its submission to the Board. It has offered no rebuttal nor does the record contain any evidence as to how it calculated the cost of concrete removal in its bid. All we have before us is a cost submittal for "extra" concrete removal at one end of the Building. Moreover, our own independent examination of the East and West Wing Demolition Plans confirms the Contracting Officer's position that, applying the Appellant's interpretation consistently to both ends, the actual amount of concrete to be removed is more than contemplated at the West Wing but less than contemplated at the East Wing. The combined effect is that the total amount of concrete actually removed by the Contractor is no greater than that which should have been expected under the Contractor's interpretation.

We agree with the Contractor that the usage of Note 1 to designate concrete pads to be removed is ambiguous at best. However, we find that even if we apply the Contractor's interpretation, it cannot prevail based on the findings above. The Contractor has failed to prove that it performed any additional work or that the Government received anything beyond that for which it had bargained. When a Contractor makes an affirmative claim against the Government, the ultimate burden of proof or persuasion is upon the Contractor, and the final evidentiary question is whether the claim is supported by substantial evidence and proven by a preponderance of evidence. A claim against the Government may not be allowed merely because it has been alleged. ***J.C. Edwards Contracting and Engineering, Inc.***, VABCA Nos. 1947, 1969, 85-2 BCA ¶ 18,068. And as we said in ***Sefco Constructors***, VABCA 2747, 93-1 BCA ¶ 25,438 at 126,802:

> A party seeking an equitable adjustment acts at its peril, in a Rule 11 procedure, where it fails to provide the Board sufficient factual information, supported by affidavits or probative documentary evidence. ***Jen-Beck Associates***, VABCA Nos. et. al., 87-2 BCA ¶ 19,831 at 100,322; ***Spanjer Brothers, Inc.***, VABCA No. 1819, 84-1 BCA ¶ 16,926. As we articulated in ***Spanjer***, "[a]n Appellant claiming additional compensation for claimed extra work must show with reasonable certainty wherein the extra work was performed. The burden is not sustained by general statements in Appellant's correspondence."

Accordingly, Appellant is not entitled to recover for its alleged extra costs incurred in removal of the concrete pads.

DECISION

For the foregoing reasons the appeal is denied.

[¶ 28,328] Freedom, NY, Inc.

ASBCA No. 35671, May 7, 1996. Contract No. *DLA13H-85-C-0951*. Corrected, August 15, 1996, 96-2 BCA ¶ 28,502.

Defaults, Government Acts Excusing—Government-Furnished Property—Withdrawal.—A contractor supplying ready-to-eat meals was excused from its obligation to provide inventory control and property management because the government interfered with its performance by permitting its personnel to enter the contractor's premises and remove government property. During performance, the contractor suffered financial difficulties and was about to be evicted. The government sent in personnel who removed government-furnished property and finished product. The government then terminated the contract for default for the contractor's failure to perform its property management responsibilities under the Government Property clause. Nothing in the contract, however, authorized the government to remove government property while the contract was still in effect. Such interference excused the contractor's inability to perform its property management duties.

Defaults, Waiver—Delivery Date—Failure to Reestablish.—Termination of a contract to deliver ready-to-eat meals for failure to make progress was improper because during performance the parties executed a modification that changed the delivery schedule and no reasonable new delivery schedule was ever reestablished. The contractor's financial setbacks and the government's failure to deliver government-furnished material delayed performance. After the contractor declined the government's offer for a no-cost termination, the government issued a 10-day notice to cure. The contract was thereafter terminated, one month prior to a delivery schedule purportedly established unilaterally by the government. However, the modification ended the original delivery schedule, and a new schedule could be set only by agreement between the parties or by setting a new schedule that was reasonable to the contractor. The government's removal of product from the contractor's premises prior to establishing the new schedule, and its failure to provide material it was obligated to furnish, convinced the board that the new schedule was not reasonable.

Defaults, Government Acts Excusing—Payments—Payment Delay.—A contractor's failure to make progress on its contract to provide ready-to-eat meals was not excused by the government's reduction and suspension of progress payments, because the contracting officer's exercise of discretion was reasonable, considering the contractor's shaky financial condition and its failure to make progress. The Progress Payment clause in this contract authorized the contracting officer to suspend progress payments to protect against overpayments and losses if the contractor failed to make progress or was in such an unsatisfactory financial condition that performance was endangered. At the time the contractor submitted its best and final offer it had amassed operating losses of $1.9 million and had lost its financial backer.

Modifications—Bar to Claims—Duress.—A release in a modification executed by a contractor was not obtained through mistake, duress, or unconscionability. The modification was neither unfair nor unfavorable to the contractor. The party asserting a defense of duress must show that it accepted the terms of another, that the circumstances permitted no other alternative, and that the circumstances were the result of coercion. Prior to the execution of the modification, the contractor was already in default on one portion of its contract and was projecting losses on another portion. The modification reinstated a terminated portion of the contract, restored more than $3 million to the contract price, and extended delivery schedules.

Payments, Progress—Completion Basis—Costs v. Deliveries.—A modification that extended delivery schedules and provided for increased progress payment ceilings on the basis of specified levels of successful deliveries did not illegally tie progress payments to deliveries. The Progress Payment clause based payments on costs, while another provision established a ceiling on progress payments for the entire contact. The change in the ceilings did not change the scheme of progress payments, which were tied to costs rather than deliveries.

For the appellant: Hugh R. Overholt and Albert R. Bell, Jr., Ward and Smith, New Bern, North Carolina, James C. Dever III, Maupin Taylor Ellis & Adams, Washington, D.C., Andrew J. Detherage and Robert D. MacGill, Barnes & Thornburg, Indianapolis, Indiana. For the government: Kathleen D. Hallam, Trial Attorney, Defense Personnel Support Center (DLA), Philadelphia, Pennsylvania.

Before GROSSBAUM, SPECTOR, and STEMPLER, Administrative Judges.

GROSSBAUM, Administrative Judge: This appeal arises under a fixed price contract to supply a quantity of combat rations, referred to as "Meal[s], Ready-to-Eat" (MRE). The appeal was taken from a contracting officer's decision terminating the contract for default and, as supplemented, asserting a claim for repayment of unliquidated progress payments in the amount of approximately $1.63 million. Only the propriety of the default termination and entitlement to repayment of unliquidated progress payments is before us.

FINDINGS OF FACT

1. The Meal, Ready-to-Eat (MRE) ration was a mobilization essential item that could be procured by negotiation pursuant to 10 U.S.C. § 2304(a)(16), in effect in the early 1980s. In accordance with Defense Acquisition Regulation (DAR) 3-216.2(iv), the MRE rations were selected supplies which had been approved for production planning under the Industrial Preparedness Program (IPP) and competition for procurement of MREs was limited only to "planned producers" with whom industrial preparedness agreements for these items had been entered into with the Defense Personnel Support Center (DPSC) of the Defense Logistics Agency (DLA).

2. Four MRE procurements had been undertaken by early 1984. A secretarial determination and findings issued on 7 February

capitalized and subject to depreciation or amortization except for the properly depreciated or amortized portion of such costs.

(3) The amount of unliquidated progress payments shall not exceed the lesser of (i) ninety-five percent (95%) of the costs mentioned in (a)(1)(i) above, plus any unliquidated progress payments mentioned in item (a)(1)(ii) above, both of which are applicable only to the supplies and services not yet delivered and invoiced to and accepted by the Government, or (ii) ninety-five percent (95%) of the total contract price of supplies and services not yet delivered and invoiced to and accepted by the Government, less unliquidated advance payments.

(4) The aggregate amount of progress payments made shall not exceed ninety-five percent (95%) of the total contract price.

* * *

(b) *Liquidation.* Except as provided in the clause entitled "Termination for Convenience of the Government," all progress payments shall be liquidated by deducting from any payment under this contract, other than advance or progress, the amount of unliquidated progress payments, or ninety-five percent (95%), ... of the gross amount invoiced, whichever is less. ...

(c) *Reduction or Suspension.* 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 this contract, (ii) has so failed to make progress, or is in such unsatisfactory financial condition, as to endanger performance of this contract, (iii) has allocated inventory to this contract substantially exceeding reasonable requirements, (iv) is delinquent in payment of the costs of performance of this contract in the ordinary course of business, (v) has so failed to make progress that the unliquidated progress payments exceed the fair value of the work accomplished on the undelivered portion of this contract, or (vi) is realizing less profit than the estimated profit used for establishing a liquidation percentage in paragraph (b), if that liquidation percentage is less than the percentage stated in paragraph (a)(1).

* * *

(h) *Special Provisions Regarding Default.* If this contract is terminated pursuant to the clause entitled "Default," (i) the Contractor shall, upon demand, pay to the Government the amount of unliquidated progress payments and (ii) with respect to all property as to which the Government elects not to require delivery under the clause entitled "Default," title shall vest in the Contractor upon full liquidation of progress payments, and the Government shall be liable for no payment except as provided by the "Default" clause.

(R4, tab 2)

10. RFP Special Provision (SP) L-4, Approval of First Articles and Progress Payments, established the following ceiling on progress payments after first article acceptance at:

... a maximum of 50% of the total item or subcontract dollar value whichever applies. ... 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. ... The progress payments shall be for only those costs that are determined by the Defense Contract Administration Office as reasonable, allowable [sic] to the contract, and consultant [sic] with sound and generally accepted accounting principles and practices....

(R4, tab 2 at 66)

11. Defense Contract Financing Regulations in effect at the time of the RFP encouraged "prompt payment of proper progress billings" and also required "careful administration to insure against overpayments and losses." Among other things, these regulations noted that the supervision needed, either to prevent losses or avoid overpayments, varies "inversely" with such factors as contractors' "experience, performance record, ... and financial strength ... and with the adequacy of their accounting systems and controls" and that the rights reserved to the Government by paragraph (c) of the Progress Payment clause "are for the purpose of protecting the interests of the Government, fostering satisfactory contract performance, and guarding against overpayments and losses." The discretion conferred on the administrative contracting officer (ACO) in monitoring progress and administering paragraph (c) of the Progress Payment clause is summarized in paragraph 32.590-4 of a more recent DLA Manual (DLAM 8105.1) as follows:

the ACO must strike a delicate balance between the need to ensure delivery or, that being impossible, to minimize the flow of money into a questionable situation, and the obligation not to contribute to the contractor's financial collapse, which would result in nondelivery.

(Exh. G-1 at E-520, -521, -521.1, -524, G-3 at 172)

12. All three planned producers responded to the RFP. RAFCO and SOPAKCO submitted offers of $22.53 and $22.74 per case, respectively, on the maximum (45 percent) quantity. Freedom offered $25.376 per case on the minimum (20 percent) quantity of 620,304 MRE cases. Although 12.63 percent higher than RAFCO's low offer, Freedom's price was considered to be in the competitive range. (R4, tab 4 at 2-4)

13. The Defense Contract Audit Agency (DCAA) conducted an audit of Freedom's offer. Moreover, since Freedom did not possess a certificate of competency (CoC) from the SBA, a preaward survey to determine its "responsibility" was also conducted by the Defense Contract Administration Services Management Area, New York (DCASMA-NY). The survey was completed in June 1984 and recommended that "No Award" be made to Freedom, due mainly to "lack of adequate financial resources." (R4, tab 1A at 4, 28, 34)

14. The financial capability survey noted that Freedom had not performed any major work since January 1984 and that its credit line had been withdrawn by its bank, Dollar Dry Dock Savings Bank (Dry Dock), "because of Freedom's inability to obtain Government contracts." Since DCASMA-NY was reluctant to recommend awarding a contract to a company without adequate financing, the financial survey noted a "Catch-22" situation, which might be alleviated by having Dry Dock send a "pro-forma" letter giving a commitment conditioned on an award to Freedom. However, on 6 June 1984 Dry Dock had advised the Government that any "pro-forma letter would be so qualified that it would be meaningless at this stage." (R4, tab 1 at 27-28)

15. During July 1984 Freedom's president, Mr. Thomas, met with DLA officials to discuss the negative award recommendation and Freedom's obvious need for outside financing. Freedom had no backlog of work and no revenue producing potential without securing contracts. Moreover, it had deficit working capital and deficit equity positions amounting to more than $2 million. To overcome its concerns, the Government needed assurances of outside financing, as evidenced by a clear commitment from a financial institution. (R4, tab 1 at 3; tr. 5/14-15, 89)

16. Best and final offers (BAFOs) were invited by 2 August 1984. RAFCO and SOPAKCO reduced their initial offers to $20.73 and $20.895 per case, respectively. Awards were made at those prices to RAFCO and SOPAKCO for quantities of 1,385,640 and 1,085,532 cases, respectively. (R4, tab 9 at 2-3)

17. Freedom's BAFO increased its offer to $34.81 per case, a total price of approximately $21,593,000, and requested an economic price adjustment (EPA) clause. Freedom also offered alternate prices ranging from $33.282 to $29.757, depending on whether DPSC either permitted charging $2,187,000 in one-time start up costs as direct costs of the MRE-5 contract or guaranteed Freedom a follow-on MRE contract, or a combination of these measures. Notwithstanding the higher proposed prices, DPSC agreed to negotiate with Freedom and arranged for the performance of another audit and pre-award survey. (R4, tab 9 at 2-3)

18. Freedom's financial statements as of March 1984 reflected operating losses of more than $1.9 million and it was obvious that Freedom could not perform a proposed $21 million contract without a tremendous infusion of outside equity and/or debt financing. Mr. Thomas persuaded Dry Dock to issue a letter of intent addressed to the DPSC procuring contracting officer (PCO). The letter, dated 9 August 1984, committed Dry Dock to extend Freedom credit up to $7,244,000 needed to perform an MRE-5 contract, if Freedom "is awarded a contract pursuant to [the RFP] ... in the amount of $21,593,000.00" and Freedom assigns the contract to Dry Dock. (R4, tabs 1, 5, 25)

19. DCASMA-NY expected Dry Dock's $7,244,000 figure to serve as a "plug" to cover Freedom's cash deficit start-up position and also to cover the difference between progress payment receipts and cash outlays. DCASMA-NY relied on Dry Dock's 9 August 1984 commitment letter to justify recommending a "Complete Award" to Freedom, feeling "comfortable" with this credit line and its belief that Dry Dock had a stake in Freedom given, *inter alia*, its holding "a $1.4 million demand note on Freedom." At the end of August 1984 the pre-award survey gave Freedom a favorable award recommendation. (R4, tabs 1, 25)

1984 authorized the fifth MRE procurement (sometimes MRE-5) to be negotiated with the three then-current planned producers for the item: Right Away Foods Corporation, (RAFCO), Southern Packaging & Storage Company (SOPACKO), and appellant, Freedom, NY, Inc. (Freedom), then known as "Freedom Industries." (AR4, tab F7)

3. Freedom was a minority-owned small business concern and, among other things, was eligible to contract with the Small Business Administration (SBA) pursuant to "Section 8(a)" of the Small Business Act, 15 U.S.C. S 637(a). Freedom had started business in 1982 and sometime thereafter it entered into an industrial preparedness agreement with DPSC to participate as a planned producer for the MRE program. Freedom's eligibility under "Section 8(a)" had no bearing on its qualifications to be an IPP planned producer. Freedom's president, Mr. Henry Thomas, had performed food service contracts for school lunch programs in New York and New Jersey. Mr. Thomas, was also president of a separate company known as H.T. Food Products, Inc. of Mount Vernon, New York (H.T. Food), which had been formed in October 1982 but "had no transactions of a recognizable financial nature" up to the time of the MRE-5 procurement. (R4, tabs 1A at 26, 24; AR4, tab 64)

4. Freedom had offered on the third MRE procurement (MRE-3) but did not receive an award. However, DPSC awarded Freedom two contracts to produce and supply meat components as Government Furnished Property (GFP; sometimes Government Furnished Material (GFM)) to the MRE-3 prime contractors. During this time, Freedom rented a facility in the Bronx, New York, to perform these contracts.

5. Freedom submitted a $29.98 per case offer on the fourth MRE procurement (MRE-4). However, MRE-4 contracts were awarded only to SOPAKCO and RAFCO at unit prices of $22.23 and $22.657, respectively. (R4, tab 4 at 3-4)

6. On 15 February 1984 DPSC issued request for proposals (RFP) DLA13H-84-R-8257 for the fifth MRE procurement (MRE-5), involving calendar year 1985 deliveries of a total quantity of 3,101,520 cases. Offers on varying quantities were solicited from the three planned producers and were due 12 April 1984. The RFP anticipated three separate fixed-price contracts: for 45 percent, 35 percent, and 20 percent of the total requirement. (R4, tab 2)

7. The RFP and resulting contracts required contractors to assemble the MRE rations in cases containing 12 separate menu bags, each containing a meat entree, crackers and an accessory packet. The Government was required to provide all crackers, various accessory components and eight of 12 different meat entrees (beef stew, diced turkey, diced beef, ham slices, chicken ala king, frankfurters, beef slices, and ground beef). The assembly contractors were required to provide the other four meat entrees (ham and chicken loaf, meatballs, beef patties, and pork patties) as contractor furnished material (CFM). (R4, tab 2 at 10, 57)

8. The RFP incorporated by reference various standard clauses, including the Termination for Convenience of the Government (1974 OCT) and Government Property (Fixed Price) (1968 SEP) clauses prescribed by DAR 7-103.21(b) and 7-104.24(a), respectively. The RFP also included the standard Payments and Default clauses set forth in the November 1969 edition of Standard Form (SF) 32. (R4, tab 2)

9. The RFP also incorporated the DAR 7-104.35(b) Progress Payment for Small Business Concerns (1982 SEP) clause, which provided in part:

> Progress payments shall be made to the Contractor when requested as work progresses, but not more frequently than monthly, in amounts approved by the Contracting Officer under the following terms and conditions.
>
> (a) *Computation of Amounts.*
>
> (1) Unless a smaller amount is requested, each progress payment shall be (i) ninety-five percent (95%) of the amount of the Contractor's total costs incurred under this contract ... plus (ii) the amount of progress payments to subcontractors ...; all less the sum of previous progress payments. ...
>
> (2) The Contractor's total costs ((a)(1)(i)) shall be reasonable, allocable to this contract, and consistent with sound and generally accepted accounting principles and practices. However, such costs shall not include (i) any costs incurred by subcontractors or suppliers, or (ii) any payments or amounts payable to subcontractors or suppliers, except for completed work (including partial deliveries) to which the Contractor has acquired title and except for amounts paid or payable under cost-reimbursement or time and material subcontracts for work to which the contractor has acquired title, or (iii) costs ordinarily

20. Dry Dock also gave Mr. Thomas another substantially identical letter, dated 10 August 1984, but which added the following qualifying statement:

> 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.

Dry Dock's 10 August 1984 letter was never shown to any DCASMA-NY representatives before the preaward survey was completed. (R4, tab 6; tr. 1/ 78, 80)

21. DPSC and Freedom concluded negotiations covering all elements of the contract price on 6 November 1984 and agreed to a unit price of $27.725 with no EPA clause. On that day Mr. Thomas and the PCO signed a Memorandum of Understanding (MOU) that described the following "break-out of cost elements" included in the $17,197,928 total negotiated price:

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

The foregoing amounts comported with amounts entered as the tentative settlement for these elements on DPSC's price negotiation memorandum. Freedom's proposed manufacturing overhead costs included some items of a capital nature, such as: quality control equipment; maintenance equipment; an automated building management and control system; and lockers and office equipment. The costs for most of these items were included in the amount negotiated for the "Manuf. O/ H" element. The $333,333 assigned to depreciation had been based on the seeming reasonableness of Freedom's unaudited proposal of $1.5 million for capital equipment. (AR4, tab 17; R4, tabs 9, 11; tr. 5/ 9-10)

22. According to Mr. Thomas, the MOU meant that, since Freedom had no other contracts, "all these costs were direct costs to the contract, and ... [t]hey would be allowable for progress payments." However, we find that there had been no agreement on recovering the cost of capital equipment through progress payments. Instead, the MOU related simply to those elements that made up the total contract price and had no bearing on progress payments. (Tr. 5/ 10, 16-17, 116)

23. After the price negotiation the parties also agreed to raise the progress payment ceiling described in SP L-4 in steps up to an additional $4 million after delivery of the first 200,000 MRE cases. According to Mr. Thomas, the agreement to increase the progress payment ceiling, combined with the shortened expected performance period resulting from the delay in making the award, eliminated Freedom's need for any outside financing:

> because if he could raise the ceiling on the back-end while we're in production, then we could knock off our financing costs ...
>
> Now with the combination of cutting seven months worth of rent and everything off the back-end of the contract—and the back-end of the contract at this time is what Dollar Dry-Dock is supposed to be funding—you really ... chop $3 million off the contract, whatever, $2 million, whatever.
>
> What was left there was, like $4 million. That's all that was left when we cut it down, from a cash-flow view point. Now when you raise the ceiling by $2 million and raise the ceiling by another $2 million, Dollar Dry-Dock is no longer necessary for the back-end of this contract.

(Tr. 5/ 18, 113-14)

24. Moreover, Freedom did not really expect to receive any infusion of capital from Dry Dock, whose $7.2 million credit "commitment" Mr. Thomas characterized as "back-end financing" and whose financial support to Freedom in past months had been undependable. Instead, Mr. Thomas claimed to have believed that "the Government's coming up with the front-end financing." According to Mr. Thomas:

> My understanding with that was that as long as we got our 95 percent of all costs that was direct to the contract, that Dollar or anyone else—I had some leasing companies, and I've never had a problem getting equipment. We would take, and we did take, $1.5 million as a proposal to the Government for a full-blown MRE plant. ...
>
> The $1.5 million of production equipment is self-collateralizing. Therefore, since it is self-collateralizing, it's like an automobile: the bank will give you money on it basically because of the value of the car, as long as you've got income. So based on us showing that we could put $333,000

on the table out of the Government toward that payment, then there's no problem in financing the production capitalization equipment ...

The 5 percent is covered because the Government ... allowed that we could assign this contract. ... It's an assignment where you can assign your contract value to the bank. Based on us having a $2.2 million profit sitting back there, the 5 percent of the cost side of this thing was only $700,000. So we had no problem with this particular piece either.

(R4, tab 8; tr. 5/86-89) Given Freedom's financial condition at the time of award and the fact that progress payments do not cover 100 percent of costs, we conclude that Mr. Thomas' professed expectation that "front-end financing" from the Government would obviate outside start-up financing was unrealistic (tr. 4/195-96).

25. On 15 November 1984 the captioned contract was awarded to Freedom to supply 620,304 cases of MRE at $27.725 per case, for a total firm fixed-price of $17,197,928. Delivery was to be made in six monthly installments between 2 July and 31 December 1985, each installment being assigned a separate line item number (CLIN). Inspection and acceptance was to be made at the contractor's plant in the Bronx and Freedom was required to store and safeguard all Government property and to establish a system "which will assure adequate control for all Government Property provided under this contract." (R4, tabs 2, 10)

26. The contract also modified the SP L-4 progress payments ceiling as follows:

Clause L-4, page 66 of 96 of Solicitation DLA13H-84-R-8257; the limitation on Progress Payments shall increase by $2,000,000 after the first delivery increment (100,000 cases) has been completed. This limitation shall increase by another $2,000,000 after the second delivery increment (100,000 cases) has been completed.

(R4, tab 2 at 81, tab 10 at 7)

27. At a 14 December 1984 post-award conference Freedom admitted, *inter alia*, that it had not obtained and saw little hope of getting any financing from Dry Dock and that it owed over $3 million to its creditors, of whom Dry Dock was the largest. Mr. Thomas mentioned exploring other sources of financing, but had no assured credit commitment at that time. (Tr. 1/72, 73; AR4, tab 1 exh. 25)

28. Freedom's first progress payment re quest (PPR No. 1) in the amount o $100,310, covered only rent and real estat taxes. Before the DCASMA-NY administra tive contracting officer (ACO) could review the request, Freedom revised the amount t $252,150 and resubmitted it. In mid-Decem ber 1984 the ACO requested DCAA to re view the acceptability of Freedom' resubmitted PPR No. 1. (AR4, tabs 20, 232)

29. On or about 17 December 1984 the ACO and other DCASMA-NY officials con tacted Dry Dock to verify its commitment to Freedom. During this conversation DCASMA-NY first learned about Dry Dock's 10 August 1984 letter (which Dry Dock asserted superseded its 9 August 1984 "draft" commitment letter on which the DCASMA-NY pre-award survey team had relied) and Dry Dock's expectation that any funds it advanced to Freedom would be guaranteed by the Government. (Tr. 1/78-80, 91; AR4, tab 27)

30. In a 26 December 1984 response to the ACO's request for specific information concerning its financial condition, Freedom asserted that it needed "Private Financing" of only $415,164 in order to complete the contract. This figure was arrived at by subtracting 95 percent for progress payments from projected total performance costs of $14,970,142 and further subtracting the $333,333 that had been allowed for depreciation. The response also indicated various potential funding sources, none of which was firm, and advised that "formal" submission of any loan applications was "being withheld until ... the Government actually commits to a speedy release of Progress Payment #1." The ACO did not consider Freedom's response adequate to relieve his concerns about its "questionable financial condition." (R4, tabs 12, 13; AR4, tab 26; tr. 1/87)

31. DCAA's 4 January 1985 audit report on PPR No. 1 recommended that nothing be paid toward that request because, among other things, the claimed costs represented "unbooked accrued salaries and related estimated payroll taxes," mainly for guards furnished by the landlord and billed to H.T. Food, "unbooked occupancy and tax escrow costs billed to H.T. Food" by the landlord, and other "unbooked" travel and other indirect expenses unsupported by any records. The qualifications Dry Dock placed on its prior commitments and the recent DCAA audit recommendations caused the ACO to consider suspending progress payments. (R4, tab 15; AR4, tab 30; tr. 1/97)

32. On or about 15 January 1985 Freedom submitted PPR. No. 2 in the amount of $299,683, bringing its total requested progress payments to $551,833. The ACO requested a DCAA audit of this and every subsequent progress payment request Freedom submitted under the contract. (AR4, tabs 30, 232)

33. In an 18 January 1985 letter to the ACO, Freedom asserted that it had firm commitments with all its primary subcontractors and attributed its inability to conclude financing arrangements to the ACO's having provided incorrect information to Freedom's prospective financial backers and his refusal to pay progress payments promptly. However, its own financial statements through 4 January 1985 showed that Freedom was insolvent, having a net worth deficit of more than $3.7 million with no current assets to offset or service its current liabilities, and was without credit commitments from any financial institution. (AR4, tab 34; R4, tab 25)

34. By letter dated 6 February 1985, the ACO returned PPR Nos. 1 and 2 to Freedom unpaid and advised it that progress payments were suspended due to its unsatisfactory financial position. Among the specific reasons given for suspending progress payments were the facts that: Dry Dock had withdrawn any credit commitment until an arrangement was made to settle Freedom's debts; Freedom had neither applied for nor received loans from any other financial institution; and Freedom was the defendant in numerous claims arising from non-payment of bills. (AR4, tab 43)

35. In mid-February 1985 meetings and discussions with DLA and DCASMA-NY personnel, Freedom was advised that release of progress payments depended on its obtaining a $3.8 million line of credit from a reputable source and was encouraged to enter into a novation agreement. On 28 February 1985 Bankers Leasing Association, Inc. of Northbrook, Illinois (Bankers Leasing), agreed to provide H.T. Food an accounts receivable line of credit in the amount of $5,000,000. (R4, tab 27; AR4, tabs 46, 49, 53)

36. On 26 March 1985 Freedom and H.T. Food entered into a Novation Agreement, transferring Freedom's interest in the contract to H.T. Food. The Government approved the novation agreement on 17 April 1985. (H.T. Food subsequently changed its name to Freedom, NY, Inc.) At all relevant times the Government understood that Freedom's arrangement with Bankers Leasing did not constitute an open line of credit and that such financing depended upon approval of progress payment requests and timely payment of invoices for supplies delivered and accepted. (AR4, tabs 46, 51, 53, 64, 180; R4, tab 61)

37. Progress payments had been suspended prior to the Government's approval of the novation agreement. On or about 10 April 1985 appellant submitted a new PPR No. 1 in the amount of $1,766,923, which combined and superseded its earlier requests. On 6 May 1985 the ACO approved payment of $1,700,078 toward new PPR No. 1, disallowing certain costs including approximately $22,000 for office automation equipment but otherwise lifting the suspension of progress payments. (AR4, tab 232; R4, tab 50)

38. After first article samples were approved, Freedom requested a delivery schedule extension in exchange for consideration. Modification P00011, effective 14 June 1985, revised the delivery period to start in October 1985 and continue through 31 March 1986 for $100,000 consideration. (AR4, tabs 56, 71; R4, tabs 41, 55)

39. In May and June 1985 Freedom submitted PPR Nos. 2 and 3 in the amounts of $673,074 and $535,767, respectively. The ACO approved payment of PPR No. 3 in full but he had paid only $332,421 with respect to PPR No. 2. In so doing, the ACO treated certain quality control equipment costs, automated building management costs and office equipment costs as capital costs ineligible for progress payments. (AR4, tab 232)

40. The issue of disallowed equipment costs was not resolved for many months. Freedom believed these costs had been approved as directly chargeable to the MRE-5 contract in the 6 November 1984 MOU, a view not shared by officials at DCASMA-NY, DPSC and DLA. As a minimum the Government felt that a DAR deviation from the standard Progress Payment clause was needed to permit payments for these ordinarily capitalized equipment costs. On 18 July 1985 the ACO requested a one-time DAR deviation to permit payment of equipment costs amounting to nearly $312,000. In mid-August a new DPSC PCO made a similar request. The matter was resolved tentatively in early October 1985, when the PCO advised Freedom that certain capital costs in the total amount of $522,218 could be direct charged for progress payment purposes after DOD approval of a DAR devia-

tion. (AR4, tabs 76, 77, 79, 81, 85, 87, 91; R4, tab 75; finding 23)

41. An August 1985 DCAA audit report indicated that Freedom's then-current accounting system was inadequate for progress payment purposes. DCAA had found, *inter alia*, understated liabilities (including, but not limited to, taxes) that were not properly reflected on Freedom's books, many instances of inadequate supporting documentation, failure to record subcontractor invoices, and the absence of journals or ledgers that would permit tracing transactions from appellant's check register to its general books of account. Despite earlier audits finding appellant's accounting system to be adequate, the August DCAA report gave the ACO reason to believe that numerous flaws in appellant's accounting system impaired its reliability. Nevertheless, Freedom eventually improved its methods of recording costs and payments were made on each monthly progress payment request submitted between September 1985 and May 1986. (R4, tabs 54, 57, 60(d), 62, 94; tr. 1/150-51, 158; exh. A-9)

42. Freedom failed to make the scheduled October 1985 delivery. Bilateral modification P00018, effective 14 November 1985, adjusted line item quantities and extended the delivery schedule through 31 May 1986 in exchange for an additional $100,000 consideration. The modification also adjusted the progress payment ceiling so as to "increase by $1,000,000 after each incremental production of 50,000 cases has been completed and accepted by the Government" up to a $4,000,000 increase after completion and acceptance of 200,000 cases. (R4, tabs 82, 83, 85)

43. Freedom did not commence assembling complete MRE-5 cases until early November 1985. As of 2 December 1985, 24,088 cases had been produced, but only 242 cases had been accepted. Several MRE case lots were rejected for incompleteness and for such sanitary conditions as leakage and vacuum loss. During December 1985 Freedom experienced a rejection rate of over 90 percent, which it brought down to 57 percent by early January 1986. The high rejection rate and schedule slippages were caused by, *inter alia*, inadequately trained personnel and flaws in Freedom's production processes. (R4, tabs 91, 193 at 29-44)

44. Freedom failed to make scheduled November and December 1985 deliveries. By telegrams issued on 6 December 1985 and 2 January 1986, the Government terminated for default the quantities of 49,758 and 65,000 cases, respectively. These terminations were memorialized in unilateral modification P00019, dated 23 January 1986. (R4, tabs 90, 99, 103) Freedom took a timely appeal to this Board (docketed as ASBCA No. 32570) from the partial default terminations.

45. On 29 January 1986 the parties executed bilateral modification P00020, which: (a) reduced the total contract quantity from 620,304 to 505,546 cases, and reduced the total adjusted contract price from $16,997,928 to $13,816,262.86, to reflect the termination of undelivered quantities; (b) removed the Clause L-4 limitation restricting pre-delivery progress payments to 50 percent of the contract price; and (c) revised and extended the delivery schedule for the unterminated MREs to from 1 January through 31 July 1986. The modification also provided that the Government might reinstate the 114,758 cases terminated for default at the end of the delivery schedule if Freedom met the revised delivery increments through 30 April 1986. (R4, tab 104)

46. On 29 January 1986 DPSC notified Freedom that it planned to solicit a 4.5 million case MRE-7 IPP requirement, expected to involve three separate awards at 47 percent, 33 percent and 20 percent of the calendar year 1987 requirement. By this time the MRE-6 procurement was already in progress. Responses to an RFP for a total of 4,176,447 MRE-6 cases had been received in August 1985 and Freedom's protest against soliciting a Cincinnati, Ohio firm called "CINPAC" had been denied by the Comptroller General in a decision (B-219676) dated 6 December 1985. (AR4, tab 1 attch. 12; R4, tab 93)

47. By March 1986 Freedom had produced and shipped more than 95,000 acceptable MRE cases and was meeting the revised delivery schedule established in modification P00020. In accordance with the Progress Payment clause, DCASMA-NY applied a 95% liquidation rate in making payments for invoiced deliveries.[1] By the end of April 1986 more than 180,000 MRE cases had been accepted and Freedom had received progress and invoice payments amounting to

[1] Appellant alleges that the parties had agreed to an alternate 82.6 percent liquidation rate permitted by DAR E-512.2. However, there is no credible evidence showing mutual agreement to any lower liquidation percentage. (App. br. at 157; exh. G-1)

more than $9.9 million. However, Freedom needed to deliver another 325,304 cases by the end of July and its cost "estimate(s) to complete" showed losses of between $2.2 million and $3.1 million, depending on whether the previously terminated 114,758 cases were reinstated. In view of these projected losses, which never disappeared, the ACO applied a loss ratio formula to PPR No. 14, submitted on 19 March 1986, and continued to compute a loss ratio formula with respect to all subsequent progress payment requests. (R4, tabs 190, 194 at 4; AR4, tabs 1 attchs. 13 and 14, 232, 233; exh. A-9)

48. On or about 20 March 1986 Freedom submitted a certified claim for a $3.48 million equitable adjustment based, *inter alia*, on alleged Government-caused delays and the Government's alleged wrongful failure to make progress payments. A 26 March negotiation at DPSC ended without settlement because Freedom wanted a guaranteed portion of the MRE-7 procurement and refused to waive any part of its claim. The entire matter was then referred to DLA Headquarters in Alexandria, Virginia, and negotiations resumed during April 1986. (R4, tab 119; AR4, tab 1 attch. 13)

49. Freedom was represented at the April and May 1985 negotiations at DLA by an outside attorney and a consultant and Mr. Thomas did not participate personally. In addition to demanding a guaranteed portion of the MRE-7 procurement, Freedom wanted: a contract price adjustment; elimination of CINPAC from the IPP program; technical assistance in reworking approximately 50,000 of its MRE-5 cases that had earlier been rejected as nonconforming; assurance of receiving certain contracts through the SBA "8(a)" program; and a $2.7 million guaranteed loan to cover its expected loss. (AR4, tab 1 attch. 13; tr. 5/ 247-57)

50. During these negotiations, Freedom's representatives proposed several "side agreements" to DLA that they understood to be inappropriate for inclusion in the settlement modification "but were more appropriately to be addressed in a separate letter." The terms of these proposed "side agreements" were described in a draft letter (presumably to be sent by Mr. Thomas to the DPSC PCO) that Freedom's outside attorney sent to DLA's executive director of contracting, Mr. Raymond Chiesa, on 6 May 1985. The "side agreements" purported to commit DLA to: (1) have DPSC "negotiate a fair and reasonable contract with Freedom" for one of four planned MRE-7 contracts; (2) have DPSC and DLA "process a request for a guaranteed loan" to Bankers Leasing in an amount up to $2.7 million to "ensur[e] Freedom the necessary cash flow" to complete the current contract; (3) assist Freedom in obtaining contracts through the SBA's "8(A) program"; and (4) provide Freedom "technical and production assistance to rework and reprocess ... approximately 46,000 MRE[-5] Cases presently ... [on] a medical hold." (Tr. 5/ 264-68; AR4, tab 1 attch. 2)

51. The proposed "side agreements" were an effort by Freedom "to elicit additional commitments" from DLA. DLA management was willing to assist in the "timely processing of the loan guarantee request and the request for production assistance," but considered "any other commitments [to] be inappropriate." In particular, DLA representatives felt they could not promise in advance the award of either a follow on MRE-7 contract or an SBA "8(a)" contract, nor could they commit another agency to guaranteeing a loan. The PCO had never been privy to any discussions concerning the proposed "side agreements" and we find that neither DLA nor DPSC ever agreed to any proposed "side agreements." (AR4, tabs 1 attch. 18, 134; tr. 4/ 16-17)

52. The agreement actually reached by Freedom and the Government was memorialized in bilateral modification P00025, executed at DPSC by Mr. Thomas and the PCO on 29 May 1986. Pursuant to the terms of that modification: (a) the entire terminated quantity of 114,758 cases was reinstated, to be manufactured in the MRE-6 configuration[2]; (b) the $200,000 consideration taken for previous time extensions was rescinded and the contract price was restored to the original $17,197,828; (c) Freedom agreed to withdraw with prejudice its appeal from the default termination under ASBCA No. 32570; (d) the delivery schedule for the undelivered balance of 440,062 MRE cases

[2] The change from the MRE-5 to the MRE-6 configuration was made because MRE-5 components were no longer available and Freedom would have to use components from rejected lots for the remaining MRE-5 requirements. Any price adjustment associated with this configuration change was to be determined under the Changes clause and definitized by the cognizant ACO. Although the PCO estimated that the change to the MRE-6 configuration would produce a cost saving of approximately $1.00 per case, due to a decrease in cost of CFM, neither party ever pursued a price adjustment concerning this change (tr. 4/ 20-21, 23, 194-95; R4, tab 131) and such adjustment is irrelevant to these appeals.

(325,304 MRE-5 cases followed by the reinstated cases in the MRE-6 configuration) was further revised and extended to 31 October 1986; and (e) an immediate payment of $399,111, relating to certain capital equipment costs, was authorized.[3] (R4, tab 119)

53. Modification P00025 concluded, as follows:

> 5. With execution of this modification, Freedom waives all claims for all happenings and/or occurrences which have arisen to date under law and/or relating to he contract, DLA13H-85-C-0591[4] ... Both parties have had time and opportunity to review this Agreement and consult with counsel. Both parties expressly state that the aforesaid recitals are the complete and total terms and conditions of their Agreement and that this Agreement has been entered into free from duress or coercion.

(*Ibid.*)

54. The record includes another letter describing Freedom's proposed "side agreements" (finding 50), dated "May 13, 1986" and addressed to DLA's contracting director, Mr. Chiesa (rather than to the PCO). The letter is signed by Mr. Thomas but does not appear to have been mailed to DLA. Instead, according to Mr. Thomas, he stapled a copy of this letter to the copy of modification P00025 that he executed on 29 May and told the PCO that he understood that this letter was part of the modification "[b]ecause these two documents are attached[, t]hey're one document as far as I'm concerned." However, we find that the PCO told Mr. Thomas that "there is no side deal" and cautioned him not to sign the modification if he thought that there were any outside agreements. (Tr. 5/273-78; 6/140; AR4, tab 1 attch. 1)

55. The PCO telefaxed a copy of "May 13" letter to Mr. Chiesa on 29 May 1986. In a letter to Mr. Thomas dated 30 May 1986, Mr. Chiesa expressed his disagreement with the "May 13" letter, cautioned that the letter jeopardized the integrity of the recently negotiated settlement and reemphasized that the settlement reflected in modification P00025 "stands on its own." (Tr. 5/274; AR4, tab 134)

56. In accordance with the terms of modification P00025, by order dated 9 June 1986 the Board dismissed with prejudice the appeal in ASBCA No. 32570 and certified copies of this order were transmitted to the parties on 16 June 1986. Meanwhile, under letter to the Board dated 10 June 1986, a different attorney from the lawyer who had represented Freedom in modification P00025 negotiations filed a "complaint" on Freedom's behalf in ASBCA No. 32570, seeking relief only from the contracting officer's decision partially terminating the contract for default with respect to the November and December 1985 deliveries. The "complaint" made no reference to Freedom's $3.48 million monetary claim, which had never been the subject of a decision or an appeal. The attorney's 10 June covering letter explained that he had been informed

> that the government, in the person of the Defense Logistics Agency, has failed to fully implement the understandings surrounding Modification P00025. Accordingly, Appellant will not at this time move for dismissal

of ASBCA No. 32570. (AR4, tabs M26, M27; R4, tab 125) By letter to Freedom's attorney dated 27 June 1986, the Board confirmed its dismissal order in ASBCA No. 32570 and returned the 10 June "complaint," noting that neither the dismissal order nor its 27 June notice "is prejudicial to appellant's right to appeal a contracting officer's decision regarding the Government's interpretation of the contract modification [P00025]." (AR4, tab M29) Appellant did not pursue this matter further until it filed the approximately $22 million claim that is the subject of ASBCA No. 43965. Apart from the 10 June 1986 letter and "complaint" in ASBCA No. 32570, there is nothing in the record showing words or conduct by either party inconsistent with the express terms of modification P00025 and we conclude that the parties thereafter conducted themselves in a manner consistent with the terms of that modification.

57. In its first payment request submitted after modification P00025 restored the original total contract quantities and price (PPR No. 17) Freedom claimed to have incurred costs amounting to $15,046,797 as of 6 June 1986 and estimated more than $4.3 million in costs to complete the contract. This indicated an expected loss of more than $2.1 million and the ACO continued to apply a

[3] This amount represented the difference between $522,218 in capital type costs included in Freedom's manufacturing overhead costs as covered in the November 1984 MOU and previous payments of $123,107 made therefor.

[4] Except for a claim relating to the manufacture of certain CFM not relevant to these appeals.

loss ratio in approving payment requests. With the payment of PPR No. 17 in mid-July 1986, Freedom had received progress payments amounting to more than $12.9 million and total contract payments of nearly $13.7 million. (R4, tabs 147, 190; AR4, tab 232; exh. A-9)

58. Modification P00025 required delivery of a cumulative quantity of 330,242 MRE cases by 30 June 1986. Due to unexcused schedule slippages Freedom had shipped only 330,050 cases by 9 July 1986, a shortfall of 192 cases against the June 1986 requirement. At that time, Freedom's daily production rate was between 2,800 to 3,000 cases. (R4, tabs 133, 141, 144)

59. The impact of the June slippages and problems with Freedom's box erector and sealer, would cause a shortfall in completing the 410,242 case cumulative requirement scheduled for 31 July 1986. The July slippage was aggravated by lack of GFM jellies and a strike that delayed one of its suppliers. The unavailability of GFM jellies, which did not reach Freedom until 28 July 1986, "resulted in no new production for 7 1/2 days." By this time the Government understood that "without an increase in the current contract progress payment ceiling of $13 million, Freedom's ability to complete the contract will be impaired." (R4, tabs 131, 133, 137, 138, 141, 144, 194 at 20; AR4, tab 180)

60. Bilateral modification P00028, effective 7 August 1986, adjusted and extended the overall delivery schedule a total of eight days to 12 November 1986, and increased the ceiling on progress payments to $15.8 million, based on specific completion milestones. In particular, the delivery schedule was amended as follows:

Line Item	Quantity	Delivery Date
0001KK	65,000	30 May 86
0001KM	85,000	30 Jun 86
0001KN	80,000	12 Aug 86
0001KR	80,000	10 Sep 86
0001KS	15,304	10 Oct 86
0001KT	64,696	10 Oct 86
0001KU	50,062	12 Nov 86

The $13 million limit on progress payments was to be increased in steps, based on completion of successive 80,000 case increments, as follows: to $14 million upon completion and acceptance of a cumulative total of 410,000 cases; to $15 million at 490,000 cases; and to $15.8 million at 570,000 cases. The modification also made provision for a proportionate "protanto progress payment," based on partial delivery. (R4, tab 144)

61. Modification P00028 stated, *inter alia*, that Freedom's delivery delay was "partially excusable due to lack of Government Furnished Material jellies for eight production days" and Freedom waived all claims "whatsoever for any consideration or damages, monetary or otherwise, resulting from lack of [GFM] jellies during the period 16-28 July 86." The final paragraph of the modification provided in part:

> This document contains the complete agreement of the parties. There are no colleteral [sic] agreements, reservations or understandings other than expressly set forth herein.

(*Ibid.*)

62. During negotiations leading to modification P00028 Freedom had requested raising the progress payment ceiling to $16 million, representing approximately 95 percent of the nearly $17.2 million contract price reduced by the $399,111 paid in full for capital-type items pursuant to modification P00025. The PCO would not agree to a ceiling above $15.8 million. Mr. Thomas testified that Freedom "had to go along with" this arrangement "if we were ... to continue." However, there is no evidence showing either coercion by the Government or that Freedom accepted the terms of modification P00028 involuntarily. (R4, tabs 130, 131 137; tr. 6/6-7)

63. Under the revised delivery schedule a cumulative quantity of 410,242 MRE-5 cases was required by 12 August 1986, with a total of 490,242 cases due by 10 September 1986. By 12 August 1986 Freedom had completed 388,060 acceptable MRE cases. The delay was caused by the impact of the July slippages and stock outages of GFM fruit mix items. As of 31 August 1986, 415,511 MRE-5 cases had been accepted and Freedom had shipped 410,242 cases. (R4, tabs 146, 194 at 25)

64. During the summer of 1986 Freedom reworked more than 40,000 previously rejected MRE-5 cases and reduced substantially the rejection percentage it had experienced. Freedom also corrected problems with certain equipment (*e.g.*, case erector/bottom sealer, automatic case sleever) that had impeded production. Despite these performance improvements, Freedom shipped only 46,260 cases towards the 80,000 cases due by 10 September 1986. The main causes of this shortfall were the impact of the August slippages and down-

time due to stock outages of GFM fruit mix and potato patties. Through 2 October 1986, 472,465 cases had been produced and accepted and 465,440 cases were shipped. (R4, tab 193 at 83-86, 91, 95)

65. Completion and acceptance of additional MRE cases permitted proportionate increases in the progress payment ceiling. On or about 19 August 1986 the ACO approved payment of $704,068 towards Freedom's PPR No. 18, which had requested payment of $1,054,612 towards costs incurred through 4 July 1986. On 8 and 23 September 1986 the ACO approved payments of $200,291 and $311,447, respectively, towards Freedom's PPR Nos. 19 and 20. As of 30 September 1986 Freedom had received more than $14.1 million in progress payments. (R4, tabs 193 at 95, 194 at 27, 29-33; AR4, tabs 164, 179, 232)

66. By letter to the PCO dated 17 September 1986, Freedom alluded to the lack of GFM fruit and potato patties as causing delivery slippages and proposed a revised delivery schedule. During the last week of September 1986 accessory production had to be shut down for approximately one week, until on or about 3 October, "due to a stock outage of GFM item, Cream." Freedom received a shipment of more than 1.1 million packets of Cream substitute on 3 October 1986 and resumed accessory production on 6 October. (R4, tab 153; AR4, tabs 164, M44)

67. During a 26 September 1986 telephone conversation, the PCO informed Mr. Thomas that, upon execution of the contract modification then being negotiated, the current progress payment ceiling would be increased to $14,900,725 "based on delivery of 482,058 cases" and that this increase "leaves a balance of $721,887.00 available to you[, which] amount will be paid to you by DCASMA N.Y. against progress payment requests ..." At this time Freedom was awaiting payment of its 15 September 1986 PPR No. 21, which sought $1.09 million with respect to costs incurred through 5 September 1986. PPR No. 21 also indicated that Freedom had already incurred costs of $18.6 million and estimated $2.1 million additional costs to complete the contract. (AR4, tabs 165, 232)

68. Meanwhile, Freedom had responded to the RFP for the MRE-7 requirement. A September 1986 pre-award survey for that procurement, including a review of Freedom's financial capability, was favorable and recommended a complete award to Freedom of a contract for nearly 900,000 MRE-7 cases.[5] (R4, tab 145; AR4, tabs 159, 163, 166)

69. On 3 October 1986 the ACO approved PPR No. 21 in the amount of $721,887. A check in that amount was issued on 9 October. This disbursement brought cumulative progress payments to $14,894,725 and the total amount disbursed under the contract to $15,876,512. (R4, tabs 162, 190, 194 at 36-37; AR4, tab 232)

70. Bilateral modification P00029, executed on and effective 7 October 1986, extended the delivery schedule as follows:

Line Item	Quantity	Delivery Date
0001KR	80,000	15 Oct 86
0001KS	15,304	15 Oct 86
0001KT	64,696	15 Nov 86
0001KU	50,062	5 Dec 86

In consideration for the foregoing time extension, Freedom agreed to "pay the Government $100 as a requisite modification fee." (R4, tab 159)

71. Modification P00029 also included a broad release.[6] There is no evidence in the record showing coercive acts by the Government to support Mr. Thomas' conclusion that Freedom was "already under duress" and had to sign modification P00029 as "the only way we were going to get any money." (R4, tab 159; tr. 6/8)

[5] A September 1986 amendment to the MRE-7 RFP indicated awards would be made for four different quantity ranges. This encouraged Freedom's belief that it would receive one of the MRE-7 contracts. The favorable review of Freedom's financial capability contemplated that Bankers Leasing would extend a $6 million line of credit to Freedom. (AR4, tabs M35, 163, 166; tr. 4/152-53, 5/303-04)

[6] Specifically, the release stated:

In further consideration of the aforesaid extension of delivery schedule, the contractor for itself, it successors and assigns, releases and forever discharges the Government of and from all manner of action, causes of action, suits, proceedings, debts, dues, judgments, damages, claims, and demands whatsoever, in law or equity or under administrative procedures which, 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 in modifications P00024 and P00026 or monies due to become due as payment for product delivered to and accepted by the Government.

(R4, tab 159)

72. On 15 October 1986 Freedom informed the ACO of impending "serious stock shortages of both CFM and GFM components that would impact on performance of the MRE[-6] assembly portion of the contract." The PCO was also advised that specific GFM meat entree items for the MRE-6 configuration (ground beef, diced turkey, frankfurters and ham slices), which should have been provided by the end of September, had still not been received as of 15 October. By letter dated 17 October 1986 Freedom informed the ACO that shortage of GFM components was

> our most immediate concern. To date we have not been supplied with 8 oz. pouches of Ground Beef with Spice Sauce, Diced Turkey, or Beef Slices. The final 114,754 [sic] cases cannot be assembled without these products.

(R4, tabs 160, 194 at 35; AR4, tab M39)

73. By 17 October 1986 a total of 490,838 MRE-5 cases had been produced and accepted and within the next few days Freedom completed production of the entire 505,546 case MRE-5 portion of the contract. Acceptance of this quantity would raise the progress payment ceiling to $15,155,460. On 20 October 1986 Freedom submitted its PPR No. 22, seeking payment of $1.22 million for costs previously incurred. (R4, tabs 161, 193 at 97, 99-100; AR4, tab 232) The Government never made any payments with respect to PPR No. 22.

74. By 22 October 1986 Freedom had received all of the CFM needed to begin producing cases in the MRE-6 configuration but had still not yet received GFM beef slices, diced turkey, ground beef or ham slices. In a 22 October letter, Freedom advised the PCO that it was shutting down assembly production of MRE-6 cases, effective immediately, due to "lack of GFM." (R4, tabs 161; AR4, tab 172)

75. Unrebutted evidence in the record establishes that Government had not paid 25 of Freedom's invoices (DD Forms 250) for MRE shipments. 15 of these invoices applied to nearly 33,000 cases shipped between 14 March and 6 October 1986. The last ten unpaid invoices covered 20,646 cases shipped between 9 and 28 October. The total value of these unpaid invoices was nearly $1,486,000 and, at a 95 percent liquidation rate, Freedom would have received approximately $74,300. In early November 1986 Freedom's vice president reminded the ACO in writing that invoices through 31 October amounting to approximately $1.5 million had not been paid. The ACO did not reply. (AR4, tabs 173, 179, 233)

76. Due to lack of GFM entrees for MRE-6 cases, Freedom ceased final case assembly on 22 October and laid off 146 production workers out of approximately 400 employees. As admitted by the PCO, except for crackers, DPSC had never purchased sufficient amounts of MRE-6 configured components to permit assembly of the entire reinstated quantity of 114,758 cases. Nevertheless, on 23 October 1986 DPSC provided Freedom approximately 15,000 bags of eight-ounce beef slices, expected to be sufficient to permit assembly of MREs for five to six days and on 24 October 1986 DPSC authorized a limited substitution of certain GFM meat entrees. (R4, tabs 161, 193 at 99; AR4, tab 172; tr. 6/181; exh. G-5)

77. Freedom needed a few days to evaluate the impact of the substitutions. On 24 October 1986 Freedom notified the ACO that it had laid off an additional 140 production workers but advised that it expected to recall most of its 286 laid-off employees on 3 November 1986 to commence producing MRE-6 cases. (R4, tabs 193 at 103, 194 at 36)

78. According to a GFM inventory list Freedom provided the Government on 28 October 1986, the PCO believed that Freedom had enough GFM components "with substitutions[,] to probably do another 30 or 40,000 cases" in the MRE-6 configuration. This quantity would not have been sufficient to meet the 64,696 case requirement due 15 November 1986. (Tr. 4/48-49; exh. G-6; finding 62)

79. Freedom called back some of its laid off workers and resumed production of MRE-6 cases during the first week of November 1986. Freedom also advised the DCASMA industrial specialist that it anticipated additional call backs the following week. As of 6 November 1986, 508,681 cases had been produced and accepted. Freedom's "last full day of production was 7 November 1986," by which time it had laid off most of its production workers and had inventory on hand for only 6,000 to 8,000 MRE-6 cases. Despite the reduced production force, Freedom completed and shipped by 28 November a total of 512,462 cases (including 6,916 MRE-6 cases). (R4, tabs 193 at 104, 194 at 38, 40)

80. In a 5 November 1986 telephone conversation with Freedom's vice president, the ACO advised that he would not make a further progress payment because, *inter alia*, the Government was unwilling to "increase

... the undelivered items of the (findings 83, 85).

essary to complete the contract." The letter also cautioned that, if payments were not received within seven days "Freedom will then request a change in place of performance but will still be able to perform." The PCO understood this statement to mean that Freedom would soon be evicted from its present facility. (R4, tab 174; tr. 4/182, 184-85)

88. On or before 5 March 1987 the PCO requested Freedom to perform a physical inventory on all GFM components and make a final inventory report. Later in March Mr. Thomas informed the PCO that Freedom was going to be evicted at the beginning of April 1987. On or about 23 March Government personnel entered the premises and began removing GFM and finished product. (R4, tabs 185, 194 at 47)

89. Freedom was evicted from its facility on 2 April 1987 for nonpayment of rent. Upon notification of the eviction, the Government accelerated its GFM removal activity. Bankers Leasing also sought to enter the premises to conduct an auction. During April the Government and Bankers Leasing attempted to resolve ownership of various capital type items and materials located on the site. (R4, tab 194 at 47, 49-51; tr. 4/186)

90. On 23 April 1987 the PCO issued unilateral modification P00030, purporting to establish the following revised delivery schedule for the last two shipments under the contract:

Line Item	Quantity	Delivery Date
0001KT	57,780 cases	1-30 Aug 87
0001KU	50,062 cases	1-30 Sep 87

(R4, tab 182)

91. On 1 May 1987 the PCO sent Freedom a three-page cure notice. Referring to the standard Government Property clause and special provisions requiring Freedom to maintain inventory control of and safeguard all Government property, the notice accused Freedom of failing to comply with these contractual requirements and characterized such alleged failures as "a breach of contract and a risk to the Government of loss of its Government property." The notice gave Freedom 10 days to cure these conditions that were allegedly "endangering performance." (R4, tab 183)

92. On 22 June 1987 the PCO issued a decision, designated modification P00031, terminating the undelivered 107,842 MRE cases for default. The reason cited in the decision was Freedom's "failure to perform [its] inventory control requirements and to make progress towards completing [its] contract in accordance with the delivery schedule" (R4, tab 186). This decision was supplemented by a letter from the contracting officer asserting a claim for repayment of unliquidated progress payments in the amount of $1,630,747.28. Freedom's timely appeal was docketed as ASBCA No. 35671.

93. On 1 May 1991 appellant filed a certified claim for an adjustment or damages in the amount of $21,959,311, based on various constructive changes and breaches by Government officials going back to the inception of the contract. According to the claim, Freedom had incurred total costs of $21,727,850 performing the contract. (AR4, tab 1 at 39, exh. 36) Freedom's timely appeal from the contracting officer's 7 October 1991 decision denying this claim was docketed as ASBCA No. 43965, which appeal is not presently before us.

DECISION

This appeal deals only with the propriety of the 22 June 1987 termination of the then uncompleted portion of the contract (107,842 undelivered cases in the MRE-6 configuration) for default. If the default termination was proper, the Government will be entitled to recover unliquidated progress payments. If improper, the termination will be converted to one for convenience of the Government.

The focus of this appeal revolves around the questions of whether Freedom was actually in default or, if so, whether its default was excusable or, alternatively, whether its duty to continue performance had been discharged by a material breach by the Government?

Among other things, appellant contends that various Government acts and omissions from the beginning of the contract excused its subsequent performance delays and that none of these excusable causes of delay were extinguished by any bilateral delivery schedule extensions. In this regard, appellant argues that the releases in bilateral modifications P00025, P00028 and P00029 are unenforceable because they were extracted by means of duress, mistake or misrepresentation.

The gravamen of the claim in this appeal is that the releases in bilateral modifications P00025, P00028 and P00029 are unenforceable because they were extracted by means of duress, mistake or misrepresentation. By nullifying these modifications, earlier Government acts or omissions might be considered as excuses for appellant's alleged default. Moreover, many Government acts or omissions, both before and after the releases in these modifications, allegedly constituted compensable changes, delays or breaches for which appellant would be entitled to additional compensation. Appellant bears the burden of proof on every element of its claim.

We consider first the alleged acts or omissions occurring before the challenged modifications that constituted excusable causes for delay. According to appellant, these acts or omissions revolve mainly around the allegedly improper manner in which the Government, especially the ACO, administered progress payments. Appellant cites several specific examples of alleged misfeasance and contends, *inter alia*, that 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.

(App. br. at 139-62, 210-11) Appellant also alludes, in general terms, to the Government's alleged failure to cooperate and to the alleged breach of its duty not to hinder, delay or interfere with Freedom's performance. (App. br. at 163-65, 212)[8]

Appellant argues that the ACO "abused his discretion" in administering progress payments. To support this argument appellant cites such alleged acts or omissions by the ACO as: requiring prepayment audits of every progress payment request; effectively "reevaluating Freedom's responsibility immediately after award"; requiring actual physical progress as a condition for payment; effectively suspending progress payments from November 1984 to 6 May 1985; wrongfully ignoring the "Cost Agreement" concerning allowability of certain capital equipment costs "as one-time direct costs to the MRE-5 contract"; suspending progress payments for "an allegedly inadequate accounting system"; and wrongfully reducing progress payments on several occasions by, for example, paying less than the amount recommended by DCAA and by applying a loss ratio.[9] (App. br. at 141-53, 158-61)

Appellant also argues that the above Government acts or omissions materially breached the terms of the contract and demonstrated "bad faith." (*Id.* at 168-71, 201-05) The "bad faith" allegations are based on the same occurrences as the alleged abuses of discretion, with no specific differentiating facts presented, although "bad faith" involves an added layer of proof. *Darwin Const. Co., Inc. v. United States* [83 CCF ¶75,063], 811 F.2d 593, 598 (Fed. Cir. 1987).

The discretion conferred upon Government officials is not unfettered and we may inquire into whether the exercise of that discretion amounted to "arbitrary and capricious" conduct. The following "subsidiary criteria" are helpful in determining whether a procurement official's conduct was arbitrary and capricious: "subjective bad faith on the part of the procuring officials"; proof "that there was 'no reasonable basis' for the administrative decision," with the necessary "degree of proof of error" ordinarily being directly "related to the amount of discretion entrusted to the procurement officials by applicable statutes and regulations"; and "proven violation of pertinent statutes or regulations." *Keco Industries, Inc. v. United States* [19 CCF ¶82,861], 492 F.2d 1200, 1203-04 (Ct. Cl. 1974).

As for the first criterion, proof of "bad faith" requires showing some specific intent to injure the contractor or "a showing of malice or conspiracy," *Kalvar Corp., Inc. v. United States* [22 CCF ¶80,737], 543 F.2d 1298, 1302 (Ct. Cl. 1976). Such a showing has

[8] Appellant also alludes to the Government's failure to provide or delay in providing GFM as compensable constructive suspension or delays of work (app. br. at 213-14).

[9] Some of appellant's arguments involve marginal incidents that did not merit specific findings. For example, the ACO paid less than the amount recommended by DCAA on some occasions and paid more than the recommended amount on other occasions. (R4, tab 94; exh. A-9) In connection with PPR No. 8, appellant complains that the ACO treated as a "credit to Freedom's rent" H.T. Food's $400,000 proceeds from the sale of an option to buy the premises that Freedom was leasing, because the option sale was an allegedly unrelated transaction. (App. br. at 59-60, 158-59) Since the interests of Freedom and H.T. Food became virtually indistinguishable by the time of the March 1985 novation agreement (findings 3, 36), we are not persuaded that the option sale was unrelated to Freedom's lease obligations. Finally, appellant's assertion that the ACO suspended progress payments "de facto" from December 1985 through June 1986 is not supported by a record establishing that Freedom regularly requested and received progress payments, albeit reduced for indicated losses, during the first half of 1986 (findings 42, 47).

not been made with respect to any Government acts or omissions predating the challenged modifications.

Appellant notes a distinction between progress payments based on percentage of completion, as under construction and shipbuilding contracts, and progress payments based on costs, as in Freedom's contract. (App. br. at 162; see DAR E-106) One salient difference between these progress payment methods pertains to the amount of discretion reserved to the contracting officer in approving and making payments. In construction and shipbuilding contracts, once the percentage of completion has been ascertained computation of the amounts to be paid becomes routine and payment of the amounts so determined must be made when due. DAR E-201; *see Brooklyn & Queens Screen Mfg. Co. v. United States,* 97 Ct. Cl. 532 (1942); *Suburban Contracting Co. v. United States,* 76 Ct. Cl. 533 (1932).

Although the prompt payment policy applies equally to progress payments based on costs, no "violation of pertinent statutes or regulations" has been shown in this case. The applicable Progress Payment clause itself and implementing regulations and directives entrust the contracting officer with broad discretion in monitoring and supervising such payments so as "to insure against overpayments and losses." In particular, paragraph (c) of the Progress Payment clause enumerates various circumstances under which the contracting officer may "reduce or suspend progress payments" if found "upon substantial evidence."

These grounds include, *inter alia,* the contractor's having "so failed to make progress, or [being] in such unsatisfactory financial condition, as to endanger performance of this contract[.]" (Findings 9, 11) Since the discretion entrusted the ACO is quite broad, a high degree of proof is needed to establish that the ACO's actions in administering progress payments up to the time of the challenged bilateral modifications lacked any "reasonable basis."

Appellant's brief portrays Freedom as a "socially and economically disadvantaged small business" which, on one hand, was otherwise responsible and simply "expected to be able to use progress payments as a means of 'financing' its contract" and which, on the other hand, the Government had some obligation "to *develop* into a source of supply for MREs as a member of the Industrial Planned Producer Program and be *maintained* in the Program." (App. br. at 1-2; emphasis in original) Neither portrait is completely accurate.

There is nothing in the record nor in applicable statutes and regulations linking the qualifications of planned producers under the Industrial Preparedness Program (IPP) to their "small business" status nor to their "socially and economically disadvantaged" status. The IPP is not a financial assistance program. The objective of maintaining an industrial production base for mobilization essential items is accomplished by negotiating contracts for quantities of such items within the mobilization capabilities of the several planned producers for the items, not by providing financial aid. (See findings 1, 3)

Freedom entered into an industrial preparedness agreement with DPSC to be a planned producer for the MRE program sometime after it started business in 1982. However, by the time Freedom submitted its BAFO for the MRE-5 procurement (increasing its initial unit price offer from $25.376 to $34.81) it had managed to amass operating losses of more than $1.9 million. Freedom had no current backlog nor revenue producing potential and, with working capital and equity deficits amounting to more than $2 million, the company was insolvent and could not perform a proposed multi-million dollar MRE contract without a tremendous infusion of outside equity and/or debt financing. Moreover, Freedom had no CoC from the SBA. (Findings 3, 11-14, 16, 17)

Freedom was considered "responsible" to perform the MRE-5 contract only because its bank, Dry Dock, had furnished a commitment letter indicating that it would extend Freedom credit up to $7.2 million. Without such assurance of financing to cover Freedom's deficit start-up position, Freedom would not have been determined to be "responsible" and would not have received the contract. Moreover, the profitability of this contract was never assured. There is nothing in the record to show that Freedom had ever made a profit on any work it performed during its brief existence, or that, given its substantial debts, it could reasonably expect to make much, if any, profit on MRE contracts. (The 6 November 1984 MOU between Freedom and DPSC no more guaranteed Freedom a $2.2 million profit on the MRE-5 contract than it guaranteed that Freedom's performance costs would not exceed $14.97 million. The MOU numbers simply reiterated figures that had been used in the Government pricing memorandum to justify the amount negotiated and would not have included debt service costs.) (Findings 18-21)

However, Freedom entered into the contract without expecting any start-up financing from Dry Dock, whose dependability it doubted, and instead entertained the unrealistic expectation that "the Government's coming up with the front-end financing." In keeping with that expectation Freedom submitted a first progress payment request covering only rent and real estate taxes, even before it incurred labor costs or placed orders for materials and equipment. (Findings 23, 24, 28)

We are not persuaded that the ACO "abused his discretion" up to the time of the challenged bilateral modifications. By the time he had completed his review of Freedom's resubmitted first progress payment request, the ACO had adduced "substantial evidence" that Dry Dock's commitment to extend credit to Freedom was inoperable, that Freedom had no firm sources of outside financing, and that Freedom's already unsatisfactory financial condition had deteriorated. The ACO also received information calling into question the adequacy of Freedom's records for supporting claimed costs, a problem which resurfaced in August 1985. (Findings 27-34, 41) These facts provided the ACO a "reasonable basis" for suspending progress payments up to 6 May 1985 and for regularly requiring prepayment audits of each progress payment request.

Although the ACO could not reevaluate the favorable "responsibility" determination that had enabled Freedom to obtain the contract, he could consider Freedom's lack of actual progress and unsatisfactory financial condition in administering progress payments. This gave the ACO a reasonable basis for requiring Freedom to obtain outside financing from a reputable source and to demonstrate some performance progress (*i.e.*, in labor effort and materials acquisition, rather than actual physical deliveries) as conditions for releasing progress payments. (Finding 34, 35) Similarly, the obscure articulation of an alleged "Cost Agreement," if any, in the 6 November 1984 MOU gave the ACO a reasonable basis for initiating a deviation request in connection with making progress payments on certain capital equipment costs. Moreover, once Freedom's progress payment requests indicated anticipated losses, the ACO was justified in applying a loss ratio. (Findings 22, 40, 47)

Turning to the specific challenged modifications, appellant first contends that the Government breached the terms of the "side agreements" purportedly incorporated in modification P00025. Appellant accuses DLA and DPSC officials of being "evasive" in not informing Freedom "*before execution* that DLA did not plan to abide by the [side] agreements," citing *Malone v. United States* [84 CCF ¶75,508], 849 F.2d 1441 (Fed. Cir. 1988), as authority. (App. br. at 172-78; emphasis in original) Appellant's reliance on *Malone* is misplaced. There, a contracting officer had been evasive as to his acceptance of an exemplar when presented to him, thereby misleading the contractor as to contractual workmanship standards. 849 F.2d at 1445-46. Here, the proposed "side agreements" were initiated by Freedom in an effort "to elicit additional commitments" from DLA concerning matters outside the contract and neither DLA nor the PCO gave Freedom any reason to believe that agreement had been reached on any of the terms. There was no evasiveness by Government officials and, if Freedom's president harbored any doubt about the continued effectiveness of any "side agreements," such doubt should have been dispelled by the express statements in the concluding paragraph of modification P00025. Moreover, we are not persuaded that the filing of a purported "complaint" in ASBCA No. 32570, which was returned to appellant's counsel by the Board and was not further pursued by appellant, signified the reservation of any rights under the purported "side agreements." (Findings 50, 51, 54-56)

Appellant next argues that the broad release in modification P00025 is unenforceable because of unilateral mistake, economic duress, and unconscionability. (App. br. at 178-85) Each of these grounds revolve around what appellant perceives to be the inadequate consideration exchanged in modification P00025, if the "side agreements" were not part of the bargain. According to appellant, without the "side agreements" Freedom must have "made a colossal, *unilateral mistake*." Further, appellant asks:

> 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 was not under duress?

(*Id.* at 180, 182; emphasis included) We do not find these arguments persuasive.

The party seeking to establish duress must show that one side involuntarily accepted the terms of another, that circumstances permitted no other alternative, and that said circumstances were the result of coercive acts of the opposite party. *Fruhauf S.W. Garment Co. v. United States*, 111 F. Supp. 945 (Ct. Cl. 1953); *Varsburn Ltd & Lin Heng Engineering Ltd., Joint Venture*, ASBCA No. 22177, 82-1 BCA ¶15,744 at 77,927. None of these elements has been demonstrated here.

From the circumstances surrounding its negotiation we conclude that modification P00025 was neither unfair nor unfavorable to Freedom. Freedom had already defaulted on increments of more than 100,000 MRE-5 cases and was barely on schedule for the unterminated quantities, for the completion of which it was projecting a more than $3 million loss. There is little credible evidence showing that Freedom's earlier default had been excusable or that any part of its putative $3.4 million claim had merit. Among other things, modification P00025 reinstated the previously terminated 114,758 cases, restored to the contract price more than $3 million (including the $200,000 consideration given for previous time extensions), and extended the delivery schedule for the unterminated MRE-5 cases as well as for the cases reinstated in the MRE-6 configuration. These terms do not strike us as unconscionable or the result of overreaching. Finally, the express terms of the release at the conclusion of modification P00025 should negate any claimed mistake by either party concerning the viability of any outside agreements and also militate against the Government having reason to know of such a mistake being harbored by Freedom. (Findings 43-46, 48, 52, 53)

After modification P00025 appellant's productivity improved. However, slippages persisted, caused mainly by GFM shortages. In August 1986 the parties agreed to modification P00028, which extended the overall delivery schedule and increased the progress payment ceiling. (Findings 59, 60) Appellant challenges the enforceability of modification P00028, contending that this instrument "illegally tied progress payments to deliveries." (App. br. at 161-62) This contention is inaccurate and lacks merit.

The Progress Payment clause in this contract bases such payments on costs, not on a percentage of completion. However, SP L-4 in the MRE-5 RFP, to which Freedom and two other planned producers responded without objection, imposed "a total progress payment ceiling for the entire contract ... [of] $9,000,000 or 50% of the contract value whichever is lesser." Prior to award Freedom was pleased to negotiate an incremental increase in the progress payment ceiling up to $13 million after delivery of the first 200,000 cases. The scheme of progress payments based on costs incurred was never changed. All bilateral modification P00028 did was further increase the progress payment ceiling to $15.8 million, based on completion of successive 80,000 case increments, with proportionate adjustments for partial deliveries. (Findings 9, 10, 23, 26, 62)

After modification P00028, Freedom continued to experience delivery shortfalls, caused in large part by GFM outages. To extend the delivery schedule, on 7 October 1986 the parties entered into bilateral modification P00029 with the understanding that a $721,887 progress payment would be made to Freedom upon execution of the instrument. The payment check was issued on 9 October. Appellant challenges the enforceability of the broad release in this instrument on the grounds of duress, contending that collusion between the ACO and PCO caused the ACO to illegally withhold payment of PPR No. 21, to Freedom's prejudice, until after modification P00029 was executed. (App. br. at 153-54) We are not persuaded that Freedom was coerced into signing modification P00029 or that Mr. Thomas signed the instrument under duress. (Findings 63, 64, 67, 69-71)

Around the time the parties executed modification P00029, Freedom had shipped nearly 482,000 MRE-5 cases and had been paid a total of $15,876,512: $14,894,725 as progress payments through PPR No.21; the balance as payments against invoices, liquidated at 95 percent. Approximately 15 invoices submitted before 6 October 1986 for accepted MRE-5 cases remained unpaid. (Findings 69, 75) Although modification P00029 did not discharge the Government's duty to pay the invoices, the parties' mutual agreement to the new delivery schedule therein eliminated nonpayment of those invoices from consideration as an excusable cause of any later delay. *Orion Electronic Corp.*, ASBCA No. 18918, 80-1 BCA ¶14,219 at 70,010 and cases cited therein; *accord Charles H. Siever Co.*, ASBCA Nos. 24814, 25730, 25855, 83-1 BCA ¶16,242; *Integral Corp.*, ASBCA No. 25188, 81-1 BCA ¶15,061.

Although Freedom never received any further payments, it completed production of the entire 505,546 case MRE-5 portion of the contract by late October 1986. However, its ability to assemble the remaining MRE-6 cases was impaired by persistent shortages of GFM components, about which it gave the Government timely notification. Lack of GFM entree components caused Freedom to shut down assembly production of MRE-6 cases on 22 October 1986. (Findings 72-74, 76)

The record indicates that Freedom's scheduled delivery of 114,758 assembled MRE-6 cases by 5 December 1986 had never been an urgent Government requirement. DPSC had never purchased enough MRE-6 configured components to permit assembly of that entire quantity, and by autumn 1986 DPSC was preparing to award its MRE-7 requirements. Nevertheless, to encourage Freedom to resume assembly of MREs, DPSC furnished approximately 15,000 bags of beef slices and authorized substitution of from 15,000 to 30,000 boxes of certain GFM meat entrees. However, the total quantities of GFM components furnished to Freedom, including the authorized substitutions, were insufficient to complete assembly of all the cases required to be delivered by 15 November 1986. (Findings 76, 78)

Freedom resumed assembling MRE-6 cases in early November, but discontinued full case production on 7 November 1986. A total of 6,916 MRE-6 cases was completed. At the time Freedom stopped production, its PPR No. 22 (submitted 20 October 1986) and more than 25 invoices remained unpaid. (Findings 73, 75, 79)

The standard Payment clause in this supply contract required the contractor to "be paid, upon the submission of proper invoices, ... the prices stipulated herein for supplies delivered and accepted ..." and defined the Government's fundamental obligation as the buyer thereunder. The duty to make payments under this clause is not discretionary. Nevertheless, due to lack of proof, we can only speculate as to whether the uncured nonpayment of any of these invoices was material, so as to discharge Freedom's duty to continue performance. *See Consumers Oil Co.*, ASBCA No. 24172, 86-1 BCA ¶ 18,647.

Similarly, abuse of the discretion entrusted to the ACO with respect to progress payments might constitute a material breach, discharging a contractor's duty to continue performance. At all relevant times the ACO was aware of Freedom's strained financial condition and its anticipated multi-million dollar loss on the contract. On the other hand, he knew that the solution to Freedom's main performance problem with CFM inventories, paying vendors in advance of delivery, depended on funding from its lender, Bankers Leasing, which depended in turn on timely approval of progress payment requests and timely payment of invoices. The ACO had also been reminded of his failure to pay outstanding invoices and he was aware that $327,893 was admittedly payable toward PPR No. 22. (Findings 36, 75, 80) How effectively the ACO struck that "delicate balance" between the

> need to ... minimize the flow of money into a questionable situation, and the obligation not to contribute to the contractor's financial collapse, which would result in nondelivery

(finding 11) by not making a payment toward PPR No. 22 is a close question, the answer to which is not essential to the disposition of this appeal.

For purposes of our decision, we assume that Freedom's duty to continue performance had not been discharged by the Government's uncured failures to make payments and that, despite the unavailability of sufficient GFM, Freedom's failure to meet the 15 November 1986 delivery schedule was inexcusable. Over the importunings of the ACO, the Government elected to forbear from terminating Freedom's contract for default. In reliance on the Government's forbearance through early 1987, Freedom attempted to continue performance with its reduced workforce, despite lack of sufficient GFM and its strained financial condition, contributed to by unpaid invoices. During this time Freedom also proposed several revised delivery schedules. (Findings 83, 85) Accordingly, the November and December delivery schedules set by modification P00029 were disestablished. *See DeVito v. United States* [13 CCF ¶ 82,319], 413 F.2d 1147 (Ct. Cl. 1969)

Through March 1987 Freedom was prepared to resume production of the remaining MRE-6 cases upon receipt of needed GFM and moneys (including its share of inexplicably unpaid invoices) undisputably owing to it. However, the Government never furnished additional GFM components to Freedom. Aware that Freedom would not be a contractor for the MRE-7 requirement and that the delivery dates under the instant contract had been "waived," the Government apparently wished to sever its relations with Freedom through a "No Cost" termination for convenience. (Findings 85-87)

When Freedom declined the PCO's 3 March 1987 invitation to request "a no cost termination," the Government sought some other basis for bringing the contract to an end. Before Freedom's eviction, Government personnel entered the premises and started removing property to which the Government could claim title. Soon thereafter, the PCO issued a unilateral modification purporting to establish a revised delivery schedule. The PCO then issued a notice, giving Freedom 10 days to cure its failure to comply with contractual provisions concerning inventory control and care of Government property. (Findings 88-91)

On 22 June 1987, more than a month before the earliest delivery date set by the PCO's unilateral modification, the Government terminated the 107,842 undelivered MRE cases for default. The termination was effected pursuant to subparagraph (a)(ii) of the Default clause because of Freedom's alleged "failure to perform [its] inventory control requirements and to make progress towards completing [its] contract in accordance with the delivery schedule." (Finding 92)

Subparagraph (a)(ii) of the SF-32 Default clause permits the Government to terminate for default the whole or any part of a supply contract

> [i]f the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days ... after receipt of notice from the Contracting Officer specifying such failure.

However, the Government's right to terminate for a contractor's "fail[ure] to make progress" requires the existence of a valid delivery schedule against which the contractor's progress can properly be measured. *Lanzen Fabricating, Inc.*, ASBCA No. 40328, 93-3 BCA ¶ 26,079 at 129,609; *Motorola Computer Systems, Inc.*, ASBCA No. 26794, 87-3 BCA ¶ 20,032 at 101,416; *see Electronics of Austin*, ASBCA No. 24912, 86-3 BCA ¶ 19,307 at 97,631.

Since the delivery dates set by modification P00029 had been disestablished, the existence of a valid new delivery schedule would require either mutual agreement thereto or the setting by the contracting officer of a specific new time for performance that was reasonable from the standpoint of the contractor and its capabilities at the time the new schedule was set. *See International Tel. & Tel. Corp. v. United States* [20 CCF ¶ 83,645], 509 F.2d 541 (Ct. Cl. 1975); *DeVito v. United States*, 413 F.2d at 1154. In this case, no mutual agreement was ever reached on new delivery dates. Moreover, the Government has failed to satisfy its burden of proving that the new delivery schedule set by unilateral modification P00030 on 23 April 1987 was reasonable from the standpoint of the contractor and its capabilities at that time. Instead, the Government's acts and omissions concerning its duty to provide needed GFM—*e.g.*, its having neglected to purchase sufficient quantities of MRE-6 configured components to permit assembly of the complete undelivered balance of MRE cases and its removal of GFM from appellant's plant before issuing modification P00030—suggest the opposite. (Findings 76, 85-86, 88) Accordingly, we conclude that no valid, enforceable delivery schedule existed at the time of the termination and hold that the Government could not properly have terminated the contract for "fail[ure] to make progress."

Finally, it is clear from the record that Freedom's alleged failure to perform inventory control and property management requirements imposed by the Government Property clause and other related provisions of the contract was excused by the Government's interference. Among other things, the Government Property clause imposes on the contractor the risk of any loss of or damage to Government property and accords the Government access, at reasonable times, to premises where Government property is located "for the purpose of inspecting Government property." However, nothing in this clause, nor in DAR Appendix B, *Government Property in Possession of Contractors*, incorporated in and made part of the contract, authorizes the Government to remove Government property from the contractor's premises while the contract is still in effect.

By instructing or permitting its personnel to enter Freedom's premises and begin removing GFM and other Government property in late March 1987, the Government made it impossible for Freedom to perform its property management responsibilities under the Government Property clause and related provisions. In effect, the Government breached its implied duty not to interfere with or hinder the contractor's performance. *See Malone v. United States*, 849 F.2d at 1445 (and cases cited). Having interfered with Freedom's ability to control Government property on its premises, the

Government could not properly invoke such inability as a basis for a default termination.

We hold that the default termination of Freedom's contract was improper. Since the contract contained "a clause providing for termination for convenience of the Government," paragraph (e) of the Default clause provides that "the rights and obligations of the parties shall ... be the same as if the notice of termination had been issued pursuant to such [termination for convenience] clause.

The appeal is sustained and the termination for default is converted to one for convenience of the Government.

[¶ 28,329] **Materials Science Corp.**

ASBCA No. 47067, May 7, 1996. Contract Nos. DAAL04-87-C-0064, DAAL04-89-C-0023, N6226904-90-C-0280, F49620-92-C-0024, N00167-93-C-0022.

Cost Principles—Interdivisional Transfers—Competition.—A contractor's time/use cost for automatic data processing equipment was limited to the equipment provider's cost of ownership of the equipment because the provider shared ownership with the contractor. The cost did not fall within the exception for items acquired after obtaining quotes from outside sources, because there was no proof that such quotes had been obtained. FAR 31.205-26(e) excepts from the requirement that items transferred between commonly owned entities be at cost those transfers in which prices are based upon catalog or market prices and those that are based upon adequate price competition. The contractor did not qualify for either exception, because its prices were not based on established catalog or market prices and there was no evidence that the contractor obtained quotations on an equal basis from outside sources.

Cost Principles—Disallowance—Estoppel.—The government was not estopped to deny the allowability of time/use costs charged to a contractor by a supplier owned by the same person, by reason of its prior approval of such charges, because at the time the government approved those costs it did not know that the contractor and the supplier were commonly owned. After the government discovered the identity of ownership, it suspended payment of the costs.

Cost Types—Rental Costs—Nature of Agreement.—The costs of ADPE obtained by a contractor on a time/use basis were not subject to the provisions of FAR 31.205-2 governing leases, because the agreement between the contractor and the supplier conveyed no legal right to use the ADPE on a time/use basis. The government limited the contractor's costs to the provider's cost of ownership of the equipment on the basis of its determination that the charges were rental costs from an entity under common control. This equipment was not subject to a written lease agreement conveying a legal right to use the equipment on a time/use basis. Furthermore, the government's acceptance of the time/use charges as direct costs for 10 years, while leased equipment of the same sort was treated as indirect costs, was inconsistent with its argument that those charges were lease charges.

For the appellant: Robert G. Fryling, Blank, Rome, Comisky & McCauley, Philadelphia, Pennsylvania. For the government: Jerome C. Brennan, Associate District Counsel, and Charles W. Goeke, Trial Attorney, Defense Contract Management Area Operations (DLA), Philadelphia, Pennsylvania.

Before FREEMAN, SPECTOR, and STEMPLER, Administrative Judges.

FREEMAN, Administrative Judge: Materials Science Corp. (MSC) appeals a decision that the allowable cost of using automatic data processing equipment (ADPE) owned by its president is limited to the president's cost of ownership. We deny the appeal.

FACTS

1. MSC is an engineering research firm which has performed cost reimbursement contracts for the Government from 1970 to the present. Dr. B. Walter Rosen is MSC's president and owns 94 percent of the stock (Gov't R4, tab 13; exh. A-1; tr. 1/20-23, 85)