense."

App. br. at 48-49 (emphasis in original). Our review of the evidentiary record does not disclose any reliable estimates of increased time or extra expenses associated with producing this alleged "handmade product." Under these circumstances, we cannot

conclude that the speculations set forth in appellant's brief establish commercial senselessness or exorbitance in terms of the impact of the government's alleged breach. The commercial impracticability aspect of appellant's case thus fails for lack of proof. *See*, *Dae Shin Enterprises, Inc. d/b/a Dayron, supra,* 03-1 BCA at 158,649 and cases cited therein.

Appellant also argues that various government acts establish a bad faith course of conduct on the part of the government during performance of contracts 7755, 7767 and 7769. Appellant must prove that the government acted in bad faith by clear and convincing evidence. *Am-Pro Protective Agency, Inc. v United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002). Appellant cites, *e.g.*, the "foregone conclusion" that appellant would fail the reinspection of production lots 1 and 2, *supra*, finding 20(h) and Ms. Springborn's alleged prejudicial conduct with respect to appellant during administration of the contracts, coupled with a government representative's hostility at the 9 April 1997 meeting and the government's incorrect characterization almost immediately thereafter of appellant as the only vendor who had experienced the black speck problem and the government's refusal to institute GSI procedures. None of the instances cited by appellant equate to bad faith either separately or severally. We have addressed, *supra*, the circumstances associated with the reinspection of lots 1 and 2 and the revised delivery schedules and have examined Ms. Springborn's conduct with respect to the administration of the contracts (findings 10, 11(d), 12(d), 14-15, 17, 19, 20(a-h), 23-26, 32, 37, 40, 45, 50, 54-66, 68) and do not conclude that the government acted in bad faith in connection therewith. The confrontation between Messrs. Walleck and McFarland does not appear to have prevented the parties from regarding the 9-10 April 1997 meeting as successful (finding 27). The immediately subsequent characterization of appellant as the only vendor experiencing the black speck problem appears to be harmless (finding 28). The government was not required, by the terms of the firm fixed-price contracts involved herein, to institute any GSI procedures and, indeed, appellant bore primary responsibility under the contracts for insuring that the contamination bags conformed to the applicable requirements of SS-481, L-P-375 and MIL-STD-105 (findings 1-9, 40). We reject appellant's bad faith arguments.

In accordance with the foregoing discussion, the appeals from the terminations for default are denied.

ASBCA No. 52756

In ASBCA No. 52756, appellant contends that the government's demand for repayment of unliquidated progress payments under contract 7755 should be denied because the default termination thereof was improper in view of the government's allegedly wrongful rejection of production lots 1 and 2 and the government's allegedly improper issuance of a new delivery schedule on 14 July 1999 (finding 67). Subparagraph (h) of the Progress Payments contract clause of contract 7755 provides:

> Special terms regarding default. If this contract is terminated under the Default clause, (i) the Contractor shall, on demand, repay to the Government the amount of unliquidated progress payments and (ii) title shall vest in the Contractor, on full liquidation of progress payments, for all property for which the Government elects not to require delivery under the Default clause. The Government shall be liable for no payment except as provided by the Default clause.

(Finding 5). The contract fully allocates the total contract price among the contract deliverables covered by CLINs 0001AA, 0001AB and 0001AC (finding 1). No portion of the contract price is allocated to the FAT samples or production lot test samples covered by CLINs 0001AE and 0001AF (*id*.). CLINs 0001AE and 0001AF contemplate "destructive" testing thereby precluding inclusion of the approved first article as a part of the contract quantity (*id*.; finding 5; *see*, subparagraphs (e)(1) and (h) of the FAR 52.209-4, FIRST ARTICLE APPROVAL-GOVERNMENT TESTING (SEP 1989) contract clause of contract 7755). We have sustained the government's default termination of contract 7755 in ASBCA No. 52755, *supra*. The evidentiary record establishes that the amount of unliquidated progress payments under contract 7755 is $295,104.00 (finding 67). In accordance with subparagraph (h) of the Progress Payment clause in contract 7755, appellant's appeal herein is denied. The government is entitled to recover the sum of $295,104.00 as repayment of unliquidated progress payments under the provisions of the standard Progress Payments clause of contract 7755.

Dated: 13 December 2004

J. STUART GRUGGEL, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 52755, 52756, 52994, 53138, Appeals of D.A. Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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