Before The

Armed Services Board of Contract Appeals

Falls Church, Virginia

Appeal of	)	
	)	
FREEDOM NY, Inc.	)	**ASBCA No. 43965**
	)	
Under Contract No. DLA13H-85-C-0591	)	
	)	

NOTICE OF APPEARANCE

Please enter my appearance as counsel for Freedom NY, Inc. ("Freedom NY").

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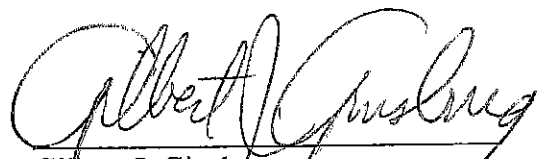
Respectfully submitted,



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October 9, 2000

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MOTION FOR RECONSIDERATION

INTRODUCTION

On September 5, 2001 the Armed Services Board of Contract Appeals (hereinafter the "Board") issued its decision in the above captioned matter (hereinafter the "Decision"). The Board held, agreeing with Appellant, that respondent had breached the contract. Specifically, appellant alleged that respondent had breached the contract by improper denial, suspension and delay of progress payments and the Board agreed. Decision, p. 32. Appellant alleged that respondent had breached the contract by improper deductions from progress payments and, citing certain specified exceptions, and the Board agreed. *Id.*, p. 33. Appellant alleged that respondent had breach the contract by its interference with prospective financers and the Board agreed. *Id.*, p. 34. Appellant alleged that respondent had breached the contract by unauthorized diversion of CFM and the Board agreed. *Id.*, p. 35. Appellant alleged that respondent had breached the contract by failing to pay for delivered product and the Board agreed. *Id.***,** p. 36. The Board also agreed with appellant's breach allegations with respect to GFM delays, Id., p. 36; improper inspections. *Id.*, p. 37; and Zyglo testing, *Id.,* p. 37.

Despite strong words about respondent's conduct, the Board did not allow any price adjustment other than that associated with 446 days of Government responsible delay.

Appellant requests the Board to reconsider its decision with respect to several specific points. First, the Board should find that the delays found by the Board were also constructive changes, entitling appellant to an equitable adjustment. Second, the Board should find that the measure of the equitable adjustment in this case should be revised in order to better capture the full cost impact of the cumulative effect of the Government's actions. Third, the Board should find that the Government's actions cumulatively had a profound effect on the contract, so that the contract was cardinally changed thereby. Fourth, the Board should find that appellant's damages caused by the Government's breaches are not speculative or remote. And fifth, the Board should find that appellant is entitled to the profit and allocable fixed overhead which appellant would have obtained from performance of other MRE contracts awarded to those in the IPP planned producer program.

JURISDICTION

The Decision is dated August 28, 2001 and was certified and issued by the Board on September 5, 2001. The decision was received by appellant on Tuesday, September 11, 2001. The Board's records support this. Board Rule 29 requires filing of a Motion for Reconsideration within 30 days of receipt of the decision. This Motion is timely filed.

I. THE DELAYS FOUND BY THE BOARD ALSO WERE CONSTRUCTIVE CHANGES TO THE CONTRACT ENTITLING FREEDOM TO AN EQUITABLE ADJUSTMENT, INCLUDING PROFIT ON THE ADDITIONAL COSTS

In its August 28, 2001 decision, the Board held that the Government's interferences with Freedom's financing, the Government's delay and withholding of progress payments and the Government's diversion of contractor-furnished materials ("CFM") were delays to the contract for which Appellant is not entitled to recover profit. *Id*. pp. 42-43. Appellant respectfully suggests that the Board erred in not finding that these circumstances also created constructive changes to the contract for which an equitable adjustment, including profit, is due.

As the Board found, the flow of progress payments was a key element of the contract between Freedom and the Government. Findings 12, 15, 19, 23. As the Board also found, the Government knew that Freedom's performance was predicated on obtaining certain financing. Findings 12, 13, 15, 19, 21. And, the Board expressly found that Freedom's cash flow spreadsheets, which were predicated on progress payments and outside financing, were made a part of the contract. Finding 22.

Because the progress payment schedule was an integral assumption on which the contract was based, the Government's delay and withholding of progress payments were changes to the contract. In this respect, the present case is very similar to *Aerojet-General Corp.*, ASBCA No. 13548, 70-1 BCA ¶ 8245, where the timing of funding and progress payments was considered to be crucial to performance and where the contracting officer erroneously placed a ceiling price on progress payments. In that case, this Board

determined that a constructive change had occurred as a result; as the Board summarized its own decision in a later case--[1]

> The initial *Aerojet* decision [citation omitted] involved a situation where Government representatives misinterpreted contract provisions. As a result of this misinterpretation they unilaterally revised the contract price and ceased making progress payments. We held that the contractor was entitled to an equitable adjustment for increased costs resulting from the refusal of the Government to make progress payments.

Here, too, the contracting officer and his auditors misinterpreted the contract (Findings 26, 30, 32, 43, 55, 66-67; *see also* slip. op. at 32-33), withheld progress payments, and changed the contract thereby.

Additionally, when the Government withholds progress payments but continues to demand performance, as it did here, a constructive change has occurred. *See Electro Optical Mechanisms, Inc.*, ASBCA No. 20704, 79-2 BCA ¶ 14,135 (concurring opinion). This is especially true if that continued performance must take a different form because of the Government's failure to pay. *See, e.g., O'Neal Construction Co.,* ENGBCA No. 5038, 87-2 BCA ¶ 19,935, where the Corps of Engineers Board of Contract Appeals rejected a constructive changes claim because, the Board said, there was no evidence that the withholding of progress payments caused the contractor to perform additional work. This implies that an equitable adjustment for constructive changes is appropriate if the contractor's work changes because progress payments have been withheld, exactly what happened here. The Board found here, for example:

> In March 1985, AT&T installed a networked, automated, building management and control system in [Freedom's] facility. ACO Liebman knew that this system was needed for contract performance. AT&T's Jim McGowan called ACO Liebman to

[1] *Systems Consultants, Inc.*, ASBCA No. 18487, 75-2 BCA ¶ 11,402.

> confirm progress payment financing, but Liebman refused to do so, whereupon AT&T repossessed and removed its equipment.

Finding 45, citations to the record omitted. Thereafter, Freedom had to perform without this system which "was needed for contract performance." *Cf.*, Finding 54. Likewise, Freedom had to perform with slower and less efficient equipment than it would have used had progress payments been made. It was as a direct result of the Government's (ACO Liebman's) actions that resulted in cancellation of Freedom's order for the planned equipment. Findings 57, 59-60. Accordingly, Freedom's contract was constructively changed.

This Board has allowed equitable adjustments for delayed progress payments on other occasions even without stating expressly that a constructive change had occurred. *See, e.g., Virginia Electronics Company, Inc.*, ASBCA No. 18778, 77-1 BCA ¶ 12,393; *Hydrospace Electronics & Instrument Corp.,* ASBCA No. 17922, 74-2 BCA ¶ 10,682. In this case, too, the Board should find that Freedom is entitled to an equitable adjustment, including profit, because of the Government's delay and withholding of progress payments.

Finally, the Delay clause itself (DAR 7-104.77(f)) provides that an equitable adjustment would be applicable in cases such as this. That clause states, in pertinent part, that:

> However, no adjustment shall be made under this clause for any delay or interruption . . . (ii) for which an adjustment is provided or excluded under any other provision of this contract.

Finding 7. The Government's actions changed the contract's agreed payment and financing arrangements. The acts did not, in the first instance, address performance time. While the acts did in fact cause delay, that delay was only a result of the change and not the change itself. The adjustment for the Government's acts is provided under Contract

General Provision No. 2 "CHANGES." Since the Changes clause is clearly applicable, the Delay clause, by its own terms, is not.

II. THE AMOUNT AWARDED BY THE BOARD UNDER THE APPLICABLE CONTRACT CLAUSES WAS INADEQUATE; APPELLANT IS ENTITLED TO THE FULL AMOUNT OF ADDITIONAL COSTS ATTRIBUTABLE TO THE VARIOUS ACTIONS OF THE GOVERNMENT, INCLUDING THE COMBINED EFFECT OF THOSE ACTIONS

An equitable adjustment is supposed to put the contractor in the economic position he would have been in but for the event or events for which the Government has cost responsibility. In other words, an equitable adjustment is intended to make a contractor whole. *Bruce Construction Corporation v. United* States, 163 Ct. Cl. 97, 100, 324 F.2d 516, 518. *See also* Ginsburg, *Loss of Efficiency and Extended Overhead Claims*, pp. 1-2, 23 (Manual, Touro College 1999); *Pricing of Claims*, pp. D-1-D-2, D-20-D-22 (Manual, Touro College 1999). Thus, a contractor is supposed to receive the difference between what it actually cost him and what it would have cost him but for the Government's actions. *Id*. The latter is commonly referred to as a "would have cost." *Loss of Efficiency*, p. 1, *Pricing of Claims*, p. D-1.

It is generally accepted that in complex claims, the total impact of those claims may be greater than the sum of the parts. *McMillin Brothers Constructors, Inc.*, EBCA No. 328-10-84, 91-1 BCA ¶ 23,351; *Bechtel National, Inc.*, NASA-BCA No. 1186-7, 90-1 ¶ 22,549. Accordingly, in order to accurately quantify the amount to which the contractor is entitled in complex claims, it is necessary to *aggregate* the claims for which the Government has cost responsibility. *Loss of Efficiency*, pp. 1-2, and *Pricing of Claims*, *supra*, pp. D-1-D-2. Actions for which the Government has cost responsibility include actual and constructive changes, suspensions and Government delays of work, differing site conditions, claims

under the contract's GFM clause(s), and any other Government actions or inactions for which the contract, the law, or case precedent places cost responsibility on the Government. *Id*. The various events for which the Government has cost responsibility are then eliminated from the picture, so that what is left is the way the work would have gone but for the problems for which the Government is responsible. *Id*. The "would have cost" is then calculated on this "but for" basis.

In the present case, the would-have cost is the budgeted figure agreed to by the parties, *i.e.*, $14,970,142 (Finding 17), adjusted for any increases or decreases which would have taken place in the absence of the Government's actions (or inactions).

The only adjustment to the budget cost figure which is indicated by the record is $48,035 for higher material costs resulting from vendor orders not apparently affected by Government actions. App. post hearing brief, Appendix Quantum Charts, Figure 9. The only other possible adjustments affecting the "would have cost" would be delays or problems in obtaining CFM foodstuffs. However, in the present case, all of those shortages or delays were caused by the Government's wrongful withholding of progress payments[2], discouragement of appellant's financing sources, and diversion of CFM

[2] The Government's withholding of progress payments and other actions caused the contractor's cash flow to be decimated and its concomitant financial condition to be weakened. Thus, the Government's actions, which the Board found to be unauthorized and breaches of contract, caused the contractor's projected costs to exceed the contract price. ACO Liebman knew or should have known that his actions were unauthorized and that they caused appellant's loss position. Therefore, his application of a "loss ratio" to progress payments for appellant was unreasonable and an abuse of discretion. Accordingly, contrary to its conclusion on p. 33, the Board should have found that the ACO's deductions for a "modified loss ratio" *were* an abuse of discretion at the time he did it and *were* a breach of contract. Similarly, since appellant's "serious financial difficulties" which led to its inability to make progress were *directly* caused by ACO Liebman's improper actions which were a breach of contract (*see* the Board's rulings on pp. 32, 33, 34, and 35-36), it was unreasonable and a breach of contract for ACO Liebman to impose a 100% liquidation rate. Accordingly, the Board's ruling that such actions were justified was inappropriate and should be corrected.

components from appellant's cake supplier.[3] *But for* the Government's actions and inactions for which it has cost responsibility, the record indicates that appellant would have performed the MRE-5 contract at a cost of $14,970,142 plus $48,035, or $15,018,177.

The actual cost incurred is disputed in the record. *See* Finding127. However, some of that cost is *undisputed*, and the Board found (Finding 127) actual costs of $21,525,710 and estimated cost to complete of $1,435,171. Thus, the best calculation of undisputed actual costs at completion is $22,960,881. The difference between the probable actual costs and the "would-have-cost" is $7,942,704 ($22,960,881 less $15,018,177). This amount reflects the overall additional cost, sometimes referred to as "loss of efficiency," caused by the Government's various actions. Appellant should have been awarded this amount for the cost portion of the equitable adjustments attributable to the Government's actions.

The Board erred in holding appellant to a standard of proof requiring segregation of costs among complex claims involving overlapping impact from Government actions. *See* Findings 126 and 127. The present case involves multiple Government actions which cannot be severably and discretely quantified.[4] What *is* demonstrated from the record is

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[3] The diversion of brownies from appellant's supplier, Sterling Bakery (Finding 78), and its concomitant shift in production to "catch up" the brownies had a ripple effect on Sterling's production, causing it to be late in delivery of maple nut cake (as noted in Finding 87).

[4] Appellant notes that some additional items of increased costs *were* separately identified by appellant in its quantum sheets and testimony. Thus, appellant identified $355,155 in direct material cost increases caused by vendor price increases directly attributable to Government caused delays ("due to inflationary price escalation over the passage of time resulting from Government caused delays," App. post hearing brief, Appendix, Quantum Charts, Figure 3). Also, a portion of the direct labor inefficiency, $548,057, was claimed (caused by several different specific reasons, *Id*., Figure 4)) – only a portion, since direct labor inefficiency was $1,776,908 in excess of the would-have-cost. *Id*. The Board rejected both items in Finding 126, stating that appellant had not "explain[ed]" these two items, although both Quantum Charts, Figures 3 and 4 contained what appears to be specific and credible explanations.

the *total amount* of cost to which appellant is entitled. And that is sufficient. Indeed, only a reasonable approximation is required.

The U.S. Supreme Court has made clear that the proper standard of proof to be used in quantum cases is considerably lower than the standard of proof necessary to demonstrate entitlement. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). Said the Court in *Story Parchment*:

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to [damages which do not definitely result from] the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in … amount.

Id. at 562. *Cf.*, *Dale Construction Co. v. United States*, No. 85-58 Ct. Cl., May 10, 1963. *See also Wunderlich Contracting Co. v. United States*, 351 F.2d 956 (Ct. Cl. 1965)

The ASBCA has long recognized that the would-have-cost is, of necessity, almost always going to be an estimate. Thus, the Board stated 38 years ago:

> A construction contractor cannot be expected to maintain accounting records from which the increased labor costs resulting from reduced labor efficiency can be ascertained by audit. The very nature of such costs makes it necessary that the amount be determined from engineering estimates made by men with construction experience and knowledge of labor costs under the contemplated method of performance in comparison with actual costs under the methods [the contractor] was forced to apply as a result of conditions encountered.

Paccon, Inc., ASBCA 7890, 1963 BCA ¶ 3659; *see also Luria Brothers & Co., Inc. v. United States*, 369 F.2d 701, 713 (Ct. Cl. 1966). While *Paccon* was a construction case, the same principles apply to all types of contracts where loss of efficiency from multiple

Government actions is involved. *Cf., Speciality Assembling & Packaging Co., Inc. v. United States*, 174 Ct. Cl. 153, 355 F.2d 554 (1996); *Continental Consolidated Corp*., ASBCA 4372, 71-1 BCA ¶ 8742; *International Aircraft Servs. Inc.*, ASBCA 8389, 65-1 BCA ¶ 4793; *Therm-Air Mfg. Co.*, ASBCA 15842, 74-2 BCA ¶ 10,818; *Data-Design Laboratories*, ASBCA 17193, 73-2 BCA ¶ 10,284.

The $7,942,704 represents costs directly associated with loss of efficiency appellant suffered as a result of Government action and inaction. Appellant waived $255,754 of this amount by execution of Mod. P00028 even though the cost was caused by GFM fruit jellies delays in July 1986. Quantum Charts, Figure 9. However, the Government furnished no valid consideration for Mod. P00028. Appellant was given a two-week time extension, but *no money*. The Government essentially agreed not to terminate appellant for default because of the *Government's* failure to meet its contractual GFM responsibilities.

The Board found that appellant's claim for the costs attributable to the lack of GFM was barred by Mod. P00028. Decision at 40. Although Mod. P00028 could have been attacked for lack of consideration (or for economic duress), appellant did not challenge its release provision. In any event, if the $255,754 is deducted from the $7,942,704 which represents the loss of efficiency attributable to Government actions, that still leaves $7,686,950 which is not barred by valid modifications in the record. To this amount should be added profit, which is a fundamental part of equitable adjustments. *Bruce Construction*, *supra*.

The agreed-upon profit rate on this contract was 14.88%. Finding 17. That amount, $1,143,818, should be added to the cost of $7,686,950, resulting on a total equitable

adjustment of $8,830,768. Accordingly, the Board should correct its decision to increase the equitable adjustment awarded from $5,907,654 to $8,830,768.

III. THE CONTRACT AS PERFORMED WAS CARDINALLY CHANGED FROM THE CONTRACT THAT WAS CONTEMPLATED BY THE PARTIES THUS ENTITLING FREEDOM TO RECOVER BREACH DAMAGES INCLUDING ANTICIPATORY PROFITS

Not only were the Government's actions in interfering with Freedom's financing and in delaying and withholding progress payments constructive changes to the contract, they actually caused a cardinal change to the contract.[5] Accordingly, the Board erred in limiting Freedom to the remedies provided for in the contract's delay clause. Slip. op. at 42. Nor would its remedies be limited to the Changes clause or other remedy granting clauses. *See* the discussion in Section I, above. Instead, Freedom is entitled to recover breach of contract damages, including anticipatory profits.

A cardinal change to a contract occurs when there is "drastic modification beyond the scope of the contract." *Air-A-Plane Corporation v. United States,* 408 F.2d 1030, 1033 (Ct. Cl. 1969). "Under established case law, a cardinal change is a breach. It occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. By definition, then a cardinal change is so profound that it is not redressable under the contract." *Allied Materials & Equip. Co. v. United States*, 569 F.2d 562, 563-564 (Ct. Cl. 1978). "[A] fundamental alteration of this type is a contract breach, entitling the contractor to breach damages." *Air-A-Plane, supra*, 408 F.2d at 1033.

[5] In its several briefs, appellant asserted to the Board that appellant was entitled to breach of contract damages. *See, e.g.,* Appellant's Corrected Post-Hearing Brief, pp. 180 *et seq.*; Appellant's Reply Brief, p. 33.

It is irrelevant, when examining whether a cardinal change has occurred, that the final product is identical to the product contemplated by the contract. "Where a cardinal change is concerned, it is the entire undertaking of the contractor, rather than the product, to which [courts] look." *Edward R. Marden Corp. v. United States*, 442 F.2d 364, 370 (Ct. Cl. 1971).

The contract performed by Freedom clearly was not the same as the contract that the parties originally bargained for. In that connection, appellant submits that the circumstances surrounding the contract's formation, and particularly the knowledge and understanding of the parties are relevant to defining that bargain.

Prior to the award of the MRE-5 contract, on November 15, 1984, appellant undertook a concerted effort to gain admission as an IPP assembler in the MRE mobilization program. Since the MRE program was administered by DPSC Philadelphia (Findings 1-4), appellant's effort required close dealing with Philadelphia's contracting personnel. Further, inasmuch as appellant was located in the New York City area, DPSC's local administrative arm, DCASMA-NY was an essential player. Finding 10. The key participant at DCASMA-NY was ACO Marvin Liebman. Findings 16 & 23.

As of the negotiation and award of the MRE-5 contract, appellant had a negative net worth and owed creditors several million dollars. Findings 10 & 23. Not only were DPSC and DCASMA contracting officials aware of this situation, they had to a significant degree, been responsible for its creation.[6]

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[6] Appellant respectfully directs the Board's attention to the following circumstances that were previously addressed in appellant's unchallenged proposed findings of facts (PFFs).

As of the award of MRE 5, cognizant Government contracting personnel both in Philadelphia and New York knew, and in some cases were responsible for, the following:

MRE contract negotiation and award occurred in the context, and with full Government knowledge, of appellant's circumstances and the reasons therefore. The result, taking into account those circumstances, was a unique contractual arrangement that was documented, *inter alia*, by a formal advance agreement on the treatment of costs (Finding 17), and appellant developed proposal spreadsheets, incorporated by reference as part of the contract, that specified the requirement for and timing of progress payments as well as an 82.6% liquidation rate thereof. Findings 19 & 22.

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1. That appellant had been a successful minority owned small business. It was profitably engaged in providing school lunches to the Paterson, New Jersey public schools. App. post hearing brief, PPF 13;

2. That appellant had received an award from DPSC of two contracts for the production and delivery of MRE components, i.e., food items preserved in retort pouches. This product was to be provided to MRE assemblers as GFP. The intent of both the Government and appellant was to qualify appellant as a Walsh Healey manufacturer in order that appellant might gain admission to the MRE IPP program as an assembler. *Id*., PPFs 14 & 15.

3. That appellant, using its own resources and without any Government assistance, *e.g.*, Government financing, obtained the plant and facilities not only to perform the retort pouch contracts, but to provide the capability required by the Government of MRE IPP assemblers. *Id*., PPF 17, 18, 20, 21, & 22.

4. That appellant, a small minority company, had undertaken a huge investment. Further, that appellant undertook this huge investment based on Government representations: (a) that successful development of the required capability would gain appellant access to the MRE IPP program; and (b) that admission to the MRE IPP program assured appellant of successive MRE contracts in the same manner as the then successful assemblers, RAFCO and SOPAKO. *Id*., PPFs 18, 23 & 24.

5. That, because of the huge up-front investment, appellant could not profitably perform the retort pouch contracts and that additional contracts were required in order for appellant to recoup its initial investment. *Id*., PFF 22.

6. That the DPSC contracting officer demanded, as a condition precedent to appellant's designation as an MRE IPP assembler, and in order to assure appellant's entire attention to and emphasis on MRE production, that appellant abandon its school lunch program. That appellant met this demand, so that appellant's very survival rested on Government performance in accordance with Government representations. *Id*., PFF 16 & 18; *Cf.* Decision findings 1 & 23.

Freedom's entire undertaking changed as a result of the Government's subsequent actions. As the Board expressly found, Freedom's cash flow projections, which were predicated on progress payments and outside financing, were made a part of the contract by the parties. Finding 22. Furthermore, the Government knew at the time of award that the flow of progress payments was a key element of the contract between Freedom and the Government. Findings 12, 15, 19, 23. Also, the Government knew that Freedom's performance was predicated on obtaining certain financing. Findings 12, 13, 15, 19, 21. Finally, the Government knew that all of Freedom's costs were direct costs and were to be paid as such. Findings 18, 23. Accordingly, when the Government took actions that negated Freedom's cash flow projections, actions that included delaying and withholding progress payments, cutting off financing from third parties, and otherwise failing to pay direct costs when due, thereby precluding the obtaining and use of necessary and desirable production equipment and severely impacting the efficient and economical performance of the contractor, the Government dramatically changed Freedom's undertaking.

The Board made express findings that Freedom fundamentally changed its method of performance as a result of the Government's changes to the contract financing. The Board found, for example:

> In March 1985, AT&T installed a networked, automated, building management and control system in [Freedom's] facility. ACO Liebman knew that this system was needed for contract performance. AT&T's Jim McGowan called ACO Liebman to confirm progress payment financing, but Liebman refused to do so, whereupon AT&T repossessed and removed its equipment.

Finding 45 (citations to the record omitted). Thereafter, Freedom had to perform without this system which "was needed for contract performance." *See also* Finding 54. Likewise,

Freedom had to perform without Koch Multi-Vac vacuum equipment, the equipment expressly contemplated by the parties in their contract negotiations. Finding 20. Instead of the contemplated equipment, Freedom had to use slower and less efficient equipment to perform the same tasks. Findings 57, 59-60. But, even the use of that less efficient equipment was impacted by the Government's delays of progress payments in that Freedom was unable to obtain spare parts due to lack of financing. Finding 60.

As the Board found, appellant and the Government agreed that appellant would need to expend $811,002 in direct labor costs. Decision, finding 20. Instead, because of the Government's breaches, appellant was forced to expend $2,526,746 on direct labor, over three times the "would-have" direct labor, based upon the use of the state-of-the-art automated equipment, and the Government's fulfilling its contractual requirements, including its duty of cooperation. Board's Exh. 1, p. 5. Clearly, all of these facts combined created a cardinal change to the contract.

But there is more: As negotiated, Freedom's contract was to have a term of thirteen months, i.e., from November 1984 to December 1985, with deliveries being made in six monthly installments between July and December 1985. Finding 22. As performed, and as a result of the Government's changes, the contract was still ongoing in June 1987, i.e., 31-1/2 months after award. Finding 120. The 31 ½ months of actual contract performance was almost 2 ½ times as much as contract performance should have and would have taken but for the Government's actions. The Government never provided any cost coverage for the delays. Appellant had to finance all the delayed performance at the original costs.

In comparison to originally negotiated costs of $14.97 million (Finding 127), and Freedom's "would have cost" of $15.0 million on these facts (see the discussion *supra* at page 8), Freedom incurred total costs (short of completion) of the contract which were 1 ½ times that amount. *Id*. Of the actual costs, as noted above, over $2.5 million was direct labor, over three times the "would-have" direct labor. Finding 20 and Board's Exh. 1, p. 5. These facts, too, support the existence of a cardinal change.

When a contract has been cardinally changed, the contractor may recover its complete damages, including anticipatory profits. *See, e.g., Allied Materials & Equip. Co., supra,* 569 F.2d at 564 (citing other cases). Accordingly, any limits on recovery, for example those in the Government Delay of Work and Changes clauses, are not applicable to Freedom in the present case. The Board should reconsider and correct its decision accordingly.

IV. FREEDOM'S ANTICIPATORY PROFITS ARE NOT SPECULATIVE OR REMOTE

The Board found in its August 28, 2001 decision that Freedom was an approved Industrial Preparedness Producer ("IPP") beginning with the so-called MRE-4 contract cycle (Findings 3-4), that award of Meal, Ready-to-Eat ("MRE") contracts was limited to IPP "planned producers" (Finding 1), that the objective of the IPP was "to maintain viable producers capable of increasing their peacetime production to satisfy national mobilization needs in the event of mobilization" (*Id.*), and that MRE producers had no non-MRE business. *Id.* The Board further found that Freedom was authorized to receive awards for the MRE-5, -6, -7 and -8 contracts (Findings 5, 58, 103, 119), but that Freedom did not receive any awards for MRE-6 or later. Findings 58, 117.

The Board found that Freedom submitted an offer for the MRE-7 requirement, and that a pre-award survey found that Freedom's financial capability was favorable and

recommended award (Finding 103); however, the Government did not attempt to negotiate an MRE-7 contract with Freedom and no award was made to Freedom for the MRE-7 configuration. Finding 117. This, despite the Government's commitment that it would attempt to negotiate an MRE-7 contract with Freedom. Finding 92.

After finding these facts, the Board concluded on page 38 of its slip opinion that Freedom's anticipatory profits for post MRE-5 contracts were remote or speculative because "designating [Freedom] as an IPP planned producer was not a Government commitment or guarantee that it would maintain [Freedom] in such status or continue to award MRE contracts to [Freedom]." Appellant respectfully submits that the Board erred in making that determination and applied the wrong legal standard.

A well-established line of cases holds that once a contractor is admitted to a discrete group of potential awardees, it has the right to expect a fair share of future contracts barring any changed circumstances that justify removal from that group. *See* cases discussed below.[7] Here, once the Board found that Freedom was an IPP planned producer and that Freedom's contract was breached and was wrongly default-terminated, the Board should have applied the line of cases discussed below to find that Freedom's claim for anticipatory profits was *not* remote or speculative.

In *Ace-Federal Reporters, Inc. v. Barram,* 226 F.3d 1329 (Fed. Cir. 2000), the Federal Circuit held that the Government had breached the contracts of court reporters listed on the Federal Supply Schedule by procuring transcription services from a contractor not listed on the schedule. As a result of that breach, the Federal Circuit found that the aggrieved contractors were entitled to an award of lost profits. *Id.* at 1330.

In holding that Ace-Federal's lost profits were not too speculative or remote to be awarded as damages, the Federal Circuit explained as follows:

> A contract is not unenforceable merely because it does not fit neatly into a recognized category. To be valid and enforceable, a contract must have both consideration to ensure mutuality of obligation, *see generally* Restatement (Second) of Contracts §§ 71, 72 (1981), and sufficient definiteness so as to "provide a basis for determining the existence of a breach and for giving an appropriate remedy." *Id.* § 33(2); *see, e.g., Aviation Contractor Employees, Inc. v. United States,* 945 F.2d 1568, 1572-74 (Fed.Cir.1991). In our case, as consideration for the contractors' promises regarding price, availability, delivery, and quantity, the government promised that it would purchase only from the contractors on the schedule, with few exceptions. The government's promise, just as in *Locke,* has substantial business value because there were only between two and five authorized sources in each of the designated geographic regions. Rather than vying with 18,000 other transcription services for the government's business, the contractors had to compete with only one to four other contractors. The government cites the multiple awards clause of the contract stating that the agencies are instructed to consider other sources besides the contract sources. *See* note 1, *supra*. The government interprets this clause as allowing the agencies to purchase the contractually covered services from any source as they saw fit. However, the contractual language states that the agencies should "consider" other sources; it does not give them authority to contract with companies other than those listed absent a waiver. Therefore, each time an agency that did not obtain a GSA waiver arranged for services covered under the contract from a non-contract source, the government did not act within the limited exception and breached the contract.

Id. at 1332-33 (emphasis added; footnote omitted). *See also Gap Instrument Corp.,* ASBCA No. 51658, 01-1 BCA ¶ 31,358 (finding that membership in a small group of contractors entitled to contracts had business value).

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[7] *See also*, the U.S. Supreme Court's discussion, *supra*, of the less stringent standard of proof that applies to damages cases generally. *Story Parchment v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

Here, too, Freedom gave consideration for the privilege of becoming an IPP planned producer because that privilege had "substantial business value." *Inter alia*, Freedom made concessions on price, availability, delivery, and quantity and it agreed not to perform non-MRE business, e.g., school lunch production. (*See, e.g.,* Findings 12, 15 & 17, describing Freedom's price concessions, and Finding 1; *see also* Appellant's Corrected Post-Hearing Brief at 6, Proposed Findings 13-16 (Government required Freedom to give up its school lunch business).)

This last concession, the fact that Freedom was precluded from performing any business other than MREs, is particularly significant in light of the Court of Claims' decision in *Goldwasser v. United States*, 325 F.2d 722 (Ct. Cl. 1963). There, as here, the Government claimed that a contract clause absolved it of any duty to award future contracts to the appellant. In rejecting that claim, the court stated:

> According to the Government's contention, when it paid for $100 worth of printing, its obligation was discharged. But, on the other hand, it acknowledges that the contractor was bound to keep his facilities available to print 10,000 copies a week of the newspaper whenever the Government might elect to order them. This would have prevented him from accepting any other business requiring the need of these facilities. It would have been a one-sided bargain, bordering upon a lack of mutuality under the facts of this case. The contract should not be given this construction if it can be avoided.

Id. at 723-24. Here, too, if Freedom had no right to expect MRE contracts after MRE-5, its promise to stop all non-MRE business "would have been a one-sided bargain, bordering upon a lack of mutuality." Such a contract interpretation must be avoided. *Id.*

In short, Freedom's claim for lost revenues, including anticipatory profits and the allocable share of fixed overhead for post-MRE-5 contracts is anything but remote or speculative. To the contrary, there is a clear basis for determining what contracts

Freedom had a reasonable chance of obtaining and what Freedom's profits as well as its fixed overhead absorbed would have been. Accordingly, the Board should reconsider and correct its decision and should award Freedom its lost anticipatory profits.

V. THE PROPER MEASURE OF FREEDOM'S DAMAGES CAUSED BY THE GOVERNMENT'S BREACH

In the present case, but for the Government's breaches, Freedom would likely have remained in the IPP program until the conclusion of that program. There is nothing in the record to indicate that appellant would not have continued to satisfactorily perform in the program, in the absence of the Government's actions and inactions during the MRE-5 contract.

Appellant was approved is an IPP planned producer on 30 March 1983. Finding 3. Appellant was awarded its first contract, MRE-5, on 15 November 1984. Finding 22. Not only does the MRE IPP program still exist, but it is still limited to the same assemblers, RAFCO, SOPACKO and CINPAC[8], the Government's substitute for appellant.

The record reflects appellant's heroic persistence in producing MRE's, the Government's actions notwithstanding. Finding 116. As late as September, 1986, the Government performed an MRE-7 pre-award survey and recommended appellant for award. Finding 103. The negative second pre-award, performed after appellant had successfully produced over 500,000 MRE cases, was based not on any production deficiency, but on appellant's financial condition (Finding 116), a condition clearly caused by the Government's breach. Appellant's technical production ability and effectiveness was never in doubt.

[8] CINPAC was purchased by Ameriqual and the contracts are now being performed by Ameriqual.

Because of appellant's technical proficiency it is abundantly clear that but for the Government's maladministration of the MRE-5 contract, appellant would have continued in the MRE IPP program. This conclusion is supported by the continued participation of all the same planned producers in the MRE IPP program more than 14 years after the Government wrongfully defaulted appellant. Finding 119; R4,Tab FT 393

Between November 1984 and May 1985, the Government wrongfully refused to pay appellant a penny in progress payments. Finding 52. This placed the Government in arrears on payment in the amount of approximately $1.7 million. *Id*. The lack of the promised financing created havoc with appellant's production plans. Findings 43, 45, 49 & 57. The Government's response to the problems it induced, was, in the June 1985 time frame, to introduce a fourth company, CINPAC, into the program. R4, FT 191. Clearly, CINPAC was brought in to replace appellant because of appellant's Government-caused difficulties.[9] Thus, but for the Government's breaches, appellant would have received the contracts which were given to CINPAC since that time.

However, even if CINPAC had been brought into the program autonomously and not as a substitute for appellant, that would have meant that there would have been four, rather then three, IPP planned producers, including appellant and CINPAC.

Under the case precedents discussed above, in either case appellant would be entitled to damages for breach of contract. Appellant would be one of a limited number of sources for IPP planned producer contracts.[10] As the Federal Circuit said in *Ace-Federal*

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[9] The Government brought CINPAC into the IPP program despite the fact that CINPAC was *not eligible* for contract awards. R4, FT 278.

[10] Indeed, all four producers were intended recipients of MRE 7 contract awards. R4 FT 247 (the MRE 7 D & F); R4 Exh. F 15 to Tab F-1; R4 Exh. F16 to Tab F-1. Presumably that situation would

Reports, Inc. v. Barram, *supra*, quoting *Locke v. U.S.*, 151 Ct. Cl. 262, 283 F.2d 521 (1960), which in turn cited the Supreme Court in *Story Parchment Co.*, *supra*:

> … "If a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery," and the board's duty is to "make a fair and reasonable approximation of the damages." *Locke*, 283 F.2d at 524. The relevant factors in determining the value of a chance for obtaining business include: the total amount of business the plaintiff would have been eligible for; any material facts that would have tended to prevent the plaintiff from receiving his proportionate share of such business; and the average expenses incurred in fulfilling the obligations of the contract. …

The Government maintains its IPP planned producers by giving each producer contracts in amounts based on the excess capacity the producer is willing to maintain for mobilization purposes.[11] In appellant's case, that would have been contracts for 100,000 cases per month during peace time, based upon a "surge" capacity of 1,199,000 cases per month during mobilization. R4, FT 030, pp. 78-80.

While the amounts of the IPP planned producer contracts during the last 15 years is not expressly in the Record, they are official public records. Appellant respectfully requests the Board to take judicial notice of their existence and rule that recovery of profits by appellant should be governed by such records once they are obtained from the Government by FOIA request or otherwise.

With respect to the damages portion of the contract awards which appellant likely would have obtained, the portion of the contract revenues which are incremental costs, *e.g.*, direct vendor costs for CFM, are a "wash," *i.e.*, they are expended in full by the contractor. What comprises the damages are the lost profits and lost fixed indirect costs

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have continued, if appellant had not been removed from the program by the Government's breaches.

(including the fixed portion of semi-variable costs). *See* Uniform Commercial Code (UCC) § 2-708(2); *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795, 798-99 (3rd Cir. 1967); Ginsburg, *Pricing of Claims*, *supra*, Section III C, *Fixed and Variable Costs*, pp. A-16 through A-19. The profit would be calculated at 14.88%, which is the precedent set by the parties in the MRE-5 contract. Fixed overhead would include such things as management salaries, unamortized equipment costs, occupancy costs, utility costs, insurance, pest control, maintenance, refuse and snow removal, legal and accounting. For the MRE-5 contract, appellant's budgeted costs for these indirect cost items (excluding Henry Thomas' salary) was $2,606,723. R4, FT 062, FT 443. Fixed overhead made up about 34% of appellant's budgeted indirect costs during performance of the MRE-5 contract. *Id*. The fixed overhead would have continued at about the same rate (with escalation of 3 ½ to 4 percent annually) for the 14 years of continuing MRE contracts to date.

In that connection, since appellant was deprived of the revenues it would have obtained from the IPP planned producer program, it was never able to recover the following for which it was and is liable to its creditors:

A.	Unrecovered investment costs	$1,062,138
B.	Dollar Dry dock unpaid principal	1,429,012
C.	Amounts owed to Bankers Leasing for failure to pay on time	4,900,000
D.	Accounts payable, including charges for failure to pay timely	8,282,000

See Finding 132. In addition, appellant was not able to pay the salary it owes its president, Henry Thomas, ($2,000,000 to date). Accordingly, as a minimum, appellant is entitled in

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[11] *See, e.g.,* Rule 4, Tab FT 393, p. 20.

damages to the above amounts that it was not able to recover through the revenues of which it was deprived by the Government's breaches, including the cardinal change.

CONCLUSION

For the reasons set forth above, appellant respectfully requests that the Board's decision of 28 August 2001 be revised as requested above.

Respectfully submitted,

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