BEFORE THE ARMED SERVICES
BOARD OF CONTRACT APPEALS
Falls Church, Virginia 22332

APPEAL OF:	)	
	)	ASBCA NOS. 35671 & 33965
FREEDOM, N.Y., INC.	)	
CONTRACT NO. DLA13H-85-C-0591	)	

Appellant's Post-Hearing Brief

This is an appeal pursuant to the Contracts Disputes Act of 1978, 41 U.S.C. § 601 et seq., from the contracting officer's final decisions dated June 22, 1987, and October 7, 1991, under Contract No. DLA13H-85-C-0591 ("MRE-5 contract"). Pursuant to the Board's February 17, 1993, order, Appellant Freedom, N.Y., Inc. ("Appellant" or "Freedom"), hereby submits its post-hearing brief in the above-captioned matter.

At its most basic level, this appeal involves three fundamental precepts that the government continually ignored throughout the life of Freedom's contract. First, and most fundamentally, that Freedom negotiated a contract to produce Meals-Ready-To-Eat ("MREs") with the PCO in one branch of the Defense Logistics Agency ("DLA"), but that an ACO in another branch refused to administer the contract as negotiated. Second, that Freedom, as a socially and economically disadvantaged small business, expected to be able to use progress payments as a means of "financing" its contract, but that the government continually ignored the purpose of progress payments and demanded that Freedom finance the contract itself or obtain traditional bank financing. Third, that Freedom expected to work with the government to develop into a source of supply for MREs as a member of the Industrial Planned Producer Program and be maintained in the Program, but that the government simply ignored this development objective in administering Freedom's MRE contract and thereby thwarted Freedom's efforts to remain an

MRE producer within the IPP Program. Ironically, after effectively driving Freedom out of business in 1987, DLA solicited Freedom in January 1991, during Operation Desert Shield, as a potential MRE supplier because the demand for MREs "far exceeded" the production capabilities of existing MRE suppliers.

For the reasons set forth below, the Board should, at a minimum, convert DLA's termination for default into a termination for convenience. In reality, the evidence demonstrates that the government not only repeatedly abused its discretion in how it treated Freedom, but also that it acted in bad faith. Moreover, the Board should conclude that DLA breached Contract No. DLA13H-85-C-0591 and permit Freedom to obtain appropriate relief for the claims arising from the government's conduct throughout the life of the contract.

I. **PROPOSED FINDING OF FACTS**.

A. Freedom Industries' Exposure to the Industrial Planned Producer Program.

1. Freedom is a socially and economically disadvantaged small business. See Rule 4 File ("R4") Tab G2, at 86.[1] Freedom is a successor to the interests of Freedom Industries, Inc. ("Freedom Industries") and was formerly known as H.T. Food Products, Inc.

2. The president of Freedom is Mr. Henry Thomas. See H.T. at 5-50-5-51. Mr. Thomas was the president of a food service contractor in New York and New Jersey in the late 1970's. Mr. Thomas' company, Freedom Industries, had food service contracts for the school lunch programs for Patterson, New Jersey, Newark, New Jersey, White Plains, New York, and Mount Vernon, New York. Hearing Transcript ("H.T.") at 5-62-5-63.

3. As a school lunch contractor, Freedom Industries operated two production facilities: one facility in Mt. Vernon, New York to support the White Plains and Mt. Vernon schools and one facility in New Jersey to support the Newark and Patterson, New Jersey schools. See H.T. at 5-62-5-63.

4. In approximately 1980, White House personnel contacted Mr. Thomas to see if he would assist American Pouch Foods, a minority-owned contractor in Chicago, Illinois that received a contract from the Defense Personnel Support Center ("DPSC"), a field activity of the Defense Logistics Agency ("DLA"), to produce combat rations called Meals-Ready-to-Eat

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[1]The Rule 4 File consists of three district sets of documents: the Government's Revised and Consolidated Rule 4 File (hereinafter designated "R4 Tab G__"), Freedom's Rule 4 File (hereinafter designated "R4 Tab F__"), and Freedom's Rule 4 File Supplement (hereinafter designated "R4 Tab M__"). Various trial exhibits admitted during the hearing will be designated "Govt. Trial Exhibit ___" or "Freedom Trial Exhibit ___."

("MRE"). See H.T. at 5-51-5-52. DPSC awarded the contract ("MRE-1 contract") to American Pouch Foods as part of the Industrial Planned Producer ("IPP") Program. See id.

5. Under the IPP Program, DOD awards contracts to a limited number of contractors under other than full and open competition. See 10 U.S.C. § 2304(a)(16) (1982). Such contracts not only provide certain supplies to the DOD, but also develop and maintain a source of supply in the event of a national emergency. See id.

6. Despite Mr. Thomas efforts to assist American Pouch Foods, DPSC terminated American Pouch Foods' MRE-1 contract for default. See H.T. at 5-51.

B. Freedom Industries Attempts to Enter the IPP Program, Successfully Performs Two MRE-3 Component Contracts, But Does Not Get An MRE-4 Award.

7. DPSC sought to reprocure the terminated portion of American Pouch Food's MRE-1 contract, and Freedom Industries submitted a proposal. See H.T. at 5-51-5-52. When Freedom Industries submitted its proposal, there were two other contractors in the IPP Program in connection with the assembly and production of MREs: Southern Packaging and Storage Company ("SOPACKO") of Mullins, South Carolina, and Right Away Foods Company ("RAFCO") of McAllen, Texas. See H.T. at 4-8, 5-52.

8. Ultimately, Freedom Industries did not receive an award under the MRE-1 reprocurement or the MRE-2 procurement. See H.T. at 5-53. Rather, RAFCO and SOPACKO received awards. See id.

9. In late 1982, after not receiving an MRE-2 award, Freedom Industries submitted information to DPSC and was accepted into the IPP Program. See H.T. at 5-55. Freedom Industries then submitted a proposal to DPSC for the MRE-3 procurement. See id.

10. After receiving the MRE-3 proposal, DPSC informed Freedom Industries that it needed to demonstrate subcontractor planning capability and meet the requirements of the Walsh-Healy Act in order to participate in the IPP Program as a prime contractor. See H.T. at 5-56-5-57.

11. After Freedom Industries met the subcontractor planning and Walsh-Healy Act requirements, DPSC awarded Freedom Industries two meat-component contracts as part of the MRE-3 procurement. See H.T. at 5-58-5-59. The two meat-component contracts had a total value of approximately $2,000,000. See id. at 5-60.

12. The two meat-component contracts required Freedom Industries to produce a beef-stew entree and a diced-beef-with-gravy entree. See H.T. at 5-60-5-61. DPSC then provided these two pouched entrees as government Furnished Material ("GFM") to the two MRE-3 prime contractors, RAFCO and SOPACKO, for inclusion within a complete MRE. See id. at 5-61.

13. Freedom Industries' manufacturing facility for two meat-component contracts was a 200,000-square foot plant in Hunts Point, Bronx, New York ("Hunts Point facility"). See H.T. at 5-59-5-63.

14. DPSC informed Freedom Industries that it wanted the MRE production facilities to be segregated from any other type of production within the Hunts Point facility and not to produce school lunches alongside the MREs. See H.T. at 5-68. DPSC also expressed concern to Freedom Industries about the ability of Freedom Industries to manage both school lunch contracts and MRE contracts. See id. at 5-68-5-69.

15. After these discussions, Freedom Industries stopped producing school lunches and concentrated on being developed and maintained as a successful MRE prime contractor within the IPP Program. See H.T. at 5-67-5-69.

16. Freedom Industries successfully completed the two meat-component contracts. See H.T. at 5-59-5-62. At about the time that Freedom Industries completed the meat-component contracts, Freedom Industries submitted a proposal in response to the MRE-4 solicitation. See H.T. at 5-63. DPSC, however, only awarded contracts to RAFCO and SOPACKO. See H.T. at 5-42, 5-63-5-64.

17. Freedom's Industries' failure to receive an MRE-4 award was devastating. See H.T. at 5-64-5-65. Despite Freedom Industries' success in completing the MRE-3 meat-component contracts, Freedom Industries was unable to sustain the momentum gained from its MRE-3 performance. See id. at 5-64. Freedom Industries had incurred numerous fixed start-up costs associated with converting the Hunts Point facility into a facility that could produce MRE components as part of the IPP Program. See id. at 5-65. Without any additional MRE contracts, Freedom Industries could not recoup these fixed start-up costs and could not retain its work force. See id. at 5-64-5-65.

C. The MRE-5 Solicitation and Negotiations.

18. To avoid being precluded from participating in the calendar year 1985 MRE program (MRE-5), Freedom Industries filed suit in federal court. Following resolution of the suit, the acting Under Secretary of Defense for Research and Engineering, James P. Wade, Jr., executed a determination and finding ("D&F") dated February 7, 1984. See R4 Tab F7; R4 Tab F1, p. 35; H.T. at 5-69-5-70. The D&F authorized DPSC to negotiate a class of proposed

contracts for the production and assembly of MREs under the IPP Program. The authority to negotiate this procurement, rather than to submit to competitive sealed bidding, was 10 U.S.C. § 2304(a)(16) (1982). See R4 Tab F7. Section 2304(a)(16) permitted negotiated procurements for essential military supplies and services required in the interest of national defense. See 10 U.S.C. § 2304(a)(16) (1982).

1. The Solicitation.

19. On February 15, 1984, DLA issued solicitation DLA13H-84-R-8257 ("MRE-5 solicitation"). R4 Tab G2. Thomas Barkewitz of DPSC was the PCO. See H.T. at 5-6. The MRE-5 solicitation limited participation in the MRE-5 program to the three planned producers having approved IPP plans: SOPACKO, RAFCO, and Freedom Industries. See R4 Tab G2.

20. The MRE-5 solicitation sought 3,101,520 cases of MREs at an estimated price of $124,000,000. R4 Tab F7. The D&F contemplated negotiation with SOPACKO, RAFCO, and Freedom Industries. Id. DLA was to award contracts to these three contractors so that they (1) would produce the MREs under their respective contracts and (2) would be kept available as part of this country's industrial base in the event of a national emergency. Id.

21. The solicitation required the contractors to assemble the MREs in cases containing twelve menu bags. Each menu bag was to contain a meat entree, crackers, and an accessory packet. See R4 Tab G2, p. 28; R4 Tab G10, p. 2.

22. The MRE-5 solicitation contained twelve menus:

Menu 1	-	Pork Patty, Accessory Packet D
Menu 2	-	Ham and Chicken Loaf, Accessory Packet A
Menu 3	-	Beef Patty, Accessory Packet B
Menu 4	-	Beef Slices, Accessory Packet C
Menu 5	-	Beef Stew, Accessory Packet A

Menu 6	-	Frankfurters, Accessory Packet E
Menu 7	-	Turkey diced, Accessory Packet A
Menu 8	-	Beef diced, Accessory Packet A
Menu 9	-	Chicken ala king, Accessory Packet A
Menu 10	-	Meatballs, Accessory Packet A
Menu 11	-	Ham Slices, Accessory Packet A
Menu 12	-	Ground Beef, Accessory Packet C

R4 Tab G2, p. 28.

23. Each MRE ration case consists of twelve menus. Retort food pouch components are the principal foot item in each menu (usually the entree item). The retort pouch is made of three-layer plastic and aluminum laminated film which is formed into a pouch. The pouch is filled with food, the air is drawn out, and the pouch is vacuum sealed. Finally the pouch is "retorted" (immersed in a high temperature water or steam bath) for sterilization and preservation, and then incubated. The pouches are then assembled with other items into a complete MRE. See R4 Tab G2, pp. 11-25.

24. The government was to provide government Furnished Material ("GFM") to the contractors, including the following entrees: beef stew, turkey diced, beef diced, ham slices, chicken ala king, frankfurters, beef slices, and ground beef. See R4 Tab G2, p. 57. The contractor was to provide certain Contractor Furnished Material ("CFM"), including the following entrees: ham & chicken loaf, meatballs, beef patties, and pork patties. See R4 Tab G2, p. 10.

2. Freedom Industries' April 1984 Proposal and August 1984 BAFO.

25. In response to the MRE-5 solicitation, Freedom Industries submitted its proposal dated April 11, 1984. R4 Tab G2. Freedom Industries' proposed price was $25.376 per case. See H.T. at 5-23, 5-75-5-76; R4 Tab G2; R4 Tab F9.

26. After Mr. Thomas received additional financial advice concerning the MRE-5 solicitation, he informed Thomas Barkewitz that Freedom Industries was going to revise its price proposal. See H.T. at 5-76-5-77.

27. On August 2, 1984, Freedom Industries submitted a revised price as part of its best and final offer ("BAFO"). Freedom Trial Exhibit A-10; R4 Tab F11; H.T. at 5-77-5-78. Freedom Industries' BAFO included three alternative price proposals: Plan A, Plan B, and Plan C. See H.T. at 5-45-5-46, 5-78; R4 Tab F11; Freedom Trial Exhibit A-10.

28. In Plan A, Freedom Industries offered to provide 620,304 cases of MREs at $34.81 per case, for a total price of approximately $21,593,000. See H.T. at 5-78; R4 Tab G9; Freedom Trial Exhibit A-10.

29. In Plan B, Freedom Industries offered to provide the MREs at $31.285 per case, so long as DPSC permitted Freedom Industries to charge $2,187,000 in certain one time start-up costs as direct costs to the contract. See H.T. at 5-78; R4 Tab G9; Freedom Trial Exhibit A-10. By permitting Freedom Industries to charge certain one-time start-up costs as direct costs to the MRE-5 contract, Freedom Industries would avoid having to recoup such one-time costs over time and thereby reduce its price per case. See H.T. at 5-78; Freedom Trial Exhibit A-10.

30. In 1979, DPSC permitted RAFCO to charge selected capital costs against RAFCO's first MRE contract in order to build a viable facility for MRE production in peacetime and to meet mobilization requirements. See R4 Tab F215, p. 4.

31. In Plan C, Freedom Industries offered to provide the MREs at $33.282 per case, so long as DPSC guaranteed a follow-on MRE contract. See H.T. at 5-78; R4 Tab G9; Freedom Trial Exhibit A-10. A guaranteed follow-on MRE award would permit Freedom

Industries to lower its price because it could eliminate certain MRE-5 gear-down costs and reduce other MRE-5 costs while completing the follow-on contract. See H.T. at 5-78; R4 Tab G9; Freedom Trial Exhibit A-10.

32. In all three plans, Freedom Industries included an economic price adjustment ("EPA") provision. See R4 Tab G9; Freedom Trial Exhibit A-10..

33. The solicitation contained the Changes clause, the Government Delay of Work clause, and the Assignment of Claims clause. See R4 Tab G2, p. 81, p. F37, p. F38.

34. The solicitation contained the Progress Payment for Small Business Concerns (1982 SEP) clause prescribed by DAR § 7-104.35(b), which provides inter alia, for progress payments at a rate of ninety-five percent (95%) of the contractor's total costs incurred under the contract. See R4 Tab G2, p. 81.

35. The solicitation also contained clause L-4. See H.T. at 5-79. Clause L-4 provided:

> APPROVAL OF FIRST ARTICLES AND PROGRESS PAYMENTS: First Articles are required under this contract (see Item 0002, page 7), and must be approved prior to commencing production under this contract for that respective item. . . . After acceptance of the First Article, the progress payment ceiling is increased to a maximum of 50% of the total item or subcontract dollar value whichever applies. Requests for increases beyond this 50% ceiling rate must be accompanied by a cash flow analysis detailing the necessity of the increase by showing the impact of progress payments on operations over and above the impact on

> profit. No other costs or increases on the progress payment rate will be allowed unless written approval is received from the PCO. In addition, a total progress payment ceiling for the entire contract is established at $9,000,000 or 50% of the contract value whichever is lesser. Increases to this ceiling must be accompanied by a cash flow analysis, detailing impact over and above that on profit, as noted previously. Requests for increases for long lead time materials must also be accompanied by a similar cash flow statement. The progress payments shall be for only those costs that are determined by the Defense Contract Administration Office as reasonable, allowable to the contract, and consistent with sound and generally accepted accounting principles and practices.

R4 Tab G2, p. 66 (emphasis added).

36. MRE-5 was the first MRE solicitation that included a clause imposing a ceiling on progress payments as set forth in clause L-4. See H.T. at 5-23-5-24, 6-12. Clause L-4 was a local DPSC clause. See id.; R4 Tab M19, p. 3.

37. When Freedom Industries submitted its BAFO, it anticipated a 21-month time period from contract award to contract close-out. See H.T. at 5-79. Its proposal included an estimate for both start-up costs and gear-down costs over the life of a 21-month contract. See id.

38. Freedom Industries anticipated that if it received a follow-on award to the MRE-5 contract, it would not incur numerous gear-down costs built into the MRE-5 proposal. See H.T. at 5-80.

3. Freedom Industries, Dollar Dry Dock, and Outside Financing.

39. On June 6, 1984, William Stokes of Defense Contract Administration Management Area-New York ("DCASMA-NY") completed a pre-award financial analysis of Freedom Industries regarding the MRE-5 award. See R4 Tab G1, p. 27. Mr. Stokes recognized that Dollar Dry Dock Commercial ("Dollar Dry Dock"), a Division of Dollar Dry Dock Savings Bank, had withdrawn Freedom Industries' credit line because Freedom Industries lacked government contracts, and that DCASMA-NY would not make a positive recommendation absent bank financing. Mr. Stokes described the situation as the classic "Catch-22." See id.

40. In trying to alleviate this "Catch-22," Mr. Stokes called Noel Siegert at Dollar Dry Dock. See R4 Tab G1, p. 27. Mr. Stokes asked Mr. Siegert to send a pro-forma letter to DCASMA-NY stating that Dollar Dry Dock would provide some sort of financing if Freedom Industries received a contract. See R4 Tab G1, p. 27. Mr. Siegert stated that the letter would be too conditional, at that stage, because Dollar Dry Dock lacked certain other financial information about the MRE-5 contract; therefore, Dollar Dry Dock would not send a pro-forma letter at that time. See id., p. 28. Absent the "pro-forma letter," DCASMA-NY recommended "No Award." See id.

41. After receiving Freedom Industries' 2 August 1984 BAFO, DPSC conducted another pre-award survey. See H.T. 5-82; R4 Tab G1. During the financial analysis portion of the pre-award survey, William Stokes told Mr. Thomas that pursuant to clause L-4, DLA would only pay progress payment requests up to the lesser of $9,000,000 or 50% of the dollar value of the MRE-5 contract. See H.T. at 5-83-5-85; R4 Tab G2. Mr. Stokes said that Freedom Industries would be responsible for financing the remainder of the contract. See H.T. at 5-83. Moreover, Mr. Stokes informed Mr. Thomas that if Freedom Industries failed to receive

some outside financing for the MRE-5 contract, DLA would conclude that Freedom Industries lacked the financial capability to perform the contract. See id. at 5-86.

42. Mr. Thomas again contacted Dollar Dry Dock concerning contract financing. See H.T. at 5-83. Since June, Dollar Dry Dock had been working with Freedom Industries and DCASMA-NY in order to provide DLA an acceptable commitment letter concerning outside financing for the MRE-5 contract. See R4 Tab F10, p. 2; R4 Tab M1; R4 Tab G1, pp. 27-28. In fact, "DCASMA New York . . . supplied both Freedom Industries and Dollar Dry Dock Commercial with several samples of acceptable commitment letters." R4 Tab F10; see also R4 Tab M1 (recognizing that there were six (6) previous letters between DCASMA-NY and Dollar Dry Dock regarding Dollar Dry Dock's financial commitment before the letters of August 9 and 10).

43. Mr. Thomas and Dollar Dry Dock representatives then met DLA officials at DLA Headquarters. See H.T. at 5-83. As a result of that meeting and in light of DCASMA-NY's previous samples of an "acceptable" commitment letter, Noel Siegert of Dollar Dry Dock sent a letter to Tom Barkewitz at DPSC dated August 9, 1984. See H.T. at 1-220-1-223, 5-84-5-85; R4 Tabs G16, G26. The letter stated:

> In the event Freedom Industries, Inc. is awarded a contract pursuant to Solicitation DLA 13H-84-R-8257 in the amount of $21,593,000.00, we shall upon assignment by Freedom Industries, Inc. to Dollar Dry Dock Savings Bank of New York of all claims or monies due or become [sic] due, from the U.S. government under the proposed contract, extend to Freedom Industries, Inc. such credit as in our judgment may be required but not to exceed $7,244,000.00 for the performance of said contract.
>
> It is understood that the government will rely on this letter of intent in making any award of the above contract to Freedom Industries, Inc.

R4 Tab F12. DLA Headquarters personnel provided the language in the letter and said it would be acceptable. See H.T. at 5-83-5-84.

44. When Freedom Industries reviewed the August 9, 1984, it became concerned that the letter might adversely affect Freedom Industries' ability to obtain financial assistance from the Small Business Administration ("SBA"). See R4 Tab G7; R4 Tab F24, p. 3; H.T. at 5-84-5-85. Freedom Industries communicated this concern to Dollar Dry Dock on 10 August. See R4 Tab G7.

45. On August 10, 1984, Dollar Dry Dock then sent a second letter to DPSC. The letter stated:

> In the event Freedom Industries, Inc. is awarded a contract pursuant to Solicitation DLA 13H-84-R-8257 in the amount of $21,593,000.00, we shall upon assignment by Freedom Industries, Inc. to Dollar Dry Dock Savings Bank of New York of all claims or monies due or become [sic] due, from the U.S. government under the proposed contract, extend to Freedom Industries, Inc. such credit as in our judgment may be required but not to exceed $7,244,000.00 for the performance of said contract.
>
> It is contemplated that any credit facilities extended will be done in conjunction with the various governmental guaranty programs available to disadvantaged small business companies.
>
> We understand that the government, in its discretion, may rely on this letter of intent in making an award of the above contract to Freedom Industries Inc.

R4 Tab F13.

46. Tom Barkewitz understood why Dollar Dry Dock sent the 10 August letter. He received a copy of Freedom Industries' 10 August letter to Dollar Dry Dock requesting that Dollar Dry Dock clarify its 9 August letter. See R4 Tab G7 (containing Tom Barkewitz's

initialed in right-hand corner); H.T. at 5-13-5-14 (T. Barkewitz testifying that he would put his initials and a date on a letter whenever he received one).

47. Mr. Barkewitz believed that these two Dollar Dry Dock letters were qualified commitment letters in that Dollar Dry Dock conditioned its commitment on the award of a $21,593,00 contract. See H.T. at 5-33. Mr. Barkewitz informed his DPSC superiors of his views. See id. at 5-34.

48. Both the August 9 letter and the August 10 letter related to Plan A of Freedom Industries' BAFO. See H.T. at 5-85. Under Plan A, Freedom Industries offered to provide MREs at a price of $34.81 per case, with a total contract price of $21,593,000. See R4 Tab G9; H.T. at 5-78; Freedom Trial Exhibit A-10.

49. Dollar Dry Dock was willing to provide the 9 and 10 August commitment letters, despite clause L-4, because progress payments largely would finance the contract up to $9 million. See H.T. at 5-86. Only upon reaching the $9 million ceiling in clause L-4 would Dollar Dry Dock, in effect, have to provide the remaining financing. See H.T. at 5-86-5-87.

50. When DLA conducted the financial portion of the second pre-award survey, Freedom Industries' balance sheet reflected $2.2 million in negative equity. See H.T. at 5-89; R4 Tab M1. Freedom Industries had this negative equity because it did not receive any follow-on contracts after completing the MRE-3 meat-component contracts. See H.T. at 5-89-5-90. DLA was aware that Freedom Industries' balance sheet reflected this deficit and was aware why Freedom Industries' balance sheet reflected this deficit. See id. at 5-89-5-90; R4 Tab G1, p. 27.

4. Freedom Industries Gets a Positive Pre-Award Survey and Negotiations Begin.

51. On or about August 30, 1984, DLA gave Freedom Industries a positive pre-award survey. As part of that analysis, Mr. Stokes concluded that Freedom Industries had the financial capability to perform the contract. See H.T. at 5-90; R4 Tab M1; R4 Tab G1, pp. 42-43 (Pre-Award Monitor Summary 31 Aug. 1984).

52. Before concluding that Freedom Industries had the financial capability to perform the MRE-5 contract, Mr. Stokes reviewed Freedom Industries' cash flow projections for the MRE-5 contract. See R4 Tab M1; see also Freedom Trial Exhibit A-10 (enclosing projected cash flows). Mr. Stokes recognized that Dollar Dry Dock's $7,244,000 figure was "a 'plug' to cover the cash shortfall start-up position and to further cover the difference between progress payment receipts and cash outlays." Tab M1; H.T. at 5-90-5-91. He doubted that Dollar Dry Dock's exposure would ever reach $7 million and was satisfied with Dollar Dry Dock's financial commitment letter. See R4 Tab M1.

53. After receiving the positive pre-award survey, Freedom Industries and DPSC began negotiations in September. See H.T. at 5-90-5-91; R4 Tab M2. During these negotiations, Tom Barkewitz and Henry Thomas discussed various methods by which Freedom Industries could reduce its $34.81 price per case. See H.T. at 5-91-5-92; R4 Tab M2.

54. DPSC offered Freedom Industries a letter contract at $28 per case. See H.T. at 5-92. Mr. Thomas rejected the offer because there were too many uncertainties. See id.

55. On September 7, 1984, as part of the negotiations, Freedom Industries reduced its price per case to $30.12. See R4 Tab M2; H.T. at 5-93. In making this offer, Freedom Industries requested certain concessions: (1) that DPSC include an Economic Price

Adjustment ("EPA") clause in the MRE-5 contract, (2) that DPSC award Freedom Industries an additional 200,000 MRE case contract at $21.00 per case through the SBA 8(a) program with delivery not later than December 31, 1985, (3) that DPSC permit progress payments for the MRE-5 contract "on a bi-weekly basis at the rate of 100% of incurred costs as defined by DAR regulations including the purchase of machinery, equipment and other tangible fixed assets necessary for performance under this solicitation," and (4) that DPSC accept its offer and award the MRE-5 contract not later than September 14, 1984. See R4 Tab M2.

56. DPSC acknowledged Freedom Industries' $30.12 price per case and informed Freedom Industries that it would respond. See H.T. at 5-95-5-96; R4 Tab M4.

57. DPSC subsequently requested that Freedom Industries submit updated financial information concerning the $30.12 price per case. On October 16, 1984, Freedom Industries submitted this information to DPSC on a DD Form 633 See H.T. at 5-96; R4 Tabs M5, M6.

5. Freedom Industries Submits Revised Cost Figures on 16 October 1984 and Negotiations Continue.

58. Freedom Industries' 16 October 1984 submission discussed certain categories of costs. See R4 Tabs M5, M6. Freedom Industries' submission stated that it intended to depreciate the $1.5 million cost of its production machinery and equipment over five years. See H.T. at 5-98; R4 Tab M6. As for other costs, Schedule 3 of the DD Form 633 listed a variety of manufacturing overhead costs and general and administrative ("G&A") costs. See R4 Tab M6. For example, within its manufacturing overhead costs, Freedom Industries included $85,000 for quality control equipment and supplies, $105,000 for maintenance equipment, $141,600 for receiving and warehouse equipment, $90,000 for building repair expenses, $177,838

for an automated building management and control system, $25,000 for lockers, and $100,000 for start-up supplies. See id. Similarly, for example, within its G&A costs, Freedom Industries included $77,000 for telephones, $80,000 for office equipment, and $30,000 for computer software. See id.; see also H.T. at 5-97-5-98.

59. Mr. Thomas placed these non-production machinery equipment items in the manufacturing overhead or G&A expense schedules under Plan B of the August 2, 1984, BAFO. See H.T. at 5-99; Freedom's Trial Exhibit A-10. Mr. Thomas divided Freedom Industries' costs in this manner because he thought that DLA should permit Freedom Industries to charge its non-production machinery and equipment as direct costs since the MRE-5 contract was Freedom Industries' only contract and Freedom Industries would use all of the equipment set forth in Schedule 3 to perform the MRE-5 contract. See H.T. at 5-104.

60. After receiving Freedom Industries' 16 October 1984 submission, DCAA audited the submission. See H.T. at 5-96, 5-105; R4 Tab G11. While the audit was on-going, Tom Barkewitz called Henry Thomas to discuss whether Freedom Industries could further reduce its $30.12 price per case. See H.T. at 5-106. Freedom Industries did not immediately respond, but in a face-to-face meeting at DPSC, Mr. Thomas reduced the price to $29.90 per case. See H.T. at 5-106.

61. On November 5, 1984, DCAA provided Tom Barkewitz the verbal results of its audit. See R4 Tab G11, p. 2. Mr. Guy Sansone, a DCAA auditor, participated in the audit. See R4 Tab G11, Ex. A. DCAA noted that Freedom Industries was not subject to the CAS rules and regulations because it was certified as a small business concern under 15 U.S.C. § 637(b)(6). See R4 Tab G11, p. 2. As part of the audit, the DCAA examined the contractor's proposed manufacturing overhead, G&A expenses, and accounting system. See id., p.4.

62. In reviewing Freedom Industries' proposed manufacturing overhead, DCAA did not question the $85,000 quality control equipment expense, the $105,000 maintenance equipment expense, the $141,600 receiving and warehousing equipment expense, the $177,838 automated building management and control system expense, the $25,000 locker expense, or the $100,000 start up supplies expense. See R4 Tab G11, p. 9. Moreover, DCAA noted, without objection, that "in the absence of other work at Freedom . . ., the contractor allocated the total overhead costs to the proposed MRE program." See id.

63. In reviewing Freedom Industries' proposed G&A expenses, DCAA did not question the $80,000 office equipment expense or the $30,000 computer software expense. See R4 Tab G11, p. 12. DCAA did question $7,000 of the $77,000 telephone expense. See id.

64. In reviewing Freedom Industries accounting system, DCAA stated:

> Freedom Industries, Inc. is currently on a double-entry accounting system. At the present time, the system does not provide for the segregation of costs by job. The contractor indicated, with the award of this contract, a computerized job-order costing system will be implemented that will enable us to track and identify all costs from receipt of material to the finished product.

R4 Tab G11, p. 15 (emphasis added).

65. This conclusion about the accounting system was consistent with DCAA's 8 May 1984 conclusion that Freedom Industries accounting system was "adequate for the administration of progress payments." See R4 Tab G1, p. 30.

66. DCAA was not the only one to review Freedom Industries' proposal. DCASR-NY conducted a "comprehensive review and evaluation of the Contractor's [16 October] proposal." R4 Tab F19. In reviewing Freedom Industries proposed manufacturing overhead, DCASR-NY approved $54,050 (of the $85,000 proposed) for quality control equipment, $25,380 (of the $105,000 proposed) for maintenance equipment, $70,800 (of the $141,600 proposed) for

receiving and warehousing equipment, $177,838 (of the $177,838 proposed) for an automated building management and control system, $25,000 (of the $25,000 proposed) for lockers, and $100,000 (of the $100,000 proposed) for start-up supplies. See R4 Tab F19, Schedule 3a (handwritten document); R4 Tab F19, pp. 3-4. DCASR-NY also noted that '[i]n the absence of other work at Freedom at the present time, the Contractor has allocated the total overhead costs to this MRE program." R4 Tab F19, p. 3, ¶ 6. Finally, DCASR-NY said that the DCASMA-NCPI industrial specialist reviewed the line items for "Quality Control Equipment," "Supplies, Maintenance Equipment," and "Rental of Receiving and Warehouse Equipment" and found them allocable. Id.

67. In reviewing Freedom Industries proposed G&A expenses, DCASR-NY approved $80,000 (of the $80,000 proposed) for office equipment and $30,000 (of the $30,000 proposed) for computer software. See R4 Tab F19, Schedule 3b (handwritten document); R4 Tab F19, pp. 3-4. DCASR-NY noted that "in the absence of other work at Freedom at the present time, the Contractor allocated the total G&A costs to the MRE program." R4 Tab F19, p. 4, ¶ 7.

6. 6 November 1984 Face-to-Face Negotiations.

68. DPSC notified Freedom Industries that it has passed the latest audits and that it was time for face-to-face negotiations. See R4 Tab F19. On November 6, 1984, DPSC and Freedom Industries conducted face-to-face negotiations at DPSC in Philadelphia, Pennsylvania. See H.T. at 5-107. Tom Barkewitz, Keith Ford, and Captain Donald Parsons (U.S.N.) represented DPSC. Henry Thomas and Patrick Marra, Freedom Industries' Vice President for Finance, represented Freedom Industries. See H.T. at 5-7, 5-106.

69. During the negotiations, the DPSC personnel reviewed Freedom Industries' 16 October 1984 DD Form 633 line-by-line. See H.T. at 5-107. DPSC suggested certain ways in which Freedom Industries could further reduce its costs based on DPSC's knowledge of the MRE production process and based on the audit results. See H.T. at 5-107-5-108. During the negotiations, neither Freedom Industries nor DPSC changed any categories of the costs contained in Freedom Industries' 16 October 1984 submission. See H.T. at 5-109. Additionally, neither Freedom Industries nor DPSC moved any items from one schedule to another schedule. See H.T. at 5-109.

70. By the conclusion of the 6 November 1984 negotiations, Freedom Industries has reduced its price per case to $27.725 per case for a total contract price of $17,197,000. See H.T. at 5-110; R4 Tab F18. Mr. Thomas believed that Freedom Industries' final negotiated price was a derivative of Plan B set forth in its 2 August 1984 BAFO. See H.T. at 5-110.

71. Freedom Industries was satisfied that it could perform the contract at $27.725 per case for a number of reasons. First, during the November 6 negotiations, DPSC provided Freedom Industries certain information concerning subcontractor costs and labor costs that enabled it to reduce both of these cost categories. See H.T. at 5-110-5-111. Second, DPSC reduced the contract length from 21 months to 14 months. See H.T. at 5-111-5-112. By reducing the contract length, Freedom was able to eliminate seven months of previously anticipated contract costs. See H.T. at 5-112. Third, because the contract negotiations had taken longer than expected, Freedom had not incurred certain G&A and associated start-up costs reflected in its submission. See H.T. at 5-112. Fourth, Tom Barkewitz agreed to modify clause L-4. See H.T. at 5-113-5-114. Specifically, Mr. Barkewitz agreed that DPSC would raise the

progress payment ceiling contained in clause L-4 by $2,000,000 after Freedom delivered the first 100,000 cases of MREs and raise the ceiling by another $2,000,000 after Freedom delivered the second 100,000 cases of MREs. Thus, Mr. Thomas believed (1) that Freedom Industries could obtain $8,598,500 (i.e., 50% of the contract value) in progress payments before delivering 100,000 cases, (2) that Freedom Industries could obtain another $2,000,000 after delivering 100,000 cases, and (3) that Freedom Industries could obtain another $2,000,000 after delivering the second 100,000 cases. See H.T. at 5-113-5-114; R4 Tab M8 (revised L-4 clause). Moreover, Mr. Thomas and Mr. Barkewitz also discussed the fact that clause L-4 permitted Freedom Industries to seek even more money if it supported its requests with appropriate cash flow analysis. See H.T. at 5-114-5-115; R4 Tab G2, at p. 66 of 96; see also R4 Tab M19, p. 3. Fifth, Mr. Barkewitz agreed that DLA would permit Freedom Industries to charge certain costs as direct costs to the contract for purposes of price determination and progress payments, rather than as indirect costs. These costs included the costs for various equipment set forth in Schedule 3 of the 16 October submission and the costs for a computerized accounting system. See H.T. at 5-114-5-115; R4 Tab F85, p. 2; see also R4 Tab G194, pp. 7, 10. Sixth, Mr. Barkewitz agreed that Freedom's progress payment liquidation rate would be 82.6% based upon the DAR Table E-512.3, which references a progress payment rate of 95% and a profit rate of 15%. See R4 Tab F114; R4 Tab F232, Progress Payment Request No. 1 (indicating an 82.6% liquidation rate). Finally, during the negotiations, Freedom Industries asked about the timing for payment of progress payments under the contract. Although Mr. Barkewitz told Mr. Thomas that he was not responsible for making progress payments, he stated that if the Department of Defense ("DOD") policy was to pay progress payments within 5-10 days, then the administrative contracting officer ("ACO") would pay progress payments in accordance with DOD policy and that he (Mr.

Barkewitz) would do everything he could to help Mr. Thomas with progress payment submissions. See H.T. at 5-35, 5-119; R4 Tab F2 (DOD Policy Letter).

72. When the November 6, 1984, negotiations ended, Mr. Barkewitz and Mr. Thomas signed a Memorandum of Understanding ("MOU") concerning the negotiations. See H.T. at 5-116; R4 Tab F17. The MOU stated:

> As a result of contract negotiations ending this date, Freedom Industries and the government have reached a settlement under solicitation DLA13H-84-R-8257 for 620,304 cases at $27.725 per case, or $17,197,928. Contract award at this price is pending approval from all appropriate review levels up to and including DLA. The break-out of cost elements as determined by the government negotiating team is as follows:
>
> | | | |
> |---|---|---|
> | Materials | | $ 8,193,637 |
> | Direct Labor | 811,002 | |
> | Manuf. O/H | | 3,627,530 |
> | Depreciation | | 333,333 |
> | Other Costs | | 163,816 |
> | G & A | 1,840,824 | |
> | Total Costs | | 14,970,142 |
> | Profit 14.997% | | 2,227,786 |
> | TOTAL PRICE | | $17,197,928 |

See R4 Tab F17.

73. The only items that Freedom Industries had to depreciate were its actual production machinery and equipment. See R4 Tab F17. Mr. Barkewitz and Mr. Thomas understood that all costs, other than the non-depreciable costs of actual production machinery and equipment, would be direct costs to the MRE-5 contract because Freedom Industries had no other contracts. See H.T. at 5-36-5-38, 5-116-5-117. Mr. Thomas was satisfied that Freedom Industries had reached a workable cost understanding with DPSC and that Freedom Industries had managed largely to eliminate the need for outside contract financing. See H.T. at 5-114, 5-117-5-118. In short, the cash flow "plug" figure for outside financing dropped from $7,244,000

to $515,164 as a result of the negotiations. See R4 Tab G13; cf. R4 Tab M1 (reference $7,244,000 as a "plug" figure).

7. 15 November 1984 Contract Award.

74. On November 15, 1984, DLA awarded the MRE-5 contract to Freedom Industries for production, assembly, and delivery of 620,304 cases of MREs. See R4 Tab M7; H.T. at 5-118. Freedom Industries was to deliver the MREs in six monthly installments between 2 July and 31 December 1985. Each installment was assigned a separate line item number. See R4 Tab M7. Freedom Industries was supposed to deliver the MREs as follows:

Date	Number of Cases
02-31 Jul 85	100,000
01-31 Aug 85	100,000
03-28 Sep 85	100,000
01-31 Oct 85	100,000
01-30 Nov 85	100,000
01-31 Dec 85	120,304

See id.

D. Marvin Liebman and Contract Administration: November 1984 - December 1984.

1. November 1984.

75. After DPSC awarded the contract to Freedom Industries, the MRE-5 contract was assigned to DCASMA-NY for administration. DCASMA-NY assigned Mr. Marvin Liebman as the Administrative Contracting Officer ("ACO") for Freedom Industries' MRE-5 contract. See H.T. at 1-47-1-48.

76. When Mr. Liebman was assigned Freedom Industries' MRE-5 contract, he was administering between approximately 500-700 other contracts, including numerous contracts

that had been awarded to the Wedtech Corporation ("Wedtech"). See H.T. at 1-197-1-199. Wedtech's contracts had an estimated face value of over $200,000,000. See id. at 1-199. The scandal surrounding Wedtech consumed approximately one-third of Mr. Liebman's time during 1986. See id.

77. Mr. Liebman had also served as the ACO on Freedom Industries' two MRE-3 meat-component contracts. See H.T. at 1-207-1-208; R4 Tab F5. Mr. Liebman was aware that the existing debt on Freedom Industries' balance sheet resulted from the two MRE-3 meat-component contracts and not receiving an MRE-4 award. See H.T. at 1-210, 2-105.

78. Mr. Liebman was not involved in negotiating the MRE-5 contract. See H.T. at 1-203. He knew, however, that Freedom Industries planned to employ approximately 400-500 chronically unemployed minorities in the Bronx and that the MRE-5 contract was Freedom Industries only government contract. See H.T. at 1-212. Nonetheless, Mr. Liebman believed that DLA was paying "$6,000,000 extra" for this contract based on the comparative prices of RAFCO and SOPACKO. See H.T. at 1-204-1-205, 1-212.

79. When Mr. Liebman became the ACO on Freedom Industries' MRE-5 contract, he was aware of the IPP Program. See H.T. at 1-214-1-215. Mr. Liebman did not, however, understand that one of the purposes underlying the IPP Program was to develop and maintain producers in connection with certain products deemed essential to the national defense. See id. at 1-213-1-215.

80. When Freedom Industries signed the MRE-5 contract, it did not have all of the equipment or the personnel needed to perform the contract. See H.T. at 5-121. Having received the contract award, however, Freedom Industries now could finalize all the tentative agreements it had entered into in anticipation of contract award. See H.T. at 5-121-5-122. For example, it could repair its 400,000 square foot plant at 1600 Bronxdale Avenue, Bronx, New York, could hire and train personnel, could set up necessary departments, and could acquire necessary production and management equipment. See H.T. at 5-122-5-125.

81. On November 15, 1984, Freedom Industries submitted Progress Payment Request No. 1 ("Request No. 1") to Mr. Liebman for $100,310, which included rent ($89,500) and real estate taxes ($16,089). See R4 Tab F232; H.T. at 5-125.

82. Mr. Liebman understood that pursuant to DOD policy he had an obligation to pay progress payments promptly, normally within five to ten days. See H.T. at 2-52-2-53; R4 Tab F2 (DOD policy statement).

83. Mr. Liebman informed Freedom Industries that Request No. 1 would undergo a pre-payment audit and final action would occur around December 21, 1984. H.T. at 2-52-2-53; see R4 Tab F20; H.T. at 5-125-5-126.

84. DAR § E-520 and the DLA Manual for Contract Administration ("DLAM") § 32.592-3 provide the guidelines for ordering a pre-payment audit. See H.T. at 2-63; Govt. Trial Exhibits G-1, G-3. DAR § E-520, ACO provides:

> For the making of progress payments, principal reliance will be placed on the adequacy of the contractor's accounting system and controls (E-506) and on the reliability of the contractor's certificates.
>
> To conserve administrative effort, hold down expense, and promote prompt payment of proper progress billings, audit before

> the making of progress payments will be kept to the minimum necessary for the protection of the interests of the government. Preaudit, that is, audit before the making of a progress payment, will be limited to those situations in which there is reason to question the reliability or accuracy of the contractor's certificate, or reason to believe that the contract will involve a loss. Where the adequacy and reliability of the contractor's accounting system and controls have been established in accordance with E-506, there shall be no requirement for preaudit of the first progress billing under new contracts.

Govt. Trial Exhibit G-1, DAR § E-520 (emphasis added).

85. As for DLAM § 32.592-3, it permitted pre-payment audits quarterly, for the most "doubtful" contractors. See H.T. at 2-69; Govt. Trial Exhibit G-3, DLAM § 32-592-3b(2)(b).

2. December 1984.

86. On December 7, 1984, Freedom Industries had incurred costs of $265,421 and submitted a Revised Progress Payment Request No. 1 ("Revised No. 1") for $252,150. See R4 Tab F232 (Section II, ¶ 10). Mr. Liebman requested a pre-payment audit. H.T. at 2-65.

87. On December 10, 1984, Mr. Liebman asked DCASR-NY Office of Counsel to review Request No. 1 and "provide a written opinion concerning payment/non-payment." See R4 Tab F22.

88. On December 13, 1984, DPSC, DCASMA-NY, and DCAA personnel had a post-award meeting. See R4 Tab F1, Ex. No. 25; H.T. at 2-17. Mr. Liebman chaired the meeting. See H.T. at 2-17.

89. At this meeting, the government personnel were sharply divided over whether to pay Request No. 1. Mr. Sansone, a DCAA auditor, stated that he felt that Freedom Industries was insolvent and not financially stable; therefore, Freedom Industries was not eligible

for progress payments. Mr. Sansone also stated that "while he realized that this was not a normal contract in terms of direct and indirect costs, in that Freedom has no other business, he still felt that what Freedom has submitted for a progress payment request was not acceptable for payment." See R4 Tab F1, Ex. No. 25, p. 2. Captain Parsons of DPSC disagreed and stated that based on a Freedom's Industries' positive pre-award survey, Freedom Industries had to be considered solvent. Id. Carl Herringer, Deputy Counsel, DCASR-NY, agreed. Moreover, Mr. Herringer stated that because all of the contractor's costs are direct costs, Freedom Industries should be paid. See id.

90. Marvin Liebman then cut short the discussion. He stated that as ACO, he had the final responsibility for determining whether a progress payment would be paid. See R4 Tab F1, Ex. No. 25, p. 2.

91. On December 14, 1984, a post-award conference was held between government personnel and Freedom Industries' personnel. See R4 Tab F1, Ex. No. 25, p. 4; H.T. at 5-126-5-127. The parties discussed numerous items, including the receipt of GFM. See H.T. at 5-128. After the post-award conference, Freedom Industries' personnel met with Mr. Liebman, Mr. Barkewitz, and certain DCAA personnel to discuss financial matters. At this meeting, Mr. Thomas informed the government that Freedom Industries was considering not using Dollar Dry Dock as one of its financial resources. Rather, Freedom Industries was negotiating with Broadway Bank because it offered better rates than Dollar Dry Dock. See H.T. at 5-128. Moreover, Mr. Thomas stated that the $7.2 million commitment from Dollar Dry Dock was significantly higher than what Freedom Industries would need to complete the contract in light of the 6 November 1984 negotiations. See R4 Tab F1, Ex. No. 25, p.4. Mr. Thomas also explained why he believed Freedom Industries was making progress on the contract and should receive

progress payments. See H.T. at 5-128-5-129. Finally, Mr. Thomas mentioned his plans to set up the computerized accounting and inventory systems. See H.T. at 5-129.

92. On December 18, 1984, Mr. Liebman wrote Mr. Thomas and requested information concerning Freedom Industries' financial posture for performing the MRE-5 contract. See R4 Tab G12; H.T. at 2-85.

93. On December 26, 1984, Mr. Thomas responded and informed Mr. Liebman that he estimated that Freedom Industries would only need $748,507 in private financing. See R4 Tab G13. Mr. Thomas further estimated that the $748,507 figure could be reduced in cash flow terms by $333,333 (i.e., the capital equipment depreciation expense). See R4 Tab G13. Thus, Freedom Industries really would only need $415,164 in outside financing. See id. Mr. Thomas then discussed a variety of sources of outside financing available to Freedom Industries to finance this amount. See R4 Tab G13, p.2. Mr. Thomas then urged Mr. Liebman to pay Revised Request No. 1 and to verify to vendors and lending institutions that DLA would pay Freedom Industries (or its assignee) promptly (i.e. within 5-10 days) for properly incurred costs under the MRE-5 contract. See id. pp. 2-3. Finally, Mr. Thomas explained why Dollar Dry Dock's original $7,224,000 commitment would not be approached. "Such amount was originally contemplated based upon a progress payment limitation of $9,000,000 which was superseded in contract negotiations with DPSC by agreement to increase progress payments upon delivery, thus substantially reducing the need for bank financing." See id. p. 3; H.T. at 5-136-5-138.

94. On December 26, 1984, Carl Herringer, Deputy Counsel, DCASR-NY responded to Mr. Liebman's 10 December 1984 request for a legal opinion regarding the propriety of paying Request No. 1 "although there has been no actual 'physical' progress on the contract." See R4 Tab F25. Mr. Herringer did not object to paying Request No. 1. See id. Mr.

Herringer explained that DPSC negotiators agreed that all costs incurred by Freedom Industries that would ordinarily be considered indirect costs (G&A and overhead expenses) are to be treated as direct costs. DPSC entered this arrangement because this was Freedom Industries' only current contract, either government or commercial, and DPSC believed Freedom Industries could charge all its allowable expenses to the MRE-5 contract. See R4 Tab F25. Moreover, based upon the DAR definitions and the progress payment clause, "it is not required that there be actual physical progress on a contract in order for a progress payment request to be valid. The contractor need merely incur costs directly allocable to the contract." See id. p. 2 (emphasis added). Finally, Mr. Herringer again reminded Mr. Liebman that there apparently had been no change in Freedom Industries' financial posture from the time of the award of the contract to the present. See R4 Tab F25, p. 2; see also H.T. at 2-27-2-29.

95. Although Mr. Liebman now knew that the PCO, Tom Barkewitz, had agreed during negotiations that Freedom Industries could treat certain items as direct costs to the contract for purposes of contract price and progress payments, Mr. Liebman refused to pay. See H.T. at 1-231-1-233; R4 Tab F85, p. 2.

96. During November 1984, December 1984, and early January 1985, Marvin Liebman repeatedly refused to confirm to Freedom Industries' bankers and potential financial supporters that Freedom Industries would receive progress payments up to approximately $9 million before delivery and that the company did not have to incur direct labor and raw material costs to obtain this money. See H.T. at 5-139-5-141. In fact, Mr. Liebman stated the opposite. See id. These statements damaged Freedom Industries' relationship with its bankers and potential financial supporters. See id.

E. Contract Administration from January 1985 Through March 1985: Marvin Liebman Suspends Progress Payments and Add Requirements to the MRE-5 Contract.

1. January 1985.

97. On January 4, 1985, Mr. Liebman wrote Mr. Thomas concerning Revised Request No. 1. See R4 Tab F30. Mr. Liebman was considering returning Revised Request No. 1 "unpaid and suspending progress payments under the contract because evidence available to me indicates that Freedom Industries is in such unsatisfactory financial condition as to endanger performance of the contract. Specifically, Dollar Dry Dock Commercial, which committed itself to extend Freedom Industries credit in the performance of the contract, has stated that no credit will be forthcoming until such time as an 'arrangement' is in place to settle the amounts owed by Freedom Industries to creditors for debts incurred prior to the subject contract." See R4 Tab F30. Mr. Liebman claimed that Dollar Dry Dock's present position was inconsistent with the August 9th and 10th, 1984 commitment letters. See id. Mr. Liebman also stated that "there does not appear to be any evidence of progress being made in the performance of the contract . . . which serve[s] to provide 'security' to the government for any monies that would be paid, in accordance with the provisions of the Progress Payment Clause." See R4 Tab F30, p. 2. Mr. Liebman gave Mr. Thomas ten days to respond to the letter. See id., p. 3.

98. Through 4 January 1987, Freedom Industries had incurred costs of $580,877, but had gotten no progress payments. See R4 Tab F232 (Freedom Industries' Request No. 2) (Section II, ¶ 10).

99. On January 14, 1985, Freedom Industries submitted Progress Payment Request No. 2 for $299,683. See R4 Tab F232. Mr. Liebman requested a pre-payment audit. H.T. at 2-65.

100. On January 16, 1985, DPSC approved all of Freedom Industries' first article samples. See R4 Tab F34, p. 3; H.T. at 5-121. Although the MRE-5 contract permitted Mr. Liebman to make progress payments up to $2,000,000 until first articles were approved, Mr. Liebman had still not paid any money to Freedom Industries. See R4 Tab F34, p. 3.

101. On January 18, 1985, Mr. Thomas responded to Mr. Liebman's January 4, 1985 letter. Mr. Thomas' explained that Mr. Liebman's refusal to confirm to bankers, suppliers, and equipment manufacturers that DLA would pay progress payments promptly was destroying Freedom Industries' ability to conclude financing arrangements. See R4 Tab F34, p. 3. In fact, Mr. Liebman's statements to financial backers that Freedom Industries would not receive progress payments until it incurred direct labor and direct material costs caused the financial backers to withdraw their financial support. See id. pp. 3-4. Moreover, Mr. Liebman's statements about progress payments contradicted what Mr. Thomas and Mr. Barkewitz agreed to during negotiations. See id.

102. On January 21, 1985, Mr. Thomas met with personnel from DCASMA-NY, including Mr. Liebman. See R4 Tab G24. On January 25, 1985, Mr. Thomas provided Mr. Liebman certain financial information that he requested at the 21 January meeting. See id.

2. February 1985.

103. Freedom Industries had incurred $824,619 in costs by February 1, 1985, but had received no progress payments. See R4 Tab F232 (Freedom Industries Request No. 3) (Section II, ¶ 10).

104. On February 6, 1985, Mr. Liebman returned Revised Request No. 1 and Request No. 2 unpaid and suspended progress payments under the contract. See R4 Tab F43, ¶

4; H.T. at 2-104-2-105. "This suspension, pursuant to Paragraph (c) Reduction or Suspension of the Progress Payment Clause of your contract, is based upon substantial evidence presented to me that Freedom Industries is in such unsatisfactory financial condition as to endanger performance of this contract." See R4 Tab F43, p. 2.

105. DAR 7-104.25(b)(c) provides:

> The Contracting Officer may reduce or suspend progress payments, or liquidate them at a rate higher than the percentage stated in (b) above, or both, whenever he finds upon substantial evidence that the Contractor (i) has failed to comply with any material requirement of the contract, (ii) has so failed to make progress, or is in such unsatisfactory financial condition, as to endanger performance of this contract . . . .

See DAR § 7-104-25(b)(c) (1982 SEP) (emphasis added).

106. Mr. Liebman listed certain reasons for suspending progress payments. See R4 Tab F43. He included Dollar Dry Dock's statement that it would not extend credit until such time as an "arrangement" is in place to settle the amounts owed by Freedom Industries to creditors for debts incurred prior to the subject contract. Mr. Liebman claimed that this condition was contrary to Dollar Dry Dock's letters of 9 and 10 August 1984, on which DPSC relied in awarding the contract to Freedom Industries. See id. Mr. Liebman also claimed that there had been "no physical progress, i.e., receipt of materials/equipment, work in process, labor, assembly at Freedom Industries, to date." See id., p. 3; see also H.T. at 2-104-2-107.

107. Mr. Thomas protested Mr. Liebman's suspension of progress payments. See H.T. at 5-145-5-146. Mr. Thomas told Mr. Liebman that Freedom Industries was in the same financial condition as during the pre-award phase, except that it had incurred numerous costs from November 1984 to mid-February 1985 and had not gotten any progress payments.

See H.T. at 5-146-5-147; R4 Tab F232 (Freedom Industries' Request No. 3) (Section II, ¶ 10) (Freedom Industries had incurred $824,619 in costs through 1 February).

108. On February 14, 1985, Mr. Thomas met with DLA personnel at DLA Headquarters. H.T. at 2-108-2-110. At the meeting, DLA Headquarters personnel told Mr. Liebman that he was wrong and that Freedom Industries did not need to incur direct labor and raw material costs to receive progress payments. See H.T. at 5-149. Mr. Liebman then informed Freedom Industries, however, that it had to obtain $3.8 million dollars in credit from traditional financing sources in order to receive progress payments. In addition, DCASR-NY personnel told Freedom Industries to novate the MRE-5 contract in order to prevent Freedom Industries' existing creditors from attaching progress payments. See H.T. at 2-108-2-110, 2-127, 5-153-5-157; see also R4 Tab F49.

109. On February 22, 1985, Mr. Thomas responded to Mr. Liebman's demands. See R4 Tab F51. Mr. Thomas informed Mr. Liebman that Freedom Industries had reached a novation agreement with H.T. Food Products, Inc., to take over and deliver under the MRE-5 contract. "The basis for such an agreement is obvious in light of Freedom's inability to honor your request to secure traditional bank financing. A novation agreement between [the] parties noted will eliminate once and for all the issue of financial capability to produce the required items and should expedite the release of contractual progress payments . . . ." See R4 Tab F51.

110. On February 25, 1985, Freedom Industries submitted Progress Payment Request No. 3 for $231,555. See R4 Tab F232; R4 Tab G33. Mr. Liebman requested a pre-payment audit. H.T. at 2-65. In a letter accompanying Request No. 3, Mr. Thomas informed Mr. Liebman that Freedom Industries requested that DCAA visit the company's facility in order to review its accounting system to ensure that Freedom Industries' accounting practices were in

accord with contractual obligations and that costs incurred are allowable costs under the contract. See R4 Tab G33.

111. On February 28, 1985, Bankers Leasing Association, Inc. ("Bankers Leasing") entered an accounts financing loan agreement with H.T. Food Products, Inc. ("H.T. Food Products"). See R4 Tab F53; H.T. at 5-160. Pursuant to the commitment letter, Bankers Leasing agreed to loan H.T. Food Products up to $5,000,000 based upon the value of accounts receivables received from H.T. Food Products. See R4 Tab F53; H.T. at 2-112-2-116, 5-160-5-162.

112. Mr. Liebman's failure to pay progress payments from November 1984 to February 1985 severely damaged the company's ability to remain on schedule. See H.T. at 5-142-5-144.

3. March 1985.

113. Mr. Liebman received the agreement between H.T. Food Products and Bankers Leasing in early March. See H.T. at 2-116-2-118. DCASR-NY approved the accounts receivable financing commitment from Bankers Leasing. See H.T. at 5-161-5-162.

114. On March 12, 1985, Freedom Industries asked Tom Barkewitz for a 90-day extension of deliveries under the MRE-5 contract to permit deliveries from October 1985 through March 1986. See R4 Tab F56. Freedom Industries based its request on a variety of reasons, including Marvin Liebman's failure to pay progress payments, Marvin Liebman's failure to confirm to suppliers the agreement reached between the PCO and Freedom Industries in connection with the payment and timing of progress payments, Marvin Liebman's requirement that Freedom Industries obtain a credit line from traditional banking sources to be used to

perform the MRE-5 contract, and the delay associated with completing the novation process. See id.; H.T. at 5-166-5-167.

115. On March 18, 1985, Freedom Industries submitted a novation package to Mr. Liebman to novate the contract to H.T. Food Products. See R4 Tab F60; see also R4 Tab F61; H.T. at 5-162-5-164.

116. On March 21, 1985, Tom Barkewitz denied Freedom Industries' request for the 90-day delivery schedule extension. See R4 Tab F60; H.T. at 5-167; cf. H.T. at 2-123-2-124.

117. The continued lack of progress payments was strangling Freedom Industries. See H.T. at 5-164-5-166. Although the company had hired people, it lacked the computerized accounting or inventory system, which it had planned to have, and was falling further behind schedule. See H.T. at 5-164-5-166.

F. Contract Administration From April 1985 Through June 1985: Marvin Liebman Refuses to Honor the Agreement Between DPSC and Freedom Industries.

1. April 1985.

118. Through 5 April 1985, Freedom Industries had incurred costs of $1,275,740, but had received no progress payments. See R4 Tab F232 (H.T. Food's Request No. 1) (Section II, ¶ 10).

119. On April 9, 1985, DPSC sent Freedom Industries a cure notice. See R4 Tab F67. DPSC informed Freedom Industries that it was considering terminating the MRE-5 contract for default because Freedom Industries had failed to correct building deficiencies that the Health Services' Command discovered in Freedom Industries' plant. See id.

120. On April 10, 1985, H.T. Food Products submitted Progress Payment Request No. 1 for $1,766,923. See R4 Tab F232; H.T. at 5-168. The request combined Freedom Industries' Revised Request No. 1, Request Nos. 2 & 3, and other incurred costs. See R4 Tab F232; H.T. at 2-126, 5-164, 5-168. Mr. Liebman requested a pre-payment audit. H.T. at 2-65.

121. On April 17, 1985, the MRE-5 contract was novated to H.T. Food Products. See R4 Tab F64.

122. On April 19, 1985, H.T. Food Products responded to DPSC's cure notice. See R4 Tab F70. H.T. Food Products stated that although it was continuing to perform under the MRE-5 contract, the ACO needed to make partial or full payment of the pending progress payment requests or to provide certain documentation in order for H.T. Food Products to be able to obtain money from Bankers Leasing. See R4 Tab F70. H.T. Food Products then proposed a schedule in order to cure deficiencies under the contract. See id. As consideration for the proposed schedules listed in the letter, H.T. Food Products offered to pay $5,000. H.T. Food Products closed its letter with the statement that the letter "should not be construed as [an] admission on the part of H.T. Food Products to be responsible for delay under the contract. We reserve the right to discuss this issue at a later date." See R4 Tab F70.

123. On April 23, 1985, H.T. Food Products amended the schedule offered in its letter of April 19, 1985. See R4 Tab F71. Again, H.T. Food Products reserved its right to discuss who was responsible for the delay associated with the MRE-5 contract. See id.

124. On April 24, 1985, DPSC granted a 90-day extension of the delivery schedule. See R4 Tab F73. As consideration for this extension, DPSC required H.T. Food Products to pay $100,000. See id.; H.T. at 5-167-5-168.

2. May 1985.

125. On May 6, 1985, Marvin Liebman partially paid H.T. Food Products Progress Payment Request No. 1. See R4 Tab F232. Although H.T. Food Products requested $1,766,923, Marvin Liebman only paid $1,700,730. In refusing to pay all of Progress Payment Request No. 1, Marvin Liebman informed H.T. Food Products that he would not pay $22,291.93 for office automation equipment. See R4 Tab G50. Although during the pre-award negotiations Mr. Barkewitz, DCAA, and DCASR-NY agreed that the contractor could charge the expense as a direct cost and receive payment, Mr. Liebman refused to pay for it. See H.T. at 2-127-2-128.

126. After receiving this first progress payment, Mr. Thomas ensured that the company's subcontractors were paid. See H.T. at 5-169-5-170.

127. On May 15, 1985, H.T. Food Products submitted Progress Payment Request No. 2 for $673,074. See R4 Tab F232; H.T. at 5-170. Mr. Liebman requested a pre-payment audit. H.T. at 2-65.

128. On May 23, 1985, Mr. Thomas wrote Ms. Rowles of DPSC, Tom Barkewitz's supervisor, and asked that DPSC inform Mr. Liebman that Tom Barkewitz had agreed during pre-award negotiations on November 6, 1984, that Freedom Industries could charge the $22,291.93 office automation equipment expense to the MRE-5 contract as a direct cost. See R4 Tab F74; H.T. at 2-127-2-128, 5-171-5-174.

129. On May 30, 1985, Mr. Thomas again wrote Ms. Rowles concerning the office automation equipment. See R4 Tab G51. Mr. Thomas again informed Ms. Rowles that Mr. Liebman was refusing to pay for office automation equipment that DPSC approved during pre-award contract negotiations as a direct expense. Mr. Thomas again requested that Ms. Rowles speak with Mr. Liebman about the pre-award negotiations. See R4 Tab G51. Mr.

Thomas informed Ms. Rowles that the issue needed to be resolved expeditiously because the office automation equipment was crucial to H.T. Food Products in order to permit it to complete its quality control sampling and tracking system, its inventory control system, its security control system, and its obligation to provide the Health Services Command a computer for their office. See R4 Tab G51.

3. June 1985.

130. Freedom Industries had incurred $2,705,378 in costs by 1 June, but had received only $1,700,730 in progress payments. See R4 Tab F232 (H.T. Food's Request No. 3)(Section II, ¶ 10).

131. On June 3, 1985, H.T. Food Products submitted Progress Payment Request No. 3 for $535,767. See R4 Tab F232; H.T. at 5-170. Mr. Liebman requested a pre-payment audit. H.T. at 2-65.

132. On 6 June 1985, Freedom Industries complained about the manner in which progress payments were being made and informed DCASMA-NY that it was constructively changing the contract. See R4 Tab F76.

133. On June 6, 1985, Mr. Liebman paid $332,421.00 of the $673,074 requested in Progress Payment Request No. 2. See R4 Tab F232. In not paying the $673,074, Mr. Liebman refused to pay $37,960 for certain quality control equipment costs, $84,092 in automated building management costs, and $19,473 in office equipment costs. See H.T. at 2-127-2-128. Mr. Liebman concluded that (despite Mr. Barkewitz's agreement to the contrary) these costs represented equipment costs that should be capitalized and were not eligible for progress payments. See id.; see also R4 Tab F76.

134. On June 9, 1985, Ms. Rowles informed Mr. Liebman about the pre-award negotiations. See R4 Tab F77; H.T. at 5-173-5-174. Ms. Rowles confirmed to Mr. Liebman that, during the pre-award negotiations, DPSC agreed that Freedom Industries could charge the following as direct costs: $54,000 for quality control equipment and supplies, $177,838 for an automated building management and control system, and $80,000 for office equipment. See R4 Tab F77. Ms. Rowles also stated that, before award, DCAA did not take exception to these costs being handled as a one time cost rather than a depreciable element. "In view of the above and the contracting officer's knowledge of the industry, it was decided to pay to pay for these elements as 100% costs rather than insist upon depreciation." See id.; H.T. at 2-128-2-130.

135. After Mr. Liebman received the telex from Ms. Rowles, he understood that DPSC believed that he should pay for such costs. See H.T. at 2-130-2-131. Nonetheless, Mr. Liebman did not pay. See id.

136. On June 12, 1985, Mr. Liebman requested a legal opinion from the DCASR-NY Office of Counsel concerning whether to pay the costs associated with quality control equipment and supplies, the automated building management and control system, and office equipment. See R4 Tab F79; H.T. at 5-175.

137. On June 12, 1985, DCAA issued a report stating that H.T. Food Products' current cost accounting system was adequate for accumulating contract costs in support of progress payment requests. See R4 Tab G54.

138. Bilateral modification P000011, effective 14 June 1985, established a new six-month delivery schedule. The first deliveries were to begin in October 1985 and were to be completed by 31 March 1986. In exchange for this delivery schedule extension, H.T. Food

Products agreed to pay $100,000. R4 Tab at G55. H.T. Food Products did not admit that it was responsible for any delay under the contract. See id.

139. On June 19, 1985, Mr. Thomas met with DCSMA-NY representative concerning payment under the MRE-5 contract. See R4 Tab F81. Mr. Thomas complained about Mr. Liebman's failure to make progress payments promptly and in accordance with DOD policy (i.e., within 5-10 days as set forth in DOD policy), Mr. Liebman's failure to pay for equipment costs as negotiated between Mr. Thomas and DPSC, and Mr. Liebman's failure to issue a list of accepted and allowable expenses under the contract in order to avoid the delays caused by his decision to order a pre-payment review of every progress payment request. See id.

140. On June 24, 1985, Mr. Liebman paid $535,767 in connection with Progress Payment Request No. 3. See R4 Tab F232.

141. On June 25, 1985, DPSC issued the MRE-6 solicitation and limited participation to those contractors having approved IPP plans. See R4 Tab G93.

142. On June 28, 1985, DCAA issued a report stating that it considered "the contractor's current cost accounting system as adequate for accumulating contract costs in support of progress payment requests." See R4 Tab G57; H.T. at 2-151-2-152.

143. In late June, Warren Rosen of Performance Financial, a company from which H.T. Food Products planned to lease equipment, learned that Mr. Liebman was not going to make progress payments. See H.T. at 5-179-5-180. Accordingly, Mr. Rosen cancelled H.T. Food Products' equipment leases for certain state-of-the-art production equipment crucial to performance. See id at 5-180-5-182; R4 Tab F1, Ex. No. 33. Mr. Liebman thereby deprived H.T. Food Products of the state-of-the-art equipment. See H.T. at 5-181-5-182.

G. Contract Administration From July 1985 Through August 1985: Marvin Liebman Seeks a DAR Deviation, Questions the Contractor's Accounting System, and Again Considers Suspending Progress Payment.

1. July 1985.

144. On July 5, 1985, H.T. Food Products submitted Progress Payment Request No. 4 for $807,348. See R4 Tab F232 (H.T. Food's Request No. 5) (Section II, ¶ 10). Through 5 July, it had incurred $3,556,278 in costs. See id. Mr. Liebman requested a pre-payment audit. H.T. at 2-65.

145. On July 15, 1985, Michael Montefinise, Assistant Counsel for DCASR-NY, responded to Mr. Liebman's 12 June 1985 letter requesting a legal opinion as to whether costs for certain quality control equipment and supplies, an automated building management and control system, and office equipment could be treated as direct costs for the purpose of MRE-5 progress payments. See R4 Tab F85. Mr. Montefinise noted that before awarding the MRE-5 contract, Freedom and the PCO, "during negotiations, agreed that the subject equipment would be treated as direct costs to the contract and such treatment was for the purpose of both price determination and progress payments. This agreement is confirmed by both a TWX dated 10 June 1985 from M. H. Rowles, Chief Operational Rations, DPSC, (presently acting as PCO) and a telephone conversation, on 10 July 1985, among the undersigned, M. H. Rowles and Keith Ford, a government member of the negotiating team." Id. (emphasis added). The PCO believed that treating the equipment as a direct cost to the contract would permit the contractor to receive progress payments based on the entire cost of this equipment, rather than only on the depreciable portion of the equipment costs. Although Mr. Montefinise was unsure whether PCO had authority to make such an agreement, he believed that government could be bound based upon a theory of estoppel. See id. p. 2. In light of the agreement with the PCO the valid business

reasons for the agreement, the contractor's need for cash to perform the MRE-5 contract, and that the equipment at issue was essential to successfully completing the contract, Mr. Montefinise discussed a DAR deviation to permit implementation of the agreement to treat all equipment in question as a direct cost to the contract for progress payment purposes. He noted that if "a deviation were not granted, the results could be a failure of the contractor to obtain the requirement and consequently an inability on its part to successfully perform the contract and the possible bankruptcy of the contractor." Id. (emphasis added). Moreover, "even if the equipment costs would not be treated as direct for progress payment purposes . . . the contractor eventually will be paid fully for these costs, in that, these costs are part of its fixed price contract." See id., p. 3. In conclusion, Mr. Montefinise stated that to the extent that the equipment is not capital equipment or that such equipment may be classified under some other category to permit treatment as a direct expense to the subject contract, the ACO may properly make payments based on the entire costs of the equipment. To the extent that the equipment is capital equipment and no classification is appropriate to permit treatment as a direct expense, progress payments could only be made on the depreciable portion of the equipment and to treat the costs otherwise would require a DAR deviation. See id., pp. 3-4.

146. After receiving this memorandum, Mr. Liebman understood that if H.T. Food Products did not get this equipment and receive payment for it, the contractor could go bankrupt or be unable to perform the contract. See H.T. at 2-172-2-173. In addition, Mr. Liebman understood that he had discretion on how to classify the equipment at issue for purposes of payment: if he classified the equipment as non-capital equipment, he could pay H.T. Food Products immediately. See at 2-173-2-175.

147. Mr. Liebman decided to reclassify the equipment as capital equipment, not pay, and seek a DAR deviation. See H.T. at 5-177, 2-175. Mr. Liebman knew that requesting a DAR deviation would further delay payment because a DAR deviation would take an indefinite period of time to process. See id. at 2-178.

148. On July 18, 1985, Mr. Liebman requested a one-time deviation to DAR 7-104-35(b) in order to permit him to treat certain costs for office equipment, quality control equipment and supplies, and an automated building management and control system in the amount of $311,838 as direct costs for progress payments purposes. Mr. Liebman noted that if the deviation were not granted, the result could be a failure of the contractor to obtain the required equipment and, consequently, an inability on its part to successfully perform the contract. See R4 Tab F87. (On August 14, 1985, the new PCO, Frank Bankoff, sent nearly the identical letter to the DLA Director requesting a similar deviation. See R4 Tab F91; H.T. at 5-192-5-193.)

149. On July 25, 1985, H.T. Food Products submitted Progress Payment Request No. 5 for $170,689. See R4 Tab F232. Mr. Liebman requested a pre-payment audit. See H.T. at 2-65. Mr. Liebman subsequently changed the numbers in connection with Progress Payment Request Nos. 4 and 5 and Request No. 4 became No. 5 and vice versa. See H.T. at 2-142-2-143.

150. On July 29, 1985, Mr. Liebman paid $170,689 in connection with Revised Progress Payment Request No. 4. See R4 Tab F232. The payment was for one of H.T. Food Products' subcontractors, Cadillac Products, Inc., in order to prevent Cadillac Products from shipping raw materials to another vendor. See id.; H.T. at 2-143, 5-182-5-183.

151. Although DCAA audit reports of 12 June and 28 June 1985 stated that H.T. Food Products cost accounting system was adequate, Mr. Liebman did not pay the $807,348

requested in the 5 July Revised Progress Payment Request No. 5 because he was considering suspending progress payments due to an allegedly inadequate accounting system. See H.T. at 2-147, 2-152-2-153. Mr. Liebman did not, however, receive a report from DCAA questioning H.T. Food Products cost accounting system until mid-August 1985. See H.T. at 2-153. Moreover, Mr. Liebman did not inform H.T. Food Products of this de facto suspension of progress payments until August 23, 1985. See R4 Tab G62.

2. August 1985.

152. Through August 2, 1985, H.T. Food Products had incurred $4,230,763 in costs, but had only received $2,739,607 in progress payments. See R4 Tab F232 (H.T. Food's Request No. 6) (Section II, ¶ 10).

153. On August 8, 1985, H.T. Food Products submitted Progress Payment Request No. 6 for $640,761.00. See R4 Tab F232; H.T. at 2-185-2-186. Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

154. On 13 August 1985, Freedom protested the terms of the MRE-6 solicitation. See R4 Tab G93. Freedom argued (1) that DPSC was improperly permitting CINPAC to participate despite not having an approved IPP schedule as of 10 June and (2) that DPSC erroneously estimated the number cases required. See id.

155. In late July or early August 1985, Mr. Guy Sansone became the cognizant DCAA auditor conducting pre-payment audit reviews of H.T. Food Products' progress payment requests. See H.T. at 2-162-2-163, 5-187-5-188. As mentioned, during the initial post-award meeting on December 13, 1984, Mr. Sansone had opined that Freedom Industries was insolvent and should not receive progress payments. See R4 Tab F1, Ex. No. 25, p. 2.

156. On August 13, 1985, Mr. Sansone authored a DCAA audit report concerning H.T. Food Products. See R4 Tab G60; H.T. at 2-162. DCAA concluded that the contractor's accounting system was inadequate for purposes of progress payments. See R4 Tab G60. The DCAA criticized Freedom's accounting system for not segregating capital costs and direct costs. See id.; see also H.T. at 5-177, 5-187-5-189. The DCAA report also stated that the contractor's financial condition was not adequate for performing the contract and that the contractor was insolvent. Absent the required cash flow (working capital), "it is exceedingly doubtful that the contractor can complete this contract." See R4 Tab G60.

157. Notably, Mr. Thomas had not changed the accounting system, which DCAA said was adequate from May 1984 through June 1985. See H.T. at 5-187-5-190; cf. R4 Tab G1, p. 30; R4 Tab G54; R4 Tab G57. What had changed, however, was that Mr. Sansone became the new auditor and Mr. Liebman had reclassified certain equipment as capital equipment, despite Mr. Thomas' agreement with the PCO to the contrary, and was criticizing the contractor's accounting system for not segregating costs in accordance with Mr. Liebman's decision. See H.T. at 5-187-5-190. As for the contractor's financial condition, the DCAA failed to recognize that Freedom had not received any progress payments until 6 May 1985 and that, through 2 August 1985, the contractor incurred $4,230,763 in costs, but had only received $2,739,607 in progress payments. See R4 Tab F232 (H.T. Food's Request No. 6)(Section II, ¶ 10).

158. On August 14, 1985, Marvin Liebman executed a change of name agreement with H.T. Food Products and substituted the name Freedom, N.Y., Inc. See R4 Tab G62. (Hereinafter this brief will refer to the contractor as Freedom.)

159. On August 23, 1985, Mr. Liebman wrote Mr. Thomas concerning Revised Progress Payment Request Nos. 4 and 5. Mr. Liebman informed Mr. Thomas that "after careful

review I am considering returning Progress Payment Request No. 5 unpaid and suspending progress payments under the contract because evidence available to me indicates that Freedom, N.Y.'s current cost accounting system and controls are not considered adequate for accumulating contract costs in support of progress payment request." See R4 Tab G62 (emphasis added); H.T. at 2-180-2-181.

160. On August 30, 1985, Frank Bankoff notified Mr. Thomas that he knew that Mr. Liebman was considering suspending progress payments under the contract based on allegedly inadequate accounting system and controls. See R4 Tab G63; H.T. at 2-182, 5-199. Moreover, Mr. Bankoff stated that a DCSMA-NY industrial specialist had informed him that necessary production equipment was not in Freedom's plant. "Considering the production lead time for assembly of MRE, it is highly improbable that the delivery schedule can be met." See id. Mr. Bankoff then notified Mr. Thomas that he considered Freedom's actions as endangering performance and gave Freedom ten days to cure the deficiency under threat of a default termination. See id. Mr. Bankoff's letter did not acknowledge Mr. Liebman's actions in late June 1985 in thwarting Freedom's attempt to obtain state-of-the-art production equipment.

H. Contract Administration From September 1985 Through October 1985: Freedom Defends Its Accounting System.

1. September 1985.

161. Freedom has incurred $5,488,123 in costs by 6 September 1985, but had received only $2,739,607 in progress payments. See R4 Tab F232 (Revised Request No. 7) (Section II, ¶ 10).

162. On September 11, 1985, Freedom submitted Revised Progress Payment Request No. 7 for $2,994,154.00. Revised Progress Payment Request No. 7 combined H.T. Food Products' Revised Progress Payment Request No. 5, H.T. Food Products' Progress Payment Request No. 6, and certain additional costs. See R4 Tab F232; H.T. at 2-186 -2-187. Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

163. On September 13, 1985, Freedom responded to Mr. Bankoff's 30 August cure notice. See R4 Tab F94; H.T. at 5-200-5-201. Mr. Thomas vigorously disputed that Freedom's accounting system was inadequate. He emphasized again that Freedom's accounting system was unfairly being faulted for the manner in which it was treating office equipment, quality control equipment, and an automated building management and control equipment for purposes of progress payments, yet the government was ignoring the pre-award agreement reached between Mr. Barkewitz and Mr. Thomas. See id. Moreover, Mr. Thomas stated that Freedom, in fact, had the equipment necessary to perform under the contract. See id., pp. 2-3. Additionally, Mr. Thomas noted that because Freedom had not received any progress payments for over 100 days, Freedom was in a poor cash position, and the failure to receive progress payments had adversely affected Freedom's ability to work with its financial institutions and suppliers. See id., pp. 3-4; see also H.T. at 5-201-5-202. Finally, Mr. Thomas offered a revised

delivery schedule. Mr. Thomas, however, again expressly stated that the revised delivery schedule should not be considered an admission on the part of Freedom that it was responsible for any delay under the contract and reserved "the right to discuss this issue at a later date." See R4 Tab F94.

164. On September 25, 1985, Mr. Liebman's supervisor paid $6,687.46 of the $807,348 requested in H.T. Food Products' Revised Progress Payment Request No. 5. See H.T. at 2-144-2-145; R4 Tab F232.

165. Other than that $6,687.46 payment, Mr. Liebman had been holding Progress Payment Requests Nos. 5, 6 & 7 "in abeyance" since July 1985. See Govt. Trial Exhibit G-4, at 41.

166. The failure to receive progress payments was devastating. See H.T. at 5-195-5-196. Freedom could not acquire state-of-the-art production equipment, and, instead, had to acquire much lower quality and more labor intensive production equipment in order to be able to deliver MREs. See id. In addition, Mr. Thomas was experiencing problems with Freedom's subcontractors and suppliers. See id. at 5-196-5-197. Finally, although Freedom had trained workers in July, Freedom had to lay them off in August because Freedom had not yet started production. See id. at 5-197-5-198.

2. October 1985.

167. Freedom had incurred $6,890,140 in costs by 4 October 1985, but had received only $2,743,996 in progress payments. See R4 Tab F232 (Request No. 8) (Section II, ¶ 10).

168. In early October 1985, Mr. Thomas attended a meeting at DLA Headquarters. See H.T. at 5-203. Raymond Chiesa, the Director of Contracts for DLA, chaired

the meeting. Id. Mr. Thomas complained that he had negotiated one agreement with the PCO, but that Mr. Liebman was not abiding by the agreement and using Freedom's alleged "non-compliance" to criticize Freedom's accounting system and withhold progress payments. See H.T. at 5-204-5-206.

169. After the meeting, DPSC personnel and DCAA personnel reviewed Freedom's accounting system. See H.T. at 5-205. DPSC and DCAA then concluded that the accounting system was adequate. See H.T. at 5-205. They stated, however, that Freedom needed additional outside financing. See H.T. at 5-207-5-208. Bankers Leasing agreed to give Freedom this additional financing. See id.

170. On October 11, 1985, Mr. Liebman paid $1,913,726 of the $2,994,159 requested in Revised Progress Payment Request No. 7. See R4 Tab F232; H.T. at 2-186-2-187.

171. On October 11, 1985, Freedom submitted Progress Payment Request No. 8 for $869,688.00. See R4 Tab F232; H.T. at 2-187. Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

172. On October 22, 1985, DCAA issued an advisory report. See R4 Tab G76. The DCAA found that Freedom had made some changes in connection with its accounting system. "The major deficiency regarding the capitalization of equipment and building improvements has been partially corrected. The contractor has established an account segregating costs which it concedes are of a capital nature. However, the progress payment requests have not been adjusted to reflect the impact of the change." See id., p. 5.

173. On October 25, 1985, Bankers Leasing wrote DLA and informed DLA that Bankers Leasing had approved a $4,000,000.00 line of credit for Freedom based on the value of

Freedom's accounts receivable, material inventory, and allowable incurred costs under the contract. See R4 Tab F103.

I. Contract Administration From November 1985 Through December 1985: DPSC Again Requests A Deviation, Marvin Liebman Erroneously Reduces Progress Payments, DPSC Terminates the December 1985 Delivery for Default, Marvin Liebman Suspends Progress Payments, and DPSC Negotiates with Freedom.

1. November 1985.

174. Through 1 November 1985, Freedom had incurred $7,140,779 in costs, but had only received $4,657,772 in progress payments. See R4 Tab F232 (Request No. 9) (Section II, ¶ 10).

175. On 12 September 1985, DOD returned the DAR deviation request to DPSC because it believed that Freedom's ability to perform MRE-5 was endangered. See R4 Tab M11 (Lt. Col. Wall's 9/12/85 Memorandum Returning DAR Deviation Request). On November 4, 1985, Colonel Charles McDonald, Director, Office of Contracting at DPSC, wrote a memorandum to the DLA Director concerning DCASMA-NY/DPSC's July/August 1985 requests for a DAR deviation and DOD's 12 September 1985 memorandum. See R4 Tab M16, p. 2, ¶ 4; H.T. at 2-190; cf. R4 Tab M11.

176. Colonel McDonald stated that at the time of DOD's 12 September 1985 memorandum, Freedom's MRE-5 contract was considered endangered. See R4 Tab M16. Colonel McDonald noted, however, that Freedom had taken corrective actions since 12 September 1985, including segregating capital and direct costs within its accounting system, which had been the DCAA's principal concern. Id. Moreover, on 25 October 1985, Freedom had also proven the presence of independent financial resources, Bankers Leasing. Id.; cf. R4 Tab F103 (Bankers Leasing letter). Finally, Freedom had offered a viable revised delivery schedule in

response to the 30 August cure notice. See R4 Tab M16. Accordingly, Colonel McDonald again requested a DAR deviation concerning the treatment of costs in a manner consistent with what the PCO and Mr. Thomas negotiated. Colonel McDonald informed DOD of the need for a deviation in the starkest terms:

> If such deviation is not granted this small business plan producer, it may appear that the government has not negotiated in good faith and the government could possibly be held in breach of contract. Also, in originally obtaining independent financing, it appears that the contractor unfortunately planned on receiving progress payments for these expense items. Disallowance of these payments has already disrupted the contractor's original projected cash flows and/or created unexpected financing need by the contractor to maintain production and ensure completion.

See R4 Tab M16 (emphasis added); H.T. at 2-190-2-193.

177. In early November, Mr. Liebman orally informed Mr. Thomas that he intended to reduce payment on Progress Payment Request No. 8 by $400,000.00. See R4 at Tab G79. The $400,000.00 represented proceeds that H.T. Food Products received when it sold Richard Penzer its option to buy the 1600 Bronxdale Avenue plant. See id. Mr. Liebman based his decision to reduce Progress Payment Request No. 8 on the DCAA's statement that "Freedom contends that they surrendered their right to buy this facility and were informally offered $400,000.00 for their rights. We saw no evidence of such an agreement." See id. (quoting DCAA Advisory Report on Review of Progress Payment Request No. 7); R4 Tab G76, p. 3.

178. On November 5, 1985, Mr. Thomas responded to Mr. Liebman concerning Mr. Liebman's intention to reduce payment on Progress Payment Request No. 8 by $400,000.00. See R4 Tab G79. Mr. Thomas explained that Mr. Liebman was wrong in concluding that $400,000 was a rental "credit" of costs from Richard Penzer to Freedom. See R4 Tab G79; see also H.T. at 3-159. Rather, Mr. Thomas explained that Freedom, as a sublessee of H.T. Food Products, incurred $400,000 in rental costs and owed that amount to H.T. Food Products. H.T. Food Products, in turn, owed $400,000 in rent to Richard Penzer. See R4 Tab G79. Although H.T. Food Products had this $400,000 debt, it also had something Richard Penzer wanted: an option to buy the 1600 Bronxdale Avenue plant. Rather than having H.T. Food Products write a check for $400,000 for this incurred rental cost to Richard Penzer, H.T. Food Products agreed to sell Richard Penzer H.T. Food Products pre-MRE-5 option to buy the 1600 Bronxdale Ave. facility for $400,000. The $400,000 that H.T. Food Products received from Richard Penzer for the option was income to H.T. Food Products and did not mean that Freedom Industries had not incurred the $400,000 in rental costs. See R4 Tab G79; H.T. at 3-159.

179. On November 8, 1985 Freedom submitted Progress Payment Request No. 9 for $979,156.00. See R4 Tab F232; H.T. at 5-222. Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

180. On November 11, 1985, Freedom again requested that Marvin Liebman exclude the $400,000 that H.T. Food Products received for the sale of the option. See R4 Tab F109. Freedom based its request on DAR § 15-205.32(f), which states that "[g]ains and losses of any nature arising from the sale or exchange of capital assets other than depreciable property shall be excluded in computing costs." See id.

181. On November 14, 1985, DPSC executed bilateral modification P00018, which revised and extended the delivery schedule for the entire contract quantity, with initial deliveries in November 1985 and final deliveries by 31 May 1986. See R4 Tab G85. In exchange for the revised delivery schedule, Freedom agreed to pay $100,000.00. See id. While negotiating the modification, the government requested that Freedom waive all rights to any future claims against government actions or inactions prior to that point. The government "vigorously pursued" this request, but Freedom "vehemently refused" to agree to this condition. See R4 Tab G75, p. 7, ¶ 8. (Frank Bankoff's D&F In Support of Extending the Delivery Schedule in Exchange for $100,000); H.T. at 5-209-5-212. Freedom claimed that due to expenses arising from the government's refusal to pay timely progress payments, Freedom estimated that its profit would be $900,000, instead of $2,200,000. "Freedom made it known that it had not ruled out the possibility of the claim to recoup damages caused by breach of contract." R4 Tab G75, p. 7, ¶ 8

182. Before signing modification P00018, Mr. Thomas again expressly informed DPSC that, notwithstanding the revised delivery schedule, Freedom reserved its rights and remedies under the contract and the law to further adjustment in the contract price or any other available relief. See R4 Tab G82; R4 Tab G83; H.T. at 5-209-5-212.

183. On November 15, Mr. Thomas wrote Mr. Bankoff and concerning progress payments. See R4 Tab G84. Mr. Thomas complained that Mr. Liebman's refusal to pay costs associated with an equipment lease caused Freedom to lose valuable production equipment and spare parts. See id.

184. In November 1985, just as Freedom was beginning to produce MRE cases, Army Veterinary Inspection ("AVI") personnel interpreted the contract specifications to require inspection of "capped and strapped" (i.e., MREs ready to go on the delivery truck), rather than

completed MREs as they came off the assembly line. See H.T. at 5-219-5-222. While Freedom and DPSC negotiated concerning this issue, Freedom continued to produce MRE cases. See id. Ultimately, DPSC agreed with Freedom and AVI then began inspecting the MREs as they came off the assembly line. See id.

185. By the time AVI began inspecting the cases, however, Freedom had produced approximately 30,000-40,000 cases. See H.T. at 5-220-5-221. Unfortunately, once AVI began inspecting the cases, it found defects. See H.T. at 5-219-5-222. The defects were attributable to Freedom's non-state-of-the-art equipment. See id. Because DPSC had taken so long to resolve the interpretation issue, Freedom was faced with 30,000-40,000 cases that needed to be reworked. See id. at 5-221-5-222.

186. On November 29, 1985, Freedom submitted Progress Payment Request No. 10 for $353,081.00. See R4 Tab F232; H.T. at 5-222-5-223. Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

187. Freedom originally estimated that it would begin receiving progress payments in mid-November 1984 and begin deliveries in July 1985, approximately 7½ months. See H.T. at 5-213. In reality, Freedom received its first progress payments in May 1985 and began deliveries in November 1985, approximately 6½ months. See id.

2. December 1985.

188. On December 2, 1985, Frank Bankoff partially terminated for default the 50,000 cases of MREs that Freedom was to deliver by 30 November 1985. See R4 Tab G90; H.T. at 2-198. In his determination and findings ("D&F"), Mr. Bankoff stated that Freedom had produced and the government had accepted 242 cases of MREs. See R4 Tab G90. Accordingly, he decided to terminate the remaining 49,758 cases and to take steps to repurchase those cases.

See id. Mr. Bankoff noted that the government could repurchase the necessary MREs from RAFCO or SOPACKO within a two-month period. See id.; H.T. at 4-89-4-90.

189. On December 5, 1985, Freedom responded to DPSC's partial termination for default. Freedom stated that the government's position was unjustified and unlawful. See R4 Tab G92. "Freedom's inability to meet the November delivery schedule was caused by excusable delays precipitated by agency action which adversely affected Freedom's ability to produce." See id. The letter then discussed the government's failure to make timely progress payments, the government's improper deductions and withholdings from progress payments, the government's refusal to abide by the contract as negotiated by the PCO, and the government's interference and disruption of Freedom's relations with its financing institutions and commercial vendors and suppliers. See id.

190. On December 6, 1985, Marvin Liebman paid $895,217.00 of the $979,156 that Freedom requested in Progress Payment Request No. 9. See R4 Tab F232.

191. Through 6 December 1985, Freedom had incurred $8,002,789 in costs, but had only received the $5,902,897 in progress payments. See R4 Tab F232 (Request No. 11) (Section II, ¶ 10).

192. On December 6, 1985, the GAO denied Freedom's pre-award protest concerning the MRE-6 solicitation. See R4 Tab G93.

193. On December 9, 1985, representatives of Freedom, DPSC, and DCASR-NY met at DPSC in Philadelphia, Pennsylvania to discuss Mr. Bankoff's partial termination for default. At this meeting, Freedom's representatives stated, inter alia, that they did not believe Freedom would meet the 65,000 cases scheduled for delivery in December 1985. See R4 Tab M17, p. 2. Freedom and the government then discussed whether Freedom would agree

to termination of the December deliveries with reinstatement of the November and December cases at the back-end of the contract. See R4 Tab M17, p. 4. Freedom said that it would agree to such an arrangement. See id. The government refused to admit any fault regarding delays in making progress payments or interference with Freedom's banks and customers. Moreover, the government rejected any equitable price adjustment or any relief under P.L. 85-804. Likewise, Freedom expressly rejected giving the government any release of any claims for events that took place between November 1984 and December 1985. See R4 Tab M17, p. 4.

194. On December 11, 1985, Freedom submitted Progress Payment Request No. 11 for $1,159,473.00. See R4 Tab F232. Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

195. On December 11, 1985, Frank Bankoff advised Marvin Liebman that no further progress payments should be made to Freedom until a decision was made concerning the MRE-5 contract. See Govt. Trial Exhibit G-4, at 65; R4 Tab M19.

196. On December 24, 1985, Freedom wrote Mr. Bankoff concerning the liquidation rate under the progress payment clause. See R4 Tab F114; see also R4 Tab M17, p. 5. Freedom explained that during face-to-face negotiations in November 1984, Freedom informed the PCO that it needed progress payment liquidation rate to be based on the "alternative method" authorized under DAR § E-512.2. The liquidation rate of 82.6% was selected based upon the table E-512.3 at a progress payment rate of 95% and a profit rate of 15%. DPSC agreed with this liquidation rate during the final negotiations. See R4 Tab F114. Freedom requested that Mr. Bankoff review this matter with the ACO and do whatever he could to have the ACO agree to using the negotiated liquidation rate of 82.6%. See id.

197. As of December 24, 1985, Freedom had produced 42,407 cases of MREs, the Health Services Command had accepted 7,464 cases, and Freedom had shipped 6,367 cases. See R4 Tab F115.

198. During December 1985, DPSC asked Freedom whether Freedom would permit DPSC to remove GFM from Freedom's plant, and to ship the GFM to the contractor from whom DPSC planned to repurchase the 114,758 cases (i.e., RAFCO). See H.T. at 5-224-5-225. DPSC told Freedom that the GFM was necessary in order to prevent the government from falling below its war reserve level. See id at 5-224-5-226. Freedom agreed that DPSC could remove the GFM, so long as it was removed and replaced at no cost to Freedom. See id. Unfortunately, for Freedom, RAFCO not only got this GFM, but also began obtaining Freedom's CFM. See id. at 5-226-5-228.

199. In late December 1985, RAFCO, SOPACKO, and CINPAC were awarded MRE-6 contracts. See H.T. at 5-231-5-234. CINPAC beat Freedom by 18 cents a case. See H.T. at 5-232. Freedom protested to the PCO and the Department of Labor that CINPAC did not qualify as a manufacturer under the Walsh-Healy Act. On May 23, 1986, the Department of Labor concluded that CINPAC did not meet the requirements of the Walsh-Healy Act. See R4 Tab F1, Ex. No. 35. Nonetheless, Mr. Bankoff refused to overturn the award. See H.T. at 5-231-5-234.

J. Contract Administration January 1986 Through February 1986: DPSC Terminates the December 1985 Deliveries, Revises the Delivery Schedule, and the De Facto Suspension of Progress Payments Ends.

1. January 1986.

200. On January 2, 1986, Frank Bankoff sent Freedom another notice of partial terminations for default for the 65,000 cases of MREs due in December 1985. See R4 Tab G99. In Mr. Bankoff's determination and findings, which accompanied his partial termination for default, Mr. Bankoff stated that the 114,758 cases that the government terminated for default would be repurchased no later than 28 February 1986. See R4 Tab G100.

201. Through 3 January 1986, Freedom had incurred $8,395,828 in costs, but had only received $5,902,897 in progress payments. See R4 Tab F232 (Request No. 12) (Section II, ¶ 10). Because of the partial terminations for default, the contract's value now was $13,815,263. See R4 Tab M19.

202. On January 15, 1986, Freedom submitted Progress Payment Request No. 12 for $638,034.00. See R4 Tab F232; see also R4 Tab F119. Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

203. On January 23, 1986, Mr. Bankoff wrote Freedom and confirmed the information set forth in his telegrams dated 6 December 1985 and 2 January 1986 concerning the partial termination for default. See R4 Tab G103.

204. On January 28, 1986, Frank Bankoff issued his determination and findings ("D&F") extending the delivery schedule under the MRE-5 contract. See R4 Tab M19. In his D&F, Mr. Bankoff stated that because of his cure notice dated 11 December 1985, Freedom had not received any progress payments since 9 December 1985. Nevertheless, Freedom continued to increase production. See id, p. 1, ¶ 4. The PCO then analyzed whether to terminate the entire

contract for default or to adopt a revised delivery schedule. See id. In that D&F, Mr. Bankoff determined that it would be in the best interest of the government to extend Freedom's delivery schedule for 505,304 cases and include a provision for reinstating the 114,758 cases previously terminated. The revised delivery schedule was:

Date	Number of Cases
01-31 Jan 86	20,000
01-28 Feb 86	30,000
01-31 Mar 86	50,000
01-30 Apr 86	80,000
01-31 May 86	100,000
01-30 Jun 86	120,000
01-31 Jul 86	105,304
Reinstatement:	
01-31 Aug 86	114,758

See R4 Tab M19.

205. In reaching this conclusion, Mr. Bankoff relied on a number of factors. See R4 Tab M19. First, Mr. Bankoff concluded that if Freedom were permitted to produce 620,000 cases, which assumed reinstatement of the terminated quantities, Freedom would break even or show a slight profit. See id., p. 2, ¶ 5. Second, Mr. Bankoff noted that until Freedom delivered 100,000 cases, clause L-4 appeared to limit progress payments to $9 million or 50% of the contract value. Because the terminated cases reduced the contract price to approximately $13.8 million, 50% of the contract value now amounted to approximately $6.9 million. Because Freedom had already received approximately $5.9 million in progress payments, clause L-4 seemed to limit Freedom to an additional $1 million in progress payments. Mr. Bankoff recognized, however, that clause L-4 permitted an increase to the progress payment ceiling where the contractor presented a cash flow analysis and a demonstrated need. See id., p. 3, ¶ 9

("[CLAUSE L-4] does not allow for the PCO or ACO denial of an increase other than for lack of need."). Third, Mr. Bankoff noted that the acquisition plan for the procurement stated that one of the purposes of the procurement was to maintain the required mobilization capacity of three suppliers. "That third supplier was Freedom, a small, disadvantaged business." See R4 Tab M19, p. 3, ¶ 11. Fourth, terminating Freedom's contract would adversely affect the government's present war mobilization base. See id., p. 4. Finally, although the government was revising the delivery schedule, Mr. Bankoff noted that "Freedom firmly refused to waive their rights to [a] claim against the government as consideration for the proposed contract extension." See id., p. 4, ¶ 12.

206. In accordance with the 28 January 1986 D&F, on 29 January 1986, DPSC issued modification P0020. Modification P0020 revised the delivery schedule as set forth above, reduced the contract price from $16,997,928.41 to $13,816,262.86, and deleted "or 50% of the contract value whichever is lesser" from clause L-4. See R4 Tab G104; H.T. at 5-229-5-230.

207. On January 29, 1986, DPSC sent Freedom a telegram concerning the MRE-7 solicitation. See R4 Tab F1, Ex. No. 12; H.T. at 4-146, 5-235. DPSC informed Freedom that the MRE-7 solicitation would include only three planned producers and would involve 4.2 million cases. See R4 Tab F1, Ex. No. 12; H.T. at 4-146, 5-235-5-236. Logically, Freedom recognized that RAFCO, SOPACKO, CINPAC, or Freedom would receive awards. See H.T. at 5-235.

208. On January 30, 1986, the 11 December 1985 de facto suspension of progress payments ended, and Mr. Liebman released $353,081 in connection with Progress Payment Request No. 10, and $1,152,015.00 of the $1,159,473 that Freedom requested in Progress Payment Request No. 11. See R4 Tab F232; R4 Tab F119.

209. Freedom delivered and the government accepted the 20,000 cases due by 31 January 1986. H.T. at 3-11, 4-109, 5-236-5-237; R4 Tab G194, p. 4.

2. February 1986.

210. Through 7 February 1986, Freedom had incurred $9,319,166 in costs, but had received only $7,407,993 in progress payments. See R4 Tab F232 (Request No. 13) (Section II, ¶ 10).

211. On February 13, 1986, Freedom submitted Progress Payment Request No. 13 for $1,002,223.00 See R4 Tab F232. Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

212. Freedom delivered and the government accepted the 30,000 cases due by 28 February 1986. See H.T. at 3-11, 4-109; R4 Tab G194, p. 4.

K. Claim Negotiation and Modification No. 25: March 1986 Through June 1986.

213. On March 21, 1986, Freedom formally submitted a claim for approximately $3.4 million to Frank Bankoff. See R4 Tab F1, p. 13, n. 34.; H.T. at 2-220-2-221, 4-30, 5-242.

214. On March 26, 1986, Freedom representatives met with Mr. Liebman, Mr. Bankoff, and other government representatives to discuss Freedom's $3.4 million claim. See H.T. at 4-113, 5-242-5-243. At that meeting, the government informed Freedom that it was willing to (1) reinstate to the contract the previously terminated for default quantity of 114,758 cases and revise the contract price accordingly, (2) extend the delivery schedule on a "no cost" basis to October 1986, (3) return the $200,000 in monetary consideration taken for June 1985 and November 1985 delivery schedule extensions, and (4) pay Freedom approximately $500,000 in capital type costs that had been allowed by the PCO in the negotiation of the MRE-5 contract (but not paid by Mr. Liebman). See R4 Tab M22; H.T. at 2-225.

215. Freedom and the government were not able to settle the claim on these terms because Freedom (1) wanted a guaranteed portion of the MRE-7 procurement and (2) refused to waive the $3.4 million claim. The meeting concluded with DPSC advising Freedom that it was going to refer the entire claim to DLA Headquarters for resolution. See R4 Tab M22; H.T. at 2-225; R4 Tab M20; H.T. at 5-242-5-244; R4 Tab G194, p. 7; H.T. at 4-140-4-141.

216. After DPSC referred the Freedom claim to DLA Headquarters, Freedom sent David Lambert, a Washington, D.C. attorney, and Frank Francois, a retired U.S. Army Colonel, to negotiate with DLA Headquarters on behalf of Freedom. See H.T. at 5-247-5-248. Colonel Francois and Mr. Lambert negotiated with Mr. Raymond Chiesa, Director of Contracts for DLA, and Mr. Karl Kabeisman, Chief Counsel for DLA. See id.

217. Freedom sought very specific items in these negotiations with DLA. Freedom wanted: (1) a guarantee that it would receive an MRE-7 contract, (2) an adjustment to the MRE-5 contract for the government's delay of work arising from the maladministration of the contract, (3) the elimination of CINPAC from the IPP Program, (4) technical assistance with approximately 40,000-50,000 cases that Freedom produced in approximately November 1985 that the government previously determined to be nonconforming, (5) certain contracts through the SBA 8(a) program, and (6) a $2.7 million guaranteed loan. See H.T. at 5-250-5-255. Freedom needed the $2.7 million guaranteed loan because it estimated that it would cost $2.7 million more than the contract price to complete 620,000 cases under the contract. See id.

218. On April 17, 1986, Frank Bankoff sent Freedom a telegram indicating that DPSC would make four awards in connection with the MRE-7 solicitation. See R4 Tab 1, Ex. No. 15; H.T. at 4-142-4-143. This telegram reversed DPSC's 29 January telegram, which said DPSC would make three awards. See R4 Tab F1, Ex. No. 12. Logically, Freedom understood

this telegram to mean that Freedom, RAFCO, SOPACKO, and CINPAC would receive MRE-7 contracts. See H.T. at 4-143-4-145, 5-257.

219. On April 25, 1986, David Lambert forwarded to DPSC a draft memorandum of understanding ("MOU") supplementing an anticipated contract modification. See R4 Tab M23. In that MOU, Mr. Lambert indicated that DLA and Freedom agreed to the following terms: (1) that DPSC would make an MRE-7 award to Freedom, (2) that DLA would process Bankers Leasing's requests for a $2.7 million guaranteed loan for Freedom in order to ensure that Freedom had adequate cash to cover the costs above the MRE-5 contract price of $17 million and to complete the MRE-5 contract through 31 October 1986, (3) that DLA would expeditiously pay progress payments to Freedom in connection with the MRE-5 contract, (4) that DLA would provide all reasonable assistance to Freedom in obtaining traypack and pouch contracts through the SBA 8(a) program, and (5) that DLA would provide technical and production support to Freedom to rework and reprocess as necessary the approximately 46,000 MRE-5 cases presently under AVI inspection and a medical hold. See R4 Tab M23.

220. On April 25, 1986, Mr. Apelian of the DPSC Office of Counsel forwarded the draft MOU to Karl Kabeisman's office. See R4 Tab M23. Mr. Ed Neill in Mr. Kabeisman's office forwarded the draft memorandum to Raymond Chiesa. See id.

221. Between April 26, 1986, and May 2, 1986, Mr. Lambert redrafted the MOU into a letter from Henry Thomas to Frank Bankoff at DPSC. See H.T. at 4-119-4-125, 5-265-5-268; R4 Tab F1, Ex. No. 2. Mr. Thomas then sent the draft letter dated May 2, 1986 to Mr. Bankoff. H.T. at 5-265-5-268, 5-281; R4 Tab F1, Ex. No. 2.

222. On May 6, 1986, David Lambert sent Raymond Chiesa a draft of the 2 May letter that Henry Thomas sent to Frank Bankoff along with a draft of what would become

Modification No. P00025 ("Modification No. 25"). See R4 Tab F1, Ex. No. 2. In that May 2 letter from Henry Thomas to Frank Bankoff, Freedom stated that during the negotiations leading up to the modification, the parties agreed that they had reached certain understandings in connection with certain "additional significant matters" relating to Freedom's participation in the MRE assembly program. See R4 Tab F1, Ex. No. 2; H.T. at 5-265-5-267. Specifically, "[i]t was agreed that the understandings reached in those matters were not appropriate for inclusion in the [modification] but were more appropriately to be addressed in a separate letter . . . Freedom wishes to confirm those commitments based on both parties in good faith and in a timely manner taking their respective actions to do the following:" (1) DPSC will negotiate a fair and reasonable contract with Freedom in connection with the MRE-7 solicitation, (2) DPSC and DLA will process a request for a guaranteed loan to be submitted by Bankers Leasing in an amount of not greater than $2.7 million for purposes of ensuring Freedom the necessary cash flow to perform the MRE-5 contract through completion on October 31, 1986, (3) DLA shall provide all reasonable assistance to Freedom in obtaining traypack and pouch contracts through the SBA 8(a) program, and (4) DLA shall provide technical and production assistance to Freedom to rework and reprocess as necessary approximately 46,000 MRE-5 cases presently being held by Freedom under AVI inspection and a medical hold. See R4 Tab F1, Ex. No. 2; H.T. at 5-266-5-267; see also H.T. at 4-119-4-225.

223. After receiving Mr. Thomas' draft letter to Mr. Bankoff, Mr. Apelian of DPSC informed Mr. Lambert that because the "agreement" set forth in the 2 May letter was not negotiated with Frank Bankoff, Mr. Thomas' 2 May letter should be addressed to Mr. Chiesa. See at H.T. 5-267-5-268.

224. In accordance with Mr. Apelian's instructions, Freedom then revised the 2 May letter to Mr. Bankoff and addressed a revised letter dated May 13, 1986 to Mr. Chiesa. See R4 Tab F1, Ex. No. 1; H.T. at 4-121, 5-268. In that letter, Mr. Thomas again recited his understanding of certain terms and conditions that DPSC and Freedom had agreed to during negotiations between Freedom's representatives and DLA's representatives. Freedom then recited the terms discussed in the 2 May letter concerning (1) the MRE-7 solicitation, (2) the $2.7 million guaranteed loan, (3) the assistance to Freedom concerning obtaining traypack and pouch contracts through the SBA 8(a) program, and (4) the technical and production assistance to Freedom to rework and reprocess the 46,000 MRE-5 cases under AVI inspection and a medical hold. See R4 Tab F1, Ex. No. 1. Mr. Thomas sent a copy of the letter to Mr. Lambert for hand delivery to Mr. Chiesa. See H.T. at 5-268-5-269.

225. Mr. Thomas then received a call from Lieutenant Colonel Doug Menarchick, an active duty officer assigned to Vice President Bush's staff. See R4 Tab M24. The White House staff had become interested in Freedom's plight based on Mr. Thomas' contacts with Mr. Cicero Wilson of the American Enterprise Institute. See H.T. at 5-269-5-270. Mr. Wilson was developing programs to employ inner-city people, like those who live in the economically depressed South Bronx. See id. Lt. Colonel Menarchick and Mr. Thomas discussed Mr. Thomas' understanding of the settlement agreement that Mr. Thomas's representatives had reached with DLA. See H.T. at 5-269-5-271; R4 Tab F1, Ex. No. 17.

226. On May 15, 1986, Raymond Chiesa spoke with Lieutenant Colonel Menarchick. See R4 Tab F1, Ex. No. 17. Mr. Chiesa informed Lt. Colonel Menarchick that DLA was prepared to sign a modification in connection with the MRE-5 contract to resolve Mr.

Thomas' claim. Mr. Chiesa recounted the conversation, in his own memorandum for record ("MFR"), as follows:

> Mr. Thomas was seeking some additional commitments from the agency, some of which we are prepared to give and some of which we consider inappropriate. Mr. Thomas has asked for expedited processing of a request for a loan guarantee and is requesting production assistance. Colonel Menarchick was advised that we have agreed on those issues and would confirm those agreements in writing . . . However, other requests made by Mr. Thomas deal with follow-on competitive contracts and other financing issues which neither the contracting officer nor the Defense Logistics Agency management can agree to without extending preferential treatment to one of the competitors in our industrial base. Colonel Menarchick advised me that he would inform Mr. Thomas that some of the issues could be agreed to and that some probably could not and that the issue should be addressed with Mr. Karl Kabeiseman . . . .

See id. (emphasis added).

227. On May 16, 1986, DPSC issued the MRE-7 solicitation. In the solicitation, DPSC stated that four (rather than three) planned producers would receive awards and that the solicitation would involve 5.2 million (rather than 4.2 million cases). See R4 Tab F1, Ex. No. 16; H.T. at 4-14-4-148. The solicitation formalized Frank Bankoff's 17 April 1986 telegram concerning the number of awards. See R4 Tab 1, Ex. No. 15; H.T. at 5-272.

228. Henry Thomas believed that the change from three to four producers in the MRE-7 solicitation resulted from Freedom's negotiations with DLA. See H.T. at 5-260.

229. On May 19, 1986, Raymond Chiesa wrote Lt. Colonel Menarchick concerning the proposed Freedom settlement. Although Mr. Chiesa did not admit that DLA had committed to give Freedom an MRE-7 award or awards through the SBA 8(a) program, Mr. Chiesa admitted that DLA had reviewed Mr. Thomas' draft letter and was "prepared to commit ourselves to timely processing of the loan guarantee request and the request for production

assistance." See R4 Tab F1, Ex. No. 18 (emphasis added); see also H.T. at 4-128 (discussing whether draft letter sent to DLA before execution of Modification No. 25).

230. On or about May 20, 1986, Mr. Thomas met with Ms. Norma Leftwich, the Director of Small and Disadvantaged Utilization for DOD. Ms. Leftwich worked with Dr. Wade, who signed the original 7 February 1984 D&F regarding MRE-5 following Freedom Industries' lawsuit concerning the MRE program. See H.T. at 5-269. Mr. Thomas informed Ms. Leftwich of the agreement that Freedom had reached with DLA and handed Ms. Leftwich a copy of the May 13, 1986 letter from Mr. Thomas to Mr. Chiesa. See H.T. at 5-269-5-271; R4 Tab F1, Ex. No. 1; see also R4 Tab M24.

231. On May 29, 1986, Mr. Thomas went to DPSC to sign Modification No. 25. Mr. Thomas travelled to Philadelphia and met Colonel Francois. See H.T. at 5-272. Mr. Thomas and Colonel Francois then met Mr. Bankoff. Mr. Thomas informed Mr. Bankoff of Mr. Thomas' understanding of Modification No. 25 and his understanding that DLA Headquarters had agreed to the commitments set forth in Mr. Thomas' letter of May 13, 1986 to Mr. Chiesa. See H.T. at 5-273. Mr. Thomas then stapled the May 13th letter to Modification No. 25 and stated:

> This is my understanding of the modification. If this is not your understanding of the modification, then there is no deal. But if there is, then we've got a deal. Let's go, because these two documents are attached. They are one document as far as I am concerned. If you've got a problem with it, then say something. If not, let's go.

See H.T. at 5-274.

232. Mr. Bankoff then stated to Mr. Thomas that he had to go fax these documents to DLA Headquarters and that he'd be right back. Mr. Bankoff then left the room. See H.T. at 5-274.

233. At 10:59 a.m., Mr. Bankoff's counsel, Bob Apelian, faxed a copy of Mr. Thomas' letter of May 13 to Ed Neill at DLA Headquarters Office of Counsel. See R4 Tab M25. When Mr. Bankoff returned to the room approximately 30 minutes after leaving the room, he informed Mr. Thomas that he had sent the letter to DLA Headquarters. See H.T. at 5-274-5-275; see also R4 Tab F134.

234. Mr. Bankoff and Mr. Thomas then executed Modification No. 25. Mr. Bankoff never informed Mr. Thomas that the agreements set forth in Mr. Thomas' 13 May letter to Mr. Chiesa (or any other letter) were not part of Modification No. 25. H.T. at 5-274-5-275; see also H.T. at 4-119-4-125 (Frank Bankoff admitted having copies of Henry Thomas' draft letter before signing Modification No. 25).

235. The express terms of Modification No. 25 (1) required Freedom to withdraw its complaint seeking $3.4 million in ASBCA No. 32570 with prejudice, (2) extended the delivery schedules for the undelivered balance of the contract with final deliveries to be completed by 31 October 1986, (3) reinstated the terminated 114,758 cases of MREs, stated that the 114,758 cases would be manufactured and delivered in the MRE-6 configuration, and stated that a price adjustment would be accomplished under the contract's Changes clause, (4) rescinded the $200,000 consideration Freedom paid for the June 1985 and November 1985 delivery schedule extensions, and (5) permitted Freedom additional payments of $399,111 based on certain costs originally included in Freedom's projected manufacturing overhead and G&A expenses. See R4 Tab F133. The $399,111 payment was for those items that Mr. Barkewitz and Mr. Thomas had negotiated as direct costs in November 1984. DLA agreed to make this payment without obtaining a DAR deviation. See id.; cf. R4 Tab G194, p. 11 (as of 5/6/86 there had been no decision regarding the DAR deviation request).

236. As further consideration for the execution of Modification No. 25, DLA agreed as an integral part of, but outside the express terms of Modification No. 25, to the following: (1) that four planned producers would receive MRE-7 prime contract awards (thereby assuring Freedom of a new award), (2) that DPSC and DLA would process Bankers Leasing's request for a guaranteed loan in an amount not greater than $2.7 million in order to ensure that Freedom had the necessary cash to perform the MRE-5 contract through completion on 31 October 1986, (3) that DLA would provide all reasonable assistance to Freedom in obtaining traypack and pouch contracts through the SBA 8(a) program, and (4) that DLA would provide technical and production assistance to Freedom to rework and reprocess approximately 46,000 MRE-5 cases presently being held under AVI inspection and a medical hold. See H.T. at 5-274.

237. Freedom's decision to withdraw its claim of $3,481,768 was based on the agreement set forth within the four corners of Modification No. 25 and within the May 13, 1986 letter addressed from Henry Thomas to Raymond Chiesa. See H.T. at 5-274, 6-5-6-6.

238. Mr. Liebman had no personal knowledge of the negotiations between Mr. Lambert and Colonel Francois and Mr. Chiesa and Mr. Kabeisman. See H.T. at 2-228. Upon reviewing Modification No. 25 without the 13 May letter to Mr. Chiesa, however, Mr. Liebman was "surprised" that Freedom executed it. See H.T. at 2-230.

239. On May 30, 1986, Mr. Raymond Chiesa sent Mr. Thomas a letter. See R4 Tab F134. Mr. Chiesa stated that on May 29, 1986 "a copy of a letter dated May 13th addressed to me was sent to me via telefax by Mr. Frank Bankoff . . . ." See id. (emphasis added). Mr. Chiesa then described Mr. Thomas' letter as purporting to "reflect an extensive negotiated agreement between your representatives and myself. Part of the agreement is said to be reflected in a contract modification designated as [Modification No. 25]. By inference, your letter

indicated that other parts of our agreement are not reflected in the contract modification. This is incorrect. The agreement that was reached as a result of our discussions is contained in whole in its entirety in the contract modification." See R4 Tab F134; R4 Tab G121. Mr. Chiesa then discussed those items in Freedom's letter dated May 13th. First, Mr. Chiesa stated that DPSC had not promised to negotiate a fair and reasonable contract with Freedom in connection with the MRE-7 procurement. See R4 Tab F134. Second, Mr. Chiesa stated that DPSC and DLA had not discussed a loan guarantee in an amount not greater than $2.7 million for costs that are further defined in Mr. Thomas' letter. Mr. Chiesa admitted, however, that "[a]s to the processing of any requests for a guaranteed loan, I can only repeat what was said to [your representatives], that we will process any such request expeditiously." Id. Third, Mr. Chiesa stated that although DLA would provide all reasonable assistance to Freedom in obtaining the traypack and pouch contract through the SBA 8(a) program, any commitment from DLA "in this regard is nothing more than a commitment to do what we would normally do for any small business concern expressing interest in contracts of this type." See R4 Tab F134. Finally, Mr. Chiesa stated that DLA had not even negotiated, much less reached an agreement, with Mr. Francois and Mr. Lambert concerning providing Freedom technical and production assistance for reworking and reprocessing approximately 46,000 MRE-5 cases presently on hold. See id. Mr. Chiesa closed this letter as follows:

> Finally, I wish to re emphasize that the settlement reflected in the contract modification to which you refer stands on its own. The other actions to which you refer in your letter will be pursued in accordance with governing regulations and the needs of the government as your representatives have been repeatedly advised.

See R4 Tab F134.

240. After receiving Mr. Chiesa's letter of May 30, 1986, Mr. Thomas informed his counsel that DLA was not complying with Freedom's understandings concerning Modification No. 25. Accordingly, Mr. Thomas instructed Freedom's attorney not to dismiss the appeal that it had filed in connection with its $3.4 million claim. See R4 Tab M26. On June 9, 1986, Freedom's attorney complied by sending the ASBCA a copy of Freedom's complaint, and telling the ASBCA that "Freedom maintains that Respondent has failed to fully comply with understandings concerning Modification P000025. Accordingly, Freedom will not move to dismiss the subject appeal at this time." R4 Tab M26. Freedom's attorney also informed DPSC of this decision . See R4 Tab M27.

241. On June 13, 1986, the ASBCA sent a letter to Freedom's counsel. informing Freedom's counsel that Freedom's complaint had been received and filed. See R4 Tab M28.

242. On June 27, 1986, the ASBCA sent Freedom's counsel another letter that stated:

> The Board has received a Complaint, dated 10 June 1986, in the above-captioned appeal. The Board's records reflect that based on the parties' agreement, as evidenced by a bilateral modification, the subject appeal was dismissed with prejudice from the Board's docket on 9 June 1986.
>
> By their executing the contract modification (P00025), the parties settled the disputes which was the subject matter of the appeal. Any breach of the terms of that supplemental agreement, which modified the then existing contract, appears to be beyond the scope of the dismissed appeal. Accordingly, the apparent dispute as the interpretation of the terms of the modification is an issue that is not properly before the Board.
> The attached Complaint is returned for your convenience. Nothing in the Board's order of dismissal or this notice is prejudicial to appellant's right to appeal a contracting officer's decision regarding the government's interpretation of the contract modification.

See R4 Tab M29 (emphasis added).

L. Contract Administration March 1986 Through June 1986.

1. March 1986.

243. Through 7 March 1986, Freedom had incurred $11,411,684 in costs, but had received only $7,407,993 in progress payments. See R4 Tab F232 (Request No. 14) (Section II, ¶ 10).

244. On 7 March 1986, AVI at Ft. Sam Houston, Texas ordered that Freedom halt production because AVI had discovered microholes in Star Food's GFM pouches at the CINPAC and RAFCO production facilities. See H.T. at 5-237; R4 Tab G111; R4 Tab G194, p. 6.

245. On 10 March 1986, Freedom sought guidance from the PCO. See R4 Tab G111. On 13 March 1986, the PCO informed Freedom that all Star Food products were on medical hold, but that a plant shutdown was not authorized. See R4 Tab G112. DPSC subsequently ordered certain substitutions, authorized AVI to monitor all vendors for potential health risks from microholes, and created an additional Zyglo test to check for microholes. See H.T. at 5-236-5-238; R4 Tab G194, p. 6; see also R4 Tab G194, p. 9; R4 Tab G114.

246. On March 18, 1986, Marvin Liebman paid $700,000 of the $1,002,223 that Freedom requested in Progress Payment Request No. 13. See R4 Tab F232. The DCAA had recommended that Mr. Liebman pay $984,507. See H.T. at 3-197; R4 Tab G109.

247. Freedom protested Mr. Liebman's short payment. See R4 Tab M56. Freedom claimed it was entitled to 95% of its incurred costs. Moreover, even if Mr. Liebman applied a loss ratio under the contract, Freedom was entitled to $955,009. See id.

248. Mr. Liebman informed Freedom that he decided to apply a "percentage of completion" analysis to reduce payment. See R4 Tab M56; H.T. at 5-244-5-247. Mr. Liebman apparently believed that because Freedom had incurred approximately 66% of the contract price, but had only made progress of 39.8%, Mr. Liebman should reduce the payment from the DCAA-recommended $984,507 to $700,000. See R4 Tab M56.

249. On March 19, 1986, Freedom submitted Progress Payment Request No. 14 for $2,101,386. See R4 Tab F232. Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

250. On March 27, 1986, Marvin Liebman decided to begin applying a loss ratio on all current and future progress payments that Freedom submitted. See R4 Tab M20; H.T. at 2-221-2-222. By applying a loss ratio, Mr. Liebman would be paying Freeman even less money in progress payments. See H.T. at 2-223, 2-236.

251. Freedom delivered and the government accepted the 50,000 cases due by 31 March 1986. See H.T. at 4-109; H.T. at 3-6-3-9, 3-11.

2. April 1986.

252. Through 4 April 1986, Freedom had incurred costs of $12,291.011, but had only received $8,711,176 in progress payments. See R4 Tab F232 (Request No. 15) (Section II, ¶ 10).

253. On April 14, 1986, Freedom submitted Progress Payment Request No. 15 for $791,284. See R4 Tab 232. Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

254. On April 25, 1986, Marvin Liebman paid Freedom $1,125,437.00 of the $2,101,386 requested in Progress Payment Request No. 14. See R4 Tab F232. Mr. Liebman applied a loss ratio. See H.T. at 2-240; R4 Tab G194, pp. 7, 10.

255. Mr. Liebman's short-payment alarmed Mr. Thomas. See H.T. at 5-238-5-239. First, he believed that even if Mr. Liebman applied a loss ratio, Freedom should have received $1,557,520 instead of $1,125,437. See R4 Tab F129; H.T. at 5-238-5-239. Second, he realized that Freedom was really spinning up production and incurring costs, but that the contract only had a $13.8 million value. See H.T. at 5-238-5-239. In fact, Mr. Thomas realized that through 2 May 1986 he had incurred $13,391,959 in costs, but had received only $9,836,613 in progress payments. See R4 Tab F232 (Request No. 16) (Section II, ¶ 10).

3. May 1986.

256. On May 9, 1986, Freedom submitted Progress Payment Request No. 16 for $2,954,192. See R4 Tab F232. Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

257. On May 20, 1986, Marvin Liebman paid Freedom $615,824 of the $791,284 that Freedom requested in Progress Payment Request No. 15. See R4 Tab F232. Mr. Liebman applied a loss ratio. See R4 Tab G194, pp. 10, 14.

258. As of approximately May 20, 1986, Freedom was at the end of the financial rope. See H.T. at 5-259-5-260. Unless the 114,000 cases were reinstated and the contract price returned to approximately $17.1 million, Freedom could not obtain additional progress payments for incurred costs. See H.T. at 5-260. Freedom estimated that even if the 114,000 cases were reinstated, it would lose approximately $2.7 million. See R4 Tab F129, (Attachment No. 1). Absent a $2.7 million guaranteed loan, Freedom would not have sufficient money to complete the MRE-5 contract. See H.T. at 5-260. Moreover, without an MRE-7 award, Freedom would not be able to repay its creditors, return to profitability, and remain an IPP producer. See H.T. at 5-255-5-256, 5-260-5-261.

4. June 1986.

259. On June 2, 1986, Freedom wrote Mr. Bankoff concerning progress payments. See R4 Tab F135. Freedom pointed out that Modification No. 25 reinstated the contract value to $17,197,828.41. To alleviate Freedom's cash flow burden, Freedom requested that the present progress payment limitation contained in clause L-4 of $13,000,00 be increased to 95% of the contract value (i.e., to $16,337,937). See R4 Tab F135.

260. On June 4, 1986, Freedom requested that Marvin Liebman pay Freedom $1,172,654 due Freedom under the MRE-5 contract based upon a recalculation of the loss ratio. See R4 Tab F136. Freedom explained that it estimated that it would lose $2,743,447 on the MRE-5 contract. See R4 Tab F136. Freedom requested that Marvin Liebman pay for certain incurred, but improperly disallowed costs, for racks and forklifts (Progress Payment No. 15), legal and accounting fees (Progress Payment Nos. 8-9, 11-16), and insurance (Progress Payment Nos. 14-15). See R4 Tab F136. By paying these amounts, Freedom's estimated loss would be reduced to $2,183,333. See R4 Tab F136. Mr. Liebman then could use this $2,183,333 adjusted contract loss figure to recalculate the amount due to Freedom under Progress Payment Request Nos. 13-16 and pay Freedom $1,172,654. See R4 Tab F136.

261. Mr. Liebman never formally responded to Freedom's 4 June 1986 letter. See H.T. at 5-282-5-283. He never paid the amount Freedom requested. See id. 262. Through 6 June 1986, Freedom had incurred $15,046,797 in costs, but had received only $10,452,437 in progress payments. See R4 Tab F232 (Request No. 17) (Section II, ¶ 10).

263. On June 12, 1986, Freedom submitted Progress Payment Request No. 17 for $3,846,410.00. See R4 Tab F232. Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

264. On June 18, 1986, Marvin Liebman paid Freedom $1,172,654.00 of the $2,954,192.00 that Freedom requested in Progress Payment Request No. 16. Although Modification No. 25 increased the contract price to over $17 million, Mr. Liebman applied a loss ratio based on a contract price of $13,816,163. See R4 Tab G194, pp. 14, 19; H.T. at 3-198-3-202; H.T. at 5-282-5-283.

265. On June 26, 1986, Freedom had lengthy discussions with Frank Bankoff concerning Freedom's request to increase the progress payment limitation from $13,000,000 to $16,337,937. See R4 Tab F141; R4 Tab G194, p. 18. Freedom explained its need for increased progress payments in order to help finance properly incurred costs. See R4 Tab F141.

266. In late June 1986, Freedom experienced a GFM jelly shortage. See H.T. at 2-251-2-252; see R4 Tab G194, p. 20; H.T. at 5-290.

267. As of 30 June, Freedom delivered 61,847 of the 85,000 MRE cases due by 30 June 1986. See R4 Tab G194, p. 17.

M. Contract Administration July 1986 Through August 1986: The Modification 25 Breaches Mount and Frank Bankoff Ties Progress Payments to Deliveries.

1. July 1986.

268. On July 1, 1986, Frank Bankoff sent a telegram to Freedom informing Freedom that DPSC had reduced the number of contracts that it intended to award in connection with the MRE-7 solicitation from four to three and that the solicitation would involve roughly 4.3 million cases (not 5.2 million cases). See R4 Tab M30; H.T. at 4-149-4-150.

269. On July 2, 1986, Mr. Bankoff responded to Freedom's request concerning the progress payment ceiling. Mr. Bankoff informed Freedom that he could tie the receipt of

progress payments to deliveries. See H.T. at 5-288; see R4 Tab G131. Mr. Bankoff informed Freedom that:

> To maintain Freedom's contract financing and uninterrupted production and ensure contract completion and liquidation of outstanding progress payments, additional progress payments must be tied to contract performance. The government considers the following increases based upon successful completion of delivery increments acceptable:
>
> | | | |
> |---|---|---|
> | Present Limit | | $13,000,000 |
> | 01-31-Jul 86 | 80,000 cases | 1,000,000 |
> | 01-31-Aug 86 | 80,000 cases | 1,000,000 |
> | 01-30-Sept 86 | 80,000 cases | 800,000 |
> | | 15,800,000 | |
>
> Modification P00025 allowed for full payment of the $399,111.00, for delivery of assembled cases in lieu of withholding 95% of such payments for the purpose of liquidating progress payments. Additionally, it is estimated that the contract value will be decreased by $114,000 for the difference and the cost of MRE-6 components, per the reinstatement agreement. This leaves a contract value of $16,683,823.00 for purposes of liquidating progress payments, of which $15.8 million represents 95%.
>
> If the offered increases in the progress payment ceiling aren't agreeable to Freedom, please advise. At that time, this office will take steps to increase the contract modification allowing these increases.

See R4 Tab G131.

270. Through 4 July 1986, Freedom had incurred $16,156,915 in costs, but had received only $11,625,091 in progress payments. See R4 Tab F232 (Request No. 18) (Section II, ¶ 10).

271. On or about 7 July 1986, Frank Bankoff spoke with Frank Skweres at the Federal Reserve Bank in Chicago. See R4 Tab M67. Mr. Bankoff learned that Mr. Kabeisman

had informed the Federal Reserve Bank that DLA had no authority to grant a guaranteed loan. See id. No one informed Freedom.

272. On July 11, 1986, Frank Bankoff sent Freedom a cure notice. See R4 Tab G134; H.T. at 4-32. Mr. Bankoff informed Freedom that it had only delivered 308,664 cases of the 330,242 cases due by 30 June 1986. Mr. Bankoff then stated that because Freedom planned to complete the June deliveries in early July, timely completion of the 31 July 1986 delivery increment was doubtful. See R4 Tab G134. Mr. Bankoff gave Freedom 10 days to cure, under the threat of a default termination. See id.

273. On July 14, 1986, DCAA recommended that Mr. Liebman pay $1,505,825.00 in connection with Progress Payment Request No. 17. See H.T. 2-247-2-249; R4 Tab G136.

274. On July 15, 1986, Mr. Liebman, paid Freedom $1,325,327.00 of the $3,846,410 that Freedom requested in Progress Payment Request No. 17. See R4 Tab F232; H.T. at 2-247-2-248. Mr. Liebman applied a loss ratio to Progress Payment Request No. 17. See H.T. at 2-237-2-239; R4 Tab G194, pp. 19, 23.

275. On 23 July 1986, Freedom responded to Mr. Bankoff's cure notice. See R4 Tab F144; H.T. at 4-33; H.T. at 4-72-4-73. Freedom advised Mr. Bankoff that it was ready, willing, and able to comply with the requirements of the subject contract. Nonetheless, it recognized that it might not meet the entire July delivery schedule because of events beyond its control and not due to its negligence. Freedom informed Mr. Bankoff that its plant had been shut down since 17 July for lack of GFM jelly, that Freedom had notified Mr. Bankoff of this shortage on 30 June, but that it had not received sufficient GFM to maintain production. See R4 Tab F144; H.T. at 5-290.

276. If Freedom had the requisite GFM, Freedom would have exceeded its July delivery requirements. See R4 Tab F145; H.T. at 5-290-5-291; R4 Tab G194, pp. 20-21.

2. August 1986.

277. Freedom desperately needed assurances that it would receive progress payments. See H.T. at 5-293. Absent such payments, it could not complete the MRE-5 contract. See id. at 5-293-5-294. As of 2 August 1986, Freedom had incurred $17,443,847 in costs, but had only received $12,950,418 in progress payments. See R4 Tab F232 (Request No. 19) (Section II, ¶ 10). Freedom's incurred costs had already roughly reached the contract value, but it had only shipped approximately 350,000 cases. See R4 Tab G194, p. 22. Mr. Thomas believed that agreeing to Modification P0028 was the only way he would receive funds and remain in the IPP Program. See H.T. at 6-6-6-7.

278. On 7 August 1986, Freedom and DPSC executed Modification P0028. See R4 Tab G144; H.T. at 2-254-255. Pursuant to that modification, DPSC amended the delivery schedule as follows:

QUANTITY	DELIVERY DATE
	80,000
12 Aug 1986	
80,000	10 Sept 1986
15,304	10 Oct 1986
64,696	10 Oct 1986
50,062	12 Nov 1986

See R4 Tab G144. In addition, DPSC increased the current ceiling on progress payments of $13,000,000 as follows:

COMPLETION AND ACCEPTANCE	CEILING
333,000 cases	$13,000,000.00

410,000 cases	14,000,000.00
490,000 cases	15,000,000.00
570,000 cases	15,800,000.00

The modification went on to state

> [I]f at the time of normal progress payment by the ACO, the contractor has completed only a portion of the 80,000 case delivery increment, the ACO is authorized to make a protanto progress payment based on this partial delivery and proportionate to the schedule. Upon completion of the remainder of the delivery increment, the ACO may complete the progress payment.

R4 Tab G144. In return for this amended delivery schedule, Freedom acknowledged "that it has no claim whatsoever for any consideration or damages, monetary or otherwise, resulting from lack of government-furnished material jellies during the period of 16-28 July 1986." See R4 Tab G144. The modification ended with the following statement:

> This document contains the complete agreement of the parties. There are no collateral agreements, reservations or understandings other than expressly set forth herein. It is agreed that no subsequent modification of this agreement shall be binding unless reduced to writing and signed by both parties.

See R4 Tab G144; H.T. at 2-263, 5-296.

279. On August 19, 1986, Mr. Liebman paid Freedom $704,068 of the $3,728,368 that Freedom requested in Progress Payment Request No. 18. See R4 Tab F232. Mr. Liebman applied a loss ratio. See H.T. at 2-242-2-244; R4 Tab G194, pp. 24, 27.

280. On 22 August 1986, there was a stock outage of fruit mix GFM. See R4 Tab G194, p. 26. Because of the outage, there was no final case assembly until 29 August 1986 when DPSC authorized substitution of another fruit item. See id.; H.T. at 5-297.

281. On 26 August 1986, Freedom fulfilled the 80,000 case delivery schedule due on 12 August. See R4 Tab G194, p. 25.

N. Contract Administration September 1986: The Government Dupes Freedom Into Believing that It Would Receive an MRE-7 Award and Would Receive Progress Payments Upon Executing Modification No. 29.

1. September 1986.

282. On September 2, 1986, Freedom wrote Mr. Bankoff concerning how progress payments were being paid. See R4 Tab F150. Freedom again requested that Mr. Bankoff permit Freedom to recoup incurred costs on the basis of the 95% rate and liquidate progress payments at the rate of 82.6%. See id.

283. Freedom submitted Progress Payment Request No. 20 on 3 September 1986. See R4 Tab F232. Because Freedom had already incurred costs as of 2 August 1986 that equalled the contract price, Request No. 20 simply sought money for costs incurred through 2 August. Compare R4 Tab F232 (Request No. 19) (Section II, ¶ 10) with R4 Tab F232 (Request No. 20) (Section II, ¶ 10). Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

284. By 5 September 1986, Freedom had incurred costs of $18,594,773, but had only received $13,654,486 in progress payments. See R4 Tab F232 (Request No. 21) (Section II, ¶ 10). The contract only had a value of approximately $17.1 million.

285. On September 8, 1986, Mr. Liebman paid Freedom $200,219 of the $2,687,842 that Freedom requested in Progress Payment Request No. 19. See R4 Tab F232. The DCAA, which had analyzed Modification No. 28, had recommended that Mr. Liebman pay $699,904. See H.T. at 2-245-2-247; R4 Tab G158; H.T. at 3-192-3-194. Mr. Liebman applied a loss ratio. See H.T. at 2-242; R4 Tab G194, pp. 27, 32.

286. On September 10, 1986, Freedom responded to Mr. Liebman's 5 September request concerning Freedom's estimates concerning the costs Freedom would incur to complete the contract. See R4 Tab 152. Freedom explained how it expected to lose

approximately $4.5 million on the MRE-5 contract. In spite of the continuing financial hardship, Freedom had managed to deliver 70% of its contractual obligations to that point. Nonetheless, Freedom informed Mr. Liebman that it needed additional support as outlined in its letter to Mr. Bankoff of September 2, 1986. Moreover, Freedom noted that, to date, it had not gotten an assurance that it would receive an MRE-7 award, and the government had not issued a guaranteed loan of $2.7 million to Bankers Leasing. See R4 Tab F152.

287. As of 10 September 1986, Freedom shipped 46,260 cases of the 80,000 case delivery requirement due on that date. See R4 Tab G194, p. 29. The causes for Freedom's delay included down time due to stock outages of GFM items, including fruit mix and potato patties. See R4 Tab G194, p. 29.

288. On September 15, 1986, Freedom personnel met with DLA personnel at DLA Headquarters. See R4 Tab G194, p. 31. DLA personnel advised Freedom that monthly progress payments could be paid in weekly installments, MRE-7 had not been awarded, and the request for a guaranteed loan was at the Congressional level. See id.

289. On September 15, 1986, Freedom submitted Progress Payment Request No. 21 for $2,487,623.00. See R4 Tab F232. Although Freedom had incurred costs approximately equalling the contract value as of 2 August, Request No. 21 included costs through 5 September 1986. See R4 Tab F232 (Request No. 21) (Section II, ¶ 10). Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

290. On September 17, 1986, the Senate Committee on Appropriations included a provision concerning the MRE Program in the Department of Defense 1987 Appropriation Bill. See R4 Tab F149. The provision stated:

> To increase the number of defense industrial preparedness program [IPP] assemblers for the meals-ready-to-eat [MRE] program, the Army encouraged businesses to bid on MRE contracts. IPP assemblers are those who have the ability to assemble cases of MREs rapidly during wartime. They are currently four such IPP assemblers. Over the past three years, two small businesses have been brought into the MRE program. After having brought the first small business into the MRE program, a year later another small business was allowed in. After only one contract, the Defense Department has decided to reduce the number of assemblers from four to three. This will have the effect of forcing one of the two small businesses out of the program with a large loss of jobs and skills. The committee directs the Department of Defense to award contracts for MRE VIII to those industrial prepared assemblers currently in the program.

See R4 Tab F149 (emphasis added). During the House Senate conference, the conferees noted that the House had not addressed this specific issue. Nonetheless, the conferees stated:

> that it is in the national interest to maximize the number of small business suppliers. The Department shall consider the impact on the existing MRE industrial-prepared assemblers and its determination of future MRE acquisition plans.

See R4 Tab F149; R4 Tab M34.

291. Freedom also continued to experience GFM outages in mid-September. Specifically, Freedom lacked GFM fruit mix and potato patties. See R4 Tab M33; R4 Tab G194, p. 31; H.T. at 5-297-5-300.

292. On September 19, 1986, Freedom stopped accessory production because it lacked cream substitute. See R4 Tab M38.

293. On September 21, 1986, DCASMA-NY informed Freedom that Freedom would only receive $311,447.00 of the $2,487,623 that Freedom requested in Progress Payment Request No. 20.

294. On 22 September 1986, Freedom informed Mr. Bankoff that its finances were strained severely due to the manner in which it was receiving progress payments. See R4 Tab F157. Unfortunately, because the government tied the release of progress payments to the completion of delivered cases, the government prevented Freedom from obtaining funds which were necessary to acquire materials, which, in turn, were necessary to deliver the MREs. See R4 Tab F157.

295. On September 25, 1986, Marvin Liebman paid Freedom $311,447.00 in connection with Progress Payment No. 20. See R4 Tab F232. Mr. Liebman applied a loss ratio. See H.T. at 2-242-2-244.

296. As part of DCASMA-NY's pre-award survey of Freedom for MRE-7 DCASMA-NY received a letter dated September 22, 1986 from Bankers Leasing in which Bankers Leasing informed DCASMA-NY that it would extend Freedom a $6,000,000.00 line of credit in connection with the MRE-7 contract. See R4 Tab M72; R4 Tab F163; H.T. at 6-15-6-16.

297. On September 25, 1986, DPSC amended the MRE-7 solicitation. See id. See R4 Tab M35; H.T. at 5-303. DPSC, inter alia, informed Freedom that it planned to make four, instead of three, awards under the MRE-7 solicitation, but that the total quantity sought would remain roughly 4.3 million case. See id.; H.T. at 4-152-4-153. Freedom, therefore, believed that the government was going to maintain Freedom in the IPP Program. Moreover, Freedom believed that MRE-7 would provide means to obtain money for MRE-5 completion. See H.T. at 5-303-5-304.

298. On September 25, 1986, DCASMA-NY completed a pre-award survey of Freedom in connection with the MRE-7 solicitation. In conducting the financial analysis, William

Stokes assumed that Freedom would receive the award to the higher quantity (i.e., approximately 1.5 million cases as opposed to 867,792 cases) and would incur $33 million in costs. See R4 Tab F182, (Stokes Analysis of 9/24/86). Mr. Stokes discussed Freedom's $6 million line of credit and concluded that Freedom had the necessary financing to complete the 1.5 million cases. See id. The pre-award survey was positive and recommended that DPSC award Freedom a contract for 867,792 cases of MREs. See R4 Tab F159; R4 Tab F182; H.T. at 4-154-4-155.

299. Freedom knew that it had passed its pre-award survey on the MRE-7 contract. See H.T. at 6-10-6-11, 6-13-6-16. Freedom also understood that its price was lower than CINPAC's price. See H.T. at 6-16-6-17.

300. On September 26, 1986, Mr. Thomas and Mr. Bankoff were negotiating the terms of modification P00029. During those negotiations, Mr. Bankoff informed Mr. Thomas that upon execution of Modification P00029:

> the current progress payment ceiling for the subject contract, per modification P00028, will be $14,900,725.00 based on delivery of 482,058 cases. To date you have been paid $14,178,838.00. This leaves a balance of $721,887.000 available to you. This amount will be paid to you by DCASMA N.Y. against progress payment request submitted by Freedom N.Y., Inc.

See R4 Tab F165; H.T. at 4-165-4-167. Mr. Thomas understood that if he executed Modification P00029, the government would release these progress payment funds. See H.T. at 6-10; R4 Tab F165; H.T. at 4-166. Freedom desperately needed this money and an MRE-7 award. See H.T. at 6-7-6-8.

301. On September 29, 1986, Freedom wrote Frank Bankoff concerning the negotiations of Modification P00029. See R4 Tab G157; H.T. at 4-170. Freedom informed Mr. Bankoff of its projected cash flow requirements. As part of its analysis, Freedom informed Mr. Bankoff that Freedom needed payment of $700,000.00 to be paid as a progress payment

> and expected that amount to be paid upon signing Modification P00029. In addition, Freedom informed Mr. Bankoff that even under the best scenario, Freedom would face a cash shortfall of $730,000.00 and that this shortfall would become virtually unmanageable by the week ending October 10th. See R4 Tab G157. "It is evident that Freedom will not be able to complete the current contract unless the projected cash shortfall is covered. This shortfall can be covered under present conditions by the award of a new contract (MRE-VII)." See id. Freedom informed Mr. Bankoff that it is critical that MRE-7 be awarded not later than the week of October 17th, so that the proper infusion of funds can be obtained to avert imminent cash disaster. See id. O. Contract Administration October 1986: Frank Bankoff Has Marvin Liebman Hold Up a $700,000 Progress Payment Until Modification No. 29 is Executed, Freedom Experiences GFM and CFM Shortages, and Freedom Ceases Final Case Assembly.

302. On October 2, 1986, Marvin Liebman decided to pay Freedom's Progress Payment Request No. 21 in the amount of $700,000.00. See R4 Tab F164; H.T. at 2-264-2-265.

303. On October 3, 1986, Frank Bankoff phoned Mr. Liebman and requested that Mr. Liebman hold the payment of $700,000.00 in abeyance pending Freedom's execution of Modification P00029. Mr. Bankoff informed Mr. Liebman that Freedom was expected to execute the Modification during the week of October 6, 1986. See R4 Tab F164; H.T. at 2-264-2-267. Mr. Liebman complied with Mr. Bankoff's request. See H.T. at 2-266-2-267.

304. On October 3, 1986, Freedom received the GFM cream substitute. Freedom resumed accessory production on October 6, 1986. See R4 Tab M38; R4 Tab M44, p. 2.

305. On October 7, 1986, Freedom and DPSC executed Modification P00029. See R4 Tab G159. Modification P00029 extended the delivery schedule as follows:

Quantity	Delivery Date
80,000	15 Oct 1986
15,304	15 Oct 1986
64,696	15 Nov 1986
50,062	5 Dec 1986

See R4 Tab G159. In consideration for the extended delivery schedule, Freedom agreed to pay the government $100.00. See id.

306. Modification No. 29 purported to contain a broad release of all claims "against the government, the contractor ever had, now has, or may have, for or by reason of any matter, cause or thing whatsoever arising out of award and performance of the subject contract to date, except claims relating to Zyglo testing implemented at Modification P00024 and P00026 or monies due or to become due as payment for product delivered to and accepted by the government." See R4 Tab G159. Mr. Thomas believed he had no choice in executing Modification No. 29 because he wanted to avoid a riot at the plant, had to obtain the money to continue working on MRE-5, and had to continue performing so Freedom would receive an MRE-7 award. See H.T. at 6-17-6-19.

307. Modification No. 29 also stated that "[t]his document contains the complete agreement of the parties. There are no collateral agreements, reservations, or understandings other than expressly set forth herein. It is agreed that no subsequent modification of this agreement shall be binding unless reduced to writing and signed by both parties." See R4 Tab G159.

308. Even after signing Modification No. 29 on October 7, Freedom continued experiencing serious GFM shortages. See H.T. at 6-19-6-20. For example, Freedom was short on numerous entree items, component parts, accessories, and crackers. See H.T. at 6-20. At the

time, Freedom had almost completed its entire production of the MRE-5 configured cases. See H.T. at 6-20-6-21. Freedom did not, however, have enough GFM to finish the approximately 505,546 cases due in the MRE-5 configuration, let alone enough GFM to complete the 114,758 cases to be completed in the MRE-6 configuration. See H.T. at 6-20-6-22, 6-26-6-28.

309. DCAA analyzed Modification No. 21 and recommended to Mr. Liebman that he pay $862,185 in connection with Progress Payment Request No. 21. See R4 Tab G162; H.T. at 3-195; H.T. at 2-250. On October 9, 1986, however, Mr. Liebman paid Freedom $721,887.00 of the $2,487,623 requested in Progress Payment Request No. 21. See H.T. at 2-250; see R4 Tab F232. Mr. Liebman applied a loss ratio. See H.T. at 2-242-2-244.

310. On October 10, 1986, Mr. Liebman provided comments on Freedom to the MRE-7 pre-award monitor. See H.T. at 2-273-2-274; Freedom Trial Exhibit A-1. Mr. Liebman opined that Freedom's "problems" on MRE-5 were considered "contractor-caused" and within the "contractor's area of responsibility." He criticized Freedom for misleading the government during the MRE-5 pre-award phase by obtaining a qualified commitment letter in August 1984 from Dollar Dry Dock. He also criticized Freedom for including specialized equipment costs at 100% progress payment request and thereby violating the progress payment clause. See H.T. at 2-278-2-279.

311. Mr. Liebman failed to inform the MRE-7 pre-award monitor about (1) the manner in which he paid progress payments vis-a-vis Mr. Thomas' negotiations with DPSC, (2) the nature of Dollar Dry Dock's 9-10 August 1984 commitment letter, (3) the fact that DCASMA-NY and DLA Headquarters had helped draft and approved the August 1984 commitment letters, (4) that the PCO and DCAA said during the pre-award phase that Freedom

could receive progress payments for certain specialized equipment costs, and that (5) Freedom only requested 95% of its incurred costs. See H.T. at 2-279-2-281.

312. Although Freedom had expected to receive deliveries of ground beef and diced turkey by September 30, 1986, as of 15 October 1986, Freedom had not received either item. See R4 Tab M39; H.T. at 6-27-6-28. In addition, Freedom had not received ham slices and franks, which Freedom had also expected to be delivered by 30 September 1986. R4 Tab M39.

313. On 15 October 1986, Freedom informed Mr. Bankoff that it could not commence production of the 114,758 cases due in the MRE-6 configuration of the contract until Freedom received the necessary GFM. See R4 Tab M39; R4 Tab M44, p. 2; H.T. at 6-27-6-29.

314. On 17 October 1986, Freedom informed Mr. Liebman that it could not commence production of the 114,758 cases due in the MRE-6 configuration of the contract until Freedom received the necessary GFM. See R4 Tab G160; H.T. at 2-289. Freedom mentioned that it lacked 8 oz. pouches of ground beef with special sauce, diced turkey, and beef slices. See R4 Tab G160. Freedom also said that cash was very scarce at Freedom and that Freedom was managing inventory on a just-in-time basis. See R4 Tab G160; H.T. at 2-291-292.

315. On October 20, 1986, Freedom submitted Progress Payment Request No. 22 for $1,443,211.00. See R4 Tab F232; H.T. at 6-19. As with Request Nos. 19 and 20, Freedom only included costs incurred through 2 August 1986. See R4 Tab F232 (Request No. 22) (Section II, ¶ 10); cf. R4 Tab F232 (Request No. 19) (Section II, ¶ 10); R4 Tab F232 (Request No. 20) (Section II, ¶ 10). Mr. Liebman requested a pre-payment audit. See H.T. at 2-65.

316. As of October 22, 1986, Freedom completed production of the 505,546 cases to be completed in the MRE-5 configuration. See R4 Tab G161; H.T. at 6-30-6-31.

317. Frank Bankoff had never repurchased sufficient GFM for Freedom to complete the 114,758 MRE-6 configured cases. See H.T. at 6-181.

318. Effective 22 October 1986, Freedom shut down its final assembly production due to a lack of GFM. See R4 Tab G170; H.T. at 6-30-6-31. Freedom informed Mr. Bankoff that it still needed the following GFM items: beef slices, diced turkey, ground beef, and ham slices. See R4 Tab F170; H.T. at 6-30-6-31. Freedom informed Mr. Bankoff that although it continued to produce cracker packets and accessory packets, it had to lay off production workers in final assembly until it received the GFM. See R4 Tab F170; H.T. at 6-30-6-31. Moreover, Freedom informed Mr. Bankoff that it was unsure what impact this layoff would have on its ability to restart the final assembly operation. See R4 Tab F170; H.T. at 6-30-6-31.

319. On October 23, 1986, Freedom informed Mr. Liebman that final case assembly had ceased, that it had laid off 146 out of 400 production employees, and that Bankers Leasing would not advance funds absent an assurance of an MRE-7 award. Nonetheless, Freedom informed Mr. Liebman that the downtime in the final assembly area would be used to (1) train employees regarding MRE-7, (2) assemble accessory packets and crackers, and (3) clean the plant. See R4 Tab M44, p. 2.

320. On October 24, 1986, Freedom laid off 140 more production employees. See R4 Tab M44. Freedom advised Mr. Liebman that it expected to recall the 286 laid off workers on November 3, 1986 and to commence production of the MRE-6-configured cases. See R4 Tab M44, p. 2.

321. On approximately October 25, Mr. Liebman determined that he could pay $208,915 on Request No. 22. See H.T. at 3-190-3-191; R4 Tab G194, p. 37. Mr. Liebman

expected to decide whether to pay Request No. 22 during the week of 3 November 1986. See H.T. at 3-190-3-191; R4 Tab G94, p. 37.

322. On October 29, 1986, Mr. Liebman decided possibly to suspend progress payments. R4 Tab F172. Mr. Liebman stated that he intended to send Freedom a letter to this effect during the week of November 3, 1986. Id.

323. Although Marvin Liebman spoke with Patrick Marra of Freedom on October 29, Mr. Liebman did not tell Mr. Marra of the possible suspension. See R4 Tab F180.

324. On October 29, 1986, Mr. Liebman directed the 100% liquidation of progress payments. R4 Tab F173, F174; H.T. at 2-293.

325. Although Mr. Liebman directed the 100% liquidation of progress payments on 29 October, there were twenty-five invoices that he had failed to pay before 29 October. See R4 Tab F233. Moreover, after the 100% liquidation decision, he failed to pay eight more invoices. See R4 Tab F233.

326. On October 30, 1986, Freedom asked DPSC for relief under P.L. 85-804. See R4 Tab M74.

327. Freedom continued to experience GFM shortages of ground beef and diced turkey between 24 October 1986 and 7 November 1986. See R4 Tab F178; H.T. at 6-34. DPSC knew that Freedom was not producing final cases because Freedom had not received GFM components of ground beef and diced turkey. See R4 Tab F178; H.T. at 6-34. Moreover, even when DPSC informed Freedom that it could substitute items for the missing GFM, Freedom still had to deal with two problems. First, it had to evaluate the impact of the substitution. See H.T. at 6-34-6-35. For example, a substituted item might not fit within the MRE packet like the originally intended item. Freedom would then have to re-engineer and reorganize the manner in

which items would be placed in the MRE packet. See H.T. at 6-34-6-35; R4 Tab F178. Second, with the stops and starts in production and the layoffs, Freedom was scrambling to retain its workforce. See H.T. at 6-32.

328. As of 31 October 1986, Freedom had shipped 90,364 cases toward the 95,304 cases due on 15 October under Modification No. 29. See R4 Tab G194, p. 34.

P. Contract Administration November 1986: Freedom Ceases Final Production and Frank Bankoff Orders a Pre-Award Resurvey For MRE-7.

329. On November 3, 1986, Freedom recommenced final assembly. See H.T. at 6-35; R4 Tab F178.

330. On November 5, 1986, Mr. Liebman orally informed Patrick Marra that Mr. Liebman did not plan to make a progress payment under present conditions and that Frank Bankoff agreed. See R4 Tab F180, p. 2.

331. On November 6, 1986, Freedom fulfilled the 95,304 monthly case requirement due 15 October 1986. See H.T. at 2-302.

332. November 7, 1986 was Freedom's last day of production in the final assembly area. See H.T. at 4-163. On November 7, 1986, Freedom laid off almost all of it production workers, i.e., 270-300 employees. See R4 Tab 184; H.T. at 6-38-6-40. On that date Freedom had inventory on-hand for approximately 6,000 to 8,000 MRE-6 configured cases. Freedom could not obtain additional inventory without outside financing or the award of the MRE-7 contract. See R4 Tab F184; H.T. at 6-39-6-40. Freedom informed DPSC of these facts. See H.T. at 4-172, 6-35-6-36, 6-40.

333. Marvin Liebman briefed DLA Headquarters and DPSC concerning Freedom. DLA Headquarters and DPSC were considering a default termination, but decided to wait and see whether Freedom received an MRE-7 award. See R4 Tab F184; H.T. at 4-54.

334. On November 10, 1986, Patrick Marra again spoke with Marvin Liebman concerning progress payments. Marvin Liebman informed Mr. Marra that he would not release any progress payments until either Bankers Leasing provided financing to Freedom or DPSC awarded an MRE-7 contract to Freedom. See R4 Tab F1, Ex. No. 19; H.T. at 6-36-6-37.

335. Upon learning of Mr. Liebman's position, Mr. Thomas believed that Freedom should continue working on MRE-5, even in a limited capacity. Upon award of MRE-7 (upon which Freedom knew it had a positive pre-award), Mr. Thomas believed that progress payments would resume, GFM would be received, and Freedom could obtain outside financing. See H.T. at 6-37.

336. On November 10, 1986, Freedom laid off more workers. See R4 Tab F183.

337. On November 12, 1986, Mr. Thomas wrote Mr. Bankoff concerning the MRE-5 contract. See R4 Tab M75. Mr. Thomas vehemently complained that Mr. Liebman's decision effectively to suspend progress payments pending outside financing or the award of the MRE-7 contract to Freedom was inconsistent with Modifications 28 and 29. Id. After tying progress payments to deliveries, Freedom was not being paid for any deliveries. Moreover, the lack of payments and the GFM outages were harming Freedom's ability to delivery. See H.T. at 6-3-7. At a minimum, Mr. Thomas believed that Mr. Liebman should have paid approximately $400,000 in progress payments. See H.T. at 6-40-6-42.

338. On November 18, 1986, Frank Bankoff ordered a pre-award resurvey of Freedom for MRE-7. See R4 Tab F192; Freedom Trial Exhibit A-8; H.T. at 3-86-3-87, 4-51-4-52, 4-167-4-168, 4-173-4-174.

339. On November 24, 1986, Freedom requested that Marvin Liebman at least pay $327,893 in progress payments. See R4 Tab G164.

340. As of November 26, 1986, Freedom had delivered 511,745 cases. See R4 Tab G165.

341. Although Freedom stopped production in the final assembly area on November 7, 1986, Freedom did not remain idle during November. See R4 Tab G165. Freedom used the down time to modify its final assembly area. See R4 Tab G165.

Q. Contract Administration December 1986: DCASR-NY Issues a Negative Pre-Award Resurvey on MRE-7.

342. On December 2, 1986, DPSC amended the MRE-7 solicitation again. See H.T. at 4-156-4-157, 6-44. The amendment reduced the number of anticipated awards from four to three. See id.; Freedom Trial Exhibit A-7.

343. On December 10, 1986, Marvin Liebman called Frank Bankoff regarding whether DPSC planned to terminate Freedom for default in connection with the 107,842 cases to be delivered. Mr. Bankoff advised Mr. Liebman that the matter was under review. See R4 Tab F186.

344. As of December 12, 1986, the government had accepted 512,462 cases from Freedom. See R4 Tab F186.

345. On December 12, 1986, Freedom submitted its MRE-7 BAFO. See R4 Tab F187. Freedom offered alternative proposals. See R4 Tab F187. Under Plan A, Freedom offered to provide 867,792 cases at $20.48 per case (i.e., $17,772,380). Under Plan B, Freedom offered to provide 867,792 cases at $22.10 per case (i.e., $19,178,203). Freedom offered Plan A with the assumption that DPSC would eliminate the fifty percent of contract value progress payment ceiling limitation in clause L-4 of the MRE-7 solicitation. See R4 Tab F187.

346. On December 16, 1986, DCASR-NY completed the financial capability portion of the pre-award resurvey for MRE-7. See R4 Tab F189; H.T. at 4-176. DCASR-NY assumed that Freedom would receive an award for 867,792 cases at a price of $22,540,376.53. R4 Tab F189 (Stokes Analysis of 12/16/86). Although Bankers Leasing had granted Freedom a $6 million line of credit and had agreed not to require repayment of Freedom's current overdue loans of $3 million, DCASR-NY concluded that Freedom lacked the financial capability to perform the MRE-7 contract and recommended "no-award." See R4 Tab F189 (Stokes Analysis of 12/16/86); H.T. at 4-176.

347. On December 17, 1986, DPSC issued Amendment No. 10 to the MRE-7 solicitation and deleted clause L-4 in its entirety. See R4 Tab F188; H.T. at 6-12-6-13.

348. On December 30, 1986, Marvin Liebman met with other DLA personnel at DLA Headquarters. See R4 Tab F191; H.T. at 3-19-3-20. At that meeting,

Mr. Liebman learned that DLA and DPSC had elected not to exercise the government's right to terminate Freedom for default for the undelivered portion of the MRE-5 contract at that time, and, instead, decided to forbear. See R4 Tab F191; H.T. at 3-20-3-21. In addition, the Deputy Director of DLA, Admiral McKinnon, stated that he would inform General Russo, DLA Director, of Freedom's negative pre-award resurvey and recommend that the same be referred to the SBA for Certificate of Competency (COC) review. See R4 Tab F191.

349. Freedom did not meet the 15 November and 5 December 1986 delivery increment because it lacked GFM and progress payments. Additionally, it lacked access to outside financing. See H.T. at 6-46.

350. Mr. Liebman informed Mr. Thomas that the government was forbearing. See H.T. at 6-47.

R. Contract Administration January 1987: Freedom Resumes Cracker and Accessory Production, Marvin Liebman Finally Notifies Freedom That He Possibly May Suspend Progress Payments, and Freedom Challenges the MRE-7 Resurvey.

351. After learning of the negative pre-award resurvey, Freedom continued to work on MRE-5. Frank Bankoff told Henry Thomas that if the resurvey was flawed, Freedom could make a submission and get the decision reversed. See H.T. at 6-54. In the meantime, Frank Bankoff said that Freedom must restart MRE-5 production in order to complete MRE-5 and to turn the negative MRE-7 resurvey around. See H.T. at 6-54. Although Freedom lacked money and GFM, Mr. Thomas believed Freedom could find a way to restart assembly of crackers and packets. See H.T. at 6-54-6-55.

352. On January 15, 1987, Freedom wrote Mr. Bankoff. See R4 Tab G168; H.T. at 4-177. Freedom formally requested that DPSC modify the MRE-5 contract in order to change the delivery schedule, provide Freedom the necessary GFM, and provide Freedom progress payments. See R4 Tab G168; H.T. at 6-56-6-57. Freedom informed DPSC that it had recalled production supervisors and other key production personnel in order to resume producing cracker and accessories sub-assemblies and thereby permit assembly lines to start producing cases of MREs no later than February 11, 1987. See R4 Tab G168; H.T. at 6-56-6-57. Freedom closed by stating:

> It is imperative that all personnel understand that it is Freedom's intention to complete this contract and to deliver to DPSC all of the 108,559 cases of MREs required to complete this contract.

See R4 Tab G168; H.T. at 6-57-6-58. As part of its proposed revised delivery schedule, Freedom offered to provide 50,062 cases by February 28, 1987 and 58,000 cases by March 15, 1987. See id.

353. Mr. Liebman also received a copy of the letter. See H.T. at 3-32-3-33. He knew that Freedom was recalling employees and needed GFM not later than 23 January and 31 January. See H.T. at 3-58, 3-62-3-64, 3-69.

354. Mr. Bankoff did not respond to Freedom's 15 January letter until March 1987. See H.T. at 4-178.

355. As of 16 January 1987, DPSC continued to forbear and did not terminate the undelivered portion of Freedom's contract for default. See R4 Tab M47; H.T. at 3-21-3-22.

356. On January 20, 1987, Freedom resumed assembly of crackers and accessory packets. See H.T. at 6-55; R4 Tab F202; R4 Tab F206. Freedom lacked GFM and money for anything else. See H.T. at 6-55-6-56. Freedom obtained the personnel to restart cracker and accessory packet production from the United Cerebral Palsy organization. See R4 Tab G193, p. 106; H.T. at 3-28-3-29, 6-61; R4 Tab F206. Freedom's total labor force was approximately 50-60 employees, exclusive of administrative and management personnel. See R4 Tab G193, p. 106; H.T. at 3-28-3-29; R4 Tab F206.

357. Mr. Thomas and Freedom relied on DPSC's forbearance and Mr. Bankoff's statements regarding MRE-7 in recalling the workers. See H.T. at 3-39-3-40, 3-51-3-56, 6-47, 6-54-6-55, 6-57.

358. On January 26, 1987, Marvin Liebman forwarded a letter to Mr. Thomas concerning Progress Payment Request No. 22. See R4 Tab F196; H.T. at 2-296, 6-62. Mr. Liebman advised Mr. Thomas that he was considering returning Progress Payment Request No. 22 unpaid and suspending all progress payments under the MRE-5 contract because Freedom "is in such unsatisfactory financial condition as to endanger performance of its contract." See R4 Tab F196. Mr. Liebman gave Mr. Thomas ten (10) days to respond. See id. Mr. Liebman's letter did not mention the decision to forbear. See id.; H.T. at 3-26.

359. Mr. Liebman's lawyer, Ed Heintz, Chief Counsel for DCASR-NY, "sat on" Mr. Liebman's October 1986 notice of possible suspension of progress payments "for approximately 3½-4 months" because of the (1) pending decision on the MRE-7 contract from October 1986 through January 1987 and (2) Congressional interest. See R4 Tab M48. Mr. Heintz recognized that "if Freedom [did] file a dispute on the lack of notification to [it] based on progress payments, . . . we possibly could have problems with this claim." See id.

360. On January 30, 1987, Freedom formally requested that DLA rescind DCASR-NY's December 4, 1986 negative pre-award resurvey. See R4 Tab F199; H.T. at

6-44-6-45. Freedom demonstrated that DCASR-NY's analysis was severely flawed. See R4 Tab F199; H.T. at 6-44-6-45.

361. Freedom pointed out, inter alia, that when the government originally issued its positive pre-award survey, the government assumed that Freedom's costs would be $33 million, it would produce approximately 1.5 million cases, and it would have a $6 million line of credit from Bankers Leasing. See R4 Tab F199. Freedom then noted that during the negative resurvey, the government assumed that its costs would be $27 million, that it would produce approximately 867,000 cases, and that it would have a $6 million line of credit from Bankers Leasing. See R4 Tab F199; R4 Tab F187. Freedom then discussed its BAFO in which its costs would be $17.8 million, it would produce approximately 867,000 cases, and it would have a $6 million line of credit from Bankers Leasing. See R4 Tab F199.

362. As of January 31, 1987, DPSC had accepted 6,916 cases in the MRE-6 configuration. See R4 Tab F202.

S. Contract Administration February 1987: DPSC Continues to Forbear and Freedom Tries to Reverse the MRE-7 Negative Pre-Award Resurvey.

363. On February 2, 1987, Freedom advised the DCASR-NY industrial specialist that it currently had no activities in the meal bag and final assembly area. Freedom indicated that it could not resume production in those areas without the GFM requested in its letter dated 15 January 1987. See R4 Tab F206. Cracker and accessory production were continuing. See H.T. at 3-73-3-74; Freedom Trial Exhibit A-4; R4 Tab F218 (2/6/87 Liebman Point Paper).

364. On February 3, 1987, Mr. Liebman concluded that Freedom did not have the financial resources to complete the balance of the MRE-5 contract (i.e., to deliver 107,842 cases). DLA Headquarters and DPSC were totally briefed regarding this matter, "but have elected to forbear at this time." See R4 Tab F202.

365. On February 3, 1987, Bankers Leasing informed the SBA that it had reclassified $3 million of Freedom's $4.3 million debt as long-term debt. See R4 Tab F201. Additionally, the remaining $1.3 million in debt was subject to an approved work out plan. See id.

366. On February 4, 1987, Bankers Leasing forwarded additional financial information to Mr. Bankoff in order to get him to reverse the negative pre-award resurvey. See R4 Tab F203; H.T. at 4-181-4-182.

367. On February 4, 1987, the SBA declined to issue a Certificate of Competency for Freedom in connection with MRE-7. See R4 Tab G171; R4 Tab F204.

368. On February 5, 1987, Freedom requested that Lieutenant General Vincent Russo, DLA Director, meet with Mr. Thomas to discuss DCASR-NY's flawed "pre-award resurvey." See H.T. at 6-63; R4 Tab F210.

369. On February 5, 1987, Freedom supplemented the information provided to Frank Bankoff concerning Freedom's protest of the pre-award resurvey. See R4 Tab F207.

370. On February 6, 1987, cracker and accessory packet production were continuing. See H.T. at 3-73-3-74; Freedom's Trial Exhibit A-4; R4 Tab F218 (Marvin

Liebman 2/6/87 Point Paper). As of February 6, 1987, there was no activity in the meal bag and final assembly areas. The total labor force on that date was still approximately 50-60 employees, exclusive of supervisory and managerial personnel. See H.T. at 3-73-3-74; Freedom's Trial Exhibit A-4; R4 Tab F218 (Liebman 2/6/87 Point Paper).

371. On February 11, 1987, Freedom supplemented the information it provided to General Russo. See R4 Tab F210. Freedom requested that General Russo conclude that Freedom was a responsible contractor and was eligible for an MRE-7 award. See id.

372. On February 11, 1987, Freedom also responded to Mr. Liebman's letter dated January 26, 1987 in which he informed Freedom that he was considering suspending progress payments. See R4 Tab F211. Mr. Thomas pointed out that Progress Payment Request No. 22 was dated 20 October 1986, but that Mr. Liebman purportedly was considering suspending progress payments. Mr. Thomas pointed out the obvious: Mr. Liebman had suspended progress payments in October 1986, but waited four months formally to inform Freedom that he might suspend progress payments. See R4 Tab F211. Moreover, Mr. Thomas pointed out that not only had Mr. Liebman's mismanagement in administering the MRE-5 contract obliterated Freedom's opportunity to perform the MRE-5 contract successfully, but also that DPSC had perversely misused Mr. Liebman's and DPSC's mismanagement to conclude that Freedom was a non-responsible contractor for MRE-7. See R4 Tab F211.

373. As of February 12, 1987, DPSC continued to forbear on terminating Freedom for default. See Freedom Trial Exhibit A-5; H.T. at 3-84.

374. On February 23, 1987, Mr. Ed Heintz, Chief Counsel for DCASR-NY, offered an opinion concerning whether DPSC could terminate the MRE-5 contract for default. Mr. Heintz stated, "I believe the government has abrogated its rights for termination for default on the 107,000 cases remaining undelivered. We have waived our delivery date." See R4 Tab M48.

375. On February 25, 1987, Con Edison shut off Freedom's electricity due to the non-payment of approximately $11,000 in electric bills. See R4 Tab F218. Mr. Thomas informed the ACO that there was no danger to the GFM in the plant. See R4 Tab F218.

376. As of February 28, 1987, Freedom had shipped 6,916 cases in the MRE-6 configuration. See R4 Tab F218.

T. Contract Administration March 1987: DLA Refuse to Change the MRE-7 Resurvey, Awards an MRE-7 Contract to CINPAC, and Attempts to Reestablish a Delivery Date in Order to Terminate Freedom for Default.

377. On March 3, 1987, General Russo wrote Freedom to say he would not overturn DPSC's and DCASR-NY's decisions concerning the MRE-7 contract. See R4 Tab G173.

378. On March 3, 1987, Frank Bankoff spoke with Henry Thomas and requested that Freedom send a telex to DPSC requesting a no-cost termination for the convenience of the government. Freedom rejected this suggestion. Rather, Freedom informed Mr. Bankoff that it was ready, willing, and able to perform the MRE-5 contract.

See H.T. at 6-66; R4 Tab G174; R4 Tab F217; H.T. at 4-183-4-184. Freedom again informed Mr. Bankoff that it needed progress payments and GFM. See R4 Tab G174; H.T. at 6-69-6-70.

379. On March 4, 1987, Frank Bankoff wrote Mr. Thomas concerning the MRE-7 contract. See R4 Tab F216. Mr. Bankoff informed Freedom that Freedom was ineligible to receive an award under the MRE-7 solicitation because it was not a responsible contractor. See R4 Tab F216. On the same date, DPSC awarded the final MRE-7 contract to CINPAC. See R4 Tab G185, ¶ 6.

380. As of March 5, 1987, DPSC and DLA Headquarters had been totally briefed regarding Mr. Liebman's belief that Freedom did not have the financial resources to complete the MRE-5 contract. Nonetheless, DLA Headquarters and DPSC "elected to forbear at this time." See R4 Tab F218.

381. As of March 5, 1987, Frank Bankoff's attorney at DPSC advised him that Mr. Bankoff may have waived the delivery schedule and should try to establish a new delivery date before terminating Freedom for default. See H.T. at 4-55.

382. On March 5, 1987, Frank Bankoff requested that Marvin Liebman ensure that the power at Freedom's plant be turned on in order to permit Freedom to perform a physical inventory of all GFM components and to perform an inventory report. See R4 Tab G175.

383. On March 11, 1987, Frank Bankoff wrote Henry Thomas concerning Freedom's 4 March letter and requested that Freedom provide a revised delivery schedule

for the MRE-5 contract with evidence that Freedom could comply with the delivery schedule. See R4 Tab F219; H.T. at 6-67-6-68; H.T. at 4-56. Mr. Bankoff's letter did not mention DPSC's delinquency in providing GFM or progress payments. See H.T. at 6-68; R4 Tab F219. Mr. Bankoff gave Mr. Thomas ten days to respond. See R4 Tab F219.

384. On March 23, 1987, Freedom's attorney, Neil Ruttenberg, responded to Mr. Bankoff's 11 March 1987 letter. See R4 Tab M49; H.T. at 6-71-6-72. Mr. Ruttenberg stated that the current impasse in connection with deliveries arose directly from the PCO continually permitting the ACO to ignore PCO contractual commitments. See R4 Tab M49. He stated:

> Although Freedom was delivering product, some six months ago, you allowed the ACO to hold progress payments on incurred costs. With these payments, Freedom could have completed the contract. Without the payments, Freedom was forced to stop its lines. Inasmuch as you recognize a weakness in the government position, after all documentation exists admitting the original breaches, you failed to act for more than six months in the face of Freedom's shutdown. Thus, you have waived the delivery schedule and waived your right to default. In addition, your lack of action combined with the failure to make payment renders the government responsible for the recent delays and the costs on account thereof. In effect, it is the government, not Freedom that abandoned the MRE V contract.

See R4 Tab M49. Moreover, Mr. Ruttenberg criticized Mr. Bankoff for his attempt to dupe Mr. Thomas into requesting a no-cost termination. See id, p. 2. Mr. Ruttenberg then informed Mr. Bankoff that Freedom would provide new delivery schedules if the government would take the following steps: (1) negotiate price increases based on the delay and disruption caused by the government's failure to pay progress payments for the

last six (6) months, (2) agree to pay Freedom's costs in relocating from its Bronxdale Avenue facility to restart operations and increase the contract price accordingly, and (3) promise in writing to promptly pay progress payments to Freedom on incurred costs without withholding or suspension as long as Freedom is performing. If DPSC agreed to these conditions, Freedom stated that it would mutually establish new delivery schedules and complete the MRE-5 contract. If the government was not willing, Freedom requested that the government terminate the contract for convenience. See R4 Tab M49.

385. On March 23, 1987, the government began to remove remaining GFM from Freedom's plant. See R4 Tab F221.

386. On March 26, 1987, Mr. Thomas informed Frank Bankoff that Freedom was being evicted from its 1600 Bronxdale Avenue facility as of April 3, 1987. See R4 Tab G183, p. 2; H.T. at 4-186, 6-72-6-73.

387. Before Freedom completely shut down its Bronxdale Avenue facility, Mr. Thomas ensured that the inventory and equipment in the plant were clean and organized. See H.T. at 6-70. The facility had been secure throughout March. See H.T. at 6-70-6-71.

U. Contract Administration April 1987: Freedom is Evicted and Frank Bankoff Unilaterally Establishes a Revised Delivery Date In Order to Terminate Freedom for Default.

388. On April 2, 1987, Freedom was evicted from its facility at 1600 Bronxdale Avenue. See R4 Tab M50; H.T. at 6-72. Freedom's landlord had not been paid since approximately October 1986. See H.T. at 6-72-6-73.

389. Following the 2 April eviction, Mr. Thomas was not allowed access into the plant. See H.T. at 6-73.

390. On April 3, 1987, the DCASR-NY industrial specialist stated that due to severe financial problems, Freedom had ceased all production and was not able to complete the MRE-5 contract. See R4 Tab M50.

391. The government accelerated removal of the GFM and finished product from Freedom's plant. See R4 Tab F221.

392. On April 6, 1987, Mr. Bankoff responded to Mr. Ruttenberg's 23 March 1987 letter. See R4 Tab F220. Mr. Bankoff rejected the conditions set forth in Mr. Ruttenberg's letter and again instructed Freedom to provide a revised, acceptable delivery schedule for completion of the MRE-5 contract. See R4 Tab F220.

393. On April 8, 1987, the landlord denied government personnel access to the Bronxdale Avenue plant until the landlord was reimbursed $3,000 per day in guard service, forklift operator charges, and storage charges. See R4 Tab F221.

394. During the weeks of April 6 and 13, 1987, Marvin Liebman and Henry Thomas discussed Freedom's eviction from its 1600 Bronxdale Avenue facility on

April 2, 1987. See R4 Tab G181. Mr. Liebman informed Freedom that although the government was removing GFM and CFM from the plant, the GFM would be available to Freedom for contract performance when needed. In addition, if the government removed any progress payment inventory or equipment from Freedom's plant, the government also would make those items available to Freedom for contract performance. See R4 Tab G181.

395. On April 14, 1987, the government gained access to the facility after Freedom's financial institution, Banker's Leasing, agreed to reimburse Freedom's landlord $2,500 per day. Banker's Leasing agreed to reimburse the landlord because Banker's Leasing needed access to the facility in order to conduct an auction. See R4 Tab F225.

396. On April 16, 1987, Frank Bankoff sent a telex to Freedom in which he informed Freedom that no further attempt would be taken to rework lots of GFM retort pouches which failed Zyglo testing. Rather, all subject lots were condemned as unfit for human or animal consumption and should be destroyed. See R4 Tab G178.

397. On April 17, 1987, Freedom responded to Mr. Bankoff's April 6, 1987 letter. Freedom rejected Mr. Bankoff's contention that its position set forth in its March 23, 1987 letter lacked merit. See R4 Tab F222; H.T. at 6-75-6-78. Moreover, Freedom again informed Mr. Bankoff that the government had to agree to the conditions set forth in Freedom's March 23, 1987 letter to DPSC in order for Freedom to be able to submit a meaningful schedule to DPSC. See R4 Tab F222; H.T. at 6-75-6-78.

398. On April 23, 1987, the PCO issued unilateral modification P00030, establishing the following revised delivery schedule for the last two shipments under the contract:

Line Item	Destination	Quantity	Delivery Date
0001KT	Cold Storage	57,780 cases	1-20 August 1987
0001KU	Cold Storage	50,062 cases	1-30 September 1987

See R4 Tab G182; H.T. at 4-57. In a memorandum for record accompanying this unilateral modification, Frank Bankoff stated that Freedom had adequate production lead time to complete the contract. See R4 Tab G182; H.T. at 4-57. Frank Bankoff reasoned that the MRE-6 and MRE-7 awards to CINPAC were based on production lead times of 90 days after award, that CINPAC planned to produce the MRE-7 cases in a different plant, and that CINPAC did not plan to move into its new plant until after the MRE-7 award. See R4 Tab G182; H.T. at 4-57.

399. Although Modifications P00028 and P00029 clearly stated that "no subsequent modification of this agreement shall be binding unless reduced to writing and signed by both parties," Frank Bankoff issued modification P00030 without Freedom's agreement or signature. See R4 Tab G182; H.T. at 4-191, 6-78-6-79.

400. As of April 24, 1987, DCASR-NY and DPSC knew that Freedom's creditors planned to have an auction on April 28, 1987 at Freedom's plant. See R4 Tab F223. A team from DCASMA-NY and Frank Bankoff planned to attend. See R4 Tab F223.

401. Mr. Thomas obtained access into the plant just before the auction. See H.T. at 6-73-6-74. The plant, including the remaining inventory and equipment, was still neat and orderly. See id.

402. On April 28, 1987, an auction was held at Freedom's plant. See H.T. at 4-57-4-58. Frank Bankoff attended. At the auction, Freedom's bank sold some of Freedom's production equipment. Frank Bankoff attended. See id.

V. Contract Administration May 1987: Frank Bankoff Sends a Cure Notice.

403. On May 1, 1987, Frank Bankoff sent Freedom a cure notice concerning the MRE-5 contract. See R4 Tab G183. Mr. Bankoff stated:

> Freedom's failure to maintain and make available inventory records, to properly handle and administer and to guarantee safe storage for government property represents a breach of contract and a risk to the government of loss of its government property. Additionally, Freedom's current status and lack of necessary production equipment jeopardizes the successful completion of the contract.

See R4 Tab G183. Mr. Bankoff stated that the government considered Freedom's actions as endangering performance and provided Freedom ten days after receipt of the notice to offer evidence that Freedom could ensure the safe storage of government property and that it could comply with the revised delivery schedule. See R4 Tab G183, p. 3.

404. On May 5, 1987, the government was again denied access to Freedom's facility by the landlord because Banker's Leasing stopped paying the security services. See R4 Tab F225, p. 2. The ACO and PCO then began to pay the landlord for

these services in order to gain access to the facility. See R4 Tab F225, pp. 2-3; H.T. at 4-60-4-61.

405. On May 13, 1987, Freedom responded to Mr. Bankoff's cure notice. See R4 Tab F226. Freedom stated that it was unable to complete the remaining portion of the MRE-5 contract for reasons which were beyond its control and without its fault or negligence within the meaning of the default clause. See R4 Tab F226. Freedom then listed a variety of reasons, including, but not limited to, the government's refusal to provide progress payments in accordance with the contract, the government's refusal to abide by the agreement negotiated with Tom Barkewitz, and the government's refusal to make progress payments since October 1986. See R4 Tab F226. Although Freedom objected to any termination, Freedom stated that any termination should be for the convenience of the government, rather than for default. See R4 Tab F226, p. 2.

406. On May 21, 1987, Freedom supplemented its response to DPSC's May 1, 1987 cure notice. See R4 Tab F227. Freedom rejected the government's statement that Freedom's lack of capability to go forward under the MRE-5 contract represented a breach of contract. Freedom then recounted a myriad of ways in which the government failed to abide by the agreement Freedom had negotiated with the PCO. See R4 Tab F227, p. 2-3. Freedom closed by requesting that DPSC negotiate an equitable adjustment for the out-of-period contract costs that were caused by the government's wrongful conduct. Such an adjustment would permit Freedom to obtain the necessary capital to complete the MRE-5 contract. See R4 Tab F227, p. 2. If the government did

not agree, Freedom stated that it might be unable to complete the remaining 107,872 MREs due under the MRE-5 contract for reasons beyond its control and without its fault or negligence. See R4 Tab F227, p. 3.

W. Contract Administration June 1987: Contract Termination.

407. On June 4, 1987, Frank Bankoff prepared determinations and findings. See R4 Tab G185. In his determination and findings, Mr. Bankoff rejected Freedom's position that Freedom had lowered its price during contract negotiations based on the government's agreement during contract negotiations to increase government financing. In addition, Mr. Bankoff found that during the negotiations, the PCO had not agreed to include certain costs as direct costs for both contract price and progress payment purposes. See R4 Tab G185, p. 4. Mr. Bankoff further determined that the government administered and paid progress payments in accordance with the terms of the contract. See R4 Tab G185, p. 5. Finally, Mr. Bankoff found that Freedom was financially unable to complete the contract and that the government could not expect Freedom to liquidate progress payments with completed MRE cases. See R4 Tab G185, p. 6. Thus, Mr. Bankoff determined that:

> Due to Freedom's failure to comply with the terms and conditions of the subject contract and failure to make progress so as to be able to perform in accordance with the contract delivery schedule, as described above and in the contracting officer's cure letter to Freedom (Reference A), and due to Freedom's failure to correct such deficiencies, after consideration of the above, it is the contracting officer's determination that the 107,842 case balance of the subject contract be terminated for default under DAR 7-103.11.

See R4 Tab G185, p. 6.

408. On June 22, 1987, Frank Bankoff forwarded his notice of termination for default to Freedom. See R4 Tab F228. Mr. Bankoff terminated the undelivered quantity of 107,842 cases under the MRE-5 contract. See R4 Tab F228. Mr. Bankoff offered two reasons for his decision: (1) Freedom's alleged failure to perform inventory control requirements, and (2) Freedom's alleged failure to make progress towards completing the contract in accordance with the revised delivery schedule set forth in modification P00030. See R4 Tab F228, p. 2. Moreover, Mr. Bankoff concluded that Freedom's alleged default was not from causes beyond Freedom's control and without Freedom's fault or negligence. See R4 Tab F228, p. 2.

X. The 1991 Need For MREs: Operation Desert Shield.

409.On 16 January 1991, DPSC wrote Freedom to see whether Freedom was interested in assembling MREs. See R4 Tab M55. DPSC informed Freedom that Operation Desert Shield created a demand far exceeding the production capabilities of existing MRE suppliers. See id.

II. PROCEDURAL HISTORY.

410. Freedom filed a timely appeal from Mr. Bankoff's decision. See Freedom, NY, Inc., ASBCA No. 35671, slip op., p. 5, ¶ 21.

411. On May 1, 1991, Freedom submitted a claim in connection with the MRE-5 contract. See R4 Tab F1.

412. On October 7, 1991, Mr. Bankoff denied Freedom's May 1, 1991 claim. See R4 Tab F231. Freedom timely appealed the government's final decision.

III. THE 22 JUNE 1987 TERMINATION FOR DEFAULT MUST BE SET ASIDE.

A contracting officer considering whether to terminate a contract for default must decide (1) whether the contractor is in default without excuse and (2) whether, objectively, the contract should be terminated for default despite the contractor being in default. See Darwin Constr. Co. v. United States, 811 F.2d 593, 596 (Fed. Cir. 1987). The contracting officer must exercise reasonable discretion in deciding both of these issues. See id.

In reviewing a termination for default, the government "bears the burden of proof on the issue of the correctness of its actions in terminating a contractor for default." Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 764 (Fed. Cir. 1987). Additionally, even if the contractor is in default without excuse, the Board can overturn a termination for default, based on the facts of the particular case, if the contracting officer abused his discretion. See Darwin Constr. Co., 811 F.2d at 596-97.

In order to constitute an abuse of discretion, a contracting officer's decision must be arbitrary and capricious. See Keco Indus., Inc. v. United States, 428 F.2d 1233, 1238-40 (Ct. Cl. 1970). In determining whether a contracting officer's decision was arbitrary and capricious, the Board examines whether the contracting officer's decision "had a reasonable basis in fact" or whether the contracting officer acted "fairly and reasonably" under the specific circumstances of the case. See Continental Bus. Enters.,

Inc. v. United States, 452 F.2d 1016, 1021 (Ct. Cl. 1971); Executive Elev. Serv., Inc., VABCA No. 2152, 87-2 BCA ¶ 19,849, at 100,438, aff'd on reconsideration, 87-3 BCA ¶ 20,083.

When the contracting officer's default termination represents an abuse of discretion, the decision will be set aside. See Darwin Constr. Co., 811 F.2d at 598. Generally, the termination for default will be converted to a termination for convenience. See id. If the contractor can prove bad faith or a clear abuse of discretion, however, the contractor is entitled to breach of contract damages. See Kalvar Corp. v. United States, 543 F.2d 1298, 1304-05 (Ct. Cl. 1976); Inland Container, Inc. v. United States, 512 F.2d 1073, 1079-82 (Ct. Cl. 1975) (per curiam); Adams Mfg. Co., GSBCA No. 5747, 82-1 BCA ¶ 15,740, at 77,890.

In reviewing the government's actions in this case, the Board should recall the critical difference between a mobilization contract and an ordinary supply contract. As the Board explained in American Radio Hardware Co., ASBCA No. 3069, 57-2 BCA ¶ 1438, at 4820:

> Mention should be made of an important difference between an Industrial Mobilization Preparedness contract and an ordinary supply contract. The sole purpose of an ordinary supply contract is to obtain currently needed supplies, and ordinarily there is a close relationship between the delivery schedule of the contract and the time when the supplies are needed. In contrast, the completed supplies to be delivered under an Industrial Mobilization Preparedness contract are not likely to be currently needed at all, and the delivery of such supplies is purely incidental to the main purpose of the contract, which is to develop a source of supply to be available in time of national emergency.

Id. (emphasis added).

The government contends that it properly terminated Freedom for default on 22 June 1987 due to Freedom's failure to make progress towards completing the contract in accordance with Modification No. 30 and failure to perform inventory control requirements. Reviewing each rationale for the 22 June 1987 termination for default, however, demonstrates that the termination for default was improper.

A. Freedom's Alleged Failure to Make Progress Toward Completing the MRE-5 Contract Provides No Basis for the 22 June 1987 Termination for Default.

1. Freedom Cannot Be Terminated for Default for Failure to Make Progress Towards the Delivery Schedule in Modification No. 30 Because the Schedule is Invalid.

In defending a termination for default based on the failure to make progress, the government must prove, on the basis of the entire record, that the contractor could not perform the contract within "the time remaining for contract performance" and that there was no excuse for such non-performance. See Skip Kirchdorfer, Inc., ASBCA No. 32637, 91-1 BCA ¶ 23,380, at 117,312; RFI-Shield Room, ASBCA Nos. 17374, 17991, 77-2 BCA ¶ 12,714, at 61,735; see also Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 766-67 (Fed. Cir. 1987). Logically, the foregoing standard requires the Board to determine the "time remaining for contract performance."

The government apparently believes that the Board should simply focus on the time period between May 1, 1987 and 22 June 1987 in assessing whether Freedom was making adequate progress. See Govt. Post-Hearing Brief at 75-80. The

government's analysis ignores, inter alia, the events from October 1986 through 22 June 1987, including the impact of DPSC's waiver of the delivery dates established in Modification No. 29.

Modification No. 29 required Freedom, inter alia, to make certain deliveries by 15 November 1986 and 5 December 1986. Proposed Finding of Fact ("PFF") No. 305. Freedom did not meet the 15 November and 5 December 1986 delivery dates. PFF No. 349.

The government is authorized to forbear for a reasonable period of time after a contractor fails to deliver in accordance with a delivery date before being forced to take some action. Where the contractor is incurring costs in continued efforts to perform, however, the government has an obligation to act expeditiously in making a termination decision. Government inaction for an unreasonable period of time and the contractor's detrimental reliance on the government's inaction will waive the delivery schedule and prevent a termination for default. See Korean Maintenance Co., ASBCA No. 31796, 88-3 BCA ¶ 21,155, at 106,798; Specialty Construction Co., ASBCA No. 21132, 78-2 BCA ¶ 13,348, at 65,254. The contract may not be terminated for default after waiver of the delivery date. See E.L. David Construction Co., ASBCA Nos. 29225, 34787, 89-3 BCA ¶ 22,140, at 111,430; Motorola Computer Systems, Inc., ASBCA No. 26794, 87-3 BCA ¶ 20,032, at 101,416.

In this case, DPSC failed to act for an unreasonable period of time after Freedom did not meet the 15 November and 5 December 1986 delivery dates set forth in

Modification No. 29. DPSC knew that Freedom laid off most production workers and ceased work in the final assembly area on 7 November. PFF Nos. 332-333, 337. Nonetheless, Freedom continued to do some work at its plant with both Frank Bankoff's and Marvin Liebman's knowledge. PFF Nos. 341, 350-353, 356. Moreover, on 15 January 1987, Freedom notified both Frank Bankoff and Marvin Liebman that it intended to recall production employees and supervisors to resume producing cracker and accessories sub-assemblies and intended to resume full production by 11 February. PFF Nos. 352-354. Orally, Mr. Bankoff encouraged this action. PFF Nos. 351, 356-357. On 20 January 1987, Freedom did restart production and continued throughout February. PFF Nos. 356, 363, 370. Both Frank Bankoff and Marvin Liebman knew that the government was forbearing. PFF Nos. 343, 348, 350, 355, 364, 373, 374.

Freedom detrimentally relied on DPSC's forbearance. See Park Indus. Inc., ASBCA No. 13218, 69-1 BCA ¶ 7508, at 34,807 (where contractor hired new employees and leased new equipment, it detrimentally relied on forbearance); see also Corway, Inc., ASBCA No. 20683, 77-1 BCA ¶ 12,357, at 59,804 (encouraging continued performance constitutes an election to forbear); Westinghouse Elec. Corp., ASBCA No. 20306, 76-1 BCA ¶ 11,883, at 56,964 (government silence for 57 days following receipt of contractor's letter stating that it was continuing performance constituted an election to forbear); Shepard Div./Vogue Instrument Corp., ASBCA No. 15571, 74-1 BCA ¶ 10,498, at 49,723 (election to forbear where encourage contractor to perform past delivery date). DCASR-NY's own lawyer Ed Heintz, candidly stated on 23 February 1987 that the

government had waived the delivery date in Modification No. 29. PFF No. 374. Similarly, on 5 March 1987, Frank Bankoff's lawyer told him to establish another delivery schedule before terminating Freedom for default. PFF No. 381.

Frank Bankoff followed this advice and on 23 April 1987 he unilaterally established a new delivery date set forth in Modification No. 30. See PFF No. 398. The new delivery date required Freedom to deliver 57,780 cases by 20 August 1987 and 50,062 cases by 30 September 1987. See id.

Mr. Bankoff correctly recognized that in order to overcome a waived delivery schedule and terminate Freedom for default, he had to reestablish a new delivery schedule. He ignored, however, that a contracting officer must provide the contractor notice of the "new time for performance that is both reasonable and specific from the standpoint of the performance capabilities of the contractor at the time the notice is given." Devito v. United States, 413 F.2d 1147, 1154 (Ct. Cl. 1969) (emphasis added). Unilaterally established delivery dates must be reasonable to be enforceable. See Oklahoma Aerotronics, Inc., ASBCA No. 25605, 87-2 BCA ¶ 19,917, at 100,775; Vista Scientific Computer Products Int'l, Inc., ASBCA Nos. 26107, 26130, 83-2 BCA ¶ 16,889, at 84,050.

The delivery schedule set forth in Modification No. 30 was unreasonable for a number of reasons. First, Frank Bankoff offered a specious rationale for the new delivery date. Frank Bankoff reasoned that because CINPAC had recently received an MRE-7 award, CINPAC planned to produce the MRE-7 cases at a new plant, CINPAC

did not plan to move to the new plant until after the MRE-7 award, and CINPAC expected to produce MRE-7 90 days after award, then Freedom could as well. PFF No. 398. Mr. Bankoff's reasoning conflicts with the plain language of Devito. Rather than examining the new delivery date from the standpoint of Freedom's performance capabilities at the time the notice was given, Mr. Bankoff examined Freedom's performance capabilities from the standpoint of CINPAC. This perverse comparison failed to account for the startling differences between CINPAC and Freedom in April 1987. CINPAC had recently completed the MRE-6 contract and received an MRE-7 award. PFF No. 379. In contrast, Freedom had been mired in disputes concerning MRE-5 from November 1984 to date, had been denied an MRE-6 award, had not received an MRE-7 award, and had been evicted from its plant. See PFF Nos. 199, 379, 388. Moreover, Mr. Bankoff knew that absent an agreement consistent with the terms in Freedom's 23 March 1987 letter, Freedom could not complete the MRE-5 contract. See PFF Nos. 384, 397.

Second, Frank Bankoff's 23 April 1987 delivery schedule was patently unreasonable in light of Freedom's 23 April performance capabilities. Frank Bankoff knew that Freedom had not received any progress payments since October 1986, lacked GFM and CFM, had been evicted from its plant, and would lose its remaining production equipment on April 28. Additionally, Mr. Bankoff knew that Freedom had not received an MRE-7 award, had tremendous debt because of the manner in which the MRE-5

contract was administered, and could not obtain outside financing. PFF Nos. 330, 332, 337, 339, 352, 364, 372, 380, 384, 386, 388, 394, 397.

Third, Mr. Bankoff knew that the 23 April delivery schedule violated the plain language of Modifications 28 and 29. PFF No. 399. Both of these Modifications stated that "no subsequent Modification of this agreement shall be binding unless reduced to writing and signed by both parties." Freedom never agreed to or signed Modification No. 30. PFF No. 399. Thus, DPSC lacked the power to issue Modification No. 30, and the dates set forth therein were unenforceable.

The government now ignores the obvious: because the new delivery dates in Modification No. 30 are unenforceable, Frank Bankoff could not use the dates as a basis for concluding that Freedom failed to make progress toward those delivery dates. The new delivery dates are nullities. Because the new dates are nullities, whether Freedom could perform the MRE-5 contract in accordance with the delivery schedule in Modification No. 30 is irrelevant. Rather, the only relevant delivery schedule would be the schedule set forth in Modification No. 29. As previously discussed, however, DPSC waived that delivery schedule and any issue as to whether Freedom was making progress toward meeting that delivery schedule. Thus, DPSC improperly used Freedom's alleged failure to make progress between 1 May 1987 and 22 June 1987 as a basis for terminating Freedom for default. See Electronics of Austin, ASBCA No. 24912, 86-3 BCA ¶ 19,307, at 97,631 (emphasis added) ("Without a binding performance schedule [the contractor] could not be in default of meeting such a non-existent schedule. [The contractor] could

not be guilty of failing to deliver items or to perform services within a specified time when there was no specified time. Likewise, [the contractor] could not be guilty of failing to progress toward an enforceable schedule in the absence of such a schedule [;therefore, the default termination was improper]."). [2]

2. In Any Event, The Default Termination Must be Excused Based on the Manner in Which Progress Payments Were Administered Throughout the MRE-5 Contract.

Very few companies have the financial resources to finance the performance of their government contracts and to defer the receipt of payments for months or years until the government accepts the supplies required by the contracts. This fact is particularly true where a contractor has to make extensive capital investments at the outset of a contract in order to create a facility to produce a given product. In

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[2]The government erroneously relies on Universal Fiberglass Corp. v. United States, 537 F.2d 393 (Ct. Cl. 1976), for the proposition that its waiver of the delivery schedule "is of no consequence." See Govt. Post-Hearing Brief at 76-78. The government ignores (1) that in Universal Fiberglass, the PCO had not issued a revised delivery schedule after waiving the initial delivery schedule and (2) that in this case, the PCO had issued an invalid revised delivery schedule. Cf. id. at 398. Notably, the court in Universal Fiberglass stated that the contractor's failure to progress up to the waived delivery schedule could not justify a default termination. See id. at 397. Thus, Universal Fiberglass actually supports Freedom's position: because the Modification No. 30 delivery schedule is invalid, the only relevant delivery schedule is in Modification No. 29, but Freedom's alleged failure to progress toward that delivery schedule cannot justify a default termination.

Moreover, the government also ignores that in Universal Fiberglass, the court described the contractor as one who had "never manufactured a vehicle under the new specifications, did not have the necessary parts and could not obtain them, and had allowed its labor force to wither away." Id. In contrast, Freedom had manufactured 83% of the MREs due under the contract, but ultimately lacked money, GFM, CFM, and a labor force because of the manner in which the contract was maladministered. Thus, in any event, the circumstances found significant in Universal Fiberglass are not present in this case. See also Motorola Computer Systems, Inc., ASBCA No. 26794, 87-3 BCA ¶ 20,032, at 101,416 (distinguishing Universal Fiberglass).

recognition of these facts, there are various financial techniques designed to provide money to contractors in the form of progress payments. See generally John Cibinic, Jr. & Ralph C. Nash, Jr., Administration of Government Contracts, 884-88 (2d. ed. 1985).

Freedom's MRE-5 contract contained DAR § 7-104.35(b), Progress Payments for Small Business Concerns (1982 SEP), which provides, inter alia, for progress payments at a rate of ninety-five percent (95%) of the contractor's total costs incurred under the contract. PFF No. 34. Both Freedom and DPSC recognized that Freedom's receipt of progress payments would finance most of Freedom's performance of the MRE-5 contract. PFF Nos. 69-73. Nonetheless, in administering the MRE-5 contract, Marvin Liebman and other government officials so maladministered Freedom's progress payments that they ensured Freedom's inability to complete the MRE-5 contract. To Freedom's credit, it overcame the maladministration of progress payments and delivered approximately eighty-three (83%) of the MREs due under the MRE-5 contract. See PFF Nos. 398, 406. Freedom's perseverance does not, however, excuse the government for the manner in which it maladministered progress payments on the MRE-5 contract.

Where the government materially breaches a contract, a contractor has the legal right to avoid the contract and the breach relieves the contractor of a default termination and its consequences. See Malone v. United States, 849 F.2d 1441, 1445-46 (Fed. Cir. 1988); Bogue Elec. Mfr. Co., ASBCA No. 25184, 86-2 BCA ¶ 18,925, at 95,482. The government's failure to pay progress payments over an extended period of

time constitutes a material breach of contract. See Northern Helex Co. v. United States, 455 F.2d 546, 550 (Ct. Cl. 1972); H.E. & C.F. Blinne Contracting Co., ENGBCA No. 4174, 83-1 BCA ¶ 16,388, at 81,479-80; Shepard Div./Vogue Instrument Corp., ASBCA No. 15,577, 74-1 BCA ¶ 10,489, at 49,722-23; R.H.J. Corp., ASBCA No. 9922, 66-1 BCA ¶ 5361, at 25,152-54.

Even if the government's conduct does not constitute a material breach, financial problems caused by the government's failure to make required progress payments constitute an excuse and relieves the contractor of a default termination and its consequences. See TGC Contracting Corp. v. United States, 736 F.2d 1512, 1515 (Fed. Cir. 1984); Johnson v. United States, 618 F.2d 751, 755 (Ct. Cl. 1980); DWS, Inc., ASBCA No. 33245, 87-3 BCA ¶ 19,960, at 101,050; Q.V.S. Inc., ASBCA No. 3722, 58-2 BCA ¶ 2007, at 8431. Moreover, the nonpayment of progress payments need not be deliberate. It can be inadvertent or result from administrative neglect. See Valley Contractors, ASBCA No. 9397, 1964 BCA ¶ 4071, at 19,945-46; U.S. Services Corp., ASBCA Nos. 8291, 8433, 1963 BCA ¶ 3703, at 18,508-09. The government must be particularly cognizant of the adverse impact that delaying (or failing to pay) progress payments can have on a small business contractor. See H.E. & C.F. Blinne Contracting Co., ENGBCA No. 4174, 83-1 BCA ¶ 16,388, at 81,480; R.H.J. Corp., ASBCA No. 9922, 66-1 BCA ¶ 5361, at 25,152-54.

a. Marvin Liebman abused his discretion by requiring the pre-payment audit of every progress payment request.

Freedom submitted its first progress payment request on November 15, 1984. PFF No. 81. Upon receipt, Marvin Liebman ordered a pre-payment audit. PFF No. 83. Ultimately, Marvin Liebman would order pre-payment audits on every progress payment request that Freedom submitted on the MRE-5 contract. PFF Nos. 83, 99, 110, 120, 127, 131, 144, 149, 153, 162, 171, 179, 186, 194, 202, 211, 249, 253, 263, 283, 289, 315.

DAR Appendix E § E-520 and DLAM § 32.592-3 provide the guidelines for ordering a pre-payment audit. PFF Nos. 84-85. DAR Appendix E § E-520 makes clear that in order to promote prompt payment of progress payments, pre-payment audits should be kept to a minimum and should be limited to those situations in which there is reason to question the reliability or accuracy of the contractor's certificate or reason to believe that the contract will involve a loss. PFF No. 84. Similarly, the DLAM permits contracting officers to conduct pre-payment audits on a quarterly basis, for the most "doubtful" of contractors. PFF No. 85.

Despite this clear guidance, Marvin Liebman ordered a pre-payment audit of every progress payment request that Freedom submitted. Obviously, at the outset of the contract, Mr. Liebman could not have reasonably concluded that the MRE-5 contract would involve a loss or that Freedom was in the category of the most "doubtful" of contractors. Similarly, there is no evidence that Mr. Liebman questioned the reliability or

accuracy of Freedom's certificate. Nonetheless, he continually ordered prepayment audits and thereby prevented the prompt payment of progress payments.

Mr. Liebman's decision to order a pre-payment audit of every progress payment request, including those critical early requests for money which Freedom planned to use to start-up its operations, constitutes an abuse of discretion. His decision thwarts the very purpose of progress payments for small businesses: to provide financing. See R.H.J. Corp., ASBCA No. 9922, 66-1 BCA ¶ 5361, at 25,153 ("[T]he Government, by its failure to make prompt progress payments when due, deprived [the contractor] of the agreed means of financing further progress, thus hindering performance . . . ."). The decision was particularly wrong in Freedom's case given that it had to incur numerous start-up costs in order to develop into a source of supply for MREs in both peace time and war. Marvin Liebman knew that Freedom's cash flow estimates, which the government received during pre-award negotiations, necessitated timely receipt of progress payments. See PFF Nos. 52, 69-73, 176. Not promptly making payments ensured that Freedom would not meet milestones, increase the cost of performance, and delay delivery under the contract. See PFF No. 176. Marvin Liebman's decision also ensured that he would never comply with the then-DOD policy, which required that payments be made in a expeditious manner ("normally within five to ten days after receipt of a proper request"). See PFF No. 82. Mr. Liebman's abuse of discretion at the outset of the MRE-5 contract set the tone for the manner in which he would administer the contract throughout.

b. Marvin Liebman abused his discretion in reevaluating Freedom's responsibility immediately after award and in requiring actual physical progress to receive progress payments.

When DPSC awarded Freedom the MRE-5 contract on 15 November 1984, the PCO necessarily determined that Freedom was a responsible contractor. Although the DAR progress payment clause no where authorizes an ACO immediately to question a contractor's financial responsibility, Mr. Liebman did immediately question Freedom's financial responsibility following the award of the MRE-5 contract. See PFF Nos. 89-95. Here again, Mr. Liebman abused his discretion, delayed Freedom's ability to obtain progress payments, and thwarted Freedom's ability to perform the MRE-5 contract.

Additionally, after receiving Freedom's first and second progress payment requests, Mr. Liebman interpreted the progress payment clause to require actual physical progress in the performance of the MRE-5 contract in order for Freedom to receive progress payments. PFF Nos. 91, 94, 96-97, 101, 106, 108. Although Freedom repeatedly informed Mr. Liebman that the plain language of the clause stated that "each progress payment shall be (i) ninety-five (95%) . . . of the amount of the contractor's total cost incurred under this contract . . .," Mr. Liebman repeatedly insisted that Freedom had to incur direct labor and raw material costs in order to obtain progress payments. PFF Nos. 91, 101. Moreover, Mr. Liebman compounded his error and the resulting harm to Freedom when he informed Freedom's financial supporters, vendors, and suppliers of his erroneous view of the progress payment clause. See PFF Nos. 96, 101.

Although on 26 December 1985, Mr. Liebman's lawyer advised him that he was wrong in requiring actual physical progress, Mr. Liebman remained firm with this interpretation of the progress payment clause until 14 February 1985. See PFF Nos. 94, 108. On that date, DLA Headquarters personnel told Mr. Liebman that he was wrong and that Freedom did not need to incur direct labor and raw material costs in order to receive progress payments. See PFF Nos. 94, 108.

Once again, Mr. Liebman's interpretation of the progress payment clause prejudiced Freedom during the critical start-up phase of the MRE-5 contract. While Freedom was attempting to start-up phase the MRE-5 contract in the manner in which it negotiated with DPSC, Mr. Liebman was misinterpreting the progress payment clause and refusing to pay Freedom for properly incurred costs. Mr. Liebman's conduct severely prejudiced Freedom because it deprived Freedom of needed progress payments and an ability to remain on schedule. PFF Nos. 52, 69, 71, 73, 101, 103, 176. Essentially, Mr. Liebman erroneously required Freedom to finance the start-up phase by itself. See H.E. & C.F. Blinne Contracting Co., ENGBCA No. 4174, 83-1 BCA ¶ 16,388, at 81,480 (convert termination for default where parties agreed that progress payments would form the basis of most of the contract financing, but the government improperly withheld progress payments and thereby prejudiced the small business contractor who had limited financial resources).

c. Throughout the MRE-5 contract, Mr. Liebman improperly suspended progress payments to Freedom's detriment.

Although the DAR progress payment clause contains authority for a contracting officer to reduce or suspend progress payments, the clause sets forth limitations on the contracting officer's discretion. Specifically, the contracting officer must find upon "substantial evidence" that the contractor has failed to abide in some respect with the provisions set forth in DAR 7-104.35(b)(c). Moreover, DAR Appendix E § E-524 requires the contracting officer to prepare written findings, to notify the contractor of the proposed action, and to provide an opportunity for discussion before suspending progress payments. See Govt. Trial Exhibit G-1, DAR Appendix E § E-524. Additionally, DAR Appendix E § E-524 provides that actions reducing or suspending progress payments "will be fair and reasonable under the circumstances of particular cases, and supported by substantial evidence." See Govt. Trial Exhibit G-1, DAR Appendix E § E-524.

In February 1985, Marvin Liebman formally suspended Freedom's progress payments. PFF No. 104. In August 1985, Marvin Liebman informed Freedom in writing that he was possibly going to suspend progress payments. PFF No. 159. Both of these formal actions were improper. Moreover, on numerous other occasions throughout the MRE-5 contract, Mr. Liebman illegally entered de facto suspensions of progress payments. All of these actions were wrong and severely prejudiced Freedom's ability to perform the MRE-5 contract.

i. Marvin Liebman improperly suspended progress payments from 15 November 1984 through 6 May 1985.

Mr. Liebman's initial de facto suspension of progress payments began immediately after receiving Freedom's Progress Payment Request No. 1. Initially, Mr. Liebman resisted paying Progress Payments Request No. 1 because he did not believe that Freedom had made actual physical progress on the MRE-5 contract. See PFF Nos. 91, 94, 96-97, 101, 106, 108. On 13 December 1984, Mr. Liebman also concluded that despite Freedom's positive pre-award survey and the contracting officer's determination of financial responsibility at the time of award, his concerns about Freedom's financial ability to perform the MRE-5 contract warranted not paying progress payments. See PFF Nos. 89-92. Thus, he did not pay Progress Payment Request No. 1, and instead requested that Freedom provide financial information to him. PFF No. 92. Even after Freedom explained how it intended to finance the MRE-5 contract and discussed a variety of financing sources available to Freedom, Mr. Liebman still refused to pay. PFF No. 93. Moreover, although Mr. Liebman received a 26 December 1984 memorandum from his legal counsel advising him that Freedom did not have to make actual physical progress on the contract in order to receive payment and reminding him that there had been no change in Freedom's financial posture from the time of the award of the contract to the present, Mr. Liebman still would not pay.[3] See PFF No. 94.

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[3]The advice was not quite accurate: Freedom's financial posture had become worse because it was incurring costs on the MRE-5 contract, but not receiving any progress payments. See PFF No. 98. Mr. Liebman's conduct gives new meaning to the phrase "self-fulfilling prophecy."

Despite the 26 December 1984 legal advice, on 4 January 1985, Mr. Liebman informed Freedom that he was returning Revised Request No. 1 unpaid and considering suspending progress payments because the evidence available to him indicated that Freedom was in such unsatisfactory financial condition as to endanger performance of the contract. Additionally, Mr. Liebman again criticized Freedom for not appearing to make physical progress in performing the MRE-5 contract. PFF No. 97. Mr. Liebman then formally suspended progress payments on 6 February 1985. See PFF No. 104.

Mr. Liebman kept the formal suspension in place until 6 May 1985. PFF No. 125. Moreover, between 4 January 1985 and 6 May 1985, Mr. Liebman required Freedom to obtain satisfactory traditional financing sources in order to receive progress payments. PFF No. 108. In addition, Mr. Liebman (as the responsible ACO) required Freedom to novate the contract. PFF No. 108. Although Freedom met both of these additional requirements by 17 April 1985, Mr. Liebman still did not pay any progress payments until 6 May 1985. PFF Nos. 111, 113, 121, 125.

The adverse impact on Freedom's start-up operations cannot be understated. During Freedom's negotiations with DPSC, Freedom presented a projected cash flow analysis which was based on Freedom receiving ninety-five (95%) of incurred costs during the critical start-up phase of the contract. PFF Nos. 52, 69, 71, 73, 176. In reality, by 30 April 1985, Freedom had incurred approximately $1.5 million in costs, but had received no progress payments. See PFF Nos. 118, 125, 130. Ironically, while Freedom

was wrangling with Mr. Liebman about its ability to obtain outside financing, it financed the MRE-5 contract in the amount of approximately $1.5 million without receiving a single progress payment. Although Freedom had managed to finance the MRE-5 contract through 6 May 1985 by itself, it obviously had not been able to remain on the schedule that it had negotiated with DPSC. Mr. Liebman abused his discretion. See Virginia Elec. Co., ASBCA No. 18778, 77-1 BCA ¶ 12,393 at 60,018 (where company desperately needs progress payments in order to get on with performance and nonpayment is due to administrative wrangling, the ACO should pay progress payments and resolve the dispute later).

ii. Marvin Liebman Wrongfully Ignored the Freedom/DPSC Cost Agreement.

Marvin Liebman wrongfully withheld progress payments from May 1985 through May 1986, concerning costs that Freedom incurred in connection with, inter alia, office automation equipment, quality control equipment, an automated building management and control system, and office equipment. Although DPSC, DCAA, and DCASR-NY had reviewed these costs and agreed before contract award that Freedom could charge these costs as one-time direct costs to the MRE-5 contract, rather than depreciate them, Marvin Liebman refused to abide by this agreement. See PFF Nos. 58-59, 61-63, 66-67, 71, 125, 128-129, 134-135. Moreover, even when his lawyer informed him in July 1985 that he had discretion to classify this equipment in a manner that would have permitted payment, Mr. Liebman instead decided to seek a DAR deviation in connection with the payment of these costs. See PFF Nos. 145-147. Mr. Liebman made this decision knowing that the PCO had agreed during negotiations that the subject equipment would be treated as direct cost to the MRE-5 contract for the purposes of both price determination and progress payments. See PFF Nos. 145-147. Additionally, he recognized that if a deviation were not granted and these costs were not paid, Freedom might be unable to perform the contract and might become bankrupt. See PFF Nos. 145-147. Finally, he realized that a DAR deviation, even if granted, would take an indefinite amount of time to process and that Freedom would not be paid in the

interim. See PFF Nos. 146-147. Nonetheless, Marvin Liebman reclassified the equipment as capital equipment and pursued a DAR deviation.[4]

Marvin Liebman abused his discretion in not abiding by the PCO's agreement with Freedom. Cf. Virginia Elec. Co., ASBCA No. 18,778, 77-1 BCA ¶ 12,393, at 60,018 (where company desperately needs progress payments to perform and nonpayment is due to administrative wrangling, the ACO should pay progress payments and resolve the dispute later). In reaching agreement with Freedom, the PCO was simply ensuring that the parties agreed, in advance, about special or unusual costs. See generally Rockwell Int'l Corp., ASBCA No. 30204, 76-2 BCA ¶ 12,131, at 58,303-04. Moreover, the DCAA and DCASR-NY approved. See PFF Nos. 60-63, 66-67, 134-135. Although DAR § 1-406 provides that "[w]hen a contract is assigned for administration, . . . if special instructions pertaining to administration . . . are to apply, they should be contained in a letter accompanying the contract when it is assigned for administration," the PCO apparently did not comply with this regulation. Nonetheless, Mr. Liebman learned no later than 13 December about Mr. Barkewitz's agreement, but erroneously refused to abide by it. See PFF Nos. 88-89; cf. Symetrics Eng. Corp., NASA BCA No. 1270-20, 74-1 BCA ¶ 10,553, at 49,988-89 (pre-award DCAA audit report showing the contractor's anticipated labor rate estopped the government from later denying the use of the rate).

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[4]In making this decision, Mr. Liebman, in effect, reclassified the equipment inconsistently with DPSC's DCASR-NY's, and DCAA's pre-award classification. Before award, all three entities realized that the equipment at issue was obtained only for this contract and could be treated as a direct contract expense. PFF Nos. 60-63, 66-67, 71, 128-129, 134-135.

Marvin Liebman compounded this error when he sought an unnecessary DAR deviation in connection with the costs at issue between him and Freedom. The strongest evidence that Mr. Liebman did not need a DAR deviation to pay these costs is that in May, 1986, when the government agreed to pay them, it did so without obtaining a DAR deviation. PFF No. 235. Obviously, however, Freedom had not received payment for the costs associated with this equipment from November 1984 through May 1986 and was prejudiced. See PFF Nos. 145, 148, 176.

iii. Mr. Liebman Compounded His Refusal to Abide by the DPSC Agreement by Suspending Freedom's Progress Payments for an Allegedly Inadequate Accounting System.

Despite the requirement to provide a contractor notice and an opportunity to respond before suspending progress payments, Marvin Liebman illegally entered a de facto suspension of progress payments from approximately 5 July 1985 through 23 August 1985 based on Freedom's allegedly inadequate accounting system. See PFF No. 151. Mr. Liebman lacked substantial evidence, failed to make written findings, and failed to discuss the matters with Freedom. See PFF Nos. 151, 165. Mr. Liebman violated DAR Appendix E § E-524 and abused his discretion.

Marvin Liebman also erred on 23 August 1985, when he formally notified Freedom that he possibly might suspend progress payments. See PFF No. 159. He erroneously concluded that Freedom's accounting systems and controls were not adequate for accumulating contract costs in support of progress payments. See PFF No. 159. Mr. Liebman reached this determination notwithstanding that from May, 1984 and

through June, 1985, the DCAA had concluded that Freedom's accounting systems and controls were adequate. See PFF Nos. 64, 137, 142; cf. Litton Sys., Inc., ASBCA No. 10395, 66-1 BCA ¶ 5599, at 26,168-69 (where government previously approved an accounting practice and then demands the contractor to change, the government must prove that the prior system produced distorted figures).

Incredibly, the reason that Marvin Liebman found Freedom's cost accounting system inadequate was because Freedom refused to classify as capital equipment the equipment that Freedom and DPSC (with the knowledge and approval of DCAA and DCASR-NY) had agreed would receive direct-cost treatment under the MRE-5 contract. See PFF Nos. 58-59, 61-63, 66-67, 71, 125, 128-129, 134-135. Mr. Liebman found support for his position from Guy Sansone, a DCAA auditor assigned to the Freedom contract in approximately July 1985. See PFF Nos. 155-156. Not surprisingly, Mr. Sansone had opined in December 1984 that Freedom was insolvent and should not receive progress payments. See PFF Nos. 89, 155. Once again, Marvin Liebman abused his discretion by refusing to accept the agreement that DPSC had negotiated with Freedom and thereby hindered Freedom's ability to perform the MRE-5 contract.

iv. Marvin Liebman illegally entered a de facto suspension of progress payments from 11 December 1985 through 30 January 1986.

Despite the clear requirements of the progress payment clause and DAR Appendix E which require "substantial evidence" for non-payment, written findings, and

of providing a contractor notice and an opportunity to be heard before a suspension, Marvin Liebman entered a de facto suspension of progress payments on 11 December 1985 which continued through 30 January 1986. See PFF Nos. 195, 204, 208. Mr. Liebman coordinated his refusal to pay with Frank Bankoff during on-going negotiations with Freedom over a partial termination for default. PFF No. 195. The government's actions flatly contradicted the progress payment clause and DAR Appendix E § E-524. See Sterling Millwrights, Inc. v. United States, 26 Cl. Ct. 49, 64-66, 89-90 (1992) (contracting officer wrongfully held up paying progress payments in order to obtain leverage in negotiating with the contractor and thereby extract an agreement).

v. Mr. Liebman illegally held Progress Payment No. 21 in abeyance pending the execution of Modification No. 29.

As evidenced by the December 1985-January 1986 de facto suspension, Marvin Liebman did not always act alone when attempting to use progress payments to extract an advantage from Freedom. Sadly, this abusive coordination between Mr. Bankoff and Mr. Liebman continued. On 2 October 1986, Marvin Liebman decided to pay Freedom's Progress Payment Request No. 21 in the amount of $700,000. PFF No. 302. On 3 October 1986, however, Frank Bankoff asked Mr. Liebman to withhold payment until Freedom executed Modification No. 29. PFF No. 303. Mr. Liebman agreed. PFF No. 303. Freedom executed Modification No. 29 on October 7. See PFF No. 305. Mr. Liebman did not make the payment in connection with Progress Payment Request No. 21 until 9 October 1986. PFF No. 309.

Mr. Liebman and Mr. Bankoff's conduct in connection with Progress Payment Request No. 21 constituted an abuse of discretion. Progress payments are designed to provide a means of financing for contractors. DAR Appendix E § E-524 requires that the ACO reduce or suspend progress payments in a manner that is "fair and reasonable under the circumstances." DAR Appendix E § E-524 obviously prohibits entering a de facto suspension of progress payments, especially where the government is using the de facto suspension as a tool to extract an agreement from contractors in dire financial need of progress payments. Yet, that is exactly how Mr. Bankoff and Mr. Liebman unfairly and unreasonably used the payment of Progress Payment Request No. 21. See Sterling Millwrights, Inc. v. United States, 26 Cl. Ct. 49, 64-66, 89-90 (1992) (contracting officer wrongfully held up paying progress payments in order to obtain leverage in negotiating with the contractor and thereby extract an agreement).

vi. Marvin Liebman Improperly Withheld Progress Payment No. 22.

Marvin Liebman wrongfully failed to pay Progress Payment Request No. 22. As of 22 October 1986, Freedom had produced the 505,546 cases to be completed in the MRE-5 configuration. PFF No. 316. On approximately 25 October 1986, Marvin Liebman determined that he could pay $208,915.00 on Progress Payment Request No. 22, and that he would decide whether to pay that request during the week of 3 November 1986. PFF No. 321.

On approximately 29 October 1986, Mr. Liebman decided possibly to suspend progress payments. PFF No. 322. Before sending Freedom a letter to notify it

of this possible suspension of progress payments, he sent the notice of possible suspension of progress payments to his attorney, Ed Heintz, of the DCASR-NY Office of Counsel for review. See PFF No. 359. Mr. Liebman, however, did not send the notice of possible suspension to Freedom until 26 January 1987. PFF No. 358. Mr. Heintz "sat on" the notice of possible suspension of progress payments for approximately three and one-half to four months because of the pending decision on the MRE-7 contract and Congressional interest in Freedom's plight. PFF No. 359. Mr. Heintz candidly recognized in February 1987 that "if Freedom does file a dispute on the lack of notification to it based on progress payments, we possibly could have problems with this claim." PFF No. 359.

Mr. Heintz was correct. The government indeed does have problems with the manner in which it handled Progress Payment Request No. 22. The DAR requires that reduction or suspension of progress payments be effected "only after notice to and discussion with the contractor, and after full exploration of the contractor's financial condition, existing or available credit arrangements, projected cash requirements, effective progress payment reduction on the contractor's operations, and generally on the equities of the particular situation." See Govt. Trial Ex. G-1, DAR Appendix E § E-524. Moreover, DAR Appendix E § E-524 goes on to state that reducing or suspending progress payments "will be fair and reasonable under the circumstances of particular cases, and supported by substantial evidence. Findings made under that paragraph will be in writing." See id.

Mr. Liebman failed to abide by DAR Appendix E § E-524. His conduct was not fair and reasonable under the circumstances and he failed to make any findings in writing. Moreover, his conduct prejudiced Freedom. Mr. Liebman knew that Freedom desperately needed money in order to complete deliveries. See PFF Nos. 300-303, 314-315, 319. Mr. Liebman also knew that additional progress payments were tied to deliveries, that Freedom had delivered MREs and invoiced the government, that payment was due, and that Freedom needed money to continue producing. See PFF Nos. 278, 281, 287, 301-303, 314, 325, 328, 331. Additionally, Mr. Liebman knew that Freedom was continuing to incur costs, planned to complete the MRE-5 contract, and planned to perform the MRE-7 contract. See PFF Nos. 327, 331, 335, 337, 339, 341, 345. In fact, Mr. Liebman knew that Freedom recalled numerous employees to restart production in January 1987. See PFF Nos. 352-353. Nonetheless, Mr. Liebman entered a de facto suspension of progress payments as of 29 October 1986 and never made another progress payment to Freedom. Mr. Liebman failed to comply with DAR Appendix E § E-524 and arbitrarily withheld any proceeds from Progress Payment Request No. 22.

d. Marvin Liebman applied the wrong progress payment liquidation rate throughout the contract.

During the pre-award negotiations with DPSC, Tom Barkewitz agreed that Freedom's progress payment liquidation rate would be 82.6% based upon the DAR table E-512.3, which references a progress payment rate of 95% and a profit rate of 15%. Freedom relied on this agreement in entering the MRE-5 contract. See PFF No. 71. When Freedom began delivering MRE cases, it learned that Marvin Liebman was

liquidating progress payments at the rate of 95% and protested. See PFF No. 196. Not only did Mr. Liebman's actions violate the agreement that Freedom had reached with Mr. Barkewitz, it further reduced the amount of money that Freedom could keep when it delivered MREs to the government.

Although Freedom protested Mr. Liebman's failure to abide by the agreement reached with Mr. Barkewitz, Mr. Liebman continued to liquidate progress payments at the rate of 95%. PFF Nos. 196, 282. This 95% liquidation rate severely prejudiced Freedom throughout 1986 and 1987 when it was delivering all of the MRE-5 configured cases and some of the MRE-6 configured cases. The additional money would have assisted Freedom in continuing to perform the MRE-5 contract.

e. Marvin Liebman wrongfully failed to pay numerous invoices that Freedom submitted.

The record contains a list of invoices that Marvin Liebman failed to pay throughout the MRE-5 contract. See PFF No. 325. Marvin Liebman's failure to pay these invoices constitutes an abuse of discretion.

f. Marvin Liebman wrongfully reduced progress payments throughout the life of the MRE-5 contract.

As discussed, Marvin Liebman maladministered the progress payments throughout the MRE-5 contract. Although all of his maladministration harmed Freedom, he repeatedly made erroneous deductions that prejudiced Freedom. Marvin Liebman's errors in paying progress payments excused Freedom's alleged default.

For example, in November, 1985, Mr. Liebman wrongfully reduced Progress Payment No. 8 by $400,000. Freedom incurred $400,000 in rent on its 1600 Bronxdale Avenue plant and was entitled to payment. Nonetheless, Mr. Liebman insisted that H.T. Food Products' sale of a pre-existing unrelated option for the price of $400,000.00 to H.T. Food Products' landlord amounted to a $400,000 "rental credit" for Freedom; therefore, he refused to pay Freedom for its incurred rent. See PFF Nos. 177-178.

DAR § 15-205.32(f) states that "gains and losses of any nature arising from the sale or exchange of capital assets other than depreciable property shall be excluded in computing contract costs." PFF No. 180. H.T. Food Products' sale of its pre-existing option was the sale of a capital asset and should have been excluded from Mr. Liebman's consideration. Moreover, because the MRE-5 contract contained the Assignment of Claims clause (PFF No. 33), the government was not permitted to set off the alleged $400,000 "credit" with rent it previously paid. See 4 Gov't Cont. Rep. ¶ 26,535 (1991). Nonetheless, Mr. Liebman erroneously refused to exclude the $400,000.00 in revenue that H.T. Food Products realized from this option sale transaction and improperly reduced Progress Payment Request No. 8.

Similarly, Mr. Liebman wrongfully deducted progress payments from Freedom even when the DCAA recommended that Mr. Liebman make certain payments. For example, in connection with Progress Payment Request No. 13, the DCAA recommended that Mr. Liebman pay $984,507.00, but Mr. Liebman paid $700,000.00.

See PFF No. 246. In connection with Progress Payment Request No. 17, the DCAA recommended that Mr. Liebman pay $1,505,825.00, but Mr. Liebman paid $1,325,327.00. See PFF No. 273. In connection with Progress Payment Request No. 19, the DCAA recommended that Mr. Liebman pay $699,904.00, but Mr. Liebman paid $200,219.00. See PFF No. 285. Similarly, in connection with Progress Payment Request No. 21, the DCAA recommended that Mr. Liebman pay $862,185.00, but Mr. Liebman paid $721,887.00. See PFF No. 309. The DCAA's own calculations demonstrate that Marvin Liebman (at least) should have paid this $1,104,988.00 in progress payments to Freedom. Freedom's failure to receive this $1,104,988.00 in progress payments prejudiced Freedom's ability to perform the MRE-5 contract and was improper. See Nash Janitorial Serv., Inc., GSBCA No. 6390, 84-1 BCA ¶ 17,135, at 85,371, aff'd on reconsideration, 84-2 BCA ¶ 17,355 (contractor sought $83,000 price adjustment, field audit recommended $23,000, and contracting officer only allowed $20,000; contracting officer's maladministration of contract violated notions of good faith and fair dealing).

Mr. Liebman also used another device to make short payments to Freedom. In April, 1986, Mr. Liebman began applying a "percentage of completion analysis" in order to reduce progress payments to Freedom. See PFF Nos. 246-248. Mr. Liebman apparently calculated Freedom's incurred costs (as a percentage of the contract price) and Freedom's alleged progress in making deliveries under the MRE-5 contract. He then apparently reduced progress payments by the difference. See PFF No. 248.

Mr. Liebman's "percentage of completion analysis" contradicts the whole purpose of progress payments. As mentioned, progress payments are a form of financing government contracts. Especially, where a government contractor is beginning a start-up operation (like Freedom), the contractor is going to incur more costs initially than it is going to make deliveries. If a contracting officer applies a "percentage of completion analysis" to reduce progress payments, the contracting officer makes it that much more difficult for the contractor to perform. Nonetheless, Mr. Liebman ignored this point and applied a "percentage of completion analysis" to the MRE-5 contract. Once again, Mr. Liebman's decision wrongfully deprived Freedom of critical progress payment dollars needed to finance the MRE-5 contract.

Similarly, on 27 March 1986, Marvin Liebman began applying a loss ratio to Freedom's progress payments. Although the DAR permits a contracting officer to apply a loss ratio, Mr. Liebman abused his discretion in applying the loss ratio to Freedom's MRE-5 contract. As Freedom pointed out to him on 4 June 1986, Mr. Liebman should have recalculated the contract loss figure by adjusting for certain previously disallowed costs. See PFF No. 260. He then should have recalculated the loss ratio for Progress Payments 13-16 based on a contract value of $17,197,828.41. Such a recalculation would have recognized that Freedom's anticipated loss was based on a contract value approximately $17.1 million, rather than $13.8 million. This recalculation would have aided Freedom and recognized that Freedom, in fact, successfully performed

throughout the Spring of 1986 in order to have the 114,000 cases reinstated. See PFF Nos. 260-261. Marvin Liebman's refusal was an abuse of discretion.

At a minimum, Mr. Liebman should not have applied a loss ratio based on a contract price of $13,816,163.00 in connection with Progress Payment Request No. 16. See PFF No. 264. Modification No. 25 had increased the contract price to $17,197,828.41 on 29 May. See PFF No. 259. By applying a loss ratio with the lower contract price on 18 June, Mr. Liebman once again deprived Freedom of much-needed progress payments and prejudiced its ability to perform.

g. DPSC wrongfully tied progress payments to deliveries in Modification No. 28.

On 7 August 1986, Freedom and DPSC executed Modification No. 28. See PFF No. 278. Modification No. 28, inter alia, increased the ceiling on progress payments of $13 million and tied the ceiling to the number of cases Freedom delivered and the government accepted. See PFF No. 278. Specifically, the ceiling was $13 million for 333,000 cases, $14 million for 410,000 cases, $15 million for 490,000 cases, and $15,800,000.00 for 570,000 cases. Additionally, the modification provided that the ACO was authorized to make a pro tanto progress payment based upon the partial delivery of cases proportionate to the schedule. In effect, the government had tied progress payments to deliveries. See PFF No. 278; see also Govt. Post-Hearing Brief at 87.

The government is not permitted to tie progress payments to a percentage of completion except in connection with contracts for construction or shipbuilding and ship

conversion. See Govt. Trial Exhibit G-1, DAR Appendix E § E-501; DAR § 7-602.7. Obviously, Freedom's MRE-5 contract was neither a construction contract nor a shipbuilding or ship conversion contract. Thus, the government illegally tied progress payments to deliveries.

h. Summary.

As discussed above, the government's administration of progress payments in connection with the MRE-5 contract was abysmal. At every turn, Marvin Liebman exercised his discretion in a manner adverse to Freedom and thwarted Freedom's ability to perform the MRE-5 contract. This conduct began on the very first day that Mr. Liebman received Freedom's Progress Payment Request No. 1 and continued throughout the MRE-5 contract. Despite the clear purpose of progress payments as a form of financing and despite Freedom's status as a small, minority-owned business, the government repeatedly treated Freedom as if it were a large business with unlimited access to capital. Assuming arguendo that the Board concludes that Freedom defaulted on the MRE-5 contract, the government's maladministration of progress payments throughout the MRE-5 contract excused the default.

3. The Government Failed to Cooperate with Freedom and Hindered, Interfered, and Delayed Freedom's Ability to Perform the MRE-5 Contract by Interfering and Disrupting Freedom's Relations with its Financing Institutions, Vendors, and Suppliers.

There is an implied duty in every government contract that neither party will do anything to prevent performance by the other party or hinder or delay the other's performance. See Argus Indus., ASBCA No. 9960, 66-2 BCA ¶ 5711, at 26,653-54;

George C. Fuller Co. v. United States, 69 F.Supp. 409, 411-12 (Ct. Cl. 1947). The government breached this duty.

After the award of the MRE-5 contract in November 1984 and throughout 1985, Marvin Liebman continually interfered and disrupted Freedom's relations with its financing institutions, vendors, and suppliers. His conduct severely prejudiced Freedom's performance of the MRE-5 contract. For example, in November 1984, December 1984, and January 1985, Marvin Liebman repeatedly refused to confirm to Freedom's bankers and potential financial supporters that Freedom would receive progress payments up to approximately $9 million before delivery and that the company did not have to incur direct labor and raw material costs to obtain these progress payments. PFF No. 96. In fact, Mr. Liebman stated just the opposite. PFF No. 96. His statements severely prejudiced Freedom's ability to complete financing arrangements during the crucial start-up period of the MRE-5 contract. PFF Nos. 96, 101.

Unfortunately, Mr. Liebman's noncooperation and interference continued. After the initial six-month delay in obtaining progress payments had ended, Freedom requested that Marvin Liebman issue a list of allowable and accepted expenses under the MRE-5 contract in order to avoid the delay associated with Mr. Liebman's decision to order a pre-payment audit of every single payment request. See PFF No. 139. Mr. Liebman refused to issue such a list. See PFF No. 139.

Similarly, in late June 1985, Freedom was attempting to finalize the lease of certain state-of-the-art production equipment needed for the MRE-5 contract. Freedom

planned to lease the equipment from Warren Rosen of Performance Financial. See PFF No. 143. Warren Rosen learned that Mr. Liebman was not going to make progress payments to Freedom. PFF No. 143. After learning of Mr. Liebman's position, Mr. Rosen cancelled the equipment leases with Freedom and deprived Freedom of the much-needed state-of-the-art equipment. PFF No. 143.

Freedom then had to scramble to obtain other less efficient and more labor intense production equipment. PFF No. 166. Unfortunately, in August 1985, Freedom had to lay off employees because it still lacked all the necessary production equipment to perform the MRE-5 contract. PFF No. 166. Moreover, as of September 1985, Freedom's failure to have received progress payments for nearly 100 days had destroyed Freedom's relationships with numerous suppliers and forced Freedom to obtain much lower quality production equipment. PFF Nos. 163, 185. Finally, in November 1985, Mr. Liebman's failure to pay certain progress payments associated with one of Freedom's equipment leases caused Freedom to lose even more valuable production equipment and spare parts. PFF No. 183.

Mr. Liebman's conduct disrupted Freedom's relationships with its financing institutions, vendors, and suppliers. Moreover, the failure to have the state-of-the-art equipment not only caused Freedom to have to obtain less productive equipment and thereby slowed production, but also resulted in Freedom having to rework numerous MRE cases that it produced in December 1985. See PFF No. 185. The cases had

certain nicks that directly resulted from the non-state-of-the-art equipment that Freedom had to obtain. See PFF No. 185.

Assuming arguendo that the Board concludes that Freedom defaulted on the MRE-5 contract, Mr. Liebman's failure to cooperate with Freedom and his interference with Freedom's relationships with its financial institutions, suppliers, and vendors excuses the default.

4. The Government's Late Delivery and Non-Delivery of GFM Excuses Freedom's Alleged Default.

Where the government fails to deliver or delays in delivering GFM needed to perform, a contractor's failure to make progress is excused. See Shepard Div./Vogue Instrument Corp., ASBCA No. 15571, 74-1 BCA ¶ 10,498, at 49,723; S. Patti Construction Co., ASBCA No. 8423, 1964 BCA ¶ 4225, at 20,503; Royal Elec., Inc., ASBCA No. 3340, 1962 BCA ¶ 3571 at 18,083-85 (termination for default for failure to make progress improper where the government failed to supply spare parts in sufficient quantity to enable the contractor to perform the work). The government's actions in connection with Freedom's GFM excused Freedom's alleged default

The MRE-5 contract required the government to provide certain GFM. See PFF No. 24. Freedom, however, experienced numerous difficulties in receiving GFM from the government. These difficulties began in December 1985 and continued throughout 1986 and 1987.

DPSC's removal of existing GFM from Freedom's plant in December 1985 following the partial termination for default proved harmful to Freedom. Although DPSC

assured Freedom that it would replace the GFM it was removing and shipping to RAFCO as part of the reprocurement of the terminated quantities, DPSC never complied with its obligation to replace Freedom's GFM. PFF Nos. 198, 317. As a result, in late June 1986, Freedom experienced a GFM jelly shortage. PFF No. 266. Freedom notified Mr. Bankoff of the shortage, but the shortage became so severe that on 17 July 1986 Freedom had to shut down its plant. PFF No. 275. The government acknowledged its failure to provide GFM jellies to Freedom in July in Modification No. 28. PFF No. 278.

Nonetheless, the GFM outages continued in August 1986. On 22 August 1986, Freedom experienced a stock outage of fruit mix GFM. Because of the outage, Freedom was not able to perform final case assembly until 29 August 1986 when DPSC authorized a substitution. PFF No. 280.

Freedom continued to experience GFM fruit mix outages and outages of potato patties in September. PFF No. 287. Moreover, on 19 September 1986, Freedom stopped accessory production because it lacked a cream substitute. PFF No. 292. On 3 October 1986, Freedom finally received the GFM cream substitute and resumed accessory production on 6 October. PFF No. 304.

On 15 October 1986, DPSC's December 1985 removal of Freedom's GFM and DPSC's subsequent failure to replace the GFM prevented Freedom from commencing production of the 114,758 cases due in the MRE-6 configuration. PFF No. 313. Freedom again informed both Mr. Bankoff and Mr. Liebman of this fact and mentioned that it lacked 8 oz. pouches of ground beef with spice sauce, diced turkey and beef slices.

See PFF Nos. 312-314. Effective 22 October 1986, Freedom shut down its final assembly production due to a lack of GFM. PFF No. 318. Freedom informed Mr. Bankoff that it needed beef slices, diced turkey, ground beef, and ham slices. PFF No. 318. Although Freedom continued to produce cracker packets and accessory packets, it had to lay off production workers in the final assembly area until it received the needed GFM. PFF No. 318.

Freedom continued to experience GFM outages of ground beef and diced turkey between 24 October 1986 and 7 November 1986. PFF No. 327. DPSC knew that Freedom was not producing final cases because Freedom had not received the necessary GFM. Although DPSC authorized certain substitutions, the substitutions required re-engineering. PFF No. 327. Moreover, the previous GFM and progress payment induced layoffs hindered Freedom from retaining its workforce. PFF No. 327. The lack of progress payments and GFM culminated on 7 November 1986, when Freedom ceased producing in the final assembly area. PFF No. 332. Freedom lacked sufficient GFM or money to complete the MRE-6 configured cases. PFF No. 332.

Although Freedom restarted production on 20 January 1987, it still lacked the necessary GFM to complete the MRE-6 configured cases. PFF No. 356. Freedom informed Mr. Bankoff and Mr. Liebman that it needed, inter alia, GFM to complete the MRE-5 contract. PFF No. 352. Although Freedom continued cracker and accessory production during February 1987, it never received the GFM needed to complete the MRE-6 configured cases. PFF Nos. 363, 370. Only later did Freedom learn the truth:

Mr. Bankoff never purchased sufficient GFM during 1986 to replace the GFM taken from Freedom in December 1985. See PFF No. 317.

Assuming arguendo that the Board concludes that Freedom defaulted on the MRE-5 contract, the government's failure to provide sufficient GFM to Freedom excused the default.

5. The Government Materially Breached the MRE-5 Contract and Thereby Excused Freedom's Alleged Default.

Where the government materially breaches a contract, a contractor has the legal right to avoid the contract and the breach relieves the contractor of a default termination and its consequences. See Malone v. United States, 849 F.2d 1441, 1445-46 (Fed. Cir. 1988); Bogue Elec. Mfg. Co., ASBCA No. 25184, 86-2 BCA ¶ 18,925, at 95,482. "The extent to which the behavior of [a] party failing to perform . . . comports with standards of good faith and fair dealing is a significant factor in determining whether that party's breach is material." See Malone, 849 F.2d at 1445 (quotations omitted). "Subterfuges and evasions violate the obligations of good faith, as does lack of diligence and interference with or failure to cooperate in the other party's performance." See id. (quotations omitted). "The need for mutual fair dealing is no less required in contracts to which the government is a party, than in any other commercial arrangement." Maxima Corp. v. United States, 847 F.2d 1549, 1556 (Fed. Cir. 1988). The government simply cannot say, "The joke is one you. You shouldn't have trusted us." See id. (quoting Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970)).

a. The Government Materially Breached the Agreement Freedom Negotiated With DPSC.

During the administration of the MRE-5 contract, the government materially breached the agreement that Freedom reached with DPSC while negotiating the MRE-5 contract. During contract negotiations, Freedom reduced its price per case to $27.725 based on explicit promises made by the PCO and the DPSC negotiating team. See PFF Nos. 71, 73.

Despite these promises, Marvin Liebman refused to abide by the contract that Freedom negotiated with DPSC. Instead, he administered an entirely different contract. Beginning in 1984, Marvin Liebman systematically rejected the terms of the agreement that Freedom reach with the PCO. He (1) improperly re-evaluated Freedom's financial responsibility to perform the contract, (2) improperly required direct physical progress to obtain progress payments, (3) wrongfully denied Freedom progress payments from 15 November 1984 to 6 May 1985, (4) wrongfully imposed requirements of additional outside financing and a novation on Freedom, (5) wrongfully refused to permit Freedom to receive payments from November, 1984 through May, 1986 for certain direct cost items that DPSC (with the knowledge of DCAA and DCASR-NY) had told Freedom would be treated as direct costs for purposes of both price determination and progress payments, (6) wrongfully denied nearly all of Freedom's progress payment requests from 25 June 1985 through 10 October 1985 by bootstrapping his belief that Freedom had to segregate those direct cost items into an allegedly defective accounting system, (7) wrongfully used a different progress payment liquidation rate than that which

Freedom and DPSC agreed to during negotiations, and (8) continually paid Freedom's progress payments late and short. See supra. pp. 139-163. Although Colonel McDonald, the DPSC Director of Contracting, was only commenting on the DPSC direct/indirect cost issue, his November 1985 comments aptly characterize Freedom's plight arising from having negotiated one contract and having an entirely different contract administered:

> It may appear that the government has not negotiated in good faith and the government could possibly be held in breach of contract. Also, in originally obtaining independent financing, it appears that the contractor unfortunately planned on receiving progress payments for these expense items. Disallowance of these payments has already disrupted the contractor's original project cash flows and/or created unexpected financing need by the contractor to maintain production and ensure completion.

See PFF No. 176. In sum, even the government knew that it was breaching the MRE-5 contract, that Freedom relied on the agreement it reached with DPSC in entering the contract, and that the maladministration of the contract created unexpected financing needs for Freedom.

These breaches led to a myriad of problems that Freedom experienced throughout the MRE-5 contra

ct. For example, the breaches from 1984 through May, 1986, led Freedom into a position wherein by the

time Freedom executed Modification No. 25, Freedom had incurred approximately $14 million in costs on a contra

ct that (before Modification No. 25) had a value of approximately $13.8 million. See PFF No. 258. Although Freedo

m valiantly attempted to overcome the government's fundamental breach of the contract negotiated by DPSC, and, in fact,

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the MRE-5 contract, the government's material breach of the MRE-5 contract that Freedom negotiated with DPSC

excused the default.[5]

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[5]Freedom recognizes that it agreed to June 1985, November 1985, and January 1986 delivery schedule extensions. Freedom is also aware that generally the Board has ruled that "[t]he action of the parties in agreeing upon a new delivery schedule eliminates from consideration the causes of delay occurring prior to such agreement." Orien Electronic Corp., ASBCA No. 18918, 80-1 BCA ¶ 14,219, at 70,010. In short, the Board treats the revised delivery schedule agreement as an accord and satisfaction. See id.

Nonetheless this Board has continually recognized that, as with all contractual matters, the intention of the parties is paramount in determining whether there was an accord and satisfaction. See Mil-Spec Contractors, Inc., ASBCA No. 29963, 87-1 BCA ¶ 19,391, at 98,037; see also Brock & Blevins Co. v. United States, 343 F.2d 951, 955 (Ct. Cl. 1965). The evidence in this case demonstrates that whenever Freedom and the government discussed extending the delivery schedule, Freedom reserved its rights to make a claim for the damages incurred for the government's wrongful conduct. For example, Freedom expressly reserved its rights on 19 April 1985, 23 April 1985, 14 June 1985, 13 September 1985, 14 November 1985, 9 December 1985, and 28 January 1986. See PFF Nos. 122, 123, 138, 163, 181, 193 & 205. Thus, the Board should not apply the general rule. Rather, it should recognize that neither the government nor Freedom intended or expected that general rule to apply. See Environmental Tectonics, Corp., ASBCA No. 23374, 86-1 BCA ¶ 18,649, at 93,786 (reservation of rights preclude any perception that modifications are accords and satisfactions); see also Leonard Blinderman Construction Co., ASBCA No. 18946, 74-2 BCA ¶ 10,811, at 51,399 (where parties conduct after execution of a release makes plain that neither construed the release as constituting an abandonment of the claim, the release does not bar prosecution of the claim).

Freedom also recognizes that the government may attempt to use the delivery schedule extensions in Modification No. 25, Modification No. 28, and Modification No. 29 as a defense to its wrongful conduct prior to the date each of those modifications. For the reasons discussed infra, however, such an argument lacks merit. See infra at 178-190.

b. The government materially breached Modification No. 25.

On 26 March 1986, Freedom met with Mr. Bankoff, Mr. Liebman and other government representatives to discuss Freedom's $3.4 million claim. See PFF Nos. 213-315. During the meeting, Freedom and the government were not able to settle the claim because Freedom unequivocally stated that it had to receive a guaranteed portion of the MRE-7 procurement and receive some financial compensation associated with the $3.4 million claim in order to complete the MRE-5 contract. See PFF No. 214. At the end of the meeting, DPSC advised Freedom that it was going to refer the entire matter to DLA Headquarters for resolution. See PFF No. 215.

Freedom's representatives, David Lambert and Frank Francois, then negotiated with Raymond Chiesa and Karl Kabeisman of DLA during April and May 1986. See PFF Nos. 216-217. Freedom sought very specific items in its negotiations with DLA, including a guaranteed MRE-7 contract, an adjustment in the MRE-5 contract for the government's delay of work, the elimination of CINPAC from the IPP Program, technical assistance with approximately 40,000-50,000 cases then on hold, contracts from the SBA 8(a) program, and a $2.7 million guaranteed loan to enable Freedom to obtain the money needed to cover the costs above the MRE-5 contract price. See PFF No. 217.

On 25 April 1986, David Lambert forwarded DPSC a draft MOU supplementing the anticipated contract modification. See PFF No. 219. After DPSC received the draft MOU, it forwarded a copy to Karl Kabeisman's office at DLA Headquarters. See PFF No. 220.

Mr. Lambert subsequently redrafted the MOU into a letter from Henry Thomas to Frank Bankoff. See PFF No. 221. On 2 May 1986, Henry Thomas sent Frank Bankoff a draft letter setting forth his understanding of the terms of Modification No. 25. See PFF No. 221. Mr. Thomas expressly informed Mr. Bankoff that he understood that the parties' representatives had agreed to certain understandings in connection with certain "additional significant matters" relating to Freedom's participation in the MRE assembly program that would not be contained in the express terms of Modification No. 25, but would be part of an agreement to resolve Freedom's existing claim. Mr. Thomas stated that he understood that (1) DPSC would negotiate a fair and reasonable contract with Freedom in connection with the MRE-7 solicitation, (2) DPSC and DLA would process a request for a guaranteed loan in an amount not greater than $2.7 million, (3) DLA would provide all reasonable assistance to Freedom in obtaining certain contracts through the SBA 8(a) program and (4) DLA would provide technical and production assistance to Freedom to rework and reprocess as necessary approximately 46,000 MRE-5 cases then on hold. See PFF Nos. 221-222.

Mr. Bankoff's counsel, Mr. Apelian, informed Mr. Lambert that Freedom should send the draft 2 May letter to Mr. Chiesa because he was involved in the negotiations with Freedom. See PFF No. 223. Accordingly, Freedom revised the 2 May letter, addressed a revised letter dated 13 May to Mr. Chiesa, and sent the letter to Mr. Chiesa. See PFF No. 224.

On 15 May 1986, Raymond Chiesa spoke with Lieutenant Colonel Menarchick of Vice President Bush's staff. Mr. Chiesa informed Lt. Colonel Menarchick that Freedom and DLA had discussed a loan guarantee and production assistance and that DLA and Freedom had agreed on those issues and would confirm those agreements in writing. See PFF No. 226.

On 19 May 1986, Raymond Chiesa wrote Lt. Colonel Menarchick and admitted that DLA had reviewed Mr. Thomas' draft letter concerning Modification No. 25 and was "prepared to commit ourselves to timely processing of the loan guarantee request and the request for production assistance." See PFF No. 229. On 29 May 1986, Mr. Thomas went to Philadelphia to execute Modification No. 25. Mr. Thomas stapled the 13 May letter to Mr. Chiesa to Modification No. 25. He then informed Mr. Bankoff that they were one document and that if Mr. Bankoff had a problem with that, then to say something. If not, Freedom was prepared to execute Modification No. 25. PFF No. 231.

Mr. Bankoff then said that he needed to fax the document to DLA Headquarters and he left the room. PFF No. 232. At 10:59 a.m., Mr. Bankoff's counsel, Bob Apelian, faxed a copy of Mr. Thomas' letter of 13 May to Ed Neill, a subordinate of Karl Kabeisman at DLA Headquarters Office of Counsel. PFF No. 233. Mr. Bankoff returned to the room in approximately 30 minutes and executed Modification No. 25. PFF No. 234. Before Mr. Thomas executed Modification No. 25, neither Mr. Bankoff nor anyone else at DLA ever informed Mr. Thomas that the agreement set forth in Mr.

Thomas' 13 May letter to Mr. Chiesa were not part of Modification No. 25.[6] PFF No. 234.

Despite Mr. Chiesa's denial in his letter dated 30 May 1986 to Freedom, there clearly was an agreement between DLA and Freedom set forth within the confines of Modification No. 25 and set forth in the 13 May letter from Mr. Thomas to Mr. Chiesa. In fact, the Chiesa MFR regarding his conversation with Lt. Colonel Menarchick demonstrates that all of the issues set forth in the 13 May letter were negotiated. Moreover, Mr. Chiesa's 19 May letter to Lt. Colonel Menarchick demonstrates that DLA had received a copy of Mr. Thomas' 13 May letter. Nonetheless, DLA did nothing to

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[6]Freedom recognizes that the Board will have to make a credibility determination in connection with the events of 29 May 1986. Notably, during his cross-examination as part of the government's case-in-chief, Frank Bankoff did not testify that he informed Henry Thomas that the conditions set forth in the 13 May Chiesa letter were not included within Modification No. 25. See H.T. at 4-125-4-133. He testified that he had no recollection. Id at 4-124-4-126. During the government's rebuttal case, Mr. Bankoff testified that he had a distinct recollection and remembered informing Mr. Thomas moments before signing Modification No. 25 that "Henry, there is no side deal. If you think there is and if you think there's any agreements, other than what's in the mod, don't sign the mod. If you don't sign it, I won't sign it." See id. at 6-140.

The Board saw both Mr. Thomas and Mr. Bankoff testify. Mr. Bankoff's testimony on rebuttal simply lacks credibility. Mr. Thomas would not have agreed to waive a $3.4 million claim for no new consideration in light of Freedom's clear negotiating position since March 1986. Indeed, Mr. Liebman testified that (without examining the 13 May Chiesa letter), he was "surprised" that Freedom executed Modification No. 25. See PFF No. 238. Moreover, Mr. Chiesa's 30 May letter further confirms that the events of 29 May occurred as Mr. Thomas testified, given that Mr. Chiesa's 30 May letter begins by stating that "a copy of a letter dated May 13 addressed to me was sent to me by telefax by Mr. Frank Bankoff" on 29 May 1986. See PFF No. 239.

attempt to repudiate the agreement until Mr. Chiesa sent his 30 May letter to Mr. Thomas (i.e., after Henry Thomas signed Modification No. 25).[7]

After entering the agreement with Freedom, DLA breached the terms of Modification No. 25. Obviously, Freedom did not receive an MRE-7 prime contract.[8] Moreover, DPSC and DLA did not process the $2.7 million guaranteed loan request, did not provide Freedom reasonable assistance in obtaining traypack and pouch contracts through the SBA 8(a) program, and did not provide technical and production assistance to Freedom in connection with the MRE-5 cases then on hold.

As in Malone, 849 F.2d at 1445-46, Mr. Chiesa's and Mr. Bankoff's conduct was "evasive." Although both Mr. Bankoff and Mr. Chiesa had a copy of a letter setting forth Freedom's understanding of Modification No. 25, neither informed Freedom before execution that DLA did not plan to abide by the agreements and understandings set forth in Mr. Thomas' 13 May letter. Rather, Mr. Bankoff permitted Mr. Thomas to execute Modification No. 25. Similarly, Mr. Chiesa waited until 30 May 1986 to attempt

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[7]Mr. Chiesa's 30 May attempted repudiation does not obviate the agreement that Freedom and DLA reached in executing Modification No. 25. See generally John Cibinic, Jr. & Ralph C. Nash, Jr., Administration of Government Contracts, 717-24 (2d ed. 1985) (discussing doctrine of anticipatory repudiation); see also John D. Calamari & Joseph M. Perillo, The Law of Contracts, §§ 12-4-12-9 (3d ed. 1987) (same).

[8]The government argues that it did not breach the agreement to provide Freedom an MRE-7 contract because Freedom was declared not responsible in March 1987. See Govt. Post-Hearing Brief at 86. The argument ignores the government's failure to comply with the other three conditions in the 13 May Chiesa letter. Similarly, it ignores how the government's failure to comply with the other conditions, especially the $2.7 million loan, and its maladministration of the MRE-5 contract caused Freedom's financial condition in March 1987. Finally, the argument ignores that the government erroneously found Freedom non-responsible on MRE-7.

to repudiate the agreement. Thus, "the Government by its conduct acknowledged that it considered the release [in Modification No. 25] in the same light as [Freedom]." Leonard Blinderman Construction Co., ASBCA No. 18946, 74-2 BCA ¶ 10,811, at 51,399.

DLA's breach of Modification No. 25 substantially impaired Freedom's ability to perform the MRE-5 contract. This breach relieves Freedom of the default termination and its consequences. See Malone, 849 F.2d 1445-46.[9]

[9]The government erroneously relies on the allegations set forth in the complaint entitled, Thomas v. Barnett & Alagia. In that complaint, Mr. Thomas made numerous allegations in the alternative. These pleadings were made prior to discovery and set forth alternative legal theories upon which Mr. Thomas sought to recover in a legal malpractice action against Mr. Lambert. The allegations do not "prove" that the "side agreement" did not exist.

c. Assuming that Modification No. 25 Does Not Include the "Side Agreement," Modification No. 25 is Unenforceable.

(i) The Purported Release Provisions of Modification No. 25 Must be Rescinded Due to Mistake.

The government argues that the release clause of Modification No. 25 constitutes an accord and satisfaction which bars the present claim. However, an effective accord and satisfaction requires both consideration and a meeting of the minds of the parties. See Mil-Spec Contractors, Inc., ASBCA 29963, 87-1 BCA ¶ 19,391 at 98,037; Brock & Blevins Co., Inc. v. United States, 343 F.2d 951, 955 (Ct. Cl. 1965); see also Societe Cotonniere Du Tonkin v. United States, 171 F. Supp. 951, 958 (Ct. Cl. 1959) (mutual assent is a prerequisite to the formation of a contract), cert. denied, 361 U.S. 965 (1960).

Modification No. 25 clearly lacks these two essential elements. As discussed above, if one ignores the 13 May Chiesa letter, the exculpatory clause in Modification No. 25 requires Freedom to waive all its rights without the government really foregoing anything in return. Thus, consideration is lacking.

Furthermore, there was no meeting of the minds of the parties over Modification No. 25. Mr. Thomas expressly advised Mr. Bankoff, prior to signing Modification No. 25, that the written terms Modification No. 25

were only a part of Freedom's agreement to abandon the $3.4 million claim, but by no means the entire agreement. See PFF Nos. 231, 237. In fact, Mr. Thomas expressly advised Mr. Bankoff that the four conditions in the 13 May Chiesa letters were part of the

deal and that Freedom understood that they had been accepted by the government. See PFF Nos. 221-223, 231. Freedom never would have assented to Modification No. 25 had it known that the government would later deny agreeing to the additional promises.[10] See PFF No. 237. Thus, there was no meeting of the minds and no enforceable agreement. See Leonard Blinderman Construction Co., 74-2 BCA ¶ 10,811, at 51,399-40 (where government had contemporaneous notice concerning the contractor's interpretation of a release and failed to make the government's contrary position known, its conduct demonstrated that it viewed the release in the same manner as the contractor; release is invalid and does not bar pre-existing claims).

Alternatively, Freedom is relieved from the release provisions of Modification No. 25 under the doctrine of unilateral mistake. If the additional conditions essential to Freedom's economic survival were not a part of the government's consideration to Freedom for waiving its $3.4 million claim, Freedom made a colossal, unilateral mistake in understanding to the contrary. Moreover Mr. Bankoff knew -- actually knew -- of Freedom's misunderstanding. After all, Mr. Thomas physically handed Mr. Bankoff the 13 May Chiesa letter stapled to Modification No. 25 and said that both documents were "one." Nonetheless, Frank Bankoff never told Mr. Thomas that

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[10]Freedom's actions upon receiving the 30 May letter from Mr. Chiesa further prove this point. See PFF Nos. 240-242. Freedom immediately sought to reinstate its ASBCA complaint because the government was not abiding by Modification No.25. See PFF No. 240. The ASBCA informed Freedom, however, that it could litigate whether the government breached Modification No. 25. See PFF No. 242.

he was mistaken and, instead, watched Mr. Thomas execute Modification No. 25. Similarly, Mr. Chiesa never informed Mr. Thomas that he was mistaken.

The Board should not stand for this. Assuming arguendo that Mr. Thomas was wrong and that DLA never agreed to anything other than the terms expressed within the four corners of Modification No. 25, Mr. Thomas' mistake and the government's inexcusable failure to tell Mr. Thomas that he was wrong before signing Modification No. 25 void Modification No. 25. See Bromley Contracting Co., Inc. v. United States, 596 F.2d 448, 453-455 (Ct. Cl. 1979) (unilateral mistake of which the government knows at the time of contracting voids the contractor's agreement); Leonard Blinderman Construction Co., ASBCA No. 18946, 74-2 BCA ¶ 10,811, at 51,399-40.

(ii) Modifications No. 25 Resulted from the Government's Economic Duress.

The government's use of economic duress in obtaining a contract amendment or a release from a contractor renders the release unenforceable. See, e.g. Urban Plumbing & Heating Co.v. United States, 408 F.2d 382, 389-92 (Ct. Cl. 1969), cert. denied, 398 U.S. 958 (1970); Ace Van & Storage, Inc., ASBCA No. 23759, 83-1 BCA ¶ 16,547, at 82,291-96; Paccon, Inc.. ASBCA No. 7890, 1963 BCA ¶ 3659, at 18,352-53. Economic duress will be found when the following three elements are present: (1) one side involuntarily accepted the terms of another; (2) circumstances permitted no other alternative; and (3) circumstances were the result of coercive acts of the opposite party. Systems Technology Assocs. v. United States, 699 F.2d 1383, 1387

(Fed. Cir. 1983); Fruhauf Southwest Garment Co. v. United States, 111 F. Supp. 945, 952-53 (Ct. Cl. 1953).

The terms of Modification No. 25 without the 13 May Chiesa letter are not such that Freedom would voluntarily accept them. The exculpatory clause in Modification No. 25 required Freedom to waive its $3.4 million claim without the government actually foregoing anything in return. The government had been obligated since the date of award to make progress payments based upon direct charging and expensing of certain specialized equipment. Similarly, the $200,000 returned to Freedom for prior delivery schedule extensions merely represented money wrongfully extracted following contract maladministration. Beyond reinstating some terminated delivery increments and extending the delivery schedule, however, that is all the government agreed to do in the "four corners" of Modification No. 25. Would a contractor agree to waive a $3.4 million claim only to obtain $399,111 in payments it already has a clear right to receive and $200,000 in wrongfully extracted consideration, if it is not under duress? To ask the question is to answer it.

In determining whether duress is present, courts focus on whether the will of the party coerced has been defeated, rather than the strict legality or illegality of a particular act. See, e.g., Systems Technology Assoc., Inc., 699 F.2d at 1387-88. In addition, the government's motivation for an act or threat may be more important in finding duress than the strict legality of illegality of the act. See, e.g., Allied Materials & Equip. Co., ASBCA No. 17318, 75-1 BCA ¶ 11,150, at 53,081-83.

Applying these principles to this case, one must examine the motives of the government in obtaining Modifications No. 25. Despite the government's agreement at the outset of the MRE-5 contract that Freedom could expense and direct charge certain equipment costs against the MRE-5 contract, and despite Freedom's further need to receive progress payments of 95% of its costs up to a total of $13 million, the government repudiated these provisions of the contract. Thereafter, the government repeatedly failed to honor its obligations under the contract. See supra pp. 139-171. Thus, when Freedom executed Modification No. 25, its incurred costs roughly equalled the contract value. See PFF No. 258.

The government took full advantage of the financial crisis it had created for Freedom in negotiating Modification No. 25. Accordingly, Modification No. 25 is unenforceable. See James Shewan & Sons, Inc. v. United States, 73 Ct. Cl. 49, 82-90 (1931) (where government wrongfully withheld payments due under the contract, terminated the contract, then offered to pay the contractor an amount much less than that which was due in exchange for a release, the contractor signed under duress and the release was invalid); see also Urban Plumbing & Heating Co., 408 at F.2d 390-93 (where duress present, release invalid).[11]

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[11]That Freedom theoretically could have stopped work and litigated with the government was not a viable alternative. See Ace Van & Storage, Inc., ASBCA No. 23759, 83-1 BCA ¶ 16,547, at 82,292 (litigating a lengthy dispute with the government is not a viable alternative where the contractor would have faced financial ruin during the course of the litigation). That Freedom had no viable alternative is particularly true given its financial condition and the fact that there was no commercial market for MREs. Cf. Universal Sportswear, Inc. v. United States, 180 F. Supp. 391, 394 (Ct. Cl. 1959) (noting that contractor was small and only had one contract).

(iii) Modifications No. 25 is unenforceable because it is unconscionable.

The doctrine of unconscionability applies to government contracts. See, e.g., ITT Defense Communications Div., ASBCA No. 11858, 13439, 70-2 BCA ¶ 8415, at 39,163; Old Atlantic Servs., Inc., ASBCA No. 19876, 75-1 BCA ¶ 11,190, at 53,286. An unconscionable contract is one "which no man in his senses, not under a delusion would make, on the one hand, and which no fair and honest man would accept on the other." Hume v. United States, 21 Ct. Cl. 28 (1886), aff'd, 132 U.S. 406 (1889). UCC § 2-302 states the standard as follows:

> **§ 2-302. Unconscionable Contract or Clause.**
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> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

In the circumstances of this case, Modification No. 25 (without the 13 May Chiesa letter) was unconscionable and should not be enforced. Modification No. 25 did not give Freedom anything but a reinstatement of previously terminated deliveries and a slight schedule extension -- at no increase in unit price -- in return for a purported waiver of a $3.4 million claim. PFF No. 235. Moreover, at the time the government executed

Modification No. 25, it knew that Freedom would lose approximately $2,700,000 in completing the MRE-5 contract. See PFF No. 258; cf. Mary P. Alsheimer aka Mary P. D'Amore, ASBCA No. 30009, 85-3 BCA ¶ 18,189, at 91,335 (noting profitability as a factor in assessing unconscionability). Finally the government knew Mr. Thomas was making a mistake in executing Modification No. 25 and did nothing to correct his apparent misunderstanding. See Samuel R. Clarke, d.b.a. Clarke Enters., ASBCA No. 24306, 82-1 BCA ¶ 15,627, at 77,185 (finding contract unconscionable based on mistake).

d. The Government Breached Modification No. 28.

Modification No. 28 became effective on 7 August 1986. PFF No. 278. By 14 October 1986, Freedom had produced and the government had accepted approximately 490,000 cases of MREs. See PFF Nos. 313, 316. The express terms of Modification No. 28 entitled Freedom to $15,000,000 upon delivery of 490,000 cases. PFF No. 278.

Marvin Liebman failed and refused to make the additional payment as required under Modification No. 28. Instead, Mr. Liebman took the position that the ceilings in Modification No. 28 were not mandatory. See PFF Nos. 285, 293, 295. Mr. Liebman's interpretation of Modification No. 28 conflicts with the plain language of the modification. His failure to provide Freedom progress payments upon the delivery of 490,000 cases was a material breach of Modification No. 28. This material breach

severely prejudiced Freedom because, once again, Mr. Liebman denied Freedom progress payments that it needed to survive.[12]

e. Modification No. 29 is Unenforceable.

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[12]Modification No. 28 does not act as an accord and satisfaction discharging the government's liability for wrongdoing before 7 August 1986. As discussed, the parties intention is paramount in determining whether there was an accord and satisfaction. See supra p. 171 n. 5.

The evidence demonstrates that Modification No. 28 was not intended to be an accord and satisfaction. First Modification No. 28 essentially grew out of a very narrow exchange concerning Frank Bankoff's 11 July 1986 cure notice (see PFF No. 272) and Freedom's 23 July response (see PFF No. 275). In Freedom's response, it discussed how it had been shutdown since 17 July due to a lack of GFM. See PFF No. 275. In order to resolve that GFM shortage issue, Modification No. 28 contained a narrow release of claims associated with the lack of GFM. See PFF No. 278. Second, Modification No. 28 states expressly that the "document contains the complete agreement of the parties. There are no collateral agreements, reservations or understandings other than expressly set forth herein." See PFF No. 278 (emphasis added). Obviously, the parties did not intend the general rule concerning an accord and satisfaction to apply. To reach such a result would be erroneous.

Alternatively, Modification No. 28 is invalid because of duress. See supra pp. 181-183 (discussing duress as applied to Modification No. 25); infra pp. 187-190 (discussing duress as applied to Modification No. 29). When Freedom executed the modification, its incurred costs were at least $17,443,847, but it had wrongfully only received $12,950,418 in progress payments. See PFF No. 277. Moreover, Freedom had only shipped approximately 350,000 cases, but its incurred costs were already equal to the contract value. See PFF No. 277. Mr. Thomas believed that Modification No. 28 was the only way to obtain some money and remain an IPP producer. See PFF No. 277. In short, the government exploited its prior unfair dealing to extract Modification No. 28. See David Nassif Assoc. v. United States, 644 F.2d 4, 12 (Ct. Cl. 1981) (per curiam) (discussing duress standard); see also Systems Technology Assocs., 699 F.2d at 1387-88 (same).

Alternatively, Modification 28 is invalid because the contracting officer improperly tied progress payments to deliveries. See supra at 161-162. Where a contracting officer adds a provision to a contract that is inconsistent with the governing regulations and beyond his authority, the provision is invalid and unenforceable. See Guard-All of America, ASBCA No. 22167, 80-2 BCA ¶ 14,462, at 71,229.

Modification No. 29 granted Freedom a thirty-day delivery schedule extension. See PFF No. 305. It also contains a broadly worded release of nearly all claims. See PFF No. 306.

The unenforceability of Modification No. 29 follows from the same "duress" and unconscionability lines of reasoning applicable to Modification No. 25. Signed only 4 months after Modification No. 25, Modification No. 29 came at a time when Freedom was still in economic ruins, made all the more severe by (1) the continued maladministration of the contract and (2) the government's refusal to honor Modification No. 25 (including the 13 May Chiesa letter) and Modification No. 28. Moreover, as of 5 September 1986, one month before Modification No. 29, Freedom had incurred costs of $18,594,733, but had only received $13,654,486 in progress payments. See PFF No. 284. Plus, Marvin Liebman and Frank Bankoff withheld a $700,000 progress payment from 3 October to 9 October to ensure that Freedom signed Modification No. 29. PFF Nos. 302-303, 305, 308. Additionally, although on or about 7 July 1986, DLA informed the Federal Reserve that it had no authority to grant a guaranteed loan (PFF No. 271), on 15 September 1986, DLA informed Freedom that the guaranteed loan request was at the Congressional level. See PFF No. 288. Finally, the government wrongfully used the lure of MRE-7 to get the release. See infra at 191-197.

A contractor's agreement to a release is involuntary if it is found that he has no reasonable or practical alternatives to signing it and is thus vulnerable to the government's pressure. See Aircraft Associates & Mfg. Co. v. United States, 357 F.2d

373, 379-80 (Ct. Cl. 1966); Varabaun Ltd. & Lin Heng Engineering Ltd., Joint Venture,ASBCA No. 22177, 82-1 BCA ¶ 15,744, at 77,927-29 (contracting officer's unreasonable position concerning progress payments cast "cloud" over the negotiating process). Due to the past failures of the government to fulfill its contractual obligations, Freedom was forced to accept any terms offered in order to avert default, to obtain a resumption of progress payments, to stave off immediate financial collapse, and to continue towards an MRE-7 award. See PFF Nos. 300-301. Once the government had placed Freedom in this untenable position in early October, Freedom's only hope of remaining in the IPP Program was to sign Modification No. 29. See PFF Nos. 300-301. In reality, Freedom had to execute Modification No. 29 to get money due under Modification No. 28. After all, Freedom produced sufficient cases to obtain progress payments, but Marvin Liebman said Modification No. 28 did not require payment. See PFF Nos. 385, 393, 395, 313, 316. Absent the money promised in Modification No. 29, Freedom knew it could not continue for very long. See PFF Nos. 384, 300-301. It also knew that stopping would jeopardize its viability for MRE-7, for which (1) it had recently received a positive pre-award survey, (2) DPSC had said would involve four awards, and (3) the Senate had said to keep four assemblers in the IPP Program. See PFF Nos. 290, 297-299.

While the stress of business conditions alone may not constitute duress, if the defendant engaged in wrongful conduct, the responsibility for agreements made by a contractor under the stress of financial necessity shifts to the defendant. See Johnson,

Drake & Piper, Inc. v. United States, 531 F.2d 1037, 1041-43 (Ct. Cl. 1976); Fruhauf Southwest Garment Co., 111 F.Supp. at 951. The government engaged in clear misconduct regarding Progress Payment Request No. 21 and deceptively used the possibility of a guaranteed loan and the MRE-7 procurement in order to obtain Freedom's signature on Modification No. 29. See infra pp. 191-197 (discussing deceitful use of MRE-7); see also Sterling Millwrights, Inc., 26 Cl. Ct. at 64-66, 89-90 (wrongful to withhold progress payments in order to obtain negotiating leverage and thereby extract an agreement); Paccon, Inc., ASBCA No. 7890, 1963 BCA ¶ 3659, at 18,351-54 (threat to withhold or recoup payments unless a contractor signed a release was a wrongful act).

Notably, Freedom need not prove that there was a wrongful act or express threat which immediately preceded execution of Modification No. 29 in order to prove coercion. Freedom need only show the wrongful act or coercion through a course of conduct which placed it in such a vulnerable position that it had no choice but to execute a release. As stated in David Nassif Assoc. v. United States, 644 F.2d 4 (Ct. Cl. 1981) (per curiam):

> To render an agreement voidable on grounds of duress it must be shown that the party's manifestation of assent was induced by an improper threat which left the recipient with no reasonable alternative save to agree. RESTATEMENT (SECOND) OF CONTRACTS ¶ 317 (Tent. Draft No. 11, April 1976). Contemporary case law has expanded the concept of improper threat beyond the categories first recognized, namely, threats to commit a crime or a tort; now also included are threats that would accomplish economic harm. RESTATEMENT (SECOND) OF CONTRACTS ¶ 318, Comment a (Tent. Draft No. 11, April 1976); Johnson, Drake & Piper, Inc. v. United States, 209 Ct. Cl. 313, 531,

> F.2d 1037 (1976); Aircraft Associates & Mfg. Co. v. United States, 174 Ct. Cl. 886, 357 F.2d 373 (1966). Such forms of economic duress, or, as it is sometimes also called, business compulsion, include threats that would breach a duty of good faith and fair dealing under a contract as well as threats which, though lawful in themselves, are enhanced in their effectiveness in inducing assent to unfair terms because they exploit prior unfair dealing on the part of the party making the threat.

Id. at 12 (emphasis added); see also Systems Technology Assocs. Inc., 699 F.2d at 1387 (cases do not require an illegal act; rather, focus is on "the coercive nature of the act as dispositive of its wrongfulness"). At a minimum, the final sentence of the foregoing quotation from David Nassif describes Freedom's situation at Modification No. 29 and thereby obviates the release in Modification No. 29. Nash Janitorial Services, Inc., GSBCA No. 68900, 84-1 BCA ¶ 17,135, aff'd on reconsideration, 84-2 BCA ¶ 17,355 at 85,270-71 (contracting officer's maladministration of the contract violated notions of good faith and fair dealing; agreement set aside due to duress).[13]

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[13]Modification No. 29 is also unconscionable. Absent another contract, Freedom could not possibly recoup its losses and remain an IPP producer. The government exploited this situation to extract Modification No. 29. See supra at 183-185 (discussing unconscionability standard).

6. The Government's Failure to Cooperate With and Duplicity Towards Freedom Concerning the MRE-6 and MRE-7 Procurements Excuse Alleged Freedom's Default.

When DPSC awarded Freedom the MRE-5 contract, it knew that Freedom had ceased its school lunch operations and that in order for Freedom to remain viable it had to receive support from DLA and follow-on MRE contracts. PFF Nos. 2-5, 10-15. Additionally, DPSC knew that it was the only viable market for MREs. Moreover, both DPSC and Freedom understood that the main purpose of contracts under the IPP Program is primarily to develop and maintain the contractor as a source of supply to be available in the time of national emergency. PFF No. 5.

Although Freedom competed for an MRE-6 award, DPSC awarded contracts to RAFCO, SOPACKO, and CINPAC. PFF No. 199. Unlike its treatment of Freedom, who had to jump through the Walsh-Healy Act "hoop," DPSC awarded the MRE-6 contract to CINPAC even though the Department of Labor found that CINPAC did not meet the requirements of the Walsh-Healy Act. PFF Nos. 9-11, 199.[14]

After Freedom failed to receive an MRE-6 award, the government knew that Freedom would desperately need an MRE-7 award. See PFF Nos. 214-217. Nonetheless, throughout 1986 and 1987, DPSC used the MRE-7 contract to mislead and

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[14]As set forth in detail in Freedom's claim, because CINPAC did not meet the Walsh-Healy Act requirements, it could not meet the "M+90" assembly capacity requirement in the solicitation. See R4 Tab F1, at 36 n. 106. Ignoring the requirements of the Walsh-Healy Act is an abuse of discretion. Id. Notably, because the Department of Labor concluded that CINPAC did not meet the requirements of the Walsh-Healy Act on MRE-6 in May 1986, DPSC should not have permitted it to complete on MRE-7. There is simply no evidence that, as of May 1986 when the MRE-7 solicitation was issued, CINPAC was Walsh-Healy qualified. Thus, it should not have been permitted to compete for an MRE-7 award.

dupe Freedom into continuing its performance on the MRE-5 contract. Whenever DPSC needed to extract some agreement from Freedom, it misled Freedom into believing that it would receive an MRE-7 contract.

For example, on 29 January, 1986, DPSC sent Freedom a telex informing Freedom that only three of four planned producers would receive an MRE-7 contract and that DPSC planned to procure 4.2 million cases of MREs. PFF No. 207. After Freedom submitted its $3.4 million claim in March 1987, Freedom expressly informed DPSC and DLA Headquarters that it had to receive an MRE-7 award to remain a viable member of the IPP Program. PFF Nos. 214-215, 217. While the claim negotiations were on-going, Freedom received a telex dated 17 April 1986 from Frank Bankoff informing Freedom that four, not three, planned producers would receive an MRE-7 award. PFF No. 218. On 16 May 1986, Frank Bankoff issued the MRE-7 solicitation, which included four planned producers and informed the offerors that DPSC would seek 5.2 million, rather than 4.2 million cases, of MREs. Freedom believed it would receive an MRE-7 award. PFF No. 227. Not surprisingly, this amendment was issued on the eve of Freedom's execution of Modification No. 25. In fact, Henry Thomas believed that the 17 April telex and the 16 May solicitation resulted from negotiations between DLA and Freedom. See PFF No. 228.

Following the execution of Modification No. 25, DPSC again amended the MRE-7 solicitation. On 1 July 1986, Frank Bankoff informed vendors that DPSC had

reduced the number of planned producers from four back to three and reduced the number of cases from 5.2 million to 4.3 million. PFF No. 268.

In late September 1986, Mr. Thomas and Mr. Bankoff were negotiating the terms of Modification No. 29. Mr. Bankoff knew that Freedom desperately needed progress payments and an MRE-7 award to complete the MRE-5 contract and to remain a viable member of the IPP Program. PFF Nos. 284, 300-301. On 25 September 1986, Frank Bankoff amended the MRE-7 solicitation yet again. DPSC informed Freedom that it planned to make four, rather than three awards, and that the total quantity sought would remain 4.3 million cases. PFF No. 298.[15] Freedom again believed it would receive an MRE-7 award. Freedom relied on this change in deciding to execute Modification No. 29 (with its sweeping release language) on 7 October 1986. See PFF Nos. 297-301.

On 10 October 1986, just after Freedom executed Modification No. 29, Marvin Liebman submitted his comments to the MRE-7 pre-award monitor concerning Freedom's performance on the MRE-5 contract. Mr. Liebman misled the pre-award monitor by stating that Freedom's "problems" on the MRE-5 contract were "contractor-caused" and within the "contractor areas of responsibility." PFF No. 310. Obviously, Mr. Liebman did not want Freedom to receive an MRE-7 award.

On 18 November 1986, Frank Bankoff ordered a pre-award resurvey of Freedom's capabilities in connection with the MRE-7 procurement. PFF No. 338. He ordered this resurvey despite Freedom's positive pre-award survey of 25 September 1986.

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[15]Freedom also knew that the Senate had directed DOD to maintain four producers in the IPP Program. See PFF No. 290.

In ordering the resurvey, Frank Bankoff contended that he was concerned about Freedom's financial capability. His decision to order a resurvey, however, ignored that Marvin Liebman had de facto suspended progress payments on 10 October 1986 and that Freedom informed Mr. Bankoff on 29 September 1986 that it would face "imminent cash disaster" if it failed to receive an MRE-7 award not later than the week of 17 October 1986. PFF Nos. 300-301, 309, 322.

While conducting the MRE-7 resurvey Frank Bankoff again changed the MRE-7 solicitation. On 2 December 1986, he informed the vendors that there would be three, not four, awards. See PFF No. 342. On 16 December 1986, DCASR-NY completed the financial capability portion of the pre-award resurvey. PFF No. 346. DCASR-NY concluded that Freedom lacked the financial capability to perform the MRE-7 contract, and recommended no award. PFF No. 346.

On 30 December 1986, DCASR-NY, DPSC, and DLA Headquarters concurred in this recommendation. PFF No. 348. Nonetheless, in January 1987, Frank Bankoff encouraged Henry Thomas to restart production in order to complete the MRE-5 contract and turn around the negative MRE-7 pre-award resurvey. PFF Nos. 351-356. Freedom relied on this encouragement, recommenced limited production in January 1987, and continued with limited production in February 1987. PFF Nos. 356-357.

Nonetheless, DLA refused to overturn the negative MRE-7 resurvey. PFF No. 377. On 4 March 1987, Frank Bankoff informed Freedom that Freedom was ineligible to receive an award under the MRE-7 solicitation because it lacked the

financial capability to perform. PFF No. 379. On that same date, DPSC awarded the final MRE-7 contract to CINPAC. PFF No. 379.

Not only did the government wrongfully use the MRE-7 procurement as "bait" to deceive Freedom throughout 1986 and 1987, the government's ultimate decision on the MRE-7 resurvey was wrong for a number of reasons. First, Frank Bankoff's 18 November 1986 decision to order a resurvey of Freedom ignored that Freedom was then the subject of a de facto suspension of progress payments and that Freedom had informed Frank Bankoff that it needed an award of the MRE-7 contract by 17 October to avoid "imminent cash disaster." Freedom's warnings became reality, and the government's failure to make an MRE-7 award or pay progress payments forced Freedom to shut down final assembly on 7 November 1986. Ironically, Frank Bankoff then ordered a pre-award resurvey on 18 November because of concerns about Freedom's financial capability.

Sadly, the errors did not end with the decision to order a pre-award resurvey. Rather, the decision to order a pre-award resurvey ultimately produced a flawed negative pre-award resurvey. The government ignored that when it issued its September 1986 positive pre-award survey to Freedom, it (1) assumed that Freedom would receive an MRE-7 contract that would cost $33 million to perform, (2) that Freedom would produce 1.5 million cases, and (3) that Freedom would have both progress payments and a $6 million financing line of credit with which to perform the contract. PFF No. 298. Nevertheless, on 16 December 1986, the government concluded that $6 million line of credit along with progress payments would not be enough to carry

a contract to produce approximately 867,000 cases at a cost of $27 million. PFF No. 246. Finally, in March, 1986, the government decided that a $6 million line of credit plus progress payments would not be enough to carry a contract to produce approximately 867,000 cases at a cost of $17 million. See PFF Nos. 360, 365, 366, 369, 377. In short, the government compounded the error when it refused to reverse the negative pre-award survey and found Freedom not responsible for an MRE-7 award.

The government's performance in connection with the MRE-6 and MRE-7 procurement epitomizes a failure to cooperate with Freedom and a failure not to interfere, hinder, or delay Freedom in performing the MRE-5 contract. Additionally, the government callously and deceitfully used the MRE-7 procurement within the IPP Program. Assuming arguendo that Freedom defaulted on the MRE-5 contract, the government's duplicity, failure to cooperate, hinderance, and erroneous decision in connection with the MRE-6 and MRE-7 procurement excuses the default.

B. Freedom did not Fail to Comply with the Contract's Inventory Control Requirements.

DPSC also claims that Freedom's alleged failure to perform inventory control requirements in March 1987 provided a second reason for terminating Freedom for default. DPSC claims that on February 27, 1987 and March 5, 1987, Frank Bankoff requested that Freedom complete an inventory record. DPSC then argues that Freedom failed to comply with this request and with the contract's inventory control requirements and that this alleged failure constituted a valid basis for terminating Freedom for default. See Govt. Post-Hearing Brief at 67-69. Neither the facts nor the law support the government's argument.

In order to sustain the termination for default for failure to comply with "any of the other provision of [the] contract" (i.e., an a(1)(iii) termination), DPSC must prove that the contractual provision represents a "material" requirement of the contract, that Freedom violated the requirement, and that there was no excuse for the violation. See Precision Products, ASBCA No. 25280, 82-2-BCA ¶ 15,981, at 79,247. DPSC cannot prove any of these requirements.

First, DPSC's and DCASR-NY's conduct demonstrates that the inventory control requirements in the contract were not material. On 23 February, 1987, Ed Heintz advised DPSC and DLA that the government had waived the delivery dates contained in Modification No. 29 and that DPSC needed to reestablish new delivery dates in order to terminate Freedom for default. PFF No. 374. Frank Bankoff's own lawyer confirmed this fact on 5 March. PFF No. 381. Notably, it was only after obtaining this information

concerning the waived delivery date that Frank Bankoff suddenly became concerned about Freedom's inventory. PFF No. 382. Frank Bankoff's inquiry was obviously a pretext to find an additional basis to seek to terminate Freedom for default. This fact is particularly evident after considering Freedom's 3 March refusal to send Frank Bankoff a request for a no-cost termination for convenience. See PFF No. 378. Where the government is previously unconcerned about a particular contractual provision, the Board should not and cannot countenance the government's pretextual attempt to use such a contractual requirement as a basis for terminating a contractor for default. See generally Maxima Corp., 847 F.2d at 1566 ("The need for mutual fair dealing is no less required in contracts to which the government is a party, than in any other commercial arrangement.").

Second, and in any event, Freedom did not breach the inventory requirements. On or about 4 March 1987, Henry Thomas learned that Freedom would not receive an MRE-7 award. PFF No. 379. Mr. Thomas then sought to arrange for an orderly way in which to complete the MRE-5 contract. PFF No. 384. Frank Bankoff refused these overtures. PFF No. 392. In March, the government then began removing GFM from Freedom's plant, and Freedom learned that it would be evicted on or about 2 April. PFF Nos. 385-386. Before Freedom was evicted, Mr. Thomas toured the plant and ensured that all of the remaining inventory and property was neat and orderly. PFF No. 387. Although Mr. Thomas himself was locked out of the plant beginning on or about 2 April, security remained present. PFF Nos. 387-388, 393, 395, 404. The

government continued to remove GFM and other property throughout April. On 16 April 1987, Frank Bankoff sent a telex to Freedom informing Freedom that it should destroy certain retort pouch items as unfit for human consumption. PFF No. 396. Frank Bankoff knew, however, that Henry Thomas had no access to the plant. PFF No. 386. Mr. Bankoff also knew that on or about 28 April 1987 an auction would be held at Freedom's plant. In fact, Mr. Bankoff planned to attend. PFF Nos. 395, 400. Finally, even on the date of the auction, the remaining inventory and equipment was still neat and orderly. PFF No. 401. In sum, the government has simply failed to prove that Freedom breached any inventory requirement.[16]

Assuming arguendo that Freedom breached the inventory requirements beginning in approximately March 1987, the breach was not material. The government has not even articulated prejudice, much less proven it. In fact, the government has unequivocally admitted that it removed approximately 23 truckloads of inventory from Freedom's plant. See Govt. Post-Hearing Brief at 68. In short, no evidence intimates, much less demonstrates, that any inventory was lost. See Lisbon Contractors, Inc., 828 F.2d at 764 (government must prove that contractor was in default.)

Finally, even if the inventory requirements in the contract are material and Freedom breached them, the breach is excused. Freedom allegedly failed to comply with inventory requirements in March 1987 and supposedly permitted hazardous food items,

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[16]The government claims that it found inventory in April 1987 "unaccounted for on any inventory" in violation of Section L. See Govt. Post Hearing Brief at 68. Notably, the government did not produce any evidence of this "extra" inventory. Moreover, they also presented no evidence that Freedom's inventory system was faulted during performance.

which were ordered destroyed on 16 April, to be intermingled with other food items. DPSC simply ignores, however, that the government's own wrongful conduct over the life of the MRE-5 contract excused Freedom's alleged breach of the inventory requirements in March and April. See supra at 139-197 (discussing wrongful conduct over the entire life of the MRE-5 contract).

DPSC's attempt to bootstrap its 16 April telex directing Freedom to destroy certain material into an alleged failure by Freedom is particularly galling. See Govt. Post-Hearing Brief at 68-69. When Frank Bankoff sent the telex to Freedom, he knew that Freedom had been evicted from the plant and that the government and Freedom's creditors were the only ones who had access to the plant. Cf. John R. Glenn, ASBCA No. 24028, 80-1 BCA ¶ 14,428, at 71,134 (discussing government's failure to make worksite available to the contractor in excusing the contractor's default). Assuming arguendo that certain food items were intermingled with items that Frank Bankoff had ordered to be destroyed, Freedom did not violate the contract. Freedom simply had no way to comply with Frank Bankoff's 16 April telex, and Frank Bankoff knew it. Moreover, assuming arguendo that any of the government inventory in the plant in April 1987 was in disarray, the government personnel and Freedom's creditors created the disarray since the inventory and equipment were neat and orderly when Freedom was evicted on 2 April. Thus, Freedom's alleged failure to comply with the inventory requirements is excused.

C. The Government's Administration of the MRE-5 Contract, Including its Decision to Terminate the MRE-5 Contract for Default, and its Treatment of Freedom in Connection with the MRE-6 and MRE-7 Solicitation Demonstrates Bad Faith.

Freedom recognizes that government officials are entitled to a presumption that they have conducted their actions in good faith. Nonetheless, the evidence in this case demonstrates bad faith concerning the manner in which the government administered the MRE-5 contract, including its decision to terminate it for default, and the manner in which it treated Freedom in connection with the MRE-6 procurement and the MRE-7 procurement.

A contractor must prove three things in order to demonstrate bad faith. First, it must show that the government intended to injure the contractor by its actions or inactions. See Kalvar Corp., 543 F.2d at 1302; see also Struck Construction Co. v. United States, 96 Ct. Cl. 186, 221-22 (1942) (discussing actions that fall below the good faith standard).[17] Second, the injury inflicted on the contractor must be a direct consequence of the government's action or inaction. See Paccon, Inc., ASBCA No. 7890, 1963 BCA ¶ 3659, at 18,354. Third, the contractor's injury must be sizeable, such as severe financial distress or bankruptcy, and the injury must have been avoidable if the government had chosen an alternative course of action. See Allied Material & Equip. Co., Inc., ASBCA No. 17318, 75-1 BCA ¶ 11,150, at 53,082-83.

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[17]Alternatively, if there is no specific intent to injure the contractor, there must be a knowing disregard that the behavior may cause injury to the contractor. See generally Ace Van & Storage, Inc., ASBCA No. 23759, 83-1 ¶ 16,547, at 82,291 (the contracting officer knew or should have known that his interpretation of the contract was not correct and that his interpretation could bankrupt the contractor).

The evidence demonstrates that Freedom has met each of these requirements. First, the only inference that can be drawn form the manner in which the MRE-5 contract, the MRE-6 procurement, and the MRE-7 procurement were handled is that the government intended to injure Freedom. DPSC knew that Freedom abandoned its successful school-lunch operations in order to work with the government to develop into a successful MRE producer in the IPP Program and be maintained as part of the industrial base. See PFF Nos. 2-5, 10-15. Moreover, the government knew that Freedom was relying on the agreements made during the 6 November 1984 negotiations in reaching an MRE-5 agreement. See PFF No. 71. Nonetheless, the government then assigned the MRE-5 contract to Marvin Liebman, who did not understand the purpose of the IPP Program and who believed the government paid $6 million "too much" in awarding the MRE-5 contract to Freedom. See PFF Nos. 76, 78-79. Marvin Liebman then knowingly set upon a course of conduct that he knew could bankrupt Freedom. See PFF No. 146. His conduct manifested itself in how he administered progress payments, how he failed to cooperate with Freedom, how he hindered Freedom's relationships with Freedom's financial supporters, suppliers, and vendors, and how he materially breached the MRE-5 contract. See supra at 139-190.

Marvin Liebman, however, did not act alone. DPSC also intended to harm Freedom. DPSC wrongfully awarded an MRE-6 contract to CINPAC and excluded Freedom notwithstanding that CINPAC did not meet the requirements of the Walsh-Healy Act. PFF No. 199. Additionally, DPSC duplicitously used the MRE-7

procurement to entice Freedom to continue to perform whenever the government needed to extract something from Freedom. See supra at 191-197. Moreover, DPSC deprived Freedom of the GFM necessary to complete the MRE-5 contract. See supra at 165-168. In fact, after DPSC took Freedom's GFM in December 1985, there is no evidence that DPSC ever ordered enough GFM to enable Freedom to complete the MRE-6 configured cases. See PFF No. 317. Rather, DPSC mismanaged Freedom's receipt of GFM from June 1986 through the date the MRE-5 contract was terminated. See supra at 165-168. Finally, DPSC terminated Freedom for default. In sum, DPSC also intended to harm Freedom.[18]

Second, Freedom's injury was a direct consequence of the government's action. Despite the awful manner in which the government treated Freedom, Freedom still managed to deliver 83% of the MREs that were due. See PFF No. 344. Nonetheless, Freedom's poor cash position and ultimate inability to complete the MRE-5 contract and remain a member of the IPP Program directly flowed from the government's misconduct.

Third, Freedom's injury is obviously sizeable and was avoidable if the government had administered the contract as negotiated and dealt fairly with Freedom. In fact, if the government had treated Freedom fairly, the government would have been able to order and obtain needed MREs from Freedom during Desert Shield instead of inquiring whether Freedom might be able to help meet the MRE demand. Tragically, the government's actions during MRE-5, MRE-6, and MRE-7 (contrary to 10 U.S.C. §

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[18]Alternatively, the government's conduct amounted to a knowing disregard that its behavior would injure Freedom.

2304(a)(16)) ensured that Freedom was not a viable manufacturer during Desert Shield, Desert Storm, or today.

D. Even if the Government Did Not Act in Bad Faith, the PCO Abused His Discretion in Terminating Freedom's Contract for Default.

1. Freedom was not in default.

As discussed above, Freedom was not in default in making progress on the MRE-5 contract (see supra at 132-138) or in connection with the contract's inventory control requirements (see supra at 197-201). Thus, the PCO erroneously concluded that Freedom was in default.

2. Even if Freedom was in default, the default was excused.

A contracting officer considering whether to terminate a contract for default must decide (1) whether the contractor is in default without excuse, and (2) whether, objectively, the contract should be terminated for default despite the contractor being in default. See Darwin Constr. Co., 811 F.2d at 596. A contracting officer must exercise reasonable discretion in deciding both of these issues. See id.

The PCO abused his discretion in concluding that Freedom was in default without excuse. Taken individually, each instance of the government's wrongful conduct excused Freedom's default for alleged failure to make progress. Moreover, the cumulative impact of the government's conduct impact virtually guaranteed that Freedom would eventually not be able to make progress on the MRE-5 contract.

Similarly, assuming arguendo that Freedom was in default in connection with the contract's inventory control requirements, the Board cannot look at the inventory

control issue in isolation. Freedom's alleged failure to perform an adequate inventory control in March and April, 1987 directly resulted from the maladministration of the MRE-5 contract beginning in November, 1984 and continuing through June, 1987.

Finally, assuming arguendo that the Board concludes that the waiver contained in Modification No. 29 is valid, the government's wrongful conduct from the date Modification No. 29 was executed through the date the contract was terminated independently provides a sufficient basis for concluding that Freedom alleged default was excused with respect to both progress and inventory controls. Specifically, with respect to both the alleged failure to make progress and the inventory control requirements, Freedom wrongfully had not received any progress payments beginning on 10 October 1986 (see supra at 154-157), had been denied necessary GFM from October, 1986 through January, 1987 (see supra at 165-168), and had used its precious remaining resources in connection with restarting operations in January, 1987, based on its desire to complete MRE-5 and its belief that by continuing it would ensure an MRE-7 contract (see supra at 194-195). Moreover, in particular with respect to the inventory control issue, the Board cannot ignore that when the PCO requested an inventory he knew that he had waived the delivery date, that he needed another delivery date in order to terminate Freedom for default, that Freedom was not going to receive an MRE-7 award, and that Freedom lacked the money to complete the MRE-5 contract absent some new agreement with the government (see supra at 197-201). In sum, if Freedom was in default, the default was excused.

3. Assuming that Freedom was in default without excuse, the contract should not have been terminated for default.

The Federal Circuit has repeatedly stated that "the default article of the contract does not require the government to terminate upon a finding of default, but merely gives the procuring agency the discretion to do so, and that discretion must be reasonably exercised." Darwin Constr. Co., 811 F.2d at 596. Assuming arguendo that Freedom was in default without excuse, the PCO abused his discretion in terminating the contract for default.

First, the PCO erroneously refused to believe that Freedom had negotiated one contract with DPSC, but that Marvin Liebman had administered an entirely different contract. Undeniably, Freedom got into a severe financial hole when, in effect, it had to finance the first six months of the contract without any progress payments. Sadly, this pattern of abusive, maladministration of the MRE-5 contract continued throughout the MRE-5 contract. The government repeatedly made express demands upon Freedom to secure independent financing and took actions which required Freedom to secure independent financing in order continue with the MRE-5 contract. This conduct simply ignored the purpose of progress payments and ensured that Freedom, a socially and economically disadvantaged small business, would be stretched beyond its financial capacity. H.E. & C.F. Blinne Contracting Co., ENGBCA No. 4174, 83-1 BCA ¶ 16,388, at 81,480; see Blackhawk Hotels Co., ASBCA No. 13333, 68-2 BCA ¶ 7265 (convert termination for default where government erroneously assured the contractor during contract negotiations that the Service Contract Act did not apply).

Second, the PCO ignored the repeated failure of the ACO to administer progress payments in accordance with the pre-award agreement with DPSC, in accordance with the DAR, in accordance with the purpose of progress payments (i.e., to provide a form of contract financing), in accordance with the goals of the IPP Program (i.e., to develop and maintain a source of supply for peace and war), and in accordance with basic principles of fairness. The manner in which progress payments were administered from November, 1984 through June, 1987 severely prejudiced Freedom. Bristol Elec. Corp., ASBCA Nos. 24792, 24929, 25135-25150, 84-3 BCA ¶ 17,543, at 87,424-26 (converting termination for default because, in part, the government reneged on an agreement to allow the contractor to use a single test; the contractor relied on the agreement in structuring its bid and the government's breach of the agreement limited progress payments).

Third, the PCO ignored the reasons for Freedom's situation as of 22 June 1987. Freedom obviously knew how to produce MREs -- it had produced 83% of the contract's requirements. Freedom's problems were, in essence, attributable to the manner in which the MRE-5 contract was administered and the manner in which the MRE-6 procurement and the MRE-7 procurement were handled. In hindsight, throughout the MRE-5 contract, the MRE-6 solicitation, and the MRE-7 solicitation, Freedom was gullible enough to believe that IPP Program contracts were, in fact, different -- (1) that the government truly did want to develop a source of supply and maintain an adequate

industrial base and (2) that remaining in the IPP Program would enable Freedom to recoup the substantial investment it made to become an MRE producer.

Fourth, the PCO erroneously determined that Freedom was not essential to the IPP Program. DPSC's 16 January 1991 letter to Freedom demonstrates that the PCO was wrong. In that letter, DPSC admitted that Operation Desert Shield had increased the demand for MREs beyond the production capacities of existing MRE assemblers and that DPSC needed assemblers who could produce MREs. DPSC then inquired about Freedom's availability to produce MREs. See PFF No. 409. Freedom, however, was not available (then or now) because of the manner in which the MRE-5, MRE-6, and MRE-7 procurements were handled.

Finally, when the PCO had to decide whether to terminate the MRE-5 contract for default or for convenience, he should have recalled the GSBCA's words in Atlantic Garages, Inc., GSBCA No. 5891, 82-1 BCA ¶ 15,479. When the disastrous results to Freedom and the manner in which it was treated:

> were made clear to all concerned, the time came for a frank confession of error . . . There is a limit to how long anyone may defend the indefensible [and] . . . we wonder why nobody would take a look at the wreckage of this contract and admit that the catastrophe was the Government's responsibility.

Atlantic Garages, Inc., GSBCA No. 5891, 82-1 BCA ¶ 15,479 at 76,711. "[D]efault terminations -- as a species of forfeiture --" should not be entered lightly. See DeVito, 413 F.2d at 1153. The PCO abused his discretion and should have terminated the MRE-5 contract for convenience, not default.

IV. Freedom is Entitled to Relief on its Claim.

A. The Government's Refusals, Deductions, and Delays in Making Progress Payments Were Constructive Changes to the MRE 5 Contract.

The MRE-5 contract contained a Changes clause. PFF No. 33. Where a contractor performs work beyond that required by the contract without a formal change and the extra work was caused by the government's fault, a constructive change has occurred. Where the government improperly withholds progress payments, it constructively changes the contract. See Aerojet - General Corp., ASBCA No. 13548, 70-1 BCA ¶ 8245, at 38,326; Virginia Elec. Co., ASBCA No. 18778, 77-1 BCA ¶ 12,393, at 60,018.

The government constructively changed the contract by the manner in which it administered progress payments. As discussed in detail earlier, the government wrongfully refused to make, wrongfully delayed in making, and wrongfully deducted in making progress payments throughout the MRE-5 contract. The government's wrongful conduct included: (1) imposing a pre-payment audit of every progress payment request, (2) never complying with DOD policy requiring that progress payments be paid expeditiously, "normally within five to ten days," (3) reevaluating Freedom's financial responsibility immediately after award, (4) requiring actual physical progress on the MRE-5 contract before paying progress payments, (5) improperly suspending and delaying progress payments throughout the MRE-5 contract, (6) improperly applying the wrong progress payment liquidation rate throughout the MRE-5 contract, (7) wrongfully

deducting money from progress payments throughout the MRE-5 contract, and (8) wrongfully tieing progress payments to deliveries. See supra at 139-163.

The government's wrongful conduct prejudiced Freedom by requiring it to finance the MRE-5 contract nearly all by itself and by converting a contract on which Freedom expected to make $2,227,786 in profit into a contract on which Freedom lost millions of dollars and was driven out of business. Although Freedom repeatedly protested, the government never fixed the problems. This Board should conclude that the government's actions amounted to constructive changes and order a trial on quantum.[19]

B. The Government's Failure to Cooperate with Freedom and Not to Hinder, Interfere With, or Delay Freedom's Performance of the MRE-5 Contract Amounted to a Constructive Change.

When the government fails to perform its obligation to cooperate with the contractor or not to hinder, interfere with, or delay its performance of work, the government constructively changes the contract. See John Cibinic, Jr. & Ralph C. Nash, Jr., Administration of Government Contracts 352 (2d. ed. 1985). In evaluating whether the government breached the implied duty to cooperate and thereby constructively changed the contract, the Board should examine the reasonableness of the government's conduct under the circumstances. See S.A. Healy Co. v. United States, 576 F.2d 299,

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[19]For the reasons set forth earlier, the delivery schedule extensions before Modification No. 25 do not obviate Freedom's entitlement to relief for these constructive changes or any other aspect of its claim. Similarly, for the reasons set forth earlier, Modification Nos. 25, 28, and 29 do not obviate Freedom's entitlement to relief for these constructive changes. Finally, assuming arguendo that the Board concludes that any delivery schedule extension acts as a bar to relief for prior governmental wrongdoing, Freedom is still entitled to relief beyond the date of such an extension. For example, even if the Board concludes that Freedom cannot recover for any constructive changes before Modification No. 29, it still is entitled to relief for the constructive changes that occurred after Modification No. 29. See supra at 206-207.

306-08 (Ct. Cl. 1978); George A. Fuller Co. v. United States, 69 F. Supp. 409, 411-12 (Ct. Cl. 1947). In evaluating whether the government breached the implied duty not to hinder, interfere with, or delay a contractor's performance, the Board should examine whether the government's wrongful conduct hindered, interfered with, or delayed the contractor's performance. See Nichols Dynamics, Inc., ASBCA No. 17949, 75-2 BCA ¶ 11,556, at 55,169-70. "The breach of the government's duty not to hinder, delay, or increase the cost of performance has frequently been found to be a constructive change when the government has been unreasonable in exercising its discretion." Cibinic & Nash, supra, at 356.

The government breached its implied duty to cooperate and its implied duty, not to hinder, interfere with, and delay Freedom's performance by (1) improperly administering progress payments throughout the MRE-5 contract (see supra at 139-163), (2) disrupting and interfering with Freedom's relations with its financing institutions, vendors, and suppliers (see supra at 163-165), (3) failing to provide and delaying in providing adequate GFM for Freedom to perform the MRE-5 contract (see supra at 165-168) (4) failing to cooperate with Freedom in connection with the MRE-6 and MRE-7 procurements (see supra at 191-197), and (5) repeatedly breaching the MRE-5 contract (see supra at 168-190). Although Freedom repeatedly protested to the government concerning its wrongful conduct, the government never corrected the problems. This Board should conclude that the government's actions amounted to constructive changes and order a trial on quantum.

C. The Government Constructively Suspended and Delayed Work by Improperly Paying Progress Payments and by Failing to Provide and Delaying in Providing Adequate GFM.

The MRE-5 contract contained the government Delay of Work clause (DAR 7-104.77)(f)(1968 SEP). PFF No. 33. The Delay of Work clause mandates that a contracting officer make an adjustment for increases in the cost of performance. The clause provides a remedy when the government actually or constructively suspends or delays work. Constructive suspensions occur where the work is stopped without an express order from the contracting officer and the government is responsible for the work stoppage. For example, where the government delays in providing funds to a contractor, it constructively suspends work. See C. H. Leavell & Co. v. United States, 538 F.2d 878, 879-80 (Ct. Cl. 1976)(per curiam). Similarly, where the government delays in furnishing GFM, it constructively suspends work. See Ingalls Shipbuilding Div., Litton Systems, ASBCA No. 17717, 76-1 BCA ¶ 11,851, at 56,718-20; S. Patti Constr. Co., ASBCA No. 8423, 1964 BCA ¶ 4225, at 20,503-06.

The government constructively suspended work on the MRE-5 contract by (1) improperly administering progress payments throughout the MRE-5 contract (see supra at 139-163) and (2) failing to provide and delaying in providing adequate GFM for Freedom to perform the MRE-5 contract (see supra at 165-168). Although Freedom repeatedly protested concerning the manner in which it was receiving progress payments and GFM, the government never corrected the problems. The Board should conclude that

the government's actions amounted to constructive suspensions of work and order a trial on quantum.

D. The Government Materially Breached the MRE-5 Contract.

For the reasons set forth supra at 168-190, the government materially breached the MRE-5 contract. Accordingly, the Board should so hold and order a trial on quantum.

E. Assuming Arguendo that Modification No. 29 is Valid, Freedom is Entitled to Relief for Claims Relating to Zyglo Testing and Monies Due as Payment Delivered After Modification No. 29.

Modification No. 29 should be declared invalid. See supra at 186-190. Assuming arguendo that the Board does not invalidate Modification No. 29, Modification No. 29 expressly permits Freedom to make claims relating to Zyglo testing and "monies due or to become due as payment for product delivered to and accepted by the government." PFF No. 306.

The government constructively changed the contract and constructively suspended work when it imposed the Zyglo testing requirement. See PFF Nos. 244-245. Similarly, the government constructively changed the contract and constructively suspended work by failing to pay monies due for products delivered after 7 October 1986. The record clearly demonstrates that Freedom received its last progress payment on 9 October. See PFF No. 309. Moreover, Marvin Liebman began liquidating progress payments at 100% in late October. PFF No. 324. The record also demonstrates that Freedom submitted eighteen invoices after Modification No. 29 and did not receive

payment for those invoices. See PFF No. 325. Despite Freedom's protest, the government simply did not pay Freedom the money due for product delivered to and accepted by the government. See PFF Nos. 337, 339. The Board should declare Freedom entitled to relief on this claim and order a trial on quantum.

V. **CONCLUSION**.

"The mildest of bureaucrats can be a brute if he does not raise his eyes from his task and consider the human beings on whom he is having an impact." Jordan v. Gardner, 986 F.2d 1521, 1544 (9th Cir. 1993) (en banc) (Noonan, J., concurring). The government personnel repeatedly refused to "raise their eyes" to see how their conduct on the MRE-5, MRE-6, and MRE-7 procurements was harming Freedom and its hundreds of employees in the Bronx. Freedom respectfully requests that this Board conclude that the government acted in bad faith and materially breached the MRE-5 contract. Furthermore, Freedom asks the Board to declare Freedom is entitled to relief on its claims. Finally, at a minimum, Freedom asks the Board to convert the termination for default into a termination for convenience.

RESPECTFULLY SUBMITTED, this the __ day of July, 1993.

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CERTIFICATE OF SERVICE

It is hereby certified that on this date the foregoing Appellant's Post Hearing Brief was served upon all parties of record to this cause by mailing a copy to the parties' attorney of record in accordance with the provisions of Rule 5, Fed.R.Civ.P.

This the ___ day of July, 1993.

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