BRIEF FOR APPELLANT, DONALD H. RUMSFELD, SECRETARY OF DEFENSE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

02-1105, -1130

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE,

Appellant,

v.

FREEDOM, N.Y., INC.

Appellee.

FREEDOM N.Y., INC.,

Appellant,

v.

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE,

Appellee.

APPEAL FROM A DECISION OF ADMINISTRATIVE JUDGE DAVID W. JAMES,
ARMED SERVICES BOARD OF CONTRACT APPEALS, No. 43965

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Dated: April 19, 2002

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STATEMENT OF COUNSEL

Pursuant to Rule 47.5, appellant's counsel states that he is unaware of any other appeals stemming from this action that previously were before this Court or any other appellate court. Appellant's counsel also is unaware of any related cases pending in this or any other court.

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the Armed Services Board of Contract Appeals ("ASBCA") by Administrative Judge David W. James, pursuant to 28 U.S.C. § 1295(b) and (c), and 41 U.S.C. § 609(b).

STATEMENT OF THE ISSUES

1. Whether the ASBCA erred in finding that contract Modification No. P00029 ("Mod. 29"), which expressly discharged all relevant Governmental liability, was procured by Governmental duress.

2. Whether the ASBCA acted arbitrarily or capriciously in holding the Government liable based upon factual findings that, without sufficient explanation, contradict findings made earlier in the same proceeding upon a related legal claim.

STATEMENT OF THE CASE

I. Nature Of The Case

The Secretary of Defense ("Defense") seeks review of a decision of the ASBCA that awarded the contractor, Freedom N.Y., Inc. ("FNY"), $5,907,654 based upon findings that FNY was delayed by the Government due to withheld and suspended progress payments, failure to provide Government furnished material ("GFM") timely, and diversion of contractor furnished material ("CFM"). The findings of fact in the ASBCA decision regarding the breach of contract and equitable adjustment claims are inconsistent with extensive findings of fact in a prior decision by the ASBCA, which converted a default termination to a termination for convenience in the same contract.

II. Course Of Proceedings And Disposition Below

On September 10, 1987, FNY filed a notice of appeal with the ASBCA, docketed as ASBCA No. 35671, challenging the contracting officer's decision to terminate for default the unfulfilled portion of its contract. On or about January 3, 1992, while ASBCA No. 35671 was still pending before the Board, FNY filed a second notice of appeal under the same contract, challenging the Government's denial of its $21,959,311

equitable adjustment and breach of contract claims. The appeals were consolidated on January 31, 1992. On May 7, 1996, Judge John J. Grossbaum issued a decision in the consolidated appeals, upholding FNY's challenge to the default termination and denying FNY's equitable adjustment and breach of contract appeal. OP1; JA 45-84.[1] FNY subsequently moved to vacate that portion of the Board's decision that related to ASBCA No. 43965 upon the grounds that those matters were outside the scope of the hearing because the Board's Notice of Hearing stated that the scope of the hearing was limited to the propriety of the termination for default. Judge Grossbaum, therefore, issued a corrected decision that removed the references to ASBCA No. 43965 and modified certain findings of fact, but did not change the remaining findings of fact. JA 85-91; Freedom, NY, Inc., ASBCA No. 35671, 96-2 BCA ¶¶ 28,328, 28,502.

On August 28, 2001, Judge James issued a decision upon FNY's equitable adjustment and breach of contract claims and awarded FNY $5,907,654. OP2; JA 1-44. FNY filed a motion for reconsideration, which was denied on December 10, 2001.

STATEMENT OF THE FACTS

On February 15, 1984, the Defense Personnel Support Center ("DPSC") issued Solicitation Number DLA13H-84-R-8257 ("solicitation 8257"). JA 96-124. The solicitation incorporated by reference, Form 3595, DPSC Master Solicitation for Nonperishable Subsistence, Jun 83, JA 118, and was restricted to three companies that

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[1] "OP1" is a citation to the opinion of Judge Grossbaum. "OP2" is a citation to the opinion of Judge James. "FOF" is a citation to the ASBCA's findings of fact. "JA __" is a citation to the Joint Appendix.

had negotiated Industrial Preparedness Agreements with DPSC. FNY's predecessor, Freedom Industries, Inc. ("FII"), was one of the three companies. JA 94, 96.

Solicitation 8257 sought offers for the assembly and delivery of 3,101,520 cases of Meal, Ready-To-Eat, Individual, ("MRE") Rations.[2] JA 94. Each case was to contain twelve different menu bags. JA 107. Each menu bag consisted of a meat entree, crackers, and an accessory packet. JA 107, 146. The assembly contractors were required to provide four of the twelve meat entrees as contractor furnished material ("CFM"): ham & chicken loaf, meatballs, beef patties, and pork patties. JA 106. The Government was required to provide the other eight entrees as Government furnished material, ("GFM"): beef stew, beef slices, diced beef, ground beef, chicken ala king, diced turkey, ham slices, and frankfurters. JA 109.

Notwithstanding the GFM obligations, the Government reserved the right to substitute any of the GFM meat entrees, as well as candies, spreads, or fruits, without compensation as long as the substituted items were of substantially the same size as the components for which they were substituted. JA 110. Additionally, the solicitation and resultant contracts required the assemblers to notify the Government no less than five days prior to any component outage. Id. In the event an assembler failed to provide such notice, the Government was not liable for any resultant delay damages. Id.

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[2] As 1984 was the fifth year that MREs were procured, the 1984 acquisition is commonly referred to as MRE 5.

As issued, the solicitation limited progress payments for the entire contract to $9,000,000 or 50 percent of the contract value, whichever was less. JA 115. The solicitation advised that "[t]he progress payments shall be for only those costs that are determined by the Defense Contract Administration Office as reasonable, allowable to the contract, and consultant with sound and generally accepted accounting principles and practices." Id.

FII submitted its initial offer on April 11, 1984. JA 96-98, 106. The Defense Contract Administration Service Region ("DCASR") conducted a preaward survey to determine FII's capability to successfully perform the contract. JA 125-28. FII did not have any financial resources of its own, was over $2 million in debt and, at that time, had no outside financial support. Consequently, DCASR recommended that no award be made. JA 128. However, on August 9, 1984, FII obtained a letter of commitment from Dollar Dry Dock Savings Bank ("Dollar Dry Dock") that provided for a line of credit up to $7,244,000 and a second financial review was then conducted. JA 130, 132-35. Because FII could not perform the contract without a tremendous infusion of equity and/or debt financing, the DCASR Financial Analyst relied upon the August 9, 1984 commitment letter from Dollar Dry Dock to justify a complete award recommendation. JA 134. After extensive negotiations, DPSC and FII reached an agreement upon a unit price of $27.725 per case, which included the cost of certain capital equipment that was allowed to be expensed under the contract. JA 138-44. The parties also agreed to an increase in the progress payment ceiling. JA 151.

Contract Number DLA 13H-85-C-0591, ("contract"), was awarded to FII on November 15, 1984, for 620,304 cases of MRE, at a unit price of $27.725 per case and

a total contract price of $17,197,928.40. JA 146-51. In accordance with the parties' agreement to raise the solicitation's limitation on progress payments, the contract provided that:

> Clause L-4, page 66 of 96 of Solicitation DLA13H-84-R8257; the limitation on Progress Payments shall increase by $2,000,000 after the first delivery increment (100,000 cases) has been completed. This limitation shall increase by another $2,000,000 after the second delivery increment (100,000 cases) has been completed.

JA 151.

The contract incorporated by reference a number of standard Defense Acquisition Regulation ("DAR") clauses, including the Government Delay of Work clause, DAR 7-104.77(f), and the Government Property (fixed price clause), DAR 7-104.24. JA 117; 32 C.F.R. §§ 7-104.24, 7-104.77(f)(1984). Additionally, the contract incorporated DAR Clause 7-104.35(b), entitled "Progress Payments for Small Business Concerns, 1982 Sept." JA 117; 32 C.F.R. § 7-104.35(b)(1984). That clause provided for a progress payment rate of 95 percent and a liquidation rate of 95 percent. Id. Clause 7-104.35(b) stated in part:

> The Contractor's total costs . . . shall not include . . .
> (iii) costs ordinarily capitalized and subject to depreciation or amortization except for the properly depreciated or amortized portion of such costs.

Id., ¶ (a)(2).

The clause further stated:

> The Contracting Officer may reduce or suspend progress payments, or liquidate them at a higher rate . . . whenever he finds upon substantial evidence that the Contractor (i) has failed to comply with any material requirement of this contract, (ii) has so failed to make progress, or is in such

> unsatisfactory financial condition, as to endanger performance of this contract, (iii) has allocated inventory to this contract substantially exceeding reasonable requirements, (vi) is delinquent in payment of the costs of performance of this contract in the ordinary course of business, (v) has so failed to make progress that the unliquidated progress payments exceed the fair value of the work accomplished or the undelivered portion of this contract, or (vi) is realizing less profit than the established profit . . . .

Id., ¶ (c).

FII submitted a request for its first progress payment on about November 29, 1984. JA 166-68. The request, dated November 15, 1994, sought $100,310 which reflected 95 percent of FII's costs for rent and real estate taxes during November 1984. JA 152-53. On or about December 7, 1984, FII revised and resubmitted the request in the amount of $252,150. JA 154. The Administrative Contracting Officer ("ACO") requested an audit of the request because FII had never received progress payments prior to the subject contract and it was "standard operating procedure" to test the accounting system of a new contractor. JA 387. The ACO continued to request prepayment audits of FII's progress payment requests throughout the contract period because FII continually and consistently included unallowable, unbooked, and duplicative costs in its requests. JA 388-89.

On December 14, 1984, a Post Award Orientation Conference was held. JA 174-76. At that time, FII revealed that it had been unsuccessful in obtaining any financing through Dollar Dry Dock and that FII saw little hope of obtaining financing from Dollar Dry Dock. JA 175. The information concerning the lack of financing from Dollar Dry Dock came as a surprise to the Government since Dollar Dry Dock's commitment

was the reason FII received a positive preaward survey and was awarded the contract upon that basis. JA 135, 385. After investigating the matter, it was revealed that Dollar Dry Dock had no intention of advancing FII any monies unless and until numerous actions were taken to protect Dollar Dry Dock's interest. JA 161-65, 169-70. Therefore, on December 18, 1984, the ACO requested that FII provide information demonstrating its financial capability. JA 155-56. FII responded to the ACO's request by a letter dated December 26, 1984. JA 157-60. However, the ACO did not find FII's response to be adequate to relieve his concerns because FII had not provided a commitment from any financial source. JA 386. Accordingly, by a letter dated January 4, 1985, the ACO informed FII that he was considering returning progress payment 1 unpaid and suspending progress payments because evidence indicated that FII's financial condition was so unsatisfactory as to endanger performance of the contract. JA 166-68.

On January 30, 1985, the ACO received further evidence of FII's unsatisfactory financial condition by way of a Postaward Financial Surveillance Report issued by the DCASR's Financial Branch. JA 177-78. Based upon the adverse information provided in the surveillance report and the fact that FII did not have a financial backer, the ACO returned progress payment requests Nos. 1 and 2,[3] and notified FII on February 6, 1985, that progress payments were suspended due to FII's unsatisfactory financial position. JA 179-81.

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[3] FII's request for progress payment No. 2 was submitted on January 14, 1985, and sought $299,683. JA 173.

On February 14, 1985, FII met with Government personnel to discuss what actions FII would have to take in order to receive progress payments. JA 185-86. At that time, FII was informed that in order to cure its financial deficiencies, FII would have to obtain a line of credit of $3.8 million. JA 184-85. FII then arranged to novate its contract to H.T. Food Products, Inc. ("H.T. Food"),[4] because it was unable to secure the required financial banking. JA 187-94, 196. Although H.T. Food lacked financial resources of its own, it was debt free and, therefore, able to obtain an accounts receivable line of credit from Bankers Leasing Association ("Bankers") in the amount of $5,000,000. JA 192. The novation was approved by the ACO on April 17, 1985. JA 201.

The suspension of progress payments was lifted on May 6, 1985, with the payment of H.T. Food's progress payment No. 1 in the amount of $1.7 million. Id. However, the ACO disallowed approximately $60,000 of H. T. Foods' request upon the ground that the claimed costs included capital costs, which were not allowable because the DAR only authorized progress payments based upon the depreciated value. JA 393-95. Subsequently, the ACO continued to withhold progress payments for capital costs that were not depreciated. JA 394-96.

By June 1985, H. T. Foods had not begun deliveries under the contract. JA 196, 198-200. As a result, bilateral Modification No. P00011 ("Mod. 11") was issued on June 14, 1985, extending the delivery schedule. JA 203.

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[4] H.T. Food was a corporation established by Henry Thomas, FII's part-owner and President, to assist FII in obtaining and performing MRE contracts. JA 195.

On July 25, 1985, the ACO received progress payment request No. 5 from H.T. Food, dated July 5, 1985.[5] JA 208. The request sought $807,348. Id. The request was submitted to the Defense Contract Audit Agency ("DCAA") for a prepayment audit. Id. On August 13, 1985, DCAA issued its audit report on the request questioning the majority of the claimed costs upon the basis that they were duplicative, inapplicable to the instant contract, otherwise ineligible, and/or unreasonable. JA 209-15. Based upon the problems DCAA found, it determined that H. T. Food's accounting system was inadequate for the purposes of progress payments. JA 214. H.T. Food then changed its name to Freedom, N.Y., Inc. ("FNY"), and modification No. A0002 was issued on August 14, 1985, acknowledging the name change. JA 216-17.

By letter dated August 23, 1985, the ACO advised that he was considering returning progress payment request No. 5 and suspending progress payments based upon DCAA's finding that FNY's current cost accounting system and controls were not considered adequate for accumulating contract costs in support of progress payment requests. JA 219-222, 389. The flaws in FNY's accounting system had become so pervasive that DCAA concluded the system was not reliable. JA 389-90.

By letter dated August 30, 1985, the Procuring Contracting Officer ("PCO") issued a cure notice stating that FNY's lack of financial capacity and lack of vital production equipment endangered performance. JA 223-24. FNY proposed two alternative plans to cure its default. JA 225-26, 227, 235. To adequately consider

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[5] The request was originally submitted as request No. 4, but was renumbered by the ACO since subcontractor costs had been paid as progress payment No. 4.

FNY's revised delivery schedules, the Government performed a complete review to ascertain the viability of FNY's offers. JA 228-32. The results of the financial survey revealed that FNY had a cash short fall of $1,000,000, and had not shown the ability to obtain additional financing from Bankers. JA 232.

Government personnel met on October 2, 1985, to determine whether FNY's delivery schedule should be extended. JA 239. During that meeting, it was determined that FNY needed outside funding in the total amount of $3.5 million, which increased FNY's original line of credit from $5 million to $5.5 million. Id. On October 2, 1985, the Government met with FNY and it was mutually agreed that: (1) the Government would seek confirmation that the $3.5 million was available to FNY and that FNY had drawn on these monies to pay all subcontractor bills over 30 days past due; and (2) if such was confirmed, the Government would extend FNY's delivery schedule in accordance with FNY's proposed "Plan 2." JA 240-42. It also was agreed that the frequency of the increases in the progress payment ceiling would be amended. Id.

Progress payments were reinstated on October 10, 1985, with the payment of progress payment No. 7 in the amount of $1,913,725.70. JA 243. On October 29, 1985, FNY commenced assembly of the final cases. JA 246. Bilateral contract Modification No. P00018 ("Mod. 18") was issued on November 15, 1985, extending the delivery schedule. JA 247-49. The modification also provided that the limitation on progress payments shall increase by $1,000,000 after each incremental production of 50,000 cases was completed and accepted by the Government. The total increase was limited to $4,000,000. Id. By the end of November 1985, FNY had received approximately $5 million in progress payments. JA 253.

As of December 2, 1985, FNY had produced 24,088 final cases. JA 251, 254. However, only Lot 1, consisting of 242 cases, had been accepted. JA 254. Lot 2 was never presented to the Government inspector because it had been rejected by FNY's quality control department. JA 251-52, 254. Lot 3, consisting of 1,215 cases, and Lot 4 were rejected for leakage. Id. Lots 5 and 2A were rejected for failure to have one of each menu per case. Id. Lot 7 was rejected for vacuum loss. Id. As of December 2, 1985, Lots 8, 9, and 10 were undergoing inspection and Lots 6, 11, 12, and 13 had not yet been presented for inspection. Id. As FNY had only shipped 242 cases of MREs by December 1985, it was 49,758 cases short of the 50,000 cases due by November 30, 1985. JA 264. The delay was attributed to production problems related to its lack of experience and training of its personnel, failure to work to capacity by utilizing all 12 assembly lines, and high rejection rates. JA 244, 246, 251-52, 259.

Due to the delinquency, the PCO made a determination to terminate the November 1985 increment. JA 263-66. On December 9, 1985, Government personnel met with FNY to discuss the future of the contract balance. JA 271. At this time, it was apparent that FNY would also fail to meet its December 1985 delivery increment. JA 267, 271. FNY suggested that the December 31, 1986 delivery increment be terminated and that it, as well as the November increment, be added to the end of the contract. JA 273. Accordingly, bilateral modification No. P00020 ("Mod. 20") was issued on January 29, 1986, reducing the contract quantity from 620,304 cases to 505,546, the difference representing the terminations of the undelivered quantity for the November 1985 delivery increment and the December 1985 delivery increment. JA 277-79.

The Government knew that FNY could not survive on a contract of 505,546 cases and that FNY needed the entire original quantity of 620,304 because the Government had looked at forecasts and conducted a financial capacity study in connection with the issuance of Mod. 20. JA 274, 378-79. Nonetheless, the Government needed to keep its supply position sound, which required an immediate repurchase. JA 379-80. Hence, the Government partially terminated the contract and, for FNY's benefit, provided that "[i]n the event the contractor meets the 1-31 Jan through 1-30 Apr. 86 increments . . . , the Government may reinstate the 114,758 cases terminated for default." JA 279, 380.

The Government awarded an add-on contract to another contractor, RAFCO, for the terminated quantity. JA 398 In order for RAFCO to perform, GFM was transferred from FNY to RAFCO. JA 397-98. At that time, FNY had already received all the GFM it needed for the entire original contract quantity. Hence, when the contract was partially terminated, FNY had excess GFM that could be provided to RAFCO. Id. At no time did the Government transfer any of FNY's CFM from its plant or divert it from its suppliers. JA 397-99.

On January 30, 1986, one day after the issuance of Mod. 20, FNY ceased meal bag and case production due to an outage of CFM brownies. JA 284. This outage of CFM was not cured until February 10, 1986. Id. The lack of CFM brownies was due to a continuing dispute between FNY and its subcontractor Sterling Bakery. In brief, Sterling Bakery contended that its original contract with FII was not assignable and, therefore, it owed no obligation to FNY to provide bakery products in accordance with the terms of that contract. JA 280-82, 289-90.

Notwithstanding the fact that FNY had agreed to the terms of the partial termination, it filed an ASBCA appeal challenging the termination on March 5, 1986. JA 285. The appeal was docketed as ASBCA 32570 on March 14, 1986. JA 286.

By April 1986, FNY again was delinquent, failing to meet its April 1986 delivery increment by 7,073 cases. JA 295. FNY's failure to meet the delivery schedule was due, in part, to the fact that one lot was on medical hold because FNY had improperly incorporated sub-lots of CFM prior to Government inspection. JA 287. Also, on April 10, 1986, FNY elected to suspend final case production to enable the Government inspector to progress further on vendor sub-lot inspections of CFM. JA 290. However, a stock outage of CFM maple nut cake also occurred in or around that time, which forced FNY to continue its suspension of production until April 21, 1986. JA 290-91.

As a result of FNY's delinquencies, the parties entered into negotiations to establish a new delivery schedule. JA 293-94. The negotiations also addressed a $3.4 million equitable adjustment claim, which FNY had not formally filed with the PCO, reinstatement of the terminated quantity, and payment of capital equipment costs that the ACO refused to allow through progress payments. JA 294.

Under Modification No. P00025 ("Mod. 25"), executed on May 29, 1986, the Government agreed to reinstate the 114,758 cases that had previously been terminated for default. JA 305. In bilateral Mod. 20, the parties agreed that this quantity may be reinstated, at the Government's discretion, if FNY successfully completed the January through April 1986 delivery requirement. JA 279. The Government recognized that FNY's survival depended upon the cases being reinstated. JA 378. The Government also agreed to pay $399,111 to cover various listed capital expenditures that were

allowed to be expensed under the contract, but could not be recovered through progress payments. JA 306. The Government further agreed to extend the delivery schedule and to rescind the $200,000 consideration for Mods. 18 and 11. Id.

FNY agreed to withdraw with prejudice its ASBCA appeal challenging the partial terminations and further agreed to waive

> all claims for all happenings and/or occurrences which have arisen to date under law and/or relating to the contract DLA13H-85-C-0591, except for any claims that may have arisen from the manufacturing of contractor furnished material by Star Food Processing under Government specifications: MIL-B-44057A, MIL-B-44066A, MIL-F44067A. Both parties have had counsel. Both parties expressly state that the aforesaid recitals are the complete and total terms and conditions of their Agreement and that this Agreement has been entered into free from duress or coercion.

JA 305, 307.

During a negotiation meeting held at DPSC on May 29, 1986, for Mod. 25, FNY alleged that it had made a number of agreements with DLA headquarters that should be included in the settlement modification. JA 381. Specifically, the agreements FNY claimed it had with DLA were:

1. If FNY is otherwise qualified, DPSC will negotiate a fair and reasonable [follow on] contract with FNY.

2. As appropriate DPSC and DLA will process a request for a guaranteed loan.

3. Provide all reasonable assistance to FNY in obtaining traypack and pouch contracts through the . . . SBA.

4. Provide technical and production assistance to FNY to rework and reprocess . . . approximately 46,000 cases on medical hold.

JA 298-300.

Prior to the execution of the modification, FNY indicated that it wanted the alleged side agreement to be part of the modification. JA 381. However, the PCO advised FNY that there was no side agreement, that there was no attachment to the modification, and that there was no addendum. JA 381, 400-01. FNY agreed to the modification as written and signed it without the incorporation of the alleged side agreement. JA 400-01. Because FNY had initially wanted to attach the alleged side agreement to the modification, the PCO stressed the modification's language stating that it was a discrete agreement and that there was no side agreement. JA 297, 400.

By letter dated May 30, 1986, Raymond Chiesa, DLA's Executive Director of Contracts, responded to a letter from FNY that had been addressed to him and dated May 13, 1986. JA 308-10. The letter, which set forth certain commitments to which DLA headquarters purportedly had agreed, had been faxed to him the day before by DPSC. JA 308. In response to the letter, Mr. Chiesa advised that the May 13, 1986 letter was basically the same as a May 2, 1986 draft letter, addressed to the PCO, upon which he already had commented to an associate of FNY's president and to FNY's attorney. Id. Mr. Chiesa furthered advised that the agreement DLA reached with FNY had been encompassed in whole and in its entirety in Mod. 25. JA 308-09. FNY's president later wrote to Mr. Chiesa asserting that he agreed certain understandings "were not appropriate for inclusion in the Mod but were more appropriately to be addressed in a separate letter." JA 317.

On June 2, 1986, just a few days after signing Mod. 25, FNY expressed its dissatisfaction with the $13 million limitation on progress payments and sought to set aside the ceiling entirely, thereby allowing FNY to receive 95 percent of the contract

price - $16,337,937. JA 315. At that point in time, FNY had received $10.4 million in progress payments and was operating in a loss position. JA 313-14.

FNY did not meet its June 30, 1986 delivery date until July 10, 1986, leaving only 15 production days to make the July 31, 1986 delivery date. JA 319, 326. Because of the anticipated shortfall for July 1986, the PCO issued a notice on July 11, 1986, advising FNY to cure its delinquency, as well as its failure to supply timely reports and correspondence. JA 319-20.

On July 15, 1986, FNY notified the Government that it would run out of jelly on July 16, 1986. JA 327. FNY asserted excusable delay as a result of the lack of GFM jellies based upon its belief that it had given the Government sufficient notice of GFM shortage via a June 30, 1986 wire that listed its GFM inventories. Id. The Government informed FNY that its June 30, 1986 wire was not considered notice of GFM shortage because that was not the purpose of the wire and because the wire contained so many discrepancies in the inventory that it was meaningless. Id. Moreover, prior to June 30, 1986, FNY had been advised that it would have to make use of the jellies in its rejected cases or rework those cases toward the the July 1986 requirement. Id. By the middle of July, FNY had been paid $12,957,105 in progress payments for requests Nos. 1–17,[6] JA 325, leaving less than $15,000 in progress payments available under the contract.

On August 1, 1986, the PCO made a determination that it was in the best interest of the Government to extend FNY's delivery schedule due to the lack of GFM jellies. JA 327. Bilateral Modification No. P00028 ("Mod. 28") was issued on August 27, 1986,

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[6] Progress Payment No. 17 was paid on July 15, 1986. JA 324.

extending the delivery schedule eight days. JA 329-31. The modification also increased the limit on progress payments as follows:

> Completion and acceptance of 330,000 cs ceiling is $13 million,
> Completion and acceptance of 410,000 cs ceiling is $14 million,
> Completion and acceptance of 490,000 cs ceiling is $15 million,
> Completion and acceptance of 570,000 cs ceiling is $15.8 million.

JA 330. In the event FNY failed to fully complete a delivery increment, the modification authorized the ACO to make pro tanto progress payments based on the partial delivery. JA 331.

Two weeks after signing Mod. 28, FNY again was in default. JA 402. FNY claimed that its failure to meet the September 1986 delivery date was due to the lack of GFM fruit (5 days) and potato patty (4 days), and to substitutions. JA 336. The fruit outage occurred on August 22, 1986, five days prior to the execution of Mod. 28. JA 333. As a result of the outage, FNY ceased final case assembly from August 22 until August 29, 1986, when it received a shipment of 216,000 units of GFM fruit mix. Id. Moreover, at the time FNY ceased assembly, it had approximately 60,000 units of GFM fruit mix in salvage from previously rejected cases, although FNY had not taken any action to determine if the units were usable. Id.

As of September 23, 1986, FNY had received $14,172,838 in 20 progress payments.[7] JA 344-45. On September 29, 1986, FNY advised of a cash shortfall and informed the PCO that the shortfall would become virtually unmanageable by the week ending October 10, 1986. JA 338. FNY also informed the PCO that it would not be

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[7] Progress payment 20, in the amount of $311,477 was paid on September 23, 1986. JA 343.

able to complete the contract unless the shortfall was corrected. Id. FNY's proposed solution was the award of a follow on contract, MRE 7. JA 339.

Mod. 29 was issued on October 7, 1986, and extended the delivery schedule for one month. JA 346-348. The parties agreed that:

> In further consideration of the aforesaid extension of delivery schedule, the contractor for itself, it successors and assigns, releases and forever discharges the Government of and from all manner of action, causes of action, suits, proceedings, debts, dues, judgments, damages, claims, and demands whatsoever, in law or equity or under administrative procedures which, against the Government, the contractor ever had, now has, or may have for or by reason of any matter, cause or thing whatsoever arising out of award and performance of the subject contract to date, except claims relating to zyglo testing implemented in modifications P00024 and P00026 or monies due or to become due as payment for product delivered to and accepted by the Government.

JA 347.

At the time the modification was executed, progress payment request No. 21, in the amount of $721,887.00, was outstanding. JA 354. The payment was held in abeyance until FNY cured its default, which it did through Mod. 29. JA 345.

By letter dated October 22, 1986, FNY advised the PCO that it had not yet received GFM beef slices, diced turkey, ground beef, or ham slices. JA 349. The following day, on October 23, 1986, FNY ceased final case assembly and laid off 146 production workers. JA 353. FNY advised that the actions were necessary because of severe inventory shortages/outages of CFM (chicken loaf and pouch stands) caused by cash flow problems resulting from failure of its financial institution to advance additional funding until it was assured that FNY could be awarded a contract under MRE 7. Id.

On October 24, 1986, FNY advised that an additional 140 production workers had been laid off, but noted that most of the laid off employees were expected to be recalled on November 3, 1986, to commence production of 12,000 cases of MRE 6. JA 354. Also, on October 24, 1986, the PCO authorized the following GFM substitutions: diced beef for diced turkey, beef stew for diced turkey, chicken ala king for ground beef, and frankfurters for ham slices. JA 350. The PCO advised FNY that the Government was not responsible for the lack of GFM since substitutions could have been arranged prior to FNY's shut down had FNY provided the contractually required five-day notice. JA 351. After the substitutions were authorized, FNY had sufficient GFM to assemble at least 30,000 cases. JA 405. FNY did not resume final assembly until the week of November 3, 1986, and ceased production again on November 7, 1985. JA 356, 358. Had FNY continued production, the Government could have provided additional GFM to keep FNY going until the contract quantity was completed. JA 382-83, 402-04.

Due to the cessation of production, the ACO advised FNY that to protect the Government's interest, he had to discuss the release of further progress payments with the PCO. JA 355, 357. The ACO ultimately suspended progress payments on January 26, 1987. JA 359.

FNY met with Government personnel on November 7, 1986 to discuss what would be necessary for FNY to complete the contract. JA 366. At that time, FNY informed the Government that it would not be able to complete the contract due to the lack of funds because its financial backer would not provide additional monies without the guarantee of an add-on MRE 7 contract. Id.

On February 25, 1987, the electrical power was shut off at FNY's plant due to the non-payment of electrical bills. JA 362, 366. On March 12, 1987, the power was turned back on at the Government's expense and the Government became the billing customer. JA 366. On April 3, 1987, FNY was evicted from its premises and on April 28, 1987, FNY's equipment was sold at public auction. JA 368.

Because FNY failed to provide a revised delivery schedule in response to the PCO's repeated requests, JA 367, the PCO issued Modification No. P00030 ("Mod. 30") on April 23, 1987 unilaterally extending the delivery schedule. JA 364-65. By letter dated June 22, 1987, the PCO terminated the unfulfilled portion of FNY's contract for default because FNY failed to perform inventory control requirements and failed to make progress. JA 372-74.

FNY appealed the contracting officer's termination for default decision to the ASBCA on September 10, 1987. FNY filed a second notice of appeal under the same contract on or about January 3, 1992, challenging the Government's denial of its $21,959,311 equitable adjustment and breach of contract claims.[8] The appeals were consolidated on January 31, 1992. Judge Grossbaum's May 7, 1996 decision in the consolidated appeals converted the default termination to a termination for convenience and denied FNY's equitable adjustment and breach of contract appeal. FNY moved to vacate that portion of the Board's decision that related to the equitable adjustment and breach of contract claims because they were not within the stated scope of the hearing, as noticed by the Board, which was limited to the propriety of the termination for default.

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[8] Over the course of time, the claims were revised to approximately $55 million.

Judge Grossbaum, therefore, issued a corrected decision removing the references to ASBCA No. 43965, modifying certain findings of fact, and leaving the remaining findings of fact unchanged. Freedom, NY, Inc. ASBCA No. 35671, 96-2 BCA ¶¶ 28,328, 28,502.

Subsequently, ASBCA No. 43965 was assigned to Judge James, who held a further hearing in the matter. On August 28, 2001, Judge James issued a decision finding that the Government delayed FNY a total of 446 days under the contract and awarded FNY $5,907,654. FNY filed a motion for reconsideration, which was denied on December 10, 2001.

SUMMARY OF THE ARGUMENT

The decision by Judge James that Mod. 29 was procured by duress is erroneous because it is not consistent with applicable law and regulations, and is unsupported by substantial evidence. As a matter of law, the fact that the Government relied upon available legal remedies that were established in regulations and contract provisions to negotiate the modification does not constitute duress.

The decision by Judge James also is arbitrary and capricious because it does not explain why his findings and rulings are squarely inconsistent with Judge Grossbaum's prior findings of fact and rulings in the same proceeding. A reviewing court cannot rely upon rational explanations for a lower tribunal's decision unless those explanations are contained in the decision itself. Where an agency reaches internally inconsistent factual conclusions in the same adjudicatory proceeding, as here, without some reasoned explanation that is discernible by appellate review, the appropriate remedy is vacatur and remand.

ARGUMENT

I. Scope And Standard Of Review

The Court's review of agency boards of contract appeals is "very limited." Erickson Air Crane Co. v. United States, 731 F.2d 810, 814 (Fed. Cir. 1984). The decision of a board upon any question of fact is 'final and conclusive,' and may not be set aside unless it is 'fraudulent, or arbitrary or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence." Id.; 41 U.S.C. 609(b); Wickham Contracting Co. v. Fischer, 12 F.3d 1574, 1577 (Fed. Cir. 199); Erickson Air Crane v. United States, 731 F.2d at 814. However, a board's determination of a question of law is reviewed de novo, even though the board's decision is accorded "careful consideration" due to the board's considerable experience in construing Government contracts. Wickham Contracting Co. v. Fischer, 12 F.3d at 1577. Where there are questions of mixed fact and law, the Federal Circuit gives careful consideration and great respect to board decisions. Vancouver Plywood Co. v. United States, 860 F.2d 409, 414 (Fed. Cir. 1988).

II. The ASBCA Erred In Finding That Mod. 29, Which Expressly Discharged All Relevant Governmental Liability, Was Procured By Governmental Duress

Judge James erroneously concluded that Mod. 29 did not operate as an accord and satisfaction because the ACO's withholding of progress payments was a coercive act and FNY signed Mod. 29 under financial duress. This conclusion is inconsistent with applicable law and regulations, and is unsupported by substantial evidence.

An accord and satisfaction exists if there is proper subject matter, competent parties, a meeting of the minds, and consideration. Brock and Blevins Co. v. United

States, 343 F.2d 951, 955, 170 Ct.Cl. 52, 59, (1965); see also, Mil-Spec Contractors, Inc. v. United States, 835 F.2d 865, 867 (Fed. Cir. 1987). An accord and satisfaction "is a perfect defense in an action for the enforcement of a previous claim, whether that claim was well founded or not." Chesapeake & Potomac Tel. Co. v. United States, 654 F.2d 711, 716, 228 Ct.Cl. 101, 108 (1981). As the Court of Claims has stated:

> It does not follow that because a claim is by hindsight seen to be even entirely meritorious, an agreement to compromise it was in any way improper. A party who settles his claim may not avoid it by proof that his claim was just. It has long been held that a release for a lawful consideration is binding though the contractor received only what was otherwise due him.

Johnson, Drake & Piper, Inc. v. United States, 531 F.2d 1037, 1044, 209 Ct. Cl. 313, 324 (1976) (citing United States v. William Cramp & Sons Co., 206 U.S. 118 (1907), and Inland Empire Builders, Inc. v. United States, 424 F.2d 1370, 1375, 191 Ct. CL. 742, 751 (1970)).

Duress is a defense whereby a party may avoid a discharge by accord and satisfaction. Shelton v. United States, 215 Ct.Cl. 908, 911 (1977). A contractor seeking to establish duress must establish that it accepted the terms of the Government involuntarily, that the circumstances permitted no other alternative, and that said circumstances were the result of coercive acts of the Government, not the contractor's needs. United States v. Bethelem Steel Corp., 315 U.S. 289, 301 (1942); Fruhauf S.W. Garment Co. v. United States, 111 F. Supp. 945, 951 (Ct. Cl. 1953). A party must show more than a reluctance to accept an agreement and financial harm; the party must prove that the economic duress was a result of the defendant's conduct. Id. Economic duress cannot be implied from making a hard bargain. Johnson, Drake & Piper, Inc. v.

United States, 531 F.2d at 1042, 209 Ct. Cl. at 324. It is "not duress to threaten to make good faith use of remedies prescribed under the contract." Id.

On October 7, 1986, the parties executed Mod. 29, which extended delivery dates by one month in exchange for $100 in consideration. Mod. 29 also stated:

> In further consideration of the aforesaid extension . . . , the contract . . . releases and forever discharges the Government of and from all manner of action, causes of action, suits, proceedings . . . damages, claims and demands whatsoever . . . [which] the contractor ever had, now has, or may have for or by reason of any matter, cause, or thing whatsoever arising out of award and performance of the subject contract to date . . . . This document contains the complete agreement of the parties. There are no collateral agreements, reservations or understandings other than expressly set forth herein.

JA 347.

In his finding of duress on Mod. 29, Judge James erred as a matter of law by holding that the DAR did not give the contracting officer the right to withhold an approved progress payment until the contractor signed a modification. By their express terms, the governing progress payment clause and DAR provisions allowed the Government to suspend, reduce or liquidate progress payments at a higher rate if the contractor fails to make progress, or is in such unsatisfactory financial condition as to endanger performance. See JA 117; 32 C.F.R. C1 SCA App. E-524.2 (1984); 32 C.F.R. § 7-104.35(b) (1984). Thus, the Government was entitled to withhold progress payments while FNY was failing to make progress or its financial condition was unsatisfactory.

Further, award of the contract was predicated upon the contractor's ability to obtain sufficient financing to manage the contract. FNY's predecessor, FII, did not have

any financial resources of its own, was over $2 million in debt, and had no outside financial support. In fact, no award would have been made, but for FII obtaining a letter of commitment from Dollar Dry Dock that provided for a line of credit up to $7,244,000. JA 126-28, 130, 132-35. The DCASR financial analyst relied upon the Dollar Dry Dock commitment letter to justify the award recommendation. JA 134. Therefore, the Government was not responsible for what later turned out to be an illusive basis for that committment or FNY's desperate reliance upon the progress payments to sustain its precarious financial condition. To the contrary, in administering progress payments, the Government could properly consider FNY's unsatisfactory financial condition and lack of progress. 32 C.F.R. § 7-104.35(b), ¶ (c) (1984); see Orion Elec. Corp., ASBCA No. 18918, 80-1 BCA ¶ 14,219, at 70,008 (1979).

In addition, the Board's determination that progress payments must be paid within 10 days, OP2 at 32, is arbitrary and contrary to the prevailing law. The Board did not give any consideration to the individual circumstances surrounding the 21 progress payments made under the contract. Rather, the Board drew a line in the sand and held that a payment made after 10 days is a breach and, in so doing, ignored all the provisions of the governing regulations and the governing progress payment clause, which vest great discretion in the ACO and recognize the Government's right to protect itself from losses.

For example, DAR Appendix E-521 provides:

> Progress Payment Clauses cannot be self-executing, and require careful administration to insure against overpayments and losses . . . . It is necessary for adequate supervision of progress payments that the administering officer keep itself informed concerning the contractor's

> overall operations and financial condition. For contracts with those contractors whose financial condition is doubtful or not strong in relation to progress payments outstanding or to be outstanding, or whose management is of doubtful capacity or whose accounting controls are found by experience to be weak, or who are encountering substantial difficulties in performance, full information concerning both the progress under the contracts involved . . . and concerning the contractor's other operations and financial condition, should be obtained and analyzed at frequent intervals, with a view to the better protection of the interest of the Government and taking of such action as may be proper to make contract performance more certain.

32 C.F.R. C1 SCA App. E-521 (1984).

DAR Appendix E-524 states that the determination to suspend or reduce progress payments "will be fair and reasonable under the circumstances of particular cases, and supported by substantial evidence." 32 C.F.R. C1 SCA App. E-524 (1984). Black's Law Dictionary, revised Fourth Edition, defines "reasonable time" as follows:

> Such length of time as may fairly, properly and reasonably be allowed or required, having regard to the nature of the act and duty, or to the subject matter and to the attending circumstances.

Consequently, the action of withholding further progress payments pending the execution of a bilateral delivery schedule extension, designed to cure FNY's failure to make progress, cannot be considered to be a coercive act for purposes of establishing duress. Economic duress cannot be implied from making a hard bargain. Johnson, Drake & Piper, Inc. v. United States, 531 F.2d at 1042, 209 Ct. Cl. at 324. It is "not duress to threaten to make good faith use of remedies prescribed under the contract." Id.

In addition, the Board failed to identify any occurrences between May 29, 1986, when Mod. 25 was signed waiving all FNY's claims except those related to zyglo testing, and October 7, 1986, when Mod. 29 was signed, to support its finding that FNY was financially distressed due to Government fault. To the contrary, the Board's findings of fact relative to this time period reflect just the opposite. In brief, the Board found that: (i) as a result of Mod. 25, FNY's indebtedness to the Government was reduced by $200,000 due to the rescission of previous consideration and FNY was paid $399,111 for certain capital equipment; (ii) on June 18, 1986, the ACO made a payment of $1,172,654, which reflected an adjustment of previously paid progress payments based upon FNY's revised loss ratio factor; (iii) on August 7, 1986, the Government increased the ceiling on progress payments from $13 million to $15.8 million; (iv) on August 18, 1986, the ACO authorized progress payment 18; (v) on September 8, 1986, the ACO authorized progress payment 19; and (vi) on September 23, 1986, the ACO authorized progress payment 20. OP2 FOF 95, 100, 101, 105; JA 22 –24.

Moreover, FNY never mentioned that its execution of the modification was involuntary until its May 21, 1987 response to a cure notice and, even then, the allegation of duress was of a general nature, applicable to all the disputed modifications. JA 375-77. As the Court of Claims has often declared, a subsequent claim of duress is seriously weakened by a contractor's silence at the time of the alleged duress and by a delay in asserting duress. Johnson, Drake & Piper, Inc. v. United States, 531 F.2d at 1043, 209 Ct. Cl. at 323; Loral Corp. v. United States, 434 F.2d 1328, 1332, 193 Ct. Cl. 473, 482 (1970).

Accordingly, the conclusion that the Government obtained Mod. 29 through duress must be reversed.

III. The ASBCA Acted Arbitrarily Or Capriciously In Holding The Government Liable Based Upon Factual Findings That, Without Sufficient Explanation, Contradict Findings Made Earlier In The Same Proceeding Upon A Related Claim

The findings of fact, and rulings based upon those facts, by Judge James contradict Judge Grossbaum's prior findings of fact, and rulings upon those facts, without sufficient explanation regarding why Judge James reached such radically different conclusions. As a result, the decision by Judge James is arbitrary and capricious.

The Contract Disputes Act provides that the Board's "decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is . . . arbitrary, or capricious, . . . or if such decision is not supported by substantial evidence." 41 U.S.C. § 609(b). A reviewing Article III court cannot, in a review proceeding, rely upon rational explanations for the Board's decision unless those explanations are contained within (or easily inferrable from) the Board's decision itself. See, e.g., SEC v. Chenery Corp., 318 U.S. 80, 93-94 (1943) (noting that a tribunal's actions must be measured by what the tribunal did, "not by what it might have done"). Where an agency reaches internally inconsistent factual conclusions in the same adjudicatory proceeding without some reasoned explanation (which in turn would be subject to appellate review), the appropriate remedy is vacatur and remand. See, e.g., Essex Electro Engineers, Inc. v. Danzig, 224 F.3d 1283, 1294 (Fed. Cir. 2000) (applying such relief where "[i]nconsistent findings by the Board undermine its conclusion" as arbitrary and capricious).

While Judge James had the benefit of additional factual evidence — resulting from his 11-day hearing — and some of that evidence may legitimately have led him to different conclusions on various matters, it is critical that his 43-page opinion provided no explanation at all for reaching factual conclusions opposite to Judge Grossbaum's. Indeed, simply from reading Judge James's opinion, one would not even know that the Board previously had addressed the factual questions at issue, much less that it previously had decided them in the Government's favor. A review of the record alone, absent any explanation by the Board itself, demonstrates that Judge James's decision violates the Chenery principle and established law. Specific instances of the disparity between the two opinions are as follows:

1. Judge James found that Mod. 25 incorporated a "side agreement" with which the Government failed to comply and, therefore, the Government was not protected by the modification's broad release. OP2 FOF 94; OP2 at 40. Judge Grossbaum's contrary prior findings and holdings on this issue in the related claim were as follows:

(a) The proposed side agreement was an effort by FNY to elicit additional commitments from the Government. OP1, FOF 51.

(b) The Government never agreed to any proposed side agreement. Id.

(c) The agreement actually reached by the parties was memorialized in Mod. 25. OP1, FOF 52.

(d) The contracting officer told Mr. Thomas that "there is no side deal" and cautioned him not to sign the modification if he thought otherwise. OP1, FOF 54.

(e) FNY did not pursue its June 1986 allegation that the Government reneged on the side agreement until it filed is 1991 equitable adjustment claim. OP1, FOF 56.

(f) The parties conducted themselves in a manner consistent with the terms of the modification. Id.

Based upon the above findings, Judge Grossbaum held that the Government did not give FNY any reason to believe that an agreement had been reached on any term contained in the side agreement. OP1 at 141,475. Judge Grossbaum also held that there was no evasiveness upon the part of the Government and, to the extent that FNY's president believed that the side agreement was part of the modification, his belief should have been dispelled by the express statements in the modification. Id.

Judge Grossbaum's ruling regarding the alleged side agreement to Mod. 25 is supported by established legal authority. The courts have repeatedly recognized that oral agreements are of no effect. Mil-Spec Contractors, Inc. v. United States, 835 F.2d at 867-868; SCM Corp. v. United States, 595 F.2d 595, 598 (1979). FNY's belief that its discussions with DLA had resulted in a binding agreement is of no significance. A Government contractor is charged with knowledge of applicable law and regulations, regardless of the contractor's subjective knowledge or intent. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947).

Moreover, the actions of the parties in agreeing to a new delivery schedule eliminates from consideration the causes of delay occurring prior to such agreement. Valcon II, Inc. v. United States, 26 Cl.Ct. 393, 397 (1992); Orion Elec. Corp., ASBCA No. 18918, 80-1 BCA ¶ 14,219. Reservations of a right or claim for damage must be

manifest and explicit. United International Investigative Services v. United States, 33 Fed. Cl. 363, 367 (1995); see also, United States v. William Cramp & Sons Ship & Engine Bldg. Co., 206 U.S. at 128 ("If these parties intend to leave some things open and unsettled, their intent so to do should be made manifest.").

The courts and the boards have consistently rejected contract interpretation which rests upon a party's subjective belief concerning what the contract entails.

> The fundamental goal of contract interpretation is to determine the intent of the contracting parties as expressed in the contract, ... We will generally reject an interpretation of a contractual provision that leaves portions of the contract language useless, inexplicable, meaningless or superfluous.

Harco Manufacturing Co., ASBCA No. 27567, 85-1 BCA ¶ 17,926, at 89,759 (emphasis added) (citing Ball State University v. United States, 488 F.2d 1014, 203 Ct. Cl. 291 (1973), Firestone Tire & Rubber Co. v. United States, 444 F.2d 547, 195 Ct. Cl. 21 (1971), and Hol-Gar Mfg. Corp. v. United States, 351 F.2d 972, 169 Ct. Cl. 384 (1965)); see also, W. G. Cornell Co. v. United States, 179 Ct. Cl. 651, 670, 376 F.2d 299, 311 (1967) (objective test used for reading contract language, not subjective test of contractor's understanding).

Judge Grossbaum further found that FNY's allegations of unilateral mistake, economic duress and unconscionability were meritless. OP1 at 141,475-476. Thus, Judge Grossbaum concluded that Mod. 25 was neither unfair nor unfavorable. Id.

2. Judge James found that Mod. 29 was signed under duress as the contracting officer would not release a pending progress payment until FNY's default was cured by obtaining a delivery schedule extension. OP2 at 41. Judge Grossbaum's contrary prior finding and holding on the same issue was that there was no evidence in the record

showing coercive acts by the Government to support FNY's claim of duress. OP1, FOF 71.

3. Judge James found that the Government was the cause of 147 days of delay from December 10, 1984, to May 6, 1985, and 88 days of delay from July 15 to October 11, 1985. OP2, FOF 129. Based upon this finding, Judge James awarded FNY delay damages for general and administrative costs, and for overhead. OP2 at 43. Judge Grossbaum's contrary prior findings and holding on the same issue were:

(a) FNY did not commence assembly until November 1985 and that FNY failed to prove any of its allegations of excusable delay during that time frame. OP1, FOF 43; OP1 at 141,473-475.

(b) The contracting officer did not abuse his discretion up to the date of the challenged modifications, i.e., Mods. 25, 28, 29. OP1, at 141,475.

(c) The contracting officer had a reasonable basis for suspending progress payments up to May 6, 1985. OP1 at 141,475.

(d) The contracting officer could consider FNY's lack of actual progress and unsatisfactory financial condition in administering progress payments. Id.

(e) The contracting officer had a reasonable basis for requiring FNY to obtain outside financing from a reputable source and to demonstrate some performance progress as conditions for releasing progress payments. Id.

4. Judge James found that the contracting officer breached the contract by delaying the initiation of progress payments upon the mistaken belief that direct costs had to be incurred. OP2 at 32. Judge Grossbaum previously addressed this issue and held that the contracting officer "could consider FNY's lack of actual progress and unsatisfactory financial condition in administering progress payments. This gave the [contracting officer] a reasonable basis for requiring FNY . . . to demonstrate some performance progress . . . ." OP1 at 141,475.

5. Judge James found that the contracting officer delayed FNY by 317 non-concurrent days because he did not pay progress payments within five to ten days, that five to ten days was a reasonable time frame for making progress payments, and, therefore, any payment after ten days was unreasonable or arbitrary. OP2 at 32. Judge Grossbaum previously considered FNY's assertions and allegations relative to the late payment issue and found that there was no violation of pertinent statutes or regulations. OP1 at 141,474. In reviewing the events surrounding the allegedly late payments, Judge Grossbaum noted that the discretion entrusted to the contracting officer was quite broad and that a high degree of proof was needed to establish that the contracting officer's actions lacked any reasonable basis. Id. Judge Grossbaum concluded that the contracting officer had not abused his discretion. OP1 at 141,475.

6. Judge James held that the contracting officer breached the contract by interfering with FNY's potential financers. OP2 at 34. Judge James found that the contracting officer provided inaccurate information concerning the incurrence of costs and physical progress. Judge Grossbaum previously found not only that these elements did not amount to inaccurate information, but that the contracting officer "could

consider FNY's lack of actual progress and unsatisfactory financial condition in administering progress payments." OP1 at 141,475.

7. Judge James also found that the contracting officer refused to confirm the proper terms of the progress payment clause. OP2 at 34. However, Judge James did not identify the "proper terms" the contracting officer refused to confirm and the facts cited as support merely indicate that the contracting officer advised that progress payments would not be forthcoming. The reasons for the withholding of payments were previously reviewed by Judge Grossbaum, who found the reasons to be proper. OP1 at 141,475.

8. Judge James held that the contracting officer breached the contract when he suspended progress payments from February 6 to May 6, 1985, based upon FNY's unsatisfactory financial condition, and allowed payments only after FNY obtained outside financing. OP2 at 32. However, Judge Grossbaum's prior decision held that the contracting officer had a reasonable basis for requiring outside financing. Judge Grossbaum also held that the contracting officer had a reasonable basis to withhold progress payments until May 6, 1985, and for requiring prepayment audits on each progress payment report. OP1 at 141,475.

9. Judge James found the contracting officer breached the contract by not paying progress payments on certain capital equipment that was expensed under the contract. Judge Grossbaum previously considered this issue and found that the fact that certain capital equipment was expensed under the contract and included in the elements listed in the MOU did not mean that the costs would be recoverable through progress payments. To the contrary, Judge Grossbaum found that the "MOU related

simply to those elements that made up the total contract price and had no bearing on progress payments." OP1, FOF 22.

Further, Judge James erred in his finding as a matter of law. DAR Clause 7-104.35(b) states in part: "The Contractor's total costs . . . shall not include . . . (iii) costs ordinarily capitalized and subject to depreciation or amortization except for the properly depreciated or amortized portion of such costs." 32 C.F.R. § 7-104.35(b)(1984). Thus, the contracting officer simply was complying with the law.

In addition, Judge James erred in finding that the Government caused delay due to diversion of CFM and to due substitution of GFM. Judge James held that the Government caused an 11-day delay at the end of January 1986 due to the diversion of CFM. OP2, FOF 78, 130. Based upon this finding, he awarded FNY $198,501 in damages. OP2, FOF 130. However, this finding is not supported by the record. While the termination settlement modification, which apparently served as a basis for this finding, stated that FNY was entitled to $193,727 for CFM "seized" by the Government, the seized CFM issue and the diverted CFM issue are totally distinct. The seized CFM was material taken out of FNY's plant in April 1997, when it was evicted, and has no relationship to the material allegedly diverted earlier. There would be no reason for the Government to pay FNY $193,727 in the settlement agreement for diverted CFM, which FNY claims it never received and to which it never took title. There is no logical basis for coupling these two issues.

Judge James also erred in finding that the Government caused FNY 40 days delay from early September through early November 1986 due to the lack of GFM and GFM substitution. OP2, FOF 130. However, Judge James did not determine how

much delay was due to lack of GFM and how much was due to GFM substitution. Since the Government had the right to substitute product under the contract, JA 110, GFM substitution cannot serve as a valid basis for a finding of delay. Therefore, it was incumbent upon Judge James to specifically identify what portion of those 40 days was due to lack of GFM alone.

CONCLUSION

For the foregoing reasons, this Court should vacate the ASBCA's August 28, 2001 decision and remand the matter to the ASBCA for further proceedings.

Respectfully submitted,

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April 19, 2002

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on the 19th day of April, 2002, I caused to be served by United States mail (first class, postage prepaid) copies of the foregoing "BRIEF FOR THE APPELLANT, SECRETARY OF DEFENSE" addressed to:

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CERTIFICATE OF COMPLIANCE

I, William K. Olivier, in reliance upon the word count of the word-processing system used to prepare the brief, certify that the "BRIEF FOR THE APPELLANT, SECRETARY OF DEFENSE" excluding the table of contents, table of authorities, certificate of service, and any certifications of counsel, contains 10,168 words and 935 lines of text. This brief was prepared using Corel WordPerfect 9.0 for Windows 95.

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