Freedom N.Y., Inc.

July 11, 2001

Mr. Edward S. Adamkewicz
Recorder
Armed Services Board of Contract Appeals
Skyline Six
5109 Leesburg Pike
Falls Church, VA 22041-3208

RE: APPELLANT'S Reply Brief
ASBCA No. 43965
Appeal of Freedom NY, Inc.
Under Contract No. DLA13H-85-C-0591

Mr. Adamkewicz:

The Government's brief, dated June 11, 2001, comprises a vicious personal **attack** on my honesty and integrity. In both the proposed findings of fact and the argument, Government counsel, Ms. Hallem, alleges that I committed fraud and perjury. This is untrue and I am outraged by the allegations. I simply cannot allow Ms. Hallam's attack to go unchallenged and I cannot and will not allow the Government's tortured and false proposed findings of fact to stand unrebutted.

Accordingly and in good faith, I urge the Board to accept the attached reply brief which has been submitted within the time allotted by the original briefing schedule. ***Tr. pp 2151 & 2152***.

Sincerely,

Freedom N.Y., Inc.

Henry Thomas
President

cc: Counsel
Defense Supply Center, Philadelphia
700 Robbins Avenue
Philadelphia, PA 19111
Att'n: Kathleem D. Hallem, Esq. (DSCP-G)

Freedom N.Y., Inc.

420 East

Martin Luther King Blvd.

Suite 100

Mt. Vernon, New York 10550

914 235 4811 Tel.

914 235 4811 Fax

SinBad99 @ AOL .COM

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

APPEAL OF:	)	
	)	**ASBCA NO. 43965**
FREEDOM, N.Y., INC.	)	
CONTRACT NO. DLA13H-85-C-0591	)	

APPELLANT'S REPLY BRIEF

1. INTRODUCTION

At the close of the hearing in this matter, the Board set forth a briefing schedule. Tr. pp 2151 & 2152. That schedule provided for the appellant to submit a reply brief 30 days after receiving the government's brief. The Government's brief was received by appellant on June 12, 2001. Accordingly, this brief is due by July 12, 2001.

Appellant is aware that the Board may not consider this brief essential to its decision. The government, however, through its defamatory allegations of fraud and misconduct, has chosen to slander and perpetuate Henry Thomas as a cheating black, wheeler-dealer liar. This incredibly biased and racial profiling approach of Mr.. Thomas caused the destruction of appellants business more than a decade ago. Appellant cannot in good conscience, with its long battle now in the final stages, allow those allegations to go unchallenged. For that reason, appellant respectfully requests that the Board accept, review and utilize this reply brief in reaching its decision.

2. APPELLANT'S COMMENTS ON THE GOVERNMENT'S PROPOSED FINDINGS OF FACT

PFF 1. No comment with the exception that Appellant objects to any citation to the "joint stipulation" as a joint stipulation was never executed. This objection is continuing throughout this reply brief.

PFF 2. Appellant objects to PFF 2 in that it misleads the Board by citing only to the provisions of the standard DD 1519. This form, used for all Industrial Planned Production, makes no distinctions between warm and cold based planned producers. Neither does it take into consideration the fact that there was no commercial market for MRE's or commercial MRE producers, i.e., **that MRE assemblers must totally rely on military sales**. R4 tab FT 393, p. 18, Bates 02654, 3rd para. To make a fair determination as to the existence of an implied-in-fact contract, i.e., the implied agreement that the designated planned producer would expend the capital to develop a continuing warm production base for MRE in return for the Government's agreement to provide yearly contracts so as to maintain that capability, the Board must consider Appellant's proposed findings of fact 360 through 408, none of which have been challenged by the Government.

PFF 2 is also misleading in that it fails to inform the Board that the Government has, in effect, fully documented the implied-in-fact contract relationship in its "Industrial Assessment for the Meal, Ready-to-Eat (MRE)." Thus in that assessment, prepared in December 1995 under the direction of the Deputy Assistant Secretary of Defense for Industrial Affairs: the Government readily admits:

1. That there is virtually no commercial market for MRE's (Id., p. x, Bates 02632, 3rd full para) so that "MRE assembly firms **are totally reliant on military sales**," that is to say they would go out of business but for MREs. Id. p. 18, 3rd. Para, emphasis added, Cf. App. PFFs 368 & 369;

2. That, as of December 1995, the exact same three assembly producers, including Cinpac, the assembler that DPSC used illegally, i.e., in violation of Walsh-Healey, to

replace Appellant, were still the only MRE assemblers and were regularly receiving the promised contracts. Id., p. 26, Bates 02662, table 3-1; and

3. That there was clearly a promise for promise, that is, "in return for contractor commitments to maintain production capability, DPSC restricts peacetime contracts for MRE, retort items and assembly to planned producers." Id., p. 27, Bates 02663, first para.

It should be clearly noted that the above quote does not even attempt the fiction that the promise was only to negotiate with, but not necessarily to award to, all assembly planned producers. This is fully consistent with the Government's admission that failure to make an award to an assembler would put one of the essential planned producers, because of the lack of commercial back-up, out of business, The recognized need was, and is, to keep them all in business. The promise, if they made the investment, was likewise.

The Government can squirm and squeal as much as it wants to avoid that commitment but the truth is that such was the implied-in-fact deal and the Industrial Assessment admits the same.

PFF 3. No comment.

PFF 4. No comment.

PFF 5. No comment.

PFF 6. No comment.

PFF 7. No comment.

PFF 8. Appellant objects to PFF 8 on the basis that the quotation of Solicitation 8257, clause L-4, is incomplete. Aside from the failure to include the first sentence concerning first article approval, the quotation also deletes language specifically covering Appellant's rights to a progress payment ceiling increase, to wit, the following two sentences precede the last sentence of the clause as follows:

> Increases to this ceiling must be accompanied by a cash flow analysis detailing impact over and above that on profit, as noted previously. Requests for increases for long lead time materials must also be accompanied by a similar cash flow statement.

R4, tab 2. P. 66, Clause L-4. In addition, the Government's cite to Clause L-4 is incorrect.

PFF 9. No comment.

PFF 10. Appellant objects to PFF 10 on the basis that the statement to the effect that any Dollar Dry Dock's ("DDD") commitment letter was meaningless is a self-serving statement of the Government's opinion, not fact, and is not supported in the record.

PFF 11. Appellant object to PFF 11 on the basis that the Government's citation to R4, tab 9, p.2 has no relation or relevance to the facts alleged.

PFF 12. Appellant objects to PFF 12 on the basis that the allegation that "FI could not perform the contract without a tremendous infusion of equity and/or debt financing" is a statement of Government opinion and not fact and ignores the Government's obligation, and breach thereof, to provide progress payments. Further, PFF 12 ignores Mr.. Thomas' (Tr. 361), Mr.. Fishbane's (Tr 988 & 989), and Mr.. Marra's testimony (Tr 146&147) re the rather modest cash requirement the contract actually imposed on Appellant.

PFF 13. Appellant objects to PFF 13 in that it clearly mischaracterizes the record. Mr.. Ford testifies that his concern with DDD's August 10, 1984 letter (R4, tab 6) was the reference to an award of a $21 million contract. Tr. 1161, lns 20-24. The record establishes that both DDD's letters, i.e., August 10th (Id.) and August 9, 1984 (R4, tab 5) contained the identical $21 million qualification. R4, tab 5. Further, PFF 13 fails to consider the following PCO Barkewitz statement concerning DDD's commitment letter:

> I did not consider the letter to be acceptable. I told Marvin Liebman, who is currently the ACO on Freedom Foods at

> DCASMA NY, that I didn't think the letter was acceptable and he agreed, but later **the letter was considered acceptable by the financial services personnel at DCASR NY when they did the preaward survey.**

R4, tab G 71, p. 2, emphasis added.

PFF 14. No comment.

PFF 15. Appellant objects to PFF 15 in that it mischaracterizes the record. The April 4, 1984 "Agreement and Conditional Assignment" between FI and H.T. Foods expresses concern with financing from DDD only up to the point of an MRE 5 contract award. R4, tab G-5, p.2, second WHEREAS. PFF 15 fails to indicate that DDD's commitment, whether in its August 9th or August 10th letters, is based on the award of the MRE 5 contract, i.e., a new circumstance affording Appellant a reasonable belief that DDD financing would be available.

PFF 16. No comment with the exception that the cite on p. 8 should be R4, tab 9, p.3, para C.

PFF 17. Appellant objects to PFF 17 in that to the extent that such PFF is based on R4, tab G 71, the alleged material attributable to PCO Barkewitz is hearsay, i.e., the document was prepared and signed by Colonel Holland and not by PCO Barkewitz, and as far as it alleges statements attributable to Mr.. Thomas it amounts to hearsay on hearsay. Further, Appellant objects to PFF 17 in that it mischaracterizes the record, i.e., while Mr.. Barkewitz allegedly stated the Government would not finance 100% of the contract, hardly surprising in light of contractually required withholding under the progress payments clause, the document, in the same paragraph also contains the following representations:

> . . . several times during the negotiations, we expressed to Mr.. Thomas **that we at DPSC could help him set up as we had done before with Southern and Right Away Foods**, but we would not be able to finance a (sic) 100% of the contract.

R4, tab G 17, p. 3, emphasis added. And again:

> In the first year if production on MREs, both Southern, APF, and Right Away were given considerable consideration.

Id. at p. 4.

PFF 18. Appellant objects to PFF 18 in that it mischaracterizes the record. The record does not support the alleged fact that "there was no agreement that the cost of this equipment could be recovered through progress payments." On the contrary, since the cost of the equipment admittedly was to be allowed as incurred totally under the MRE 5 contract, the record establishes that the parties considered it obvious, without any need for discussion, that such allowable, incurred costs would be included in progress payments. Thus, Government price analyst Ford testified:

> A. As part of the discussions, we allowed costs under the contract and actually increased the Government position for those four particular cost elements, yes.
>
> Q. With regard to your discussions or your negotiations for these particular elements, like quality control equipment, for instance, was there any follow up discussions on whether the contractor could have or not received progress payments for those items that were expensed under the contract as capital items?
>
> A. Not that I recall, no, not that I recall.

Tr 1160; and PCO Bankoff testified:

> Q. Did you talk to anyone involved in the negotiations to find out whether it was their intention that those monies be paid through progress payments?
>
> A. I spoke to Barkewitz.
>
> Q. What did he say?

A. Barkewitz said they never discussed progress payments. They discussed reaching a negotiated price. He was concerned with awarding the contract and they talked about -- they allowed it to be expensed for the contract but they never talked about progress payments.

Q. So when you were saying that you wanted them paid or you would have thought they should have been paid, that was your personal opinion?

A. It was my opinion, yes.

Q. Did you talk to legal or any other people? You had indicated that everybody else in the government didn't feel the way you did?

A. No. I think Chuck Wright, my counsel, you know, agreed with my position. I know Peggy Rowles, my boss, agreed with my position. I think most of the people at DPSC felt that they should be allowed for progress payments.

Tr 1480 & 1481.

PFF 19. Appellant object to PFF 19 in that the document citations do not support and are not relevant to the factual allegation that "(d)uring the negotiations, there was no agreement that the Government would apply an 82.6% liquidation rate, i.e., R4, tab 12 consists of two documents dated subsequent to the negotiations, neither of which address any specific liquidation rate for MRE 5; F-6, p. 1 is the executed DD 1519. Appellant further objects to PFF 19 in that it mischaracterizes and fails to include relevant testimony. In that regard, Mr.. Ford, in the cited testimony, freely admitted that the ACO did not take part in contract negotiations (Tr 1157) and the testimony of Mr.. Marra, who prepared the proposal spreadsheets and was present at the negotiations, is not referenced. Mr.. Marra testified that the spreadsheets (R4 tab FT-060) were part of the proposal (Tr 119-121); that they included an 82.6% liquidation rate (Tr 127,128, 135;

R4, tab FT 060a, Bates 00823; Cf. App. unchallenged PFFs 51-64); and that he believed they were incorporated in the contract. Tr 194 & 195.

PFF 20. Appellant objects to PFF 20 in that PFF 20 mischaracterizes the record. The Government's Price Negotiation Memorandum" (R4, tab 9) clearly states with respect to negotiations that: "(d)uring those discussions, the areas of the Freedom proposal **where there was a significant difference between the Government position and Freedom's position** were discussed." Id., p. 1, emphasis added. Such discussions took place both on October 30, 1984 and November 6, 1984. R4, tab G 71, p.3. In fact, on November 6th, progress payments were discussed. Id., p. 1. The Government admits that, the negotiations over differences notwithstanding, the Government never brought up the 82.6% liquidation rate that was included in Freedom's proposal. Government PFFs 19 & 20. The record therefore supports the conclusion that there was agreement on the proposed 82.6% liquidation rate.

PFF 21. Appellant objects to PFF 21 in that such PFF attempts to mislead the Board. PFF 21 fails to take into account the following facts:

1. Appellant was found responsible upon pre-award survey although the Government knew of and considered the conditional nature, i.e., that the award be in the amount of $21.6 million, of the DDD commitment letter. R4 tab G 71, p. 2; R4 tab FT 050.

2. The Government knowingly made an award that violated the condition of the DDD commitment letter. R4 tab 10.

3. The DAR did not require a potential contractor to have financing in place in order to be found responsible. All the DAR requires is the "ability to obtain" such financing. App. unchallenged PFF 47; and

4. ACO Liebman, in violation of his duty of cooperation, consistently interfered with Appellant's efforts, eventually successful, to secure financing. App. unchallenged PFFs 128-148.

PFF 22. Appellant objects to PFF 22 in that it mischaracterizes the record. The record demonstrates that the Government, including ACO Liebman, knew of Appellant's financial circumstances as of the award. App. unchallenged PFFs 116-125.

PFF 23. No comment except that R4 tab 2 is Appellant's April 11, 1984 proposal which incorporates RFP 8257 and the correct page number is RFP 8257, pp. 59&60.

PFF 24. Appellant objects to this PFF to the extent that failure to object would imply that the Government was not liable for late or defective GFM in specific instances on account of constructive change, waiver, breach of the duty of cooperation or other legal theory imposing liability. Cf. App. unchallenged PFF 208. The correct citation page number is RFP 8257, p. 63.

PFF 25. Appellant objects on the same basis as its objection taken to PFF 24. Page citations should be to the RFP and not to tab 2.

PFF 26. Appellant objects on the same basis as its objection taken to PFF 24

PFF 27. Appellant object to PFF 27 on the basis that it misstates the record. Section H, para. k of RFP 8257 does not require Appellant to store and safeguard all property. The requirement is to be ready and able to receive, by October 15, 1984, a certain percentage of GFM to be delivered. Further, PFF 27 does not reflect the Government's breach of its duty of cooperation, particularly with respect to honoring the advance agreement on costs or the duty to make progress payments, as it affected Appellant's ability to comply with any provision of the contract.

PFF 28. Appellant objects to PFF 28 on the basis that it misstates the record and is misleading. PFF 28 does not reflect the fact that Appellant's proposal incorporated an 82.6%

liquidation rate which was not objected to by the Government and was incorporated into the contract by operation of box 18 of the contract award sheet. R4, tab 10, p. 1. Further, Appellant objects to PFF 28 in that it is misleading because it does not reflect DAR E-210 which reads in part:

> A contractor deemed reliable, competent, capable and otherwise responsible, must not be regarded as any less responsible by reason of the need for reasonable contract financing provided or guaranteed by a Department.

PFF 29. Appellant objects to PFF 29 in that the characterization of Clause L-4 as "standard for ration contracts" misstates the record. The record reflects that the clause was not universally used for ration contracts, was in violation of the DAR, was breached by PCO Bankoff when he refused to increase the ceiling in the face of contractor established need and that its genesis was unknown and suspect even by PCO Bankoff. App. unchallenged PFFs 286-290.

PFF 30. Appellant objects to PFF 30 in that to the extent it implies that the Government had no obligation to carry out Government inspections in an efficient and timely manner, without interfering with Appellant's performance under the contract, it fails to reflect the Government's duty of cooperation and obligation not to interfere.

PFF 31. Appellant objects to PFF 31 on the same basis as its objection to PFF 30. Further, PFF 31 misstates the record in that it fails to reflect Mr.. Cabes testimony that the CIS was developed "with the blessing of Col.. LaFontaine and all of the AVIs" (Tr. 2130), a factual circumstance that is clearly relevant to the issue of breach of the Government's twin duties of cooperation.

PFF 32. No comment except that page citations are to RFP 8257 numbering.

PFF 33. Appellant objects to PFF 33 in that such PFF is primarily based on alleged lease excerpts included as part of several separate documents found under R4, tab G 18. These excerpts comprise only 6 pages of an approximately 50 page lease document (R4 tab FT 052) and, therefore, cannot fairly be relied on to reflect the understanding of the parties.

PFF 34. Appellant objects to PFF 34 in that it fails to reflect that the lease, in Schedule B as amended, provides for H.T. Foods to be obligated to pay rent starting on November 14, 1985.

PFF 35. Appellant objects to PFF 35 in that it fails to indicate that Penco continued to consider that rent and real estate taxes, at the amount established in Schedule B of the September 12, 1984 lease, was still due and owing if Freedom Industries, sublessee to H.T. Foods, was to remain in the premises under the terms of the lease. In that regard, Penco's letter of November 28, 1984 (R4, tab G 12) attached an invoice for the November rent, real estate taxes, insurance escrow and a security deposit. R4, tab FT 422, Bates 02891.

Appellant further objects to PFF 35 in that it fails to indicate that the MRE 5 contract, which had been negotiated in the context of the September 12, 1984 lease, had been awarded on November 15, 1984 (R4 tab 10) so that it was essential that H.T. Foods/Freedom Industries reestablish the lease at the original terms.

Finally, Appellant objects to PFF 35 in that it misleads the Board by the inference that Freedom Industries was not occupying the building when in fact Freedom Industries was occupying the premises in November 1984 and had commenced performance.

PFF 36. Appellant objects to PFF 36 in that it misstates the citations to Mr.. Thomas' July 11, 1985 affidavit. Appellant further objects in that PFF 36 misleads the Board as Mr.. Thomas never stated in his affidavit that H.T. Foods had no **obligation to pay** the rent and taxes incurred

before the Government commenced progress payments but only that H.T. Foods didn't have **the ability to pay** such rent and taxes prior to the commencement of payment by the Government to Freedom Industries. R4, tab G 18, p. 25, para 21.

PFF 37. Appellant objects to PFF 37 in that it misstates Mr.. Thomas affidavit. Mr.. Thomas, in paragraph 24 on page 26 of R4, tab G 18, does not state, as alleged, that H.T. foods use of the building was limited to 800 sq. ft until a new lease was signed. Mr.. Thomas' states that:

> We would only begin to pay full rent as provided for under the rent schedule attached hereto as Exhibit "C", which was page 45 of the September 12, 1984 Lease, when we actually took over the entire building.

R4 tab G 18, p. 26, para 24.

PFF 38. Appellant objects to PFF 38 in that it misstates Mr.. Thomas' affidavit and misleads the Board. Mr.. Thomas never states in his affidavit that H.T. Foods had an uncontested agreement with Penco that there was no obligation to pay rent and taxes between November 1984 and April 1985. Mr.. Thomas does put forth an arguable position, for the purposes of his litigation with Penco, that H.T. Foods was not obligated to pay. However, Mr.. Thomas makes clear that Penco refused to accept that position and continued to demand payment. Mr.. Thomas states:

> Mr.. Penzer wants rent at approximate rate of $106,000 per month from November 15, 1984 through April 8, 1985.

R4, tab G 18, pp. 27&28, para. 27.

PFF 38 is further misleading in that it fails to reference the invoices for rent and taxes, submitted by Penco, for November and December 1984 and January and February 1985 which, in the absence of a court determination that Mr.. Thomas' position was correct, reflect legitimate

incurred costs and were included with FI progress payment requests and audited by the DCAA. R4, tab FT 422, bates 02981, 02892, 02946 and 02986.

PFF 39. No comment.

PFF 40. Appellant objects to PFF 40 in that it misstates the record and attempts to mislead the Board. PFF 40 ignores the settlement agreement between Penco and H.T. Foods of August 16, 1985 (R4, tab G 22), in the matter that was the subject of Mr.. Thomas' affidavit. R4, tab G 18. By that agreement, the parties agreed that:

1. H.T. Foods had been occupying the premises since November 15, 1984 (Id., p. 1, first "WHEREAS");

2. That as of the settlement agreement, H.T. had paid $395,000 to Penzer for, inter alia, rent and tax escrow, "for the period of time from November 15, 1984 to April 8, 1985" (Id., p. 2, third "WHEREAS");

3. that H.T. Foods owed another $400,000 in rent for the period November 15, 1984 to April, 1985 (Id., p. 2, fourth "WHEREAS"); and

4. That the $400,000 in accrued unpaid rent would be set off against the agreed amount for H.T. Food's relinquishment of the option to purchase the Bronxdale premises. Id., p.8, para 3.

PFF 41. No comment.

PFF 42. Appellant objects to PFF 42 in that it misstates the record and attempts to mislead the Board. Mr. Thomas' July 11, 1984 affidavit (R4, tab G 18, pp, 17-35) does not address in any way, shape or form Southland Corporation's occupancy of the Bronxdale facility. Southland is not mentioned at all. Further, there is nothing in the record to indicate when Southland vacated the premises.

The Government's alleged fact that "Southland did not vacate the premises until April 1985" is a figment of the Government's imagination totally unsupported by the record. **What is far worse is that this transparent Government misstatement amounts to no more than a rehash of the Government's continued fiction that Henry Thomas, the black wheeler-dealer, was intent on defrauding his own government.**

When Mr.. Thomas submitted PP 1 it was supported by an invoice from Penco for the rent and taxes. That invoice was based on Penco's adamant position that the rent and taxes were due and owing. Mr.. Thomas eventually accepted the Penco position and paid the rent and taxes. See App.'s objection to PFFs 33-40 above.

PFF 43. Appellant objects to PFF 43 in that the PFF attempts to mislead the Board. The Government refers the Board to R4, tab 21, subtab b as the Appellant's submission of revised PP 1. That Government introduced document is an incomplete record of the PP submission. The complete submission can be found at R4, tab FT 422, subtab "Freedom PP - #1 (REVISED)." The complete submission not only includes a copy of the Government's policy, dated August 14, 1984, for progress payments to be made within five to ten days (Id., Bates 02882-02884), but also includes Penco's invoices for rent and taxes for November (Id., Bates 02891) and December. Id. Bates 02892. The Government's motive again is to unfairly paint Mr.. Thomas as a cheat, as that black wheeler-dealer.

PFF 44. Appellant objects to PFF 44 based on the reasons set forth in Appellant's objections to PFFs 33-40 above.

PFF 45. Appellant objects to PFF 45 in that it is misleading and mischaracterizes the record. PFF 45 fails to reflect that the DCAA had found Appellant's accounting system to be acceptable less than two weeks before ACO Liebman requested a re-audit. Further, that the

DLAM provided that the normal practice was not to audit the first PP when the accounting system had just been found adequate by a pre-award survey. App. unchallenged PFF 91.

Appellant further objects to PFF 45 in that it fails to reflect the record that demonstrates ACO Liebman's calculated use of the financing issue as a means to starve Appellant of working capital. See App. objections to PFFs 12, 13, 15, 21 & 22.

PFF 46. Appellant objects to PFF 46 as it misstates the record and attempts to mislead the Board. **The DDD financing *situation was no surprise to the Government.*** PCO Barkewitz and ACO Liebman discussed the DDD commitment letter prior to the award of the contract. To the extent that the hearsay rendition of this discussion has any credibility, Col. Holland reported the following as a response from PCO Barkewitz:

> I did not consider the letter to be acceptable. I told Marvin Liebman, who is currently the ACO on Freedom Foods at DCASMA NY, that I didn't think the letter was acceptable and he agreed, but later the letter was considered acceptable by the financial services personnel at DCASR NY when they did the preaward survey. My concern was that the letter was qualified. It presupposed that the contract would be awarded at a certain dollar value and that the line of credit was tied to the amount of the contract. It was my concern that if we negotiated a lesser price for the contract, that this would cause Dollar Drydock to drop their commitment.

R4, tab G 17, p. 2.

PFF 47. Appellant objects to PFF 47 in that it is misleading and fails to fully reflect the record. PFF 47 unfairly fails to reflect that Appellant's efforts, as recited in PFF 47, were necessitated by the Government's breach of its duty to provide progress payments and its interference with potential sources of financing. In that regard it:

1. Fails to indicate that the "Agreement and Conditional Assignment" of April 4, 1984 were intended to move Appellant's proposal process to the contract stage were it had every

reason to believe it would be able to receive progress payments. R4, tab G 5, p. 2, fourth "WHEREAS;" and

2. Fails to indicate that efforts reflected in R4, tabs 23, 24 and 25 were in the time frame, i.e., December 1984 and January 1985, when the Government, in breach of its obligation to pay progress payments as well as its duty not to interfere with Appellant's potential sources of financing, was attempting to starve Appellant of working capital. App. unchallenged PFFs 86-156.

PFF 48. Appellant objects to PFF 48 in that the supporting citations fail to show any discernible relevance to the alleged fact that the Government's contact with DDD on December 17, 1984 was driven by a fear that Appellant's debtors could drive Appellant out of business. The discrepancies are as follows:

1. R4, tab 72 is a September 1985 document, i.e., well after the fact, and covers cash flow, not indebtedness;

2. Tr. 1500 is ACO Liebman testimony, admitting his unilateral, unannounced contact with DDD, but attributing that contact not to any fear of creditors but to Appellant's information provided on December 14, 1984 that no money was coming from DDD.

Appellant further objects to PFF 48 in that it fails to reflect the fact that ACO Liebman's comments to DDD during the December 17, 1984, which included his unwillingness to pay progress payments because of his failure to recognize the efficacy of the advance agreement, were responsible for the failure of Appellant's relationship with DDD. App. unchallenged fn. 17; Cf. Appellant's objection to PFF 49 below.

PFF 49. Appellant objects to PFF 49 in that it misstates and mischaracterizes the record. R4, tab 14, cited in PFF 49, is a DDD letter of December 27, 1984 to Col.. Hein, a participant in

the December 17, 1984 DDD phone contact. The letter references the contract award price as the principal commitment qualification and points out that such qualification **was in both the August 9th and August 10th version of the commitment letter**. It also refers to Freedom's changed circumstances in the elapsed four months.

Appellant's debtor situation had not changed in the elapsed four months. What had changed was that, although a contract had been awarded, the Government had breached its obligation to provide progress payment financing. PFF 49 fails to reflect that it was the Government's breach that destroyed the DDD relationship.

PFF 50. No comment except that Mr.. Liebman's December 18, 1984 letter proves the Government's knowledge of the existing DDD qualification based on the award price of the contract. R4, tab 12, para I.

PFF 51. Appellant objects to PFF 51 in that the PFF fails to reflect the principal thrust of Appellant's December 6, 1984 response (R4, tab 13) to ACO Liebman's December 18, 1984 letter. R4, tab 12. By its December 6th letter, it was Appellant's position, identical to the same issue now before the Board, that the Government less than a month after the award of the contract, was in material breach of the contract. In that regard Appellant, with amazing prescience, stated:

> Marv, the critical matter to be finalized is the question and verification regarding the commitment and obligation of the Government to pay Freedom (or its assignee) promptly (five to ten days) for properly incurred costs.
>
> On November 6, 1984 the Government and Freedom entered into a memorandum of understanding showing a "breakout of cost elements as determined by the Government negotiating team" and signed by both parties agreeing to these line items. Freedom's cash flow given to you shows the milestones and detailed projected monthly expenditures supporting the categories specified in the

> "Memorandum of Understanding." Freedom hereby agrees to incorporate the cash flow projection milestones into the contract. The working capital cash flow must be followed by both parties on a timely basis in all material respects and in good business judgement.
>
> If the DCAS Paying Office now reneges on this negotiated approved "break-out" than the DCAS Paying Office must be and will be held responsible to the higher contracting authorities of DLA as being the cause of program failure and ultimate default because of cash strangulation. Freedom's integrity with its financial supporters will be destroyed if the DCAS Paying Office does not follow-through on the negotiated 95% terms.
>
> Freedom's performance of the MRE contract is virtually totally (95%) dependent upon the good faith and financial support of the DCAS Paying Office in meeting its obligation to pay Freedom according to the negotiated cash flow (milestones).

R4, tab 13, pp. 3 & 4.

PFF 52. Appellant objects to PFF 52 in that it represents opinion, not fact, and mischaracterizes the record. The only objective interpretation of Appellant's December 26, 1984 response (R4, tab 13) is that if the Government would honor the contract there would be absolutely no financial impediment to performance.[1]

Appellant further objects to PFF 52 as a mischaracterization of the record in that PFF 52 implies that ACO Liebman was "considering. . . suspending progress payments." In fact ACO Liebman already had a de facto suspension of progress payments, in breach of the contract, in place. Although the first progress payment request was submitted on November 16, 1984 (Tr. 369-70, 385), no payments were made for more than five months, i.e., until May 6, 1985. Tr. 1694; R4, tab FT 422. Appellant, allegedly in such bad financial condition as to endanger

[1]It should be noted that the Government's issue of existing creditors is an obvious straw man. Appellant, in its December 26, 1984 response, identified DDD as its principal creditor owed $1.43 million. R4, tab 13, p. 3, para f. DDD fully knew Appellant's financial condition. DDD's best chance to collect its debt was for Appellant to successfully perform its only contract. DDD was not going to force Appellant into bankruptcy as the Government was well aware. It was ACO Liebman who wanted to force Appellant into bankruptcy.

performance, performed for that entire period without a penny of the promised Government financing. App. unchallenged PFFs 87-99.

That the de facto suspension was a breach is evidenced by the eventual reimbursement of virtually all the costs claimed since November, 1984 as of the first progress payment on May 6, 1985. Op. Cit. Of course, by that time the breach had destroyed Appellant's credibility with its original financial supporters and had driven the costs of performance to a suffocating high.

PFF 53. Appellant objects to PFF 53 in that it mischaracterizes the record by failing to properly and fairly categorize the DCAA's primary basis for cost disallowance, i.e., the disallowance of so-called "indirect expense." The "indirect expense" disallowance, maintained by DCAA even after it was abandoned by the ACO, reflected the DCAA's stubborn and continuing refusal to recognize the advance agreement on cost allocations. R4, tab 15, p. 2. note a; App. unchallenged PFFs 100&101.[2]

PFF 54. Appellant objects to PFF 54 in that it fails to reflect the record and attempt to mislead the Board. The record is clear that the DCAA did not have a legitimate basis for its disallowance and that ACO Liebman knew that to be the case. In that regard:

1. PFF 54 fails to cite to DAR E-509.5, entitled "Incurred Costs," which provides that a small business, like Appellant, need not have actually paid a cost for that cost to be allowed for reimbursement through progress payment. E-509.5(d), Cf. App. unchallenged PFF 109;

2. That ACO Liebman knew the DCAA's position on "indirect expenses" was wrong. App. unchallenged PFF 101; and

[2]The audit report reflects that Penco invoices were submitted and that the DCAA was fully familiar with the lease arrangements. R4, tab 15, p. 3, note c. Surely, had Southland still occupied the building, the DCAA would have brought that to the world's attention.

3. That the costs in fact had been booked but that DCAA had simply failed to ask to review the books during the audit. Id.

PFF 55. Appellant objects to PFF 55 on the basis that it mischaracterizes the record. The record proves that Appellant maintained the proper books but that DCAA neglected to ask for them during audit. Further, that once the issue was raised, the books were quickly provided and DCAA admitted that the costs were recorded on the books. Id.

Appellant further objects to PFF 55 in that it fails to reflect that two weeks prior to contract award, the DCAA had found Appellant's accounting system to be acceptable and that ACO Liebman testified to that fact. Tr. 1626 & 1627; Cf. App. unchallenged PFF 91.[3]

PFF 56. Appellant objects to PFF 56 in that such PFF mischaracterizes the record and attempts to mislead the Board. The DCAA follow-up report of January 14, 1985 (R4, tab 21), which admits the costs previously disallowed were in fact booked (Id., p. 2), does not disallow costs based on any alleged problem with the accounting system. Instead, DCAA adamantly refuses to perform any audit based on its stubborn adherence to its "indirect expense" position. Thus, incredibly, the report states:

> The contractor has not started production and therefore does not qualify for progress payments. **We cannot perform any progress payment audits until such time as the contractor starts production and qualifies for progress payments.**

Id., p. 2, emphasis added.

PFF 57. Appellant objects to PFF 57 on the basis that it is knowingly inaccurate, inflammatory and, since Government counsel is fully familiar with the Penco invoices, the nature

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[3]Appellant's post-hearing brief contains a citation error re the subject audit report. The Appellant's accounting system is covered at page 15, not page 16, of R4, tab 11 and ACO Liebman's description of that entry is found at Tr. 1626&1627.

of the dispute between Penco and Appellant, and the settlement of that dispute (see PFF 112 below), it is the opinion of Appellant that such PFF is derived from the same racial profiling that apparently drove ACO Liebman's attack on the black "wheeler-dealer" Thomas. App. comments on PFFs 33 through 40 above.

If Government counsel believes that Appellant has committed fraud or perjury, then Government counsel should have the Justice Department commence an investigation. If that is not to happen, then Government counsel should not make such inflammatory representations, should withdraw the allegations of fraud and **should apologize publicly to Mr. Thomas.**.

PFF 58. Appellant objects to PFF 58 in that the conclusions contained therein are contrary to the record and to common sense.

The evidence is that, but for Mr.. Liebman's refusal to verify that progress payments would be made promptly reflecting the parties negotiated agreements, banks, suppliers and equipment manufacturers would have willingly dealt with Appellant. The Assignment of Claims Act allows the entire proceeds of a Government contract to be assigned to a financial institution, and, most importantly, **protects that assignment and the assignee institution from attack by creditors of the assignor.** This absolutely assures, as it was intended to do, not only reimbursement of the lender but payment of suppliers.

In this case, as cogently described by Appellant in its letters to ACO Liebman of December 6, 1984 (R4, tab 13) and January 18, 1985 (R4, tab 21), the only possible reservation that a potential financial source eligible for such assignment might have is that the Government would refuse to pay the progress payments needed to cover the assignees advances. Accordingly, there was no reason for a financial source to refuse to deal with Appellant other than Mr.. Liebman's refusal to verify to such source that progress payments in accordance with the contract

would be made. For that reason, it is patently unreasonable for PFF 58 to deny, as it does, the accuracy of Appellant's following description:

> The absolute primary concern and stumbling-block is caused by your unilateral failure to address the matter of verification regarding the commitment and obligation of the Government to pay Freedom promptly as discussed in our letter to you dated December 26, 1984 (copy attached). Your failure to make such confirmation obviously has created concern to financial supporters and has absolutely restricted our efforts to conclude financing arrangements with everyone (bankers, suppliers and equipment manufacturers).

Id. P. 3, emphasis in the original.

Finally, it is disingenuous for the Government to point to financing sources that became available to H.T. Foods as support for the Government's self-serving misrepresentations. While ACO Liebman kept in place the illegal de facto suspension of progress payment to Freedom Industries, he was willing to tell potential financiers that progress payments would be released, after a novation, to H.T. Foods. If progress payments were made available, under an assignment, to cover a lenders outlays, then naturally they would loan money.

PFF 59. Appellant objects to PFF 59 in that it misstates the record. There is nothing in the record to show that any financial institution's failure to support Appellant was caused by a factor other than Mr.. Liebman's representations that progress payments would flow only when Appellant incurred "direct costs," i.e., began actual production of MREs. R4, tab 22, p.3; App. unchallenged PFFs 133-138.

With the protection of the Assignment of Claims Act, there could be no reason for a financial institution to deny support other than Liebman's refusal to confirm the Government's obligation to pay. In fact, and specifically contrary to the allegations of PFF 59, Bankers Leasing, by Letter of Commitment" dated February 11, 1985, did agree to provide Freedom Industries

with accounts receivable financing subject to a valid assignment under the Assignment of Claims Act (R4, tab FT 094) as did Performance Financial Services on the same date. R4, tab FT 093.

The change occurred because Liebman, in early February 1985, lost DLA support for his bogus "indirect cost" argument. By February 14, 1985, he was directed to honor the advance agreement on indirect costs. R4, tab FT 338, p. 4. The need to incur "direct costs" is not found in his "conditions" for progress payments provided Appellant on February 15, 1985. R4, tab FT 097.

PFF 60. Appellant objects to PFF 60 in that it misstates the record. While Mr.. Thomas did try to convince DDD that it should honor its commitment letters (R4, tab 27), Appellant could and did receive financial support independent of DDD. As set forth above, it was the Government's breach of contract, not Appellant's indebtedness, that impacted contract financing. Cf. App. unchallenged PFFs 128-148.

PFF 61. No comment

PFF 62. Appellant objects to PFF 62 in that it mischaracterizes the record and attempts to mislead the Board. PFF 62 recites that ACO Liebman, on February 6, 1985, returned progress payments requests 1 & 2 in the total amount of $551,833 and suspended progress payments. PFF 62 justifies this act on a DCASR finding that Appellant was in an unsatisfactory financial position. The record reflects, however, that the unsatisfactory financial position was caused by the Government's breach of its obligation to make progress payments. See above. The record also shows that the statement that progress payments were being suspended was a cruel joke. There were never any progress payments to suspend.[4] Nevertheless, Appellant, without a cent of the promised Government financing, had passed first article approvals. R4, tab 26, p. 3. It is this

[4]Even crueler was ACO Liebman's statement to the effect that "(r)esumption of payment of your progress payment requests will be considered upon substantial evidence that the deficiencies set forth above have been corrected." R4, tab 26, p. 3. What payments were there to resume? None had ever been made.

egregious breach of contract by the Government that endangered and eventually ended, the performance of the contract, not the financial position of Appellant. Further, the record also established that any financing problems were caused by this same breach. See above.

PFF 63. Appellant objects to PFF 63 in that it misstates the record. DAR E-524.2, by its own terms, is inapplicable to the February 6, 1985 suspension. DAR E-524 is premised on the proposition that unliquidated progress payment exist and have created a risk of Government loss. In the instant case, the Government's breach of its obligation meant that absolutely no progress payments had been made. Accordingly there were no unliquidated progress payments.

Further, by any objective standard it was the Government's breach that was endangering performance. By February 6, 1985, that breach had deprived Appellant of more than $500,000 desperately needed to perform the contract. Appellant, however, continued to perform. App. unchallenged PFFs 149-156.[5] Accordingly, neither DAR E-524.2 or 7-104.35(b)(ii) was a legitimate basis for ACO Liebman's act. Payment in accordance with contract terms, not suspension of progress payments, was the cure for the problem.

PFF 64. No comment.

PFF 65. Appellant objects to PFF 65 on the basis that it misstates the record. Mr.. Ruttenberg testified that the Government did not want to do business with Freedom Industries but would do business with H.T. Foods. He admits that he put the title novation on that process and then developed the procedure. He insisted, however, that the concept to move the contract came from the Government. Tr. 2040-2043.

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[5]It should be remembered at all times that the Government's bad faith breach of the MRE 5 contract notwithstanding, Appellant always struggled to perform and successfully delivered more than 500,000 of the original requirement of 620,000 cases.

PFF 66. Appellant objects to PFF 66 on the basis that it mischaracterizes the record and attempts to mislead the Board. Appellant cites to DCAA's "Report on Contractor in Financial Jeopardy," dated February 26, 1985 (R4, tab 35), but fails to inform the Board that such report:

1. Admits that at the time of the award of the MRE 5 contract to Appellant, that the Government had full knowledge of Appellant's financial condition including debts resulting from previous Government contracts. Id., p. 1;

2. Admits that DCASMA-New York knew that the DDD letter of credit was qualified. Id;

3. Admits that Appellant's ability to perform, in the absence of progress payments, was not even considered by the Government in its record of MRE 5 negotiations. Id.

4. Admits that more than 3 months after the award the Government had failed to honor more than $500,000 in progress payment requests Id., p. 2; and

5. Cites justifications for the Government's breach of its progress payment obligation that were unsupportable and eventually rejected with the payment of HT Progress Payment #1 in the amount of $1,706,730.00 on May 6, 1985. Id., pp 2&3; R4, tab 422, subtab HT PP #1.A.

PFF 67. See Appellant's comments on PFF 57 above.

PFF 68. Appellant objects to PFF 68 to the extent that it fails to address the fact that Appellant, as Freedom Industries, received a commitment letter from Bankers Leasing on February 11, 1985 (R4, FT 094) and as H.T. Foods on February 13, 1985 (R4, FT 096), both significantly before DCAA reported "Freedom does not have and is unable to obtain the financing needed to meet the requirements of the subject contract." R4, tab 35, p. 2.

PFF 69. Appellant objects to PFF 69 to the extent that failure to do so might be considered agreement with the PCO's position stated therein. Appellant maintains that the record proves that the delays in question were the direct result of the Government's breach. R4, tab 37.

PFF 70. Appellant objects to PFF 70 in that it mischaracterizes the record. The Government does not "approve" a novation agreement. A novation agreement is a three party agreement and the Government is one of the three parties. R4, tab F-64, p. 1, first para. There was no novation agreement in effect until it was executed by the Government on April 17, 1985. Id., p. 3.

PFF 71. Appellant objects to PFF 71 in that it mischaracterizes the record and attempts to mislead the Board as follows:

1. Had the Government not interfered with Appellant's, i.e., Freedom Industries', potential financing sources, Appellant could and would have used the Assignment of Claims Act to protect the performance of the MRE contract. A novation was not necessary. App. unchallenged PFFs 128-156; 166 & 167.

2. It was the Government, not Appellant, that feared Appellant's creditors. App. unchallenged PFFs 171-173.

3. It was the Government, not Appellant, that desired a devise that would transfer the contract to another entity free of those creditors. App. unchallenged PFF 173.

4. Appellant's counsel merely identified the devise, i.e., a novation, and then implemented the process as the only way to mitigate damages resulting from the Government's breach of its duty to provide progress payments. Id.

5. The Government executed the novation agreement **as a full party** to the arrangement. R4, tab F-64

PFF 72. Appellant objects to PFF 72 because it mischaracterizes the record and attempts to mislead the Board. Appellant agrees with PFF 72 to the extent that the same costs were included that had been previously disallowed and refused payment between November 1984 and April 10, 1985, however:

1. PFF 72 fails to state that the Government recognized and paid all but $64,000 of H.T. Foods $1.76 million Progress Payment request No. 1, on May 5, 1985. R4, tab FT 422, subtab HP PP - #1.A.; Cf. Government's PFF 74;

2. PFF 72 fails to state that the progress payment request was paid even though the DCAA continued to recommend zero payment citing the same discredited rational used to recommend zero payment on all previous requests. R4, tab FT 422, subtab HP PP #1.B; and

3. PFF 72 fails to state that the Government's payment of such costs, as much as five months after incurrence and request, is proof positive that the Government breached its obligation to provide timely progress payments under the MRE 5 contract.

PFF 73. See comment on PFF 57 above.

PFF 74. Appellant objects to PFF 74 as it mischaracterizes the record and attempts to mislead the Board. PFF 74 fails to indicate that the disallowance of $64,000 in "capital" costs was simply a compounding of the Government's breach of its obligation to pay progress payments and of the parties' advance agreement. App. unchallenged PFFs 189-208.

Further, Appellant objects to the defamatory and inflammatory fraud implications inherent in PFF 74. See comment on PFF 57 above; Cf. R4, tab G 22.

PFF 75. There is no PFF 75.

PFF 76. Appellant objects to PFF 76 in that it mischaracterizes the record. PFF 76 does not include the fact that the DCAA again recommended a zero payment. R4, tab 422, subtab HT PP #2.B, p. 2. Neither does PFF 76 note the following determination of the DCAA:

> We consider the contractor's current cost accounting system adequate for accumulating contract sots in support of progress payments.

Id., p 3.

PFF 77. Appellant objects to PFF 77 in that PFF 77 mischaracterizes the record and attempts to mislead the Board. Far from evidence of Government cooperation and compliance with its progress payment obligation, the deduction of the $138,300 in "capital" costs from Appellant's progress payments request is evidence of the continuing breach by the Government. See Appellant's comments on PFF 74 above.

PFF 78. Appellant objects to PFF 78 in that such PFF mischaracterizes the record and is intended to mislead the Board. The DCAA audit report of June 28, 1985, which again recommended zero payment based on the same discredited rational, e.g., cost incurred were not direct - cost accrued but not paid (R4, tab 422, subtab HT PP - #3), does not evidence a problem with Appellant's progress payment submissions but a chronic DCAA bias against Appellant. Of note, the audit again finds the accounting system acceptable. Id., Bates 03055.

PFF 79. Appellant objects to PFF 79 in that it mischaracterizes the record and attempts to mislead the Board. See Appellant's comment on PFF 77 above.

PFF 80. Appellant objects to PFF 80 in that it misstates the record. The record provides proof positive that the production delays being experienced by June 1985 were caused by the Government's breach of contract. App. unchallenged PFFs 209 - 232. Much of the delay, in fact,

was caused by ACO Liebman's wrongful interference with potential finance source Performance Financial Services. Id., PFFs 217 - 229.

PFF 80 further misstates the record in that it fails to indicate that Appellant made clear to the Government that an offer of consideration was not an admission of fault. By mailgram dated April 19, 1985, Appellant informed the PCO's superior, Ms. Peggy Rowles, with a copy to ACO Liebman, that:

> This offer (to provide consideration for the delay extension) is being made to comply with the requirements of the subject contract. It should not be construed as an admission on the part of H.T. Food Products to be responsible for delay under the contract. We reserve the right to discuss this issue at a later date.

R4, tab F-70, p. 3.

Further, the final version of Mod. P00011, at the demand of Appellant, deleted the recitation found in the original draft to the effect that "contractor's delinquency or anticipated delinquency is not excusable." Exh. 1.

Finally, although the Government customarily added claim release language to MRE 5 contract modifications, e.g., Mod. P00008 (R4, tab 45, p. 2, para 3), Mod. P00010 (R4, tab 48, p. 2, para D), no such language appears in Mod P00011.

PFF 81. Appellant objects to PFF 81 to the extent that failure to object might be considered an admission that Appellant's agreement to allow a $100,000 contract deduction, later returned to Appellant, amounted to an implied waiver of all legitimate claims. Appellant rejects that contention and asserts that the agreement to deduct the $100,000 was extorted from Appellant

under threat of default and in an atmosphere of economic extremis caused by the Government breach of its progress payments obligation, R4, tab 55, block 13.c.

PFF 82. Appellant objects to PFF 82 in that it mischaracterizes the record and attempts to mislead the Board. Appellant's delays in building modifications were the direct result of the Government's material breach of the contract.

Appellant further strenuously objects to the allegation of fraud. See Appellant's comments on PFF 57 above.

PFF 83. No comment.

PFF 84. Appellant objects to PFF 84 in that it misstates the record. Progress payment 5 (nee 4) was submitted on July 5, 1985, not July 25. This is evidenced by the July 5, 1985 date on the transmittal letter (R4, tab 422, subtab PP#5, Bates 03088), the July 5, 1985 date on the Progress Payment request (Id., Bates 03089) and, most convincingly, the July 8, 1985 date, recorded by the DCAA, on which ACO Liebman requested the DCAA audit. R4, tab 422, subtab PP #4.B, Bates 03062. The importance is the additional 20 days that Appellant suffered without any payment.

Appellant further objects to PFF 84 to the extent that any failure to object could be construed as an admission that Appellant was responsible for performance problems as of the date the ACO requested a DCAA audit of progress payment request 5 (nee 4). As of the request for audit of PP #4, Appellant's performance and financial problems had been caused by the Government material breach of the contract. The fact is that by this time the ACO was ignoring the DCAA recommendations but, fully cognizant of the demonstrated DCAA bias against Appellant, was still requesting audits as a shield against criticism for his arbitrary decisions. App. unchallenged PFFs 233 - 235.

Appellant also objects to PFF 84 in that it mischaracterizes the record and attempts to mislead the Board. PFF 84 does not reflect that the DCAA report of August 13, 1985 again recommended zero payment (R4, tab 422, PP - #4.B, p. 1); that the DCAA having approved Appellant's accounting system on June 28, 1985 (see App. comment on PFF 78 above), now found that system unacceptable; or that by September 4, 1985, Appellant had submitted to the Government a detailed, point-by-point rebuttal to each and every DCAA allegation. Id., subtab PP - #4.D.

Finally, PFF 84 fails to reflect that PP #5 (nee 4) costs were in fact eventually paid by the ACO on October 11, 1985, some 90 days after the July 5th submission. See Gov't PFF 95 & 96.

PFF 85. Appellant objects to PFF 85 in that it mischaracterizes the record and attempts to mislead the Board. DCAA did in fact unleash a biased, vicious attack on Appellant by its August 2, 1985 report. R4, tab FT 152, Bates 01276-01279. PFF 85 does not reflect the outcome of that attack. The Government purposely tries to leave the impression that Appellant was a malfeasant. The record, however, establishes that the FBI did investigate the allegations. The case was closed without any action in March of 1986. The FBI agent in charge informed DCASMA's Col.. Holland that:

> The investigation was closed as the FBI considered it futile to continue to investigate a case in which one DoD activity (DCAA) was recommending on a continual basis nonpayment of a substantial amount of progress payments and the other DoD Agency (DCASR NY) was making payments over and above the amount recommended.

R4. Tab FT 188.

PFF 86. No comment.

PFF 87. Appellant objects to PFF 87 as it mischaracterizes the record and attempts to mislead the Board. The DCAA report of August 13, 1985 was merely a continuation of the same discredited theme. R4, tab 422, subtab PP - #4.B; Cf. App. comments on PFF 84 above.

Further, PFF 87 fails to reflect that DCAA's complaint about Appellant's accounting did not really reflect any **system** problem but only alleged discrepancies in specific accounting practices within the system, i.e., Appellant continued to operate a double entry system that had passed muster through June 28, 1985 but was now found deficient for alleged entry and supporting documentation discrepancies. **The Government cynically characterized the problem as systemic because in this manner it could once again attack progress payments.** App. unchallenged PFFs 239 - 243.

PFF 88. Appellant objects to PFF 88 because by its own terms it is inconsistent and therefore mischaracterizes the record. PFF 88 fails to reflect that, contrary to the DCAA August 13, 1985 report, Appellant did in fact have financing from Bankers Leasing. Further, PFF 88 fails to reflect that the DCAA report, by citing Appellant expenses of "bank interest for a line of credit," ***indicated the auditor knew that Appellant had financing and was apparently purposely misstating the financial situation***. R4, tab 422, subtab PP - #4.B., Bates 03066.

PFF 89. See Appellant's comments on PFF 87 above.

PFF 90. No comment.

PFF 91. Appellant objects to PFF 91 in that it mischaracterizes the record and attempts to mislead the Board. The fact is that ACO Liebman knew that there was no systemic problem with Appellant's accounting system. The record shows that Liebman simply wanted to force the Appellant to change its accounting classification for the "capital" equipment in order to gain support for his position that the costs thereof where not subject to progress payments. Economic

duress being a key Liebman tool, the ACO forced this change by suspending progress payments and issuing a cure notice. The complaints about the accounting system then evaporated. App. unchallenged PFFs 244 - 260.

PFF 92. See Appellant's comments on PFFs 87 & 91 above.

PFF 93. Appellant objects to PFF 93 on the basis that the PFF fails to reflect that the DCAA September 12, 1985 audit report, that again recommended zero, was merely a continuation of the same biased theme.

PFF 94. Appellant objects to PFF 94 in that such PFF mischaracterizes the record and attempts to mislead the Board. The emergency payment does not indicate any kind of cooperation with Appellant. On the contrary, as of September 26, 1985 (the PFF date of 1995 is incorrect) the Government was delinquent in almost $1.5 million in progress payments. More than half of this amount was in arrears for almost 90 days. App. unchallenged PFF 261; Gov't PFF 95.

The fact is that the economic duress on Appellant, imposed through the vehicle of a knowing material breach of the contract, was such that but for an emergency payment on September 26th **the lights were going off.** The significance is that the Government knew full well that it had enormous economic power, **absolutely equivalent to the power of life or death**, over this small business, one contract contractor and was quite willing to use that power whenever it needed to enforce its will.

PFF 95. Appellant objects to PFF 95 in that such PFF mischaracterizes the record and is misleading. The PFF fails to indicate that the Government was in arrears on payments due and owing under PP #5 and PP #6 in the amount of $1,448,000.

PFF 96. Appellant objects to PFF 96 in that such PFF mischaracterizes the record. The payment of $1.9 million on October 11, 1985 does not reflect cooperation by the Government or

performance by the Government in accordance with the terms of the contract. On the contrary, the real significance of that payment is the $1 million withholding which reflects the continued Government breach. The Del Monte withdrawal, presumably based on Appellant's inability to pay Del Monte, reflects the impact of that breach. In fact, from October 11, 1985 through June 18, 1986 the Government delinquency with respect to progress payments grew to **$5,368,427**. App. unchallenged PFF 261. As of the final termination of the contract in 1987, and even without considering the claims to be decided by this Board, **the Government still owed Appellant some $800,000 which went unpaid until the year 2001.** App. Post Hearing Brief, Exh. 1.

PFF 97. Appellant objects to PFF 97 in that it misstates the record and attempts to mislead the Board. PCO Bankoff's August 30, 1985 cure letter (R4, tab 63) does not, as alleged, cite Appellant's financial capacity as one of the basis for the cure. On the contrary, in an atypical burst of clarity and candor, the PCO cites the failure of progress payments as the threat to performance. The PCO says:

> Progress payments are considered vital to your company's financial capacity to perform on this contract.

Id., p. 1, para 2. Further, the PCO puts the blame squarely on DCAA's unjustified attack on Appellant's accounting system as the existing impediment to the progress payments. Id. Appellant's response clearly established the Government's breach as the cause of delays, increased costs and other performance difficulties. R4, tab 67.

PFF 98. Appellant objects to PFF 98 in that it mischaracterizes the record and attempts to mislead the Board. PFF 98, as does PFF 97, dismisses Appellant cure response (Id.) as, basically, "two plans and delivery schedules to cure the delinquency." This is a total mischaracterization as it implies contractor delinquency when the facts evidence Government delinquency. Appellant's

cure response, in truth, is an exceptionally clear indictment of the Government's maladministration. It sets forth (1) the breach, i.e., the existing $3.1 million Government payment delinquency; (2) the impact of that breach, i.e., financing problems, supplier problems, building repair and renovation delays, production layoffs, and various other increase costs; (3) Appellant's amazing progress under the contract in the face of the breach; and (4) two options to overcome the effect of the Government's breach. Id.

PFF 99. Appellant objects to PFF 99 in that it mischaracterizes the record and attempts to mislead the Board. R4, tabs 70 & 71, the Government memorandums of September 26, 1985, in fact amount to a Government admission that:

1. Appellant had made astounding progress in the face of the Government's material breach; and

2. That meeting earlier delivery schedules were in fact prohibited by a principal effect of the Government's breach, i.e., the Appellant's inability to bring on its planned automated inventory and lot tracking system. Id.

PFF 100. Appellant objects to PFF 100 in that it misstates the record. The main thrust of the Government's memo of September 30, 1985, from the Financial Analyst to the ACO, is the impact of the Government's breach. Thus, the Financial Analyst told the ACO that:

> Our estimated "up front" financing requirements is $1 million and the company must make monthly use of Progress Payments, otherwise the company cannot be considered a viable on going concern.
>
> Since the DCAA Audit Report of 12 September 1985 indicated an inadequate accounting system, the use of progress payments to finance the company's operations are now in serious doubt.

R4, tab 72.

Appellant further objects to PFF 100 in that it mischaracterizes the record and attempts to mislead the Board. PFF 100 cites to PCO Bankoff's memorandum of October 9, 1985 (R4, tab 75) in implication of a fair, thought out resolution to the problems then facing Appellant. In fact, the memorandum is the quintessential evidence of the economic duress imposed on Appellant in a constant attempt to deprive Appellant of its remedies under law. In that regard, the memorandum admits that Appellant's principal problem was cash flow brought on by the Government's breach of contract. Id., p. 5. It then documents how the Government utilizes the economic extremis that it caused to pry concessions from Appellant:

1. The Government, threatening default (Id., p. 6) and obviously concerned about an eventual reckoning, first demanded a release of all claims. Appellant refused and accused the Government of breach. Id., p. 7; then

2. The Government demanded consideration while at the same time Appellant, with absolute and obvious justification, was claiming a breach, Appellant, having only one contract and facing default and economic disaster, was forced to accept. Id.

Finally, Appellant objects to PFF 100 in that it is misleading with respect to its recitation of Appellant's alleged financial needs. Id., p. 5. The PFF fails to reflect that the Government's calculations with respect to demanded additional outside financing, were incompetent and had no basis in reality. App. unchallenged PFFs 248 - 267.

PFF 101. Appellant objects to PFF 101, which also cites to Bankoff's memo (R4, tab 75) on the same basis as the objections set forth in Appellant's comments to PFF 100 above.

PFF 102. Appellant objects to PFF 102 on the basis that it mischaracterizes the record and attempts to mislead the Board. A DAR deviation was never required nor was one obtained before the Government's delinquency was finally cured and the full amounts paid. The so-called "capital

cost" issue was no more than a construct of ACO Liebman intended to aid his campaign, in breach of the contract, to deprive Appellant of working capital. App. unchallenged PFFs 189 - 208.

PFF 103. Appellant objects to PFF 103 on the basis that it is inaccurate. Progress payment request #8 was for $869,688. R4, tab 422, subtab PP - #8.A, Bates 03893. The amount paid on November 13, 1985, was not $869,688, but was, in fact, $349,958. Id., Bates 03895.

Appellant further objects to PFF 103 in that it mischaracterizes the record and attempts to mislead the Board. PFF 103 fails to reflect that the payment, like all previous progress payments, was subject to an assignment of the proceeds of the MRE 5 contract to Bankers Leasing under the Assignment of Claims Act. Id., Bates 03898.

PFF 104. Appellant objects to PFF 104 in that it mischaracterizes the record and attempts to mislead the Board. PFF 104 fails to reflect that Appellant's option transaction was a legitimate, taxable sale. Further, that the recoupment by the Government of a payment made to an assignee pursuant to the Assignment of Claims Act was in violation of that act. App. unchallenged PFFs 236 - 238.

PFF 105. No comment.

PFF 106. No comment.

PFF 107. Appellant objects to PFF 107 on the basis that it mischaracterizes the record and attempts to mislead the Board. PFF 107, as did PFF 103, is intended to imply swift Government response to progress payments 8 and 9. On the contrary, then government policy was payment within 5 to 10 days (R4, tab F2), not the 30 days implied by PFF 103 and 107.

Appellant objects further on the basis that the Government's breach with respect to its progress payment obligation and its duty to abide by the negotiated terms of MRE 5, including

but not limited to the advance agreement, was driving Appellant's ever rising costs for outside legal and accounting services. The Government's actions having caused the need, the Government's continued disallowance of legal and accounting services, both with respect to PP # 9, as well as previous and future requests, was arrogant, ludicrous and a corollary to its program of intimidation and duress. **As any tyrant knows, intimidation and duress work best when a target is deprived of the means of effective resistance.** R4, tab FT 229, p. 3, first full para.

PFF 108. No comment.

PFF 109. Appellant objects to PFF 109 in that it does not reflect an accurate representation of the facts. Appellant sought to have the following language included in Mod P00018:

> (E) The payment of consideration herein is not to be construed as an admission of fault by the Contractor as to the causes for delivery delays. All rights of both parties with respect to equitable adjustment or other relief related to delivery delays are hereby expressly reserved.

R4, tab 83. The Government, in the person of PCO Bankoff, on November 18, 1985, responded as follows:

> Page 3, to include new subparagraph (e) - Again, as the modification stands, no rights of the contractor are abridged with respect to equitable adjustments under the subject contract and as such, this subparagraph is unnecessary.

Exh. 2.

PFF 110. Appellant objects to PFF 110 as it mischaracterizes the record and attempts to mislead the Board. PFF 110 fails to reflect the Government's own assessment that high rejection rates were normal for a new contractor in the initial production stages. It further fails to reflect that this position on rejection rates was incorporated in the ACO's own status report of October 28, 1985. R4, tab FT 194, p. 2, subpara. b.

PFF 111. Appellant object to PFF 111 on the basis that it misstates the record. No check for $ 353,081 was ever issued on January 30, 1986. Progress payment request #10, in that amount, was submitted under date of November 11, 1985. R4, tab 422, subtab PP - #10, Bates 03925. Progress payment #11, in the amount of $1,159,473 was submitted under date of December 11, 1985. Payment reflecting both requests, in the amount of $1,505,096, was made by check dated January 30, 1986. Id., Bates 03924. Payment on January 30, 1986 obviously was not helpful with respect to Appellant's efforts to meet the Mod. P00018 delivery schedules for November and December 1985.

PFF 112. Appellant objects to PFF 112 on the basis that it misstates the record in an attempt to mislead the Board. Further, it is inflammatory and defamatory. PFF 112, fn. 8. PFF 112 provides proof positive that Government counsel has total familiarity with the August 16, 1985 settlement agreement between Appellant and Richard Penzer. R4, tab 22. That agreement makes clear that Appellant admitted to full responsibility for payment of rent and taxed from November 1984 on. Further, there is nothing in the record that supports the Government's disingenuous allegation that rent was not paid "from November 1984 through March 1985." App. comments on PFF 57 above.

PFF 113. Appellant objects to PFF 113 in that it mischaracterizes the record and attempts to mislead the Board. Appellant laid out its position with respect to the option and the racks and forklifts in Mr.. Marra's letter to ACO Liebman of November 22, 1985. R4, tab 89. Mr.. Marra, confidant of his position, proposed that the dispute be decided by an independent arbiter to be chosen by Mr.. Liebman. Id., p. 2. Mr.. Liebman, intent on destruction, not fairness, ignored the suggestion.

PFF 114. Appellant objects to PFF 115 on the basis that it misstates and mischaracterizes the record in an attempt to mislead the Board:

1. The PFF cites to experience and training problems referenced in R4, tab G14 and R4, tab 193, pp 33, 37 and 40, a situation that ACO Liebman had previously categorized as anticipated by the Government. See App. comment on PFF 110 above. PFF 115, however, fails to reflect that the same Government documents attribute substantial delay to Appellant's inability, caused by the Government's breach, to implement its computerized inventory and lot tracking system (R4, Tab 14, p. 20; R4, tab 193, p 41) and to maintain a stock of repair parts for production equipment. R4, tab 193, p 33;

2. The PFF cites to the utilization of only 6 of 12 assembly lines but fails to indicate that the lack of payment impacted Appellant's ability to bring the lines into full production;

3. The PFF cites to high rejection rates but again fails to indicate that such high rates were anticipated for the start of production or that the start of production had been delayed into November 1985 because of the Government's breach;

4. The PFF cites to alleged problems with Appellant's quality control system but then provides two of three record citations that have no relevance to quality control or Appellant's system. R4, tabs 67,95; and

5. Finally, the PFF cites to problems with subcontractors but fails to indicate the impact of the problems referenced, i.e, Star Food deliveries, primarily in July and August 1985, on delays in November and December 1985. Further, the PFF does not cite to any document as evidence of such cause for delay.

PFF 115. Appellant objects to PFF 115 in that it misstates and mischaracterizes the record in an attempts to mislead the Board:

1. R4, tab 100 is PCO Bankoff's Determination and Finding, not an Appellant document. Appellant never claimed that as of January 2, 1985 it had incurred an extra seven months of fixed overhead costs including $770,000 in occupancy costs. Appellant's position then, and now, is that the Government's breach was the cause of contract delay. Accordingly, Appellant anticipated that its profits would be reduced by overhead eventually incurred on account of a stretched out performance period. When those costs were actually incurred, the Government would be responsible. R4, tab FT 229, Attachment 8, Bates 01582.

2. Mr.. Thomas' affidavit does not indicate that he believed progress payments would not start until March, 1985. To the contrary, Mr.. Thomas submitted progress payment #1 on November 15, 1984 simultaneous with contract award. R4, tab FT 422, subtab Freedom PP - #1, Bates 02871 and 02873. Mr.. Thomas' affidavit indicates that the discussion concerning the Government's delayed progress payments occurred "at the end of November, 1984." R4, tab G 18, p. 24, para 19. Accordingly, when Mr.. Thomas and Mr.. Penzer discussed the possibility of freeing up payments in March, 1985 (Id. P. 25, para 19) it was already in the context of and taking into consideration the Government's breach of its obligation to begin progress payments upon award of the contract.

3. Payment in May 1985 for rent and taxes covered incurred cost, not anticipated stretch-out costs. With respect to Government counsel's continued allegations of fraud, see App. Comments on PFF 57 above.

PFF 116. Appellant objects to PFF 116 in that it mischaracterizes the record and attempts to mislead the Board. Appellant specifically objects to PFF 116's characterization that there was a "delinquent quantity" of cases. PFF 116 fails to reflect Appellant's response, by counsel, to the

effect that the delay in the production of cases was caused by the Government. R4, tab 92; FT 211.

PFF 117. Appellant objects to PFF 117 on the basis that it mischaracterizes the record and attempts to mislead the Board. PFF 117 reflects solely PCO Bankoff's self serving Determination and Finding dated January 2, 1986. The PFF fails to reflect Appellant's cure response of December 23, 1986. R4, tab FT 229. That document established the cause of the production problems as the Government's breach and vigorously denied that Appellant would need an additional $1.4 million to complete the contract.

PFF 118. Appellant objects to PFF 118 in that it misstates the record. Freedom did not assert, as alleged by PFF 118, that CINPAC was "not eligible." Freedom claimed that CINPAC had failed to submit certain documentation, required by the RFP, in a timely manner. The GAO accepted the Government's statement that the documentation had been timely submitted. R4, tab 93, pp. 4&5,

PFF 119. No comment.

PFF 120. See App. Response to PFF 117 above.

PFF 121. Appellant objects to PFF 121 in that such PFF misstates the record. The record contains no evidence that the December increment was terminated at Appellant's request. R4, tab 99, cited by Appellant for that proposition, states simply that the increment is terminated because Appellant failed to make timely delivery.

PFF 122. Appellant objects to PFF 122 on the basis that it mischaracterizes the record. PFF 122 fails to reflect the **extraordinary economic pressure** placed on Appellant specifically to force acceptance of the Government's terms for Mod. P00020, and particularly the language that reinstatement of the 114,000 terminated cases would be at the "sole discretion of the

Government." This was a new condition contrary to earlier agreements that reinstatement would be conditioned only on Appellant's ability to make timely deliveries. App. unchallenged PFF 284; R4, tab FT 220, p. 4.

PFF 123. Appellant objects to PFF 123 on the basis that it misstates the record and attempts to mislead the Board. The record proves, by the Government's own admission, that the Government did interfere with Appellant's CFM and caused diversion to RAFCO. R4, tab FT 255, para 4; App. unchallenged PFF 281.a, 292 & 293.

PFF 124. Freedom objects to PFF 124 in that it mischaracterizes the record and attempts to mislead the Board. R4, tab 194, cited by the Government, is an ACO memorandum concerning problems confronted during January, 1986. This memo, on the same page that notes the brownie outage, also notes that Appellant, through progress payment 12, had requested $9.7 million but been paid only $7.4 million. R4, tab 194, p. 2, para 6. In fact, as of the "brownie outage," on January 30, 1986, Appellant had not received any progress payments since December 6, 1985 **and the Government was in arrears more than $3.6 million in progress payments**. App. unchallenged PFF 284. Further, PFF 124 fails further to reflect that the "brownie shortage" was caused by the Government's diversion of Sterling Bakery provided CFM to RAFCO. App. unchallenged PFFs 292 & 293.

PFF 125. Appellant objects to PFF 125 on the basis that it mischaracterizes the record. PFF 125 fails to reflect that the Appellant's financial condition with respect to contract performance was a function of the Government's breach, or that this fact had been communicated to, and aggressively pressed with, the Government virtually from the contract's inception. Further, PFF 125 fails to reflect that even with the alleged loss, i.e., the contract financial condition prior to the recognition of equitable adjustments then claimed and now under consideration, the Government

so breached its duty of payment that, as of December, 2001, it still owed Appellant $800,000 for performance under MRE 5. App. Post Hearing Brief, Exh. 1.

PFF 126. See App. comments on PFF 125 above.

PFF 127. See App. comments on PFF 125 above.

PFF 128. See App. comments on PFF 125 above.

PFF 129. Appellant objects to PFF 129 in that it mischaracterizes the record and attempts to mislead the Board. PFF 129 fails to reflect the fact that the Government was, incredibly, now willing to undue many of its past injustices, i.e., 1. reinstate the defaulted 114 thousand cases; 2. extend the delivery schedule, without any consideration, to October 1986, 3. return the $200,000 extorted consideration associated with Mods P00011 and P00018 and 4. **finally pay Appellant "approximately $500,000 in Capital costs allowed by the PCO in the negotiation of the basic contract."** R4, tab 194, p. 7. PFF 129 also fails to reflect that the offer was rejected because the Government refused to compensate Appellant for the monetary damage caused by its breach. Id.

PFF 130. See App. comments on PFF 125 above.

PFF 131. See App. comments on PFF 125 above.

PFF 132. Appellant objects to PFF 132 in that it misstates and mischaracterizes the record and attempts to mislead the Board.:

1. The correct citation for Appellants requested "recalculation" is R4, tab F 136, not tab F 135; and

2. The PFF fails to reflect that the letter is dated June 4, 1986, i.e., subsequent to the execution of Mod. P00025 on May 29, 1986 (R4, tab F 133), addresses Appellant's dire need for cash flow unrestricted by the Government's consistent, substantial and unjustified withholdings

(see PFF 131 re the Government's expressed intent to withhold $1.7 million of the $2.8 million requested by Appellant on May 5, 1986), and evidences the crushing economic leverage exercised by the Government in order to force its terms, such as Mod P00025, on the totally dependent Appellant.

PFF 133. Appellant objects to PFF 133 in that it mischaracterizes the record:

1. R4, tab 193, p. 11 is an ACO Liebman status report for April, 1986. The report does, in fact, indicate that Appellant was not able to deliver some seven thousand of the 80,000 cases due in April, 1986. Liebman describes the principal reasons for the shortfall as "a. Lack of 'state of the art', i.e., automated equipment that is needed to increase production capacity, . . . c. Failure of the contractor to pay vendors in a timely manner to prevent stock outages that can shut down production of final case assemblies." Id. **As of April 30, 1086, the Government was in arrears with respect to progress payments of more than $3.5 million.** R4, tab FT 422, PP-Chart.

2. R4, tab 193, pp 60 & 62 do indicate that there was a shortfall in April, 1986 of seven thousand cases out of 80,000 required.. These same documents also indicate that, despite the Government's breach then reflected by $3.5 million in requested but unpaid progress payments, Appellant had produced and the Government had accepted 3,404,91 accessory packets, 2,717,147 cracker packets and 156,747 cases. Further, that the contract was approximately 58% complete.

PFF 134. Appellant objects to PFF 134 in that it misstates the record in an attempt to mislead the Board. PFF 134 refers to the PCO's draft response. The PFF alleges that the PCO stated "he had no knowledge of or involvement in the alleged agreement and could not confirm the contents of the May 2, 1986 letter." In fact, the PCO's draft, which was not sent but was

discussed with Appellant's consultants Lambert and Francois, tells Appellant that it should deal with DLA on the contents of Appellant's May 2nd draft and that the PCO "presently neither concurs **nor nonconcurs** in the contents of that letter." R4, tab FT 271, Bates 01885, emphasis added.

PFF 135. Appellant objects to PFF 135 in that it mischaracterizes the record in an attempt to mislead the Board. On May 15, 1986, DLA's Ray Chiesa reduced to writing his discussion with Lt. Col.. Doug Menarchick of the White House staff. R4, tab G 38. PFF 135 would have the Board believe that the only agreements were as finally set forth in P00025. PFF 135 would have the Board believe this even though: 1. P00025 was not signed until May 29, 1986 (R4, tab FT 281); 2. Chiesa admits that he told Menarchick that there were ongoing negotiations between himself and Appellant re the contents of Appellant's May 2, 1986 draft letter; and 3. Chiesa informed Menarchick that the Government had at least **agreed to expedited processing of a loan guarantee** as well as production assistance and that **the Government would confirm those agreements in writing.** Id., Para 3.

PFF 136. Appellant objects to PFF 136 in that it misstates and mischaracterizes the record:

1. PFF 136 fails to reflect the on-going negotiations between Appellant's consultants (Lambert and Francois) and high level DLA officials, R4, tabs G 38, G 39 & G 40;

2. PFF 136 citation R4, tabs 11 has no relevance to the subject of the PFF and citation R4, tab F 131 does not have a page 4

PFF 137. Appellant objects to PFF 137 in that it misstates the record. The Government's only citation in PFF 137 is to R4, tab F-1, subtab 1. That document is Appellant's May 13, 1986 letter to Mr.. Ray Chiesa of DLA. The letter reflects the agreement that Appellant believed it had negotiated with PCO Bankoff's superiors at DLA. The record establishes that those negotiations,

as Mr.. Chiesa represented to Col. Menarchick, were underway, had already resulted in certain agreements **and were supposed to be the subject of written confirmation.** See App. comment on PFF 135 above.

PFF 138. Appellant objects to PFF 138 in that it misstates and mischaracterizes the record in an attempt to mislead the Board. Appellant refers the Board to its April 30, 2001 Supplemental Brief, pp. 12 - 18, as an accurate rendition of the facts surrounding the execution of Modification P00025.

PFF 139. See App. comments on PFF 138 above.

PFF 140. Appellant objects to PFF 140 in that it mischaracterizes the record. PFF 140 fails to reflect that as of the execution of Modification P00025, the Government was in arrears on progress payments **by more that $5.35 million.** R4, tab 422, subtab PP - Chart. Accordingly, any failure of delivery was the result of the Government's breach and thus there was no justification for the Government not to reinstate the 114 thousand cases pursuant to Modification P00020. Cf. App. Supplemental Brief, pp. 5 & 6; App. comments on PFF 133 above..

PFF 141. Appellant objects to PFF 141 in that it mischaracterizes the record and attempts to mislead the Board. Appellant refers the Board to its Supplemental Brief, pp. 10-12, for an accurate rendition of the facts and the law concerning the Government's breach of its GFM obligation under Modification P00025.

PFF 142. Appellant objects to PFF 142 in that it mischaracterizes the record and attempts to mislead the Board. Appellant refers the Board to its Supplemental Brief, pp. 6 & 7, for an accurate rendition of the facts concerning "Capital Equipment" non-payment.

PFF 143. Appellant objects to PFF 143 on the basis that it mischaracterizes the record. Appellant refers the Board to its Supplemental Brief, pp. 5 -10 for an accurate description of the facts relevant to the terms of Modification P00025.

PFF 144. Appellant objects to PFF 144 in that it misstates and mischaracterizes the record in an attempt to mislead the Board:

1. With respect to the facts concerning Appellants ASBCA appeal No. 32570 and the release language included in Modification P00025, Appellant objects to PFF 144 and refers the Board to Appellant's Supplemental Brief, pp. 2 - 18 for an accurate recounting thereof; and

2. With respect to the extra-contractual testing required on account of the so called "micro-hole" problem, Appellant objects in that PFF 144 misstates the record. Appellant's claim is not related to whether the Star Food product was CFM or GFM as stressed by PFF 144. Appellant's contention is that the Zyglo testing was unnecessarily imposed by the Government and that the Government's "substitutions" caused delay and disruption. App. Post Hearing Brief, PFFs 340 - 343.

PFF 145. Appellant objects to PFF 145 in that it mischaracterizes the record in an attempt to mislead the Board:

1. PFF 145 does not reflect that Mr.. Chiesa had previously told White House staffer, Lt. Col.. Menarchick, that he had in fact made certain commitments to Appellant, including the commitment to process the guaranteed loan, and had agreed to put those commitments in writing. See App. comments on PFF 135 above;

2. PFF 145 does not reflect the conduct of PCO Bankoff on May 29, 1986. On that date Mr.. Bankoff, as part of the Modification P00025 execution procedure and with the full understanding that Appellant considered the May 13th letter as part and parcel of an overall

agreement including, but not limited to, the written Modification P00025, faxed Appellant's May 13, 1986 letter (See R4, tab FT 280 which includes a DPSC fax transmission sheet, dated May 29, 1986 and copy of the May 13th letter) to Mr.. Chiesa. R4, tab FT 282, first para. Subsequent to that action, Mr.. Bankoff by his conduct led Appellant to believe that the terms of the May 13th letter were in fact included **as part of an overall agreement**. Tr. pp. 644-646, 2048 & 2049; Cf., App. Supplemental Brief pp. 12 - 18; and

3. PFF 145 does not reflect that Mr.. Chiesa admitted that he had the May 13th letter on May 29th, i.e., at the time the parties were executing Mod. P00025, but failed to repudiate his agreement until the next day, i.e., after it was too late for Appellant to reconsider. Op. Cit.

PFF 146. Appellant objects to PFF 146 in that it misstates the record in an attempt to mislead the Board:

1. The citation to R4, tab F-139 is incorrect. The Government most likely intended to cite to R4, Tab F-140. R4, tab F-140 does not amount to an acknowledgment by Appellant that there was no overall agreement related to the execution of Modification P00025. R4, tab 140 amounts to Appellant's desperate attempt to salvage a critical situation and mitigate damages; and

2. The record of Appellant's meeting with General Russo on August 22, 1986 (R4, tab G-45) makes absolutely no reference to the Modification P00025 overall agreement. Again, the record of the meeting evidences Appellant's attempts to overcome the effects of the Government's breach including, but not limited to, the Government's failing to honor its commitments associated with the P00025 "side-agreement."

PFF 147. No comment.

PFF 148. No comment.

PFF 149. Appellant objects to PFF 149 in that it misstates and mischaracterizes the record in an attempt to mislead the Board:

1. Appellant's cover letter dated June 12, 1986 **does not, as alleged by the Government, indicate that "the maximum balance eligible" was $1.572,097.** Appellant's cover letter indicates only that the incurred costs for the current month was $1,572,097. R4, tab FT 422, subtab PP - #17, Bates 04000. In fact, Appellant's cover letter cites to line 19 of the formal request whereon the Appellant showed $3,846,610 as the maximum balance eligible for progress payments. Id., Bates 04001. The DCAA concurred with this "maximum balance." Id., Bates 04006;

2. PFF 149 emphasizes that a progress payment of $1.325 million was made approximately 32 days after the progress payment 17 request. The most critical PFF fact associated with progress payment request 17, however, is the admission that the Government, in July 1986, was still refusing to pay $2.274 million in costs (R4, tab FT 422, subtab PP - #7, Bates 04006) some of which had been requested as long ago as March 19, 1986. Id. Bates 04007, R4, tab FT 422, subtab PP - Chart.

PFF 150. Appellant objects to PFF 150 in that it mischaracterizes and misstates the record in an attempt to mislead the Board:

1. The Government's citation to R4, tab 135 as PCO Bankoff's cure letter of July 11, 1986 is incorrect. The cure letter appears at R4. Tab 134; and

2. The alleged failure of notification of insufficient GFM jellies notwithstanding, PFF 150 fails to reflect that the Government took responsibility for that failure and accepted the lack of GFM jellies as the basis for excusable delay. R4, tab 141, p. 2, para 9.

PFF 151. Appellant objects to PFF 151 in that, as with 149, it represents a particularly egregious mischaracterization and misstatement of the record:

1. Appellant's cover letter of July 14, 1986 (R4, Tab Ft 422, subtab PP - #18, Bates 04019) **does not**, as alleged by the Government, state that "the balance eligible was only $1,054,612." As clearly indicated by the July 14th letter, the $1.054 million represents the amount of progress payment # 18 that reflects costs incurred in the current month. The letter, as with the cover letter to PP #17, cites to line 19 of the formal progress payment request. On that line Appellant has entered $3,728,368 as the "maximum balance eligible for progress payments." Id., Bates 04011; and

2. PFF 151 fails to reflect that the Government continued to withhold more than $2 million in progress payments from "prior period costs" while the DCAA auditor was reporting that Appellant's aging accounts payable were $2.6 million. Id., Bates 04020.

PFF 152. Appellant objects to PFF 152 in that it misstates and mischaracterizes the record in an attempt to mislead the Board. PFF 152 fails to reflect that the Government formally, in the person of PCO Bankoff, acknowledged its responsibility for the late GFM jellies and, the dispute over notification notwithstanding, declared the Appellant entitled to excusable delay. R4, tab 141, p. 2, para 9: Cf., App. comments on PFF 150 above.

PFF 153. Appellant objects to PFF 153 in that it mischaracterizes the record. PFF 153 fails to reflect that the debts complained of by the USDA were incurred by Freedom, Industries on contracts performed prior to MRE 5. Further, that pursuant to the novation, Appellant, as Freedom, NY, Inc., was not liable for those debts. R4, tab 139.

PFF 154. No comment.

PFF 155. Appellant objects to PFF 155 in that, **for a third time**, PFF 155 misstates the record with respect to Appellant's position on the maximum eligibility for progress payments:

1. Appellant's cover letter for progress payment # 19 **does not** state that the maximum eligibility is $1,286,932. Appellant's letter, as with progress payment requests 17 and 18, merely recites that that months current incurred costs are $1,286,932. R4. Tab FT 422, subtab PP - #19, Bates 04021. Appellant's formal progress payment 19 request, on line 19, established the maximum balance eligible for award at $2,667,842;

2. PFF 155 fails to reflect that the true significance of the facts surrounding progress payment request #19 and payment thereon is the Government continuing breach of its payment obligation. The PFF does not recount that with Appellant producing but struggling mightily to pay suppliers (DCAA reports aged accounts of $1.96 million [Id., Bates 04028], down from the previous months $2.6 million [R4, tab 422, subtab PP - #18, Bates 04020]), the Government agreed to pay **only 10%**, i.e., $200,219 of progress payment #19. R4, tab G-148.

PFF 156. Appellant objects to PFF 156 in that it mischaracterizes the record. PFF 156 fails to reflect that the Government's position on guaranteed loans, as presented by Dr. Wade to Appellant on August 26, 1986 (R4, tab 49), was known, or should have been known, to Messrs Chiesa and Kabiesman on May 29, 1986. PFF 156 further fails to reflect that such promises, made in the context of leveraging a release from Appellant under Modification P00025, amounted to fraud in the inducement as well as a breach of the overall agreement effected in the context of Modification P00025. See App. comments on PFFs 135 and 145 above.

PFF 157. Appellant objects to PFF 157 in that it misstates the record in an attempt to mislead the Board.

1. PFF 157 represents Appellant's position with respect to the Government's acceptance of an 82.6% liquidation rate as Appellant's reliance on the Governments silence. While Appellant does consider the Government's silence as operative in this respect, Appellant's principal justification is that the documents reflecting the 82.6% liquidation rate were an integral part of Appellant's proposal and as such were incorporated in the contract by the operation of award sheet box 18. App. Post Hearing Brief PFFs 52 -64;

2. PFF 157 miscites Mr.. Marra's letter to PCO Bankoff of September 2, 1986. The correct citation is R4, tab 147.;

3. PFF 157 miscites and mischaracterizes PCO Bankoff's letter of September 15, 1986. Mr.. Bankoff's letter is found in the record at R4, tab 151, not tab 146. Further, the letter responds to Mr.. Thomas letter of September 3, 1986 (R4, tab 148) not to Mr.. Marra's letter of September 2, 1986; and

4. Finally, PFF 157 fails to reflect the substance of Appellant's complaints as set forth in Mr.. Marra's letter, i.e., that progress payments based on deliveries is inconsistent with the contract which provides for payments based on incurred costs. Further, that the Government's failure to comply with the contract, i.e., demanding delivery before granting payment, was inconsistent with the progress payment procedures for small business and was having a severe detrimental effect on Appellant's ability to perform. R4, tab 147.

PFF 158. Appellant objects to PFF 158 in that it mischaracterizes the record.:

1. PFF 158 fails to reflect that the Government's acceptance of progress payment 20 within a week after progress payment #19 does not evidence Government cooperation, but Government realization that its cash flow starvation tactics, e.g., payment of only 10% of the amount requested per progress payment request #19, may have gone too far. R4, tab F-152;

2. PFF 158 also fails to reflect that on September 10, 1986 Appellant, pointing out that "in spite of the continuing financial hardships (it) has delivered 70% of its contractual obligation" (Id., p. 2), informed the Government that "(I)t can no longer assure continuity without support," and that "Freedom must have the immediate cooperation of the Government in working its way out of the present situation." Id., pp. 2 & 3;

3. PFF 158 further fails to reflect that by letter of September 22, 1986, Appellant strongly objected to the $311,446 payment, accepted it "under duress, without a reasonable choice in this matter," and warned the Government that its breach of its obligations risked "ultimate financial collapse of Freedom, which if materialized, would impose irrecoverable losses of millions to the Government, Bankers Leasing, and Freedom." R4, tab 155;

4. PFF 158 fails to reflect that despite Appellant's plea, the Government, by check dated September 23, 1986 (R4, tab FT 422, subtab PP - #20, Bates 04032), paid only $311,447 of the $1,936,353 requested. Id., Bates 04039; and

5. Finally, PFF 158 fails to reflect that the Government's breach of its payment obligation surrounding progress payment requests 19, 20 & 21, was specifically designed to leverage, through severe economic duress, an agreement from Appellant to waive its claims against the Government, i.e., to execute Mod. P00029, executed October 7, 1989 (R4, tab 159) with the Government dictated release language. App. Supplemental Brief, pp 31 & 32.

PFF 159. Appellant objects to PFF 159 in that it misstates and mischaracterizes the record in an attempt to mislead the Board:

1. PFF 159 represents the **fourth** Government misrepresentation as to Appellant's progress payment request cover letter. Once again, the cover letter dated September 15, 1986 does not address maximum eligible balance but only the incurred costs for the current month. R4,

tab FT 422, subtab PP - #21, Bates 04035. The maximum eligible balance was set forth on line 19 of Appellant's progress payment request # 21 of September 15, 1985 as $2,487,623. Id., Bates 04037. Line 19 of Appellant's amended progress payment request #21 (R4, G-192.c) establishes the maximum balance eligible as $2,165,098;

2. PFF 159 fails to reflect that whether the requested amount was $2,399,374 per the September 15, 1986 request or $2,165,098 per the amended October 1, 1986 request, the Government paid only $721,887. Id., R4, tab FT 422, subtab PP - #21, Bates 04037; and

3. The payment was made, on October 9, 1986, only after the Mod. P00029 release was extorted from Appellant. Id.; Cf., App. Post Hearing Brief PFFs. 349 - 351.

PFF 160. See App. comments on PFF 159 above.

PFF 161. Appellant objects to PFF 161 in that it mischaracterizes the record in an attempt to mislead the Board. PFF 161 fails to reflect that the lack of GFM other than crackers, as well as the improper removal of CFM, was the driving force that rendered Appellant's performance impossible after October, 1986. In that regard, the Board made the following finding in **Freedom, NY, Inc.**, ASBCA No. 35671, 96-2 BCA ¶28,328:

> 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.

Id., p. 141,470, emphasis added, Cf. App. Post Hearing Brief PFFs 308 - 323, App. Supplemental Brief, pp 10 - 12. Based at least in part on finding 76, the Board converted the MRE-5 default to a convenience termination. Id., pp. 141,478 & 141,479.

PFF 162. See App. comment on PFF 161 above.

PFF 163. Appellant objects to PFF 163 in that it mischaracterizes the record. Throughout the month of September, 1986, Appellant continually advised the Government that the Government's breach of its payment obligations was causing a critical cash flow situation. Appellant literally begged the Government to abide by its contract obligations. R4, tabs 147, 150, 153, 154, 155.

PFF 164. Appellant objects to PFF 164 in that it fails to reflect the circumstances surrounding the execution of Modification P00029 and is, therefore, misleading. Appellant refers the Board to its Post Hearing Brief, pp. 349 - 351, and its Supplemental Brief, pp. 27 - 32, for an accurate description of those circumstances. Cf., App. comments on PFFs 158 and 159 above.

PFF 165. Appellant objects to PFF 165 in that it misstates and mischaracterizes the record in an attempt to mislead the Board:

1. PFF 165 cites to the record at R4, tabs 166 and 116 as a reference to Mod. P00024. These tabs have no obvious relevance to that Modification. Appellant suggests that the correct citation, i.e., to Modification P00024, is R4, tab 115;

2. PFF 165 implies that the micro-hole problem commenced on or around May 14, 1986, i.e., the execution date of Mod. P00024. In fact, as testified to by Mr. Leon Cabes (Tr. 2098) the problem began with a medical hold on March 2, 1986. R4, tab 112;

3. PFF 165 falsely implies that the added testing had a minimum impact on Appellant. An accurate description of the relevant facts is set forth in App. Post Hearing Brief at PFFs 340 - 344; and

4. PFF 165 cites to R4, tab 146, p. 1 to support its July 22, 1986 date for start of Appellant's retort operation. The citation has no apparent relevance to the alleged fact.

PFF 166. Appellant objects to PFF 166 in that it mischaracterizes the record and attempts to mislead the Board. Appellant's letter of October 22, 1986 did not just then advise the Government that it hadn't received essential GFM. Appellant's letter indicates that such advise was continuing, i.e., "(w)e have **still** not received" the required GFM. R4, tab 161. The letter also provided the following highly relevant information:

1. The final assembly production, as of October 22nd, was shut down for lack of GFM;

2. Appellant had in house all required CFM to begin production of MRE 6 configuration cases; and

3. All MRE 5 configuration cases, i.e., **505,546**, had been completed.

PFF 167. Appellant objects to PFF 167 in that it mischaracterizes the record and attempts to mislead the Board. PFF 167 claims that the production shut down was caused by CFM outages. The PFF cites to a self serving ACO report dated November 12, 1986, R4, tab 194, p. 35. The PFF fails to reflect Appellant's letter of October 22, 1986, contemporaneous with the shutdown, to the effect that all necessary CFM was on hand. R4, tab 161; Cf. App. comments on PFF 166 above. Neither does PFF 167 reflect the finding of the Board, in ASBCA No. 35671, that the shutdown was caused by the lack of GFM. See App. comment on PFF 361 above.

PFF 168. Appellant objects to PFF 168 in that it misstates and mischaracterizes the record in an attempt to mislead the Board. Appellant refers the Board to its Post Hearing Brief, PFFs 308 through 323, and to its Supplemental Brief, pp. 10 - 12 & 24 - 27, for an accurate account of the impact of the Government's failure to provide GFM, Cf. App. comments on PFF 161 above.

PFF 169. Appellant objects to PFF 169 in that it mischaracterizes the record in an attempt to mislead the Board:

1. PFF 169 fails to reflect that Appellant submitted progress payment request 22 on October 20, 1986 in the amount of $1,443,211. R4, tab FT 422, subtab PP - #22, Bates 04044 & 04045;

2. PFF further fails to reflect that the Government not only refused to pay progress payment No. 22 but also acted to totally deprive Appellant of cash flow by:

A. As of October 29, 1986, implementing a policy whereby unliquidated progress payments were to be liquidated at 100% instead of 95%; and

B. As of November 5, 1986 suspending all progress payments; and

3. That all the foregoing are set forth in Mr.. Marra's memorandum to Mr.. Thomas of November 5, 1985, cited in PFF 169 as R4, tab F 1, subtab 21; and

4. Finally, PFF 169 fails to reflect that the alleged Government ability to provide sufficient MRE 6 GFM is based solely on the self-serving, speculative testimony of PCO Bankoff.

PFF 170. See Appellant's comments on PFF 169 above.

PFF 171. Appellant objects to PFF 171 in that it mischaracterizes the record. By PFF 171 the government implies that Appellant constructively abandoned the MRE 5 contract. In support of this implication, the Government cites to PCO Bankoff's contracting officer's decision of June 4, 1987 (R4, tab 185) by which the MRE 5 contract was finally and totally terminated for default. The use of such documentation without further explanation mischaracterizes the record in that:

1. PFF 171 fails to cite any support for the alleged statement of Mr.. Thomas other than the self serving, now discredited contracting officer's decision of June 4, 1987;

2. PFF 171 fails to reflect that the contracting officer's decision rejected totally Appellant's position, a position later adopted by the Board, that the Government had waived the

MRE 5 delivery schedule and could not unilaterally reestablish that schedule unless it took into consideration the situation that then, i.e., March, 1987, existed; and

3. Finally, PFF 171 fails to reflect that the Board rejected totally the June 4, 1987 decision, and, nine years after the Government destroyed Appellant, ruled as follows:

> 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 standard was set. . . . . 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 P00039 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 P00039 - suggests the opposite. . . . 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 "failure to make progress."

Freedom, supra at p. 141,478 (citation omitted).

PFF 172. Appellant objects to PFF 172 in that it misstates the record in an attempt to mislead the Board. Appellant's letter of January 15, 1987 (R4, tab 198), indeed did represent that Appellant would resume production. However, that resumption was conditioned on the Government's willingness to cure its breach, i.e., to resume progress payments, pay for delivered product and provided required GFM. Id. The Government failed completely on all counts.

PFF 173. There is no PFF 173.

PFF 174. Appellant objects to PFF 174 in that it mischaracterizes the record in an attempt to mislead the Board:

1. PFF 174 fails to reflect that progress payment request 22 was made on October 23, 1986, at a time that Appellant was already in severe financial straights, so that as of the date of ACO Liebman's January 26, 1987 letter (R4, tab 169), progress payments had not been paid for more than 90 days and were, in effect, already constructively suspended as the effect of the Government's continued breach of the contract;

2. PFF 174 fails to reflect that such non payment was the cause, past and present, of Appellant's financial difficulties, including those cited by ACO Liebman; and

3. PFF 174 fails to reflect that the Government has now formally admitted that there was not $1.6 million in unliquidated progress payments as of January 26, 1987 (see App. Post Hearing Brief, Exh. 1, whereby the Government agreed that Appellant did not owe money but that the Government, instead, owed $800,000 to Appellant), i.e., there was in fact no basis for the set off threatened by ACO Liebman. Op. Cit., p. 2.

PFF 175. Appellant objects to PFF 175 on the basis that it mischaracterizes the record. Appellant refers the Board to its Post Hearing Brief, to its Supplemental Brief and to these comments and asserts that the negative findings with respect to the resurvey were the results of the Government's material breach of the contract. Further, that the so called "fact finding group" was comprised solely of Government officials and employees and did not have the advantage of the record established for the Board in this case.

PFF 176. Appellant objects to PFF 176 in that it mischaracterizes the record. Appellant asserts that any inability on the part of Appellant to comply with demands of the Government re inventory was the result of the Government's material breach of the contract.

PFF 177. No comment.

PFF 178. See Appellant's comments with respect to PFF 171 above.

PFF 179. There is no PFF 179.

PFF 180. There is no PFF 180.

PFF 181. There is no PFF 181.

PFF 182. There is no PFF 182.

PFF 183. No comment.

PFF 184. Appellant objects to PFF 184 in that it mischaracterizes the record in an attempt to mislead the Board:

1. PFF 184 fails to reflect that the Appellant's inability to perform contract administration efforts, including inventories, was caused by lack of financial resources which in turn was the direct consequence of the Government's breach of the contract. R4 FT 360:

2. PFF 184 fails to reflect that the Board has already held the Government responsible for Appellant's inability to perform property management responsibilities. **Freedom, supra** at 141,468. Further, PFF 184 fails to reflect the Board ruling that the Government's removal of GFM from Appellant's plant in March 1987 constituted a breach of the Government's implied duty of cooperation. Id.

PFF 185. See Appellant's comments on PFF 171 above.

PFF 186. See Appellant's comments on PFF 171 above.

PFF 187. See Appellant's response to PFF 184 above.

PFF 188. See Appellant's response to PFFs 171 and 184 above.

PFF 189. See Appellant's response to PFFs 171 and 184 above.

PFF 190. No comment.

3. ARGUMENT

Appellant, in two previous briefs, has detailed its case. In both briefs, Appellant has provided legal argument supported by law, regulation and substantial case precedent. The Government has taken issue with Appellant's case. The Government, however, has failed to cite a single precedent to support its disagreement nor attempted to distinguish such precedents or otherewise demonstrate any error that might be present in Appellant's legal presentation. Appellant, therefore, will stand on its legal argument as presented subject only to the following:

1. Appellant never waived its rights to claim delay costs;

2. Appellant has never commited fraud or any other misdeed in connection with the MRE 5 contract; and

3. Appellant, pursuant to Modification A0004, specifically reserved its rights to claim all cost resulting from the Government's admitted failure to pay invoices due and owing.

1. Appellant has never waived its rights to claim costs on account of Government responsible delay.

Appellant's position with respect to Mods. P00025, P00028 and P00029 is set forth in its Supplemental Brief. In general, Appellant accepts that the limited specific waiver of Mod. P00028 is binding but rejects the broad release language of Mods P00025 and P00029.

In its June 11, 2001 Post Hearing Brief, the Government argues that Appellant, by its agreement on delivery schedule changes, waived its right to claim delay costs. The specific modifications relied on by the Government are identified in the Government's PFFs 80 (Mod. P00011), 108 (Mod. P00018), 122 Mod. P00020), 143 (Mod. P00025), 154 (Mod. P00028) and 164 (Mod. P00029). The Government does not cite a single case in support of this proposition.

As stated above, Appellant's rejects the Government's position that its claims are barred by the general release language of Mods P00025 and P00029. See Appellant's Supplemental Brief. Mod. P00028 involved an extention granted on account of late GFM jellies. The parties agreed that there would be no claim for costs on account of this delay and specifically so stated in the modification. The modification contains no other agreements with respect to contract time extensions, delays or costs on account thereof. The modification also contains the following:

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

R4, tab 144. Appellant has not included any claim for "consideration or damages resulting from the lack of Government Furnished Material jellies during the period 16-28 July 86." Id., p. 2.

Appellant has addressed the Government's allegations as to Mods P00011, P00018 and P00020 in its comments, above, as follows:

1. Mod. P00011 - App. comments on PFF 80 & 81;

2. Mod. P00018 - App. comments on PFF 109.

3. Mod. P00020 - App. comments on PFF 122.

The record is clear, as set forth in the specific referenced comments, the remaining comments on the Government's PFFs, as well as Appellant's PFFs and legal arguments, that Appellant, at every turn, asserted and reemphasized its position that it was admitting no responsibility for contract performance problems, including, but not limited to, the costs on account of delay. The record is similarly clear that Appellant consistently placed the responsibility for the contract's increased costs, including delay costs, on the Government.

In addition, the record is clear that the terms of the subject modifications were dictated by the Government from a position of overwhelming economic leverage. However, the record is

equally clear that, to the best of its ability, Appellant always asserted that it had no intent to abandon under any circumstances its right to eventually recover.

Where a contractor contemporaneously expresses its intent that a time extention modification not constitute an accord and satisfaction, the Board has held that no such accord and satisfaction exists. **The Daniels Company of Southern Pines**, ASBCA No. 18920, 74-1 BCA ¶10,608. Further, the Court of Claims and the Board have found there is no accord and satisfaction where the claim is for delay costs, as opposed to time extentions, when the modification included neither a waiver or release of claims nor was there evidence that the parties intended to include delay costs in the contract modification. **Merrit-Chapman & Scott Corp. V. United States,** 194 Ct. Cl. 461, 470-71(1971); **Polyphase Contracting Corp.,** ASBCA No. 11787, 68-1 BCA ¶6759; **Worsham Construction Company, Inc.,** ASBCA No. 25907, 85-2 BCA ¶18,016.

In the instant case there can be no doubt that Appellant never intended to waive its claims for delay costs nor did it ever receive any compensation in any of the modifications for such delay. The Government's position on waiver is without merit and should be rejected.

2. Appellant has never commited fraud or any other misdeed in connection with its performance of the MRE 5 contract

The Government Post Hearing Brief either implies or alleges fraud, by Appellant, in PFFs 35, 36, 37, 38, 40, 42, 43, 44, 57, 67, 73, 74, 82, 85 and 112. This brief provides detailed comments, amounting to refutations, on the Government's allegations. See above. The Board's attention is specifically and respectfully directed to Appellant's comments on PFF 57 above. In the second paragraph thereof, Appellant states:

If the Government believes that Appellant has committed fraud or perjury, then Government counsel should have the Justice Department commence an investigation. If that is not to happen, then Government counsel should not make such inflammatory representations, should withdraw the allegations of fraud and should apologize publicly to Mr.. Thomas.

3. Appellant, pursuant to Modification A00004, specifically reserved *its rights to claim* all costs resulting from the Government's admitted failure to pay invoices due and owing.

On December 29, 2000, the parties executed a settlement agreement covering Appellant's MRE 5 termination for convenience claim. By that agreement, the Government admitted it had breached the MRE 5 contract in that, inter alia, five invoices totalling, $246,947 and submitted in 1986, had never been paid. The Government now argues that " (s)ince payment of the disputed invoices has been made and the payment issued (sic) settled via the T4C modification, Appellant has waived any breach claim it may have had." Government Brief, p. 112. The Government is wrong.

The parties, in settling the convenience termination claim, agreed that the only matters settled with respect to the five unpaid invoices were that they were unpaid and that payment should be made. The parties very carefully reserved Appellant's rights to proceed with its claim before the Board for any other damages it might be entitled to on account of this admitted Government breach. Accordingly, Modification A00004 (Appellant's Post hearing Brief, Exh. 1) includes the following reservation of rights:

> This settlement incorporates payment of the remaining 5 invoices for which the Government can not locate a record of either payment or liquidation against outstanding progress payments. As such this settlement adds an amount of

> $246,947 to cover payment of invoices FNY 0172, FNY 0244, FNY 0247, FNY 0298, and FNY 0339. As consideration for the payment of the unpaid DD-250's within the net payment of $799,947 Freedom agrees to withdraw its pursuit **of the principal amount of these DD-250's**, from its appeal at the ASBCA. Freedom and the Government consider the demand for payment **of the principal amount of these outstanding balances of DD-250's** to be satisfied. This agreement does not affect Freedom's right to pursue its claim before the Board **on account of delay and disruption or any other impact on or entitlement under the contract,** specifically including but not limited to the right to recover interest, which Freedom claims **resulted from the late payment of invoices, including progress payment requests, or the recoupment of unliquidated progress payments by the Government.** The agreement not to include interest as part of the recovery under this termination settlement **does not negate Freedom's right to pursue interest in another forum**, nor does it affect the Government's right to deny it.

Id., note 6, 3rd para, pp. 4 & 5, emphasis added.

Appellant's right to recover all damages, other than the principal amount of the five invoices, caused by the Government's payment failures obviously remains totally intact.

IV. CONCLUSION

Freedom respectfully refers the Board to its Post Hearing Brief conclusions which are incorporated herein by reference.

Respectfully submitted, ProSe

Henry Thomas, President

July 12, 2001

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of July, 2001 a copy of the foregoing Appellant's Reply Brief was sent by overnight delivery, postage pre-paid, to Kathleen D. Hallem, Esquire, Chief Trial Attorney, Defense Supply Center, Philadelphia, (DSCP-G), 700 Robins Avenue, Philadelphia, Pennsylvania 19111, attorney for the Government.

Henry Thomas, President.

PFF #80 EXH 1

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

CONTRACT ID CODE	PAGE OF PAGES
J	001 | 003

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
P00011		ARS-83-276-00-0001	

6. ISSUED BY DPSC-SPPR CODE SP0102
Defense Logistics Agency
Defense Personnel Support Center
2800 South 20th Street
Philadelphia, PA 19101
Keith Ford/SPPR (215) 952-3684

7. ADMINISTERED BY (If other than Item 6) CODE S3310A
DCASMA New York
201 Varick Street
New York, NY 10014

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)

H. T. Food Products, Inc.
1600 Bonxdale Avenue
Bronx, NY 10462

Cwright 6 May 1985
DPSC-CS

(X) 9A. AMENDMENT OF SOLICITATION NO.

9B. DATED (SEE ITEM 11)

10A. MODIFICATION OF CONTRACT/ORDER NO.
DLA13H-85-C-0591

X 10B. DATED (SEE ITEM 13)
15 Nov 84

CODE 07W118 FACILITY CODE

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

(W) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).

C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:

X Default Article

D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return 1 copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.

WHEREAS, it is the intention of the parties to formalize the agreement heretofore informally entered into between the parties.

WHEREAS, said contract presently provides for the following delivery schedule:

Line Item	Quantity	Delivery Date
0001CP	100,000	1-31 Jul 1985
0001CQ	100,000	1-30 Aug 1985
0001CR	100,000	2-30 Sep 1985
0001CS	100,000	1-31 Oct 1985

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)	
		M. H. ROWLES	
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
(Signature of person authorized to sign)		BY (Signature of Contracting Officer)	

ITEM NO.	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT

Line Item	Quantity	Delivery Date
0001CT	100,000	1-30 Nov 1985
0001CU	120,304	1-31 Dec 1985

WHEREAS, the Contractor has failed or may fail to meet the above cited delivery schedule;

WHEREAS, Contractor's delinquency or anticipated delinquency is not excusable; and

WHEREAS, Contractor has offered monetary consideration for granting extension of above cited delivery schedule; and

WHEREAS, Contractor has offered to be financially liable for all costs incurred for storage of Government Furnishede Material; and

WHEREAS, the amendment or amendmdents set forth herein are in the interest of the Government:

WHEREAS, The contractor has proposed new milestones;

NOW, THEREFORE, IT IS HEREBY MUTUALLY AGREED BY AND BETWEEN THE GOVERNMENT AND THE CONTRACTOR AS FOLLOWS:

(a) The delivery schedule is amended as follows:

Line Item	Quantity	Delivery Date
0001CP	100,000	1-31 Oct 1985
0001CQ	100,000	1-30 Nov 1985
0001CR	100,000	1-30 Dec 1985
0001CS	100,000	1-31 Jan 1986
0001CT	100,000	1-28 Feb 1986
0001CU	120,304	1-31 Mar 1986

(b) In consideration of the aforesaid extension of delivery schedule, the Contractor shall pay the Government $99,900.00 plus $100.00 for the excution of this modification. In addition, the contractor agrees to be responsib for any and all costs the Government incurs for the storage of Government Furnishe Materials which the Contractor was unable to receive in accordance with the terms of the subject contract. These costs will be definitized at a later date. Contractor's liability for payment of the foregoing amount is fixed and is not, in any way, dependent upon the happening of any conditions.

(c) The following milestones are incorporated:

May 15, 1985	Roof and Window repairs complete
May 16, 1985	Health Services Command sanitary inspection of the building
May 16, to May 23, 1985	Correct any buildling deficiencies found by HSC and received approval from HSC

NAME OF OFFEROR OR CONTRACTOR

H. T. Food Products, Inc

ITEM NO.	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT

May 24, 1985 Fumigation of Building by Pest Control Company

Jun 3-23, 1985 and continue Receive GFM and CFM

Jun 1, to Aug 31, 1985 Complete recruiting and hiring of personnel, receive equipment, training of production personnel, test production debug equipment, etc.

Sep 1985 and continue Commence production under contract DLA13H-85-C-0591

(d) The foresaid extension of delivery schedule and consideration therefore are fair and reasonable

(e) Payment of the aforesaid consideration may be effected by, but not limited to, any appropriate deduction by the Government from any money which is or may become due and owing to the Contractor.

PFF 109

Exh. 2

DEFENSE LOGISTICS AGENCY
DEFENSE PERSONNEL SUPPORT CENTER
2800 SOUTH 20TH STREET
PO BOX 8419
PHILADELPHIA, PENNSYLVANIA 19101-8419

NOV 18 1985

IN REPLY REFER TO

DPSC-SPPR (Bankoff/X3660/ed)

SUBJECT: Modification P00016 to Extend Contract DLA13H-85-C-0591

Mr. Henry Thomas
President
Freedom New York, Inc.
1600 Bronxdale Avenue
Bronx, N.Y. 10462

Re: Freedom letter dated 14 November 1985, subject as above

Dear Mr. Thomas:

Your reference letter takes exception and requests revisions to selected portions of the subject modification. After careful consideration, I have determined that your recommended changes are unneccessary or unsatisfactory for the following reasons:

Page 2, 1st para - "Whereas the contractor has failed or may fail to meet the above cited delivery schedule" is a statement of fact. As such, it is the decision of the Contracting Officer to have this paragraph remain in it's position unchanged.

Page 2, 2nd para - The inclusion of "subject to other provisions of this amendment" is not acceptable. The monetary consideration is offered for an extension to the delivery schedule which is being granted and such consideration is fixed and not dependent on any other provision.

Page 2, 3rd para - The addition concerning the rights and remedies provided under this contract and the law of the parties involved is not necessary as this modification does not abridge such rights and remedies.

Page 2, subparagraph (b) - As previously negotiated and agreed to, the consideration of $100,000 and the contractor's liability to pay such consideration is indeed fixed and is the Government's basis for extending subject delivery schedule in lieu of termination.

Page 3, to include new subparagraph (e) - Again, as the modification stands, no rights of the contractor are abridged with respect to equitable adjustments under the subject contract and as such, this subparagraph is unneccessary.

The subject supplemental agreement has been signed by me and is now in effect in it's original form.

Thank you for your understanding.

Sincerely,

FRANK BANKOFF
Contracting Officer