UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 14, 2007

CBCA 129

INTERFREIGHT TRANSPORT SYSTEMS, INC.

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Sarah Syers, President of InterFreight Transport Systems, Inc., Fredonia, WI, appearing for Appellant.

Christie J. Meller, Office of the General Counsel, Department of Agriculture, Kansas City, MO, counsel for Respondent.

Before Board Judges **VERGILIO**, **POLLACK**, and **DeGRAFF**.

VERGILIO, Board Judge.

On June 9, 2006, InterFreight Transport Systems, Inc. (contractor) submitted a notice of appeal concerning its contract with the Commodity Credit Corporation (CCC) of the Department of Agriculture (Government). Under the contract, the contractor provided warehouse storage and related services. During performance, the Government determined that product (nonfat dry milk) stored at the warehouse had been damaged and made unfit for human consumption. After treatment by denaturing, the contractor did not deliver certain bags of product that were deemed to be damaged even for a secondary usage. Relying upon the contract, the Government claims entitlement to the market value of the damaged

commodities (assessed for nonfat dry milk, not denatured product) and storage charge adjustments. The contractor seeks a dismissal or stay of proceedings pending the final resolution of state court litigation involving the contractor, the warehouse owner, and an insurance company. Alternatively, it contends that it is not liable for the damage and it maintains that the amount of the claims are overstated and should be reduced.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended (CDA). The parties have submitted the appeal file (with supplements), complaint, amended complaint, and answer. The Government seeks summary judgment, asserting that undisputed facts demonstrate the contractor's liability under the terms and conditions of the contract. The contractor has provided a reply, after having engaged in limited discovery and having had the opportunity to further supplement the record. Further responses have been submitted.

This Board treats the motion for summary judgment as a motion for summary relief. The Board concludes that summary relief is appropriate; the contractor is liable for the value of the damaged goods and Government claims. The contract specifies obligations and liabilities. The contractor is responsible for all damaged commodities not reported at the time of acceptance into the warehouse. The contractor must maintain the warehouse in a sound, clean condition and take all reasonable steps to keep the warehouse free of conditions that may adversely affect the condition of the commodities or their containers. Also, the contractor must notify the Government in writing of unsound or unclean conditions at the warehouse. The contractor is liable for any loss in value of commodities from the time of receipt at the warehouse until acceptance by a carrier for delivery. Further, if the Government rejects damaged commodities, the contractor is potentially liable for their full value. The contractor is not liable for damages which could not have been avoided by the exercise of reasonable and prudent care.

Undisputed facts reveal that the contractor accepted the products into the warehouse without any reported damages. The products were damaged while in the warehouse. The contractor was aware both before commodities were delivered to the warehouse and during storage that the conditions of the space were not suitable for proper storage. The products were damaged while under the care and control of the contractor; the contractor failed to exercise reasonable and prudent care. The contractor is liable for the value of the goods that were damaged. The record establishes, without contradiction, that the Government has assessed the market value of the goods that were damaged and not delivered from the warehouse. Storage charge adjustments are not disputed. The Government has supported and proven its claims.

The Board grants the Government's motion for summary relief and denies this appeal.

Findings of Fact

The Contract

1. With an effective date of April 12, 2002, the Government, through the Commodity Credit Corporation of the Department of Agriculture, entered into a processed commodities storage agreement (PCSA), 898C, with InterFreight Transport Systems, Inc., identified in the agreement as the "contractor" and "warehouse operator." (The opinion uses the terms contract and contractor, given that the agreement became a contract with the actual warehousing of commodities.) Under the agreement, subject to space being available, the contractor offered to store and handle commodities in a particular warehouse, operated by the contractor, at specified rates. Appeal File, Exhibit 0 at 29-37 (all exhibits are in the appeal file). The agreement applies to all commodities:

> 1. As of the date of their deposit by CCC in the warehouse; and
>
> 2. Until such commodities are loaded into railroad car, truck, or other transportation conveyance for shipment and such shipment is accepted by the carrier or until title is transferred by CCC[.]

Exhibit 0 at 29 (¶ I.A.1).

2. The contract specifies that before unloading commodities, the contractor is to inspect the conveyance and the commodities for apparent damage. The contractor is to immediately notify the Government and carrier if any defect or discrepancy in the commodities exists. "Damaged commodities will be handled in accordance with instructions issued by CCC. The warehouse operator is responsible for all damaged commodities not reported even if such commodities are received on pallets." Exhibit 0 at 31 (¶ II.B).

3. As to the condition and protection of commodities, the contract specifies that the contractor "will take all steps necessary to preserve the condition of commodities and will follow good commercial practices in storing and maintaining the commodities." Exhibit 0 at 32 (¶ III.C). A separate clause provides:

> **V. RESPONSIBILITY FOR CONDITION OF WAREHOUSE AND PROTECTION OF COMMODITIES --**
>
> A. The warehouse operator must maintain the warehouse in a sound, clean condition and take all reasonable steps to keep it free of insects, rodents, birds, and other conditions which may

adversely affect the condition of the commodities or their containers.

B. Thewarehouse operator must take all reasonable steps to promptly detect any deterioration, insect infestation, rodent damage, mold, or any other condition which may adversely affect the condition of the commodities or their containers.

C. If any of the conditions in subsections V A or B are detected, the warehouse operator must notify CCC by telephone and confirm such notification in writing. Pending receipt of instructions from CCC, the warehouse operator must take all reasonable steps necessary to protect and preserve the affected commodities or their containers.

D. If loss of or damage to the commodities occur for which the warehouse operator is not liable (see Section VI), CCC will pay the warehouse operator for labor services performed at the rate specified in the Schedule of Rates and reimburse the warehouse operator for other reasonable costs incurred in performing those services which are not included among the protective and preservative services ordinarily performed by the warehouse operator for other depositors without additional charge.

Exhibit 0 at 33 (¶ V).

4. The section VI clause, Rejection of Damaged Commodities, referenced above states:

A. The warehouse operator will maintain the commodities in a sound, undamaged condition and will deliver to CCC the identical commodities received from CCC. The warehouse operator will be liable to CCC for any loss in value of such commodities from the time of delivery to the warehouse until the commodities are delivered to CCC.

B. If CCC determines at any time that any quantity of commodities held by the warehouse operator is damaged or is in unsound condition, CCC may reject such commodities and the warehouse

operator will be liable to CCC for the full value of the rejected commodities.

C. If CCC has determined that any commodities are damaged the warehouse operator will pay CCC, in cash, an amount equal to the value of the commodities, or upon approval of CCC, may:

1. Replace the damaged commodities with commodities of the same quality and quantity as the commodities received from CCC for storage;

2. Recondition the damaged commodities and restore them to a condition acceptable to CCC except that the warehouse operator will be liable to CCC for any decrease in quantity or quality of such commodities; or

3. Sell or otherwise dispose of such damaged commodities and remit the proceeds of such disposition to CCC except the warehouse operator must pay CCC the difference between the proceeds from such disposition and the value of the commodities received from CCC for storage. All such dispositions shall be in accordance with Federal, State, and local regulations and requirements. . . .

D. Notwithstanding the provision of section XI of this agreement, upon a determination by CCC that any commodities delivered to the warehouse operator by CCC are damaged, storage charges with respect to such damaged commodities will cease to accrue for the account of CCC. Storage charges for the account of CCC will resume only upon the date such damaged commodities have been reconditioned or replaced in accordance with subsections C 1 and C 2 of this section.

E. Notwithstanding any other provisions of this section, if CCC determines that the warehouse operator is not liable for the loss in value of damaged commodities: [provisions not here relevant].

Exhibit 0 at 33-34 (¶ VI).

5. The contract also contains a Liability of Warehouse Operator clause:

> The warehouse operator will be liable to CCC for loss or damage to commodities caused by the warehouse operator's failure to discharge promptly and properly the warehouse operator's obligations under this agreement and by the failure of the warehouse operator to exercise such care in regard to commodities as a reasonable and prudent warehouse operator would exercise under like circumstances, but the warehouse operator will not be liable for damages which could not have been avoided by the exercise of such care.

Exhibit 0 at 34 (¶ VIII).

6. Incorporated into the contract is the Government's approval of an application for use of the warehouse utilized for the storage of commodities in this dispute. The contractor would utilize leased warehouse space. Exhibit 0 at 13-14, 29 (¶ I.B.1).

Performance

7. Pursuant to the agreement and schedule of rates, the contractor accepted at the warehouse nonfat dry milk. One Government claim involves damage determined during a warehouse inspection. Exhibit 86; Finding 8. Forty-one Government claims involve instances when the contractor shipped fewer than the required number of bags of nonfat dry milk; damaged products accounted for the short-shipments. Exhibits 46-85; Findings 10, 14. Three Government claims involve instances of related adjustments to the storage charges, for which the Government seeks payment. Exhibits 87-89; Finding 22. Given the lack of a written report in the record indicating damage at the time of receipt and the contractor's failure to assert or support a contention that received goods were reported as damaged, the Board finds that none of the commodities in question were reported as damaged at the time of unloading and receipt into the warehouse. Finding 2.

8. In February 2004, the Government notified the contractor that five bags of nonfat dry milk in a given lot number stored at the warehouse had been rejected as damaged. On a Government claim statement dated January 12, 2006, the Government certified to the price of the commodity as of the date of damage, with supporting documentation in the record; the statement expressly constitutes a "demand for payment" of $229.28. Thereafter, the Government provided the contractor with initial and subsequent notifications of indebtedness (encompassing this and other claims), as detailed below, Finding 15. Exhibit 86.

9. As of January 20, 2005, the Government was aware of reported mold damage on products shipped by the contractor out of the warehouse. Exhibit 32 at 465.

10. One of the forty-one short-shipment Government claims, Finding 7, arose as follows. In December 2004, the Government provided the contractor with a notice to deliver 750 bags of nonfat dry milk from the warehouse. As detailed on the bill of lading, in February 2005, the contractor shipped 745 bags. Five bags were not shipped; those five bags were damaged. The Government issued to the contractor a claim statement and invoice, seeking $253.09, with a certification as to the market price used for the calculation of the value of the five bags short-shipped. A letter dated June 16, 2005, sent by the Government with the claim statement specifies that the contractor has "the right to request an administrative review of both the basis and the amount of this debt within 15 days of the date of this letter." The contractor did not seek review and did not pay the amount. By letter dated August 17, 2005, the Government informed the contractor that the debt is past due, that the Government could collect the amount through offset, and that interest would accrue. The contractor appears to have not responded until either a letter dated October 26, 2005 (with an incorrect reference to this claim number), or a letter of March 21, 2006 (with the correct claim number). The contractor acknowledges that the damages occurred in the leased warehouse, "but is disputing on how and by whom that the damages occurred to the USDA products." Exhibit 45. These letters and subsequent details are addressed in findings below.

11. On a form dated April 7, 2005, the contracting officer requested a special examination for the warehouse, specifying,

> This facility is scheduled to begin shipping product for export on 04/11/2005. An examiner should be present for the checkloading.
>
> Due to recent problems noted at this facility, all product being loaded on containers for export shall be checked for signs of any type damage such as insects, mold, etc. All damaged product should be rejected.

Exhibit 20 at 377.

12. A letter dated April 21, 2005, signed by a senior claim representative at an insurance company and addressed to the contractor, the insured, summarizes the facts and circumstances as viewed by the insurance company regarding the loss as alleged by the contractor/insured to have occurred on or about January 20, 2005: "The water damages and resulting mold that occurred from continuous seepage of the roof are excluded from coverage." Further,

> I have called a number of roofing companies supplied by your landlord. None of them have found any accidental roof damage from a **Covered Cause of Loss**. Please see the condition report from [a roofing company] done April 12, 2002. [The project manager] found numerous roof problems, but they were related to maintenance and age.

Exhibit 43 at 587-90. (This letter was submitted as an attachment to the notice of appeal and is in the appeal file as such an attachment.)

13. On April 22, 2005, the Government informed the contractor that products shipped from the warehouse showed signs of insect infestation upon arrival at their destination. The Government specified that product in the warehouse cannot be utilized for human consumption. The Government decided, and so informed the contractor, that the Government would utilize its inventory in the warehouse for a livestock feed initiative, which required that the product be denatured. Exhibit 36 at 507-09.

14. The contractor made various shipments of the denatured product from its warehouse in July and August 2005. The shipping documents indicate that the contractor short-shipped forty shipments (shortages varied within the range of 5 through 120 bags). By individual claim statements, each with a certification that it has assessed the market price, the Government assessed claims against the contractor for each of these forty short-shipments; these relate to the remaining Government claims for short-shipments, Finding 7. Appeal File at 707, 710, 724, 726, 740, 743, 756, 759, 773, 776, 790, 792, 806, 808, 820, 822, 834, 836, 848, 850, 862, 864, 876, 879, 890, 892, 904, 907, 918, 921, 927, 930, 941, 944, 960, 962, 980, 983, 999, 1001, 1015, 1018, 1034, 1037, 1053, 1055, 1072, 1075, 1091, 1094, 1105, 1108, 1119, 1122, 1133, 1136, 1147, 1150, 1161, 1163, 1167, 1170, 1181, 1184, 1195, 1198, 1209, 1212, 1223, 1227, 1235, 1238, 1249, 1252, 1263, 1266, 1277, 1279, 1304, 1307.

15. For thirty-nine of these forty claims of short-shipment (as well as that indicated in Finding 8), the Government provided the contractor with a notice of indebtedness of a specific amount, stating: "You have the right to request an administrative review of both the basis and the amount of the debt within 15 days of the date of this letter. In requesting the review, provide a written explanation of the basis of your disagreement with the determination and provide documentation to support your position." By subsequent letter, the Government informed the contractor that the stated amount is past due, and that interest would accrue. Some of the letters address multiple claims. Appeal File at 720-23 (inaccurate sum of three claims), 735-39, 815-19, 843-47, 936-40, 952-59, 1288, 1315. For two of these claims, only the initial letter was provided, not a follow-up letter. Appeal File at 925-26, 1233-34. For the remaining Government claim for a short-shipment, the Government treats

the amount due as a receivable; it has not provided the contractor with either letter. Appeal File at 1161, 1393.

16. In a letter dated October 26, 2005, to the Government, the contractor addresses three claims. It indicates that the shortages were created because the Government had instructed the contractor not to ship damaged goods. After stating that it is in litigation with the warehouse owner and the contractor's insurance company, the contractor adds that the "damages that occur[red were] due to a faulty roof and created mold and oil stains on product. We have had several rejected shipments due to mold and insect infestation." The contractor asks that the Government not pursue the claims until the contractor completes a pre-trial motion in its litigation. Exhibit 41 at 547. In a follow-up letter of November 10, 2005, the contractor amends its response in the October letter:

> According to the PCSA (Form CCC-29), section V and section VIII, Interfreight Transport performed all our due diligence per PCSA and exercised all care in regard to your commodities as reasonable and prudent warehouse operator would have to avoid any damage. The damages that occur was not negligence on our part. However, we had no control of the faulty roof in a leased facility. As I stated in our telephone conversation, we will attempt to recover your damaged/shortage claims via legal action with our landlords and insurance companies. Furthermore, the NDM [nonfat dry milk] was declared cattle feed, denatured and was donated to the Feed Initiative Program.
>
> Accordingly, InterFreight Transport respectfully deny these claims.

Exhibit 42 at 548.

17. In a letter dated December 7, 2005, the Government specifies that its contract is with the contractor, not the warehouse owner. Because the contractor is liable for the damage, the Government will not delay the recovery of the debts when they are due. The Government seeks payment on all Government claims/contractor debts due under the contract; it notes that interest is accruing. Exhibit 41 at 549.

18. By letter dated January 3, 2006, the contractor asks the Government to reconsider its determination to move forward with the collection of debts. The contractor references an Office of Inspector General Audit Report, 03099-52-KC, September 2005, relating to the livestock feed program (attached to the notice of appeal filed with the Board) and the Government letter that states that product is to be denatured and donated to that program, Finding 13. Exhibit 41 at 550. The report is not relevant to the issues of this

appeal--whether the stored commodities were damaged and whether the contractor is liable and in what amount.

19. In a letter dated January 27, 2006, the Government indicates that it has considered the submissions of the contractor. The Government continues to conclude that the contractor is liable for the damage and debt incurred. "Therefore, regular debt collection activity will continue by this office until all outstanding debts are paid in full." Exhibit 41 at 552-53.

20. Seeking to pursue its appeal rights, by letter dated March 21, 2005 [sic 2006], the contractor requests a decision from the contracting officer regarding twelve claims. The contractor identifies its reasons for the dispute and appeal. The contractor maintains that it did not cause the damage because the damage occurred in a leased facility. It references its litigation with the warehouse owner. It "acknowledges the actual claims from USDA but is disputing on how and by whom that the damages occurred to the USDA products." The contractor contends that it took all reasonable steps to ensure that products did not get damaged and that the damage "was due to lack of maintenance in a leased facility, which we have no control of other than to vacate it." The contractor asserts that it is not liable for the damages. Alternatively, it seeks a delay by the Government in pursuing repayment or a reduction in the amount owed to the alleged value of the denatured product, as opposed to the value of the nonfat dry milk that was stored and damaged. Exhibit 42 at 571-74.

21. The contracting officer issued a decision dated March 27, 2006, in response to the request, concluding that the contractor is liable for the damages in the full amount assessed. The contracting officer states that debt collection actions will not be delayed while the contractor pursues litigation with the warehouse owner. "Therefore, regular debt collection activity will continue by the Kansas City Finance Office until all outstanding debts are paid in full." Exhibit 42 at 576-78.

Storage Charge Adjustments

22. In addition to the claims for damaged and short-shipped products, the Government has three claims against the contractor for adjustments to storage charges. In each instance, the Government informed the contractor of its indebtedness; the principal amounts due are $1509.17, $97.07, and $99.93. Thereafter, for each claim, the Government provided the contractor with a letter stating the amount due and specifying:

> You have the right to request an administrative review of both the basis and the amount of the debt within 15 days of the date of this letter. In requesting

> the review, provide a written explanation of the basis of your disagreement with the determination and provide documentation to support your position.
>
> This debt is past due.

Exhibits 87 at 1361, 88 at 1374-75, 89 at 1384-85. (The letters are dated December 6, 2005, April 13, 2006, and August 2, 2006, respectively.)

23. The contractor has indicated no error in the assessments made in these three storage charge claims, either in the record in response to the Government claims at any stage or in response to the Government's motion for summary relief.

Notice of Appeal and Additional Material in the Record

24. By a submission dated June 9, 2006, the contractor filed its notice of appeal. The contractor lists the amount of the claim as $114,913.39, as of May 30, 2006. The parties have not fully reconciled the claims identified in the notice of appeal and those in the appeal file. However, the decisions of the contracting officer expressly indicate that all debts as assessed in Government claims are to be paid in full; the contractor indicates in its amended complaint that it pursues relief regarding all Government claims. Exhibits 40 at 525-45, 42 at 576-78, 90 at 1390-93.

25. With its notice of appeal, the contractor provided an affidavit, dated January 20, 2006, submitted to the State of Washington Circuit Court, Milwaukee County, by the president of the contractor (ITS), who avers:

> The principal business of ITS is to store dried milk and food products for later shipment to the USDA and other customers. In May of 2002, ITS and WFA entered into a lease for approximately 25,000 square feet of space in WFA's warehouse . . . .
>
> 4. The roof on the warehouse leaked. I insisted that the roof be repaired prior to taking possession of the warehouse. WFA promised before, after, and at the time the Lease was signed that it would repair the roof. The parties specifically carved out an exception to ITS' acceptance of the warehouse that WFA would repair the roof, as provided in Paragraph 1.9. As early as April of 2002 WFA received a report that the entire roof should be replaced.
>
> . . . .

8. The roof has numerous skylights and/or ventilation cupolas, which were inadequately repaired and maintained by WFA. As a result water leaked th[r]ough them profusely and birds had direct access to the warehouse.

9. The birds repeatedly entered the warehouse through these cupolas and contaminated ITS' stored food products with their feces and eggs.

10. The rainwater caused mold and mold eating bugs on ITS' products.

. . . .

12. There are large hoods beneath some of the cupolas. The birds laid eggs on these hoods, the eggs cracked and the insects infested the eggs and then flew down and contaminated ITS's food products.

. . . .

17. ITS's food products became contaminated with mold and insects. On January 17, 2005, a USDA affiliate, Sturm Foods, rejected ITS's product due to mold infestation. ITS called WFA and complained immediately. On February 10, 2005, Sturm again, rejected ITS's product, this time due to insect infestation. This contamination occurred despite ITS's efforts to protect the food products by shrink wrapping and fogging. ITS also placed slip sheets on top of product to try to protect it from "stuff" falling from the ceiling.

. . . .

20. WFA had actual and constructive notice since 2002 of the problems with its defective roof. ITS gave WFA oral and written notice of the problems the lack of maintenance was causing on ITS. ITS employees and I had numerous discussions with members and employees of WFA. ITS gave WFA further written notice of the problems with its roof on March 16, 2005.

Exhibit 43 at 605-08 (Bates reference numbers omitted). The affidavit is consistent with assertions made by the contractor and its president in a filing in the litigation between the contractor and the warehouse owner. In seeking relief, the contractor states in a court-filed submission that there were leaks in the roof, with water leading to mold on the bags of nonfat dry milk. The submission also addresses the "horrendous infestation" arising from birds

entering through the unrepaired roof, insects, and oil leaking from heaters on the ceiling. Exhibit 41 at 556-69.

26. The affidavit establishes that the contractor knowingly placed product in the warehouse and continued to store the product at the warehouse while believing that the condition of the roof was defective. Further, the contractor acknowledges that the damage occurred to the product while stored at the warehouse.

Discussion

The Government bears the burden of proof regarding both entitlement and quantum for each of the claims and related debt of the contractor.

Request for a Dismissal or Stay

The contractor requests that this matter be dismissed or stayed pending the outcome of its disputes with the warehouse owner and the insurance company. That litigation does not impact this dispute between the Government and the contractor, in which the Government claims contractual entitlement to payment for the value of damaged product and adjustments to related storage charges. Factually and legally the contractor has not demonstrated the appropriateness or benefit of a delay. The Government claims are ripe for resolution.

Summary Relief

With a motion for summary relief, the moving party bears the burden of establishing the absence of any genuine issue of material fact; all significant doubt over factual issues must be resolved in favor of the party opposing summary relief. At the summary relief stage, the Board may not make determinations about the credibility of witnesses or the weight of the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). However, it is also true that "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987) (citations omitted). To preclude the entry of summary relief, the non-movant must make a showing sufficient to establish the existence of every element essential to the case, and on which the non-movant has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). When a motion is made and supported as required in Federal Rule of Civil Procedure 56(a), the adverse party may not rest upon the mere allegations or denial in its pleadings, but must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. Unsupported contractor intimations that the damage arose from the inherent nature and

age of the product and from the contractor's agreement to bring contaminated product to its warehouse for reshipment are not persuasive even at this summary relief stage of leading to material facts that could alter the outcome of this dispute.

Under the contract, the contractor is the warehouse operator and the entity in direct privity of contract with the Government. Thus, by suggesting that the warehouse owner is the entity directly liable to the Government, the contractor relies upon a misconstruction of the obligations arising under the contract.

The contractor accepted the bags of product at its warehouse without any designation of damage. The nonfat dry milk was damaged while in storage. That damage arose from the conditions of the warehouse, specifically the roof, which permitted water and birds to enter. The causal connection is demonstrated without dispute by the affidavit of the contractor's president, who was aware of the ill-suited conditions of the warehouse prior to and during storage. The damage resulted in nonfat dry milk unsuitable for human consumption.

Suggestions by the contractor that it exercised the care of a reasonable and prudent contractor under the circumstances so as to be shielded from liability for the damaged products are contradicted by the record, most particularly the affidavit of the contractor's president. The contractor, through its president, knowingly accepted and continued to store products while aware of conditions that its president describes as unfit for storage; it shrink-wrapped pallets of product that had become wet and later became moldy. The emergence of mold and insects under the described conditions is not an unexpected result. The contractor did not act reasonably. That is, the contractor knowingly placed the products in the warehouse while aware of the leaking roof and penetrations that permitted birds to enter the warehouse. The contractor's professed actual knowledge that warehouse conditions were unfit for the proper storage of commodities demonstrates the unreasonableness of its actions.

In defending these claims, the contractor references periodic examinations and inspections by the Government that generally approved of the conditions and practices at the warehouse and did not disapprove of the shrink-wrapped commodities on pallets. Contractor's Brief in Opposition at 2. As noted above, under the terms and conditions of the contract, the contractor is liable for damaged goods. The actions by the Government, conducted primarily for the benefit of the Government, and the Government's silence do not alter or diminish the obligations of the contractor, and do not shift risks from the contractor to the Government.

The contract makes the contractor liable for the damaged products. The Government had the product denatured for a secondary use. For the denatured product that was not shipped because of damage, the Government assessed the market value of the nonfat dry

milk. The quantity and pricing of damaged products are supported by uncontested certifications of pricing that reflect the fair market value of the products. The contractor has not disputed the storage charge adjustments in the three related Government claims. The contractor offers nothing to contradict the assessed values in the Government claims; however, it requests that the nonfat dry milk be valued as denatured product.

The product stored at the warehouse was nonfat dry milk suitable for human consumption. The damage that occurred at the warehouse eliminated such a use. Under the contract, the Government is entitled to recover the market value of the nonfat dry milk that was stored at the warehouse, damaged while in the warehouse, and not delivered thereafter because it was damaged. The intervening denaturing served to mitigate, not escalate, the contractor's ultimate liabilities. Although the Government assessed damages for short-shipped deliveries only, and not for denatured products actually delivered, this restraint by the Government does not alter the contractual obligations of the contractor. The Government made the assessments in accordance with the terms and conditions of the contract, as it was nonfat dry milk (without denaturing) that was accepted at the warehouse and damaged while in storage.

Decision

The Board grants the Government motion for summary relief, and **DENIES** this appeal.

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JOSEPH A. VERGILIO
Board Judge

We concur:

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HOWARD A. POLLACK
Board Judge

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MARTHA H. DeGRAFF
Board Judge