

FREEDOM N.Y., Inc.

LEADERS IN FOOD PROCESSING

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May 1, 1991

Defense Logistics Agency
Defense Personnel Support Center
2800 South 20th Street
Philadelphia, Pennsylvania 19101
Attn: Mr. Frank Bankoff

CLAIM

Re: Contract No. DLA13H-85-C-0591

Dear Mr. Bankoff:

Pursuant to Order of the Armed Services Board of Contract Appeals, Freedom N.Y., Inc., 243 California Road, Mt. Vernon, NY 10552 presents herewith its formal claim for damages resulting from the Government's breach and wrongful termination of contract DLA13H-85-C-0591. It includes claim for increased costs stemming from the impact of changes in inspection criteria under MIL-P-44073A.

In addition, we make claim that the Government's conduct throughout the administration of the contract was repeatedly punctuated by bad faith, deception, arbitrary and capricious behavior, and disparate treatment.

Contract DLA13H-85-C-0591 was awarded on 15 November 1984. It was negotiated and executed and awarded under the authority of the then-existing Defense Acquisition Regulations (DAR), and the Industrial Preparedness Planning Program (10 U.S.C. 2304(a)(16), now known as 10 U.S.C. 2304(c)(3)).

The Contract contained the following Changes clause (Standard Form 32: General Provisions (Supply Contract)):

The Contracting Officer may at any time, by a written order, and without notice . . . make changes, within the general scope of this contract, in . . . specifications, . . . method of shipment or packing . . . and place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for the performance of any part of the work under this contract, . . . an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. . . . [N]othing in this clause shall excuse the Contractor from proceeding with the contract as changed.

The Government Delay of Work clause (DAR 7-104.77(f)) (1968 Sep) was also a part of the Contract:

If the performance of all or any part of the work is delayed or interrupted by an act of the Contracting Officer in the administration of this contract, which act is not expressly or impliedly authorized by this contract, or by his failure to act within . . . a reasonable time . . . , an adjustment (excluding profit) shall be made for any increase in the cost of performance . . . caused by such delay or interruption and the contract modified in writing accordingly.

The Contract was governed, in part, by application of the Contract Disputes Act of 1978 (P.L. No. 95-563, 41 U.S.C. § 601 et. seq., effective March 1, 1979). Under this act, both claims cognizable under the Changes (or other contract) Clause and breach of contract claims may be heard by Boards of Contract Appeals. It follows that claims of both types should be first submitted to the Contracting Officer for resolution at agency level.

THRESHOLD QUESTIONS FOR BRINGING CLAIM

Modification P00025

The Government has previously argued that Mod P-25 is a bar to consideration of all issues of claim arising prior to its execution, and it has been variously stated by the Courts and Boards of Contract Appeal that "the action of the parties in agreeing upon a new delivery schedule eliminates from consideration the causes of delay occurring prior to such agreement."¹ The rationale underlying this view, however, is that such a modification acts as a "substituted contract" that discharges any existing duty or liability the Government may have owed for the consequences of any earlier delays.² A substituted contract-- like any contract-- must comply with the requisite conditions of any enforceable agreement. It must be voluntarily entered into, be supported by consideration and evidence a meeting of the minds of the parties thereto.

Modification P00025 ("Mod P-25") is a "substituted contract" only to the extent that it includes the "side agreement" reached between representatives of Freedom and the Government and reduced

¹ See Orion Electronic Corp., ASBCA No. 18918, 80-1 BCA ¶14,219, at 70,010 and cases cited therein.

² King Point Mfg. Co., ASBCA No. 27201, 85-2 BCA ¶18,043, n.11 at 90,573-76; REINSTATEMENT 2ND OF CONTRACTS (1981).

to writing in the covering letter to the Mod.³

This agreement was first memorialized by Attorney David M.F. Lambert in a letter to Raymond Chiesa, Executive Director of Contracts at DLA, **dated 23 days before Mod P-25 was signed.**⁴

Lambert notes in his letter that he is enclosing a draft copy of

"the Freedom letter which will be sent to the Contracting Officer tomorrow along with a draft of the Mod with some minor changes in schedules. I understand they have been discussed with Frank Bankoff."

He goes on to say, "Col. Francois and I appreciated the manner in which you and Karl worked with us."⁵

It is clear from Lambert's letter that 1) the substance of the side agreement was being reduced to writing, and 2) that it had been referred to and fully discussed with the Contracting Officer prior to execution of the contract modification. It is also clear that the substance of this side agreement was being kept within the context of a "Freedom letter," and separate from the actual modification itself. So, without the side agreement in place, the "substituted contract" clearly fails for lack of mutuality. Without a meeting of the minds, the modification is invalid, and all pre-existing claims would be immediately revived.

Modification P00028

On July 11, 1986, the Contracting Officer issued a "cure notice" under the contract for anticipated failure to meet the required July 31 delivery increment.⁶ The company responded in writing on July 23, pointing out that the failure was due to Government delay in providing Government Furnished Material (GFM):

³Discussed within. See Exhibit No. 1: Letter from Freedom to DLA (Raymond Chiesa), dated May 13, 1986. This letter was first directed to PCO Bankoff, but his counsel, Bob Appelian, advised that it should be sent, instead, to Raymond Chiesa, the person responsible for negotiating the agreement. The letter to PCO Bankoff was then withdrawn and resubmitted with the substituted name and office of Chiesa in place.

⁴Exhibit No. 2: Letter from Attorney David M.F. Lambert to Raymond Chiesa, Executive Director of Contracts at DLA, dated May 6, 1986. Freedom's negotiating team during these "closed door" negotiations with DLA officials consisted of Lambert and Col. Frank Francois of Potomac Marketing.

⁵This final reference is to the other party involved in the negotiations for the Government, Karl Kabeisman, the Defense Logistic Agency's General Counsel.

⁶Exhibit No. 3: Letter from PCO Bankoff to Freedom, dated July 11, 1986.

Modification P00029

Like Mod P-28, Mod P-29 was intended to have limited application. It, too, resulted from the failure of the Government to timely deliver GFM to the contractor's plant. As noted by the ACO:

"Modification P00029 was faxed to Freedom for signature 2 Oct 86. The modification revises the delivery schedule as a result of delays encountered in receipt of GFM."⁹

Since both parties assumed Mod P-25 to be valid, the only time period within the contemplation of the parties to which the company's waiver of rights under Mod P-29 could apply was the time period between execution of the two modifications P-25 and P-29. (It therefore would not apply to any prior claims revived as a result of Mod P-25 being declared invalid or otherwise infirm.)

Beyond the question of narrowed application, Mod P-29 was a graphic example of Government duress. By letter dated October 7, 1986,¹⁰ PCO Bankoff made clear to the company that

"[a]s we discussed on 26 September 1986, upon execution of modification P00029, the current progress payment ceiling for the subject contract, per modification P00028, will be \$14,900,725.00 based on delivery of 482,058 cases. To date you have been paid \$14,178,838.00. This leaves a balance of \$721,887.00 available to you. This amount will be paid to you by DCASMA N.Y. against progress payment requests submitted by Freedom N.Y., Inc."

Even though the \$721,887 was owed to the company under the terms of Mod P-28, the company had to execute Mod P-29 to receive it.¹¹ Lest there be any doubt about the intent of the PCO's

⁹Exhibit No. 5-A, Internal Memorandum by ACO Liebman dated 26 Sep 86.
Exhibit No. 5-B, Internal Memorandum by ACO Liebman dated 3 Oct 86.

¹⁰Exhibit No. 6: Letter from PCO Bankoff to Freedom, dated October 7, 1986.

¹¹In addition to a revised delivery schedule, Mod P-28 provided for an increase in progress payments:
"The limit on progress payments is hereby increased over it's current ceiling of \$13 million 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

"Freedom has been shut down since 17 July for lack of GFM jelly * * *. [O]ur GFM report to you of 30 June clearly showed that we were short of jelly, and other GFM items, and constituted sufficient notice to you to obtain the needed items to maintain our production. Further, on July 15, we called to remind you of said critical shortages. * * * Had we had GFM jelly from 17 July on, we would have produced an additional 49,500 cases, thereby exceeding our July requirement, thus putting us ahead of schedule on production."⁷

Modification P00028 grew out of this exchange, and represented an attempt to fix a specific problem caused by a specific condition. It was signed by the company on August 6, 1986, and like Mod P-25, contained an extension in date of delivery. But where Mod P-25 contained broad and sweeping language of release, Mod P-28 was intended to have a much narrower and limited scope. It addressed only the time lost by the company as a result of the Government's failure to timely deliver needed GFM. The modification itself contains restrictive language:

"WHEREAS, Contractor's delinquency or anticipated delinquency is partially excusable due to lack of Government Furnished Material jellies for eight production days; * * *

The Contractor hereby acknowledges that it has no claim whatsoever for any consideration or damages, monetary or otherwise, **resulting from lack of Government Furnished Material jellies during the period 16-28 July 86.**" (Emphasis added.)

Mod P-28 was clearly intended by both parties to have a very specific application; it therefore operates as a bar only to the claim for late delivery of GFM jelly. No other pre-existing claims are affected. To characterize this agreement as having a wider and more far-reaching application would not be consonant with the intent of the parties at the time of the accord.⁸

⁷Exhibit No. 4: Letter from Freedom to PCO Bankoff, dated July 23, 1986.

⁸The determination of whether a modification acts as a substituted contract (or accord and satisfaction) rests on the intention of the parties. 6 Corbin on Contracts, Sec 1293, at 190, 199.

Perhaps more important to placing Mod P-28 into perspective, it is important to consider that adjustment of the delivery schedule was required by the Contracting Officer under threat of termination for default; the action threatened was not lawful, in the sense that the company's anticipated inability to deliver the subject increment was directly attributable to a lack of Government Furnished Material; and had the company not signed, the threatened termination for default would have caused it irreparable harm. These three elements embody the approach used by the Court in Systems Technology Associates, Inc. v. United States, 699 F.2d 1383 (1983). So that to the extent Mod P-28 can be deemed to constitute an accord and satisfaction, it is voidable on the grounds of duress.

letter, further evidence of the collusion and coercion to which the company was subjected is found in two internal memorandums authored by ACO Liebman.¹² The first, dated September 26, 1986, makes note of the fact that

"The PCO and Freedom are currently negotiating an extension in the delivery schedule as a result of stock outage of GFM item, Fruit Mix and shortage of GFM item, Potato Patties. **The PCO is trying to get a waiver of claims against the Government** as well as monetary consideration for GFM item, Crackers damaged at Freedom."¹³

Three points must be made. One, the ACO's internal memorandum makes clear that the Government was responsible for the delay. Two, it is also clear that the PCO was aware that the Government was at fault. (Since the PCO was responsible for the deployment of GFM, the ACO's admission of Government liability suggests he first determined from the PCO where responsibility lay). Third, **despite his understanding that the contractor was legitimately entitled to an equitable adjustment**, the PCO "tried to get a waiver of claims."

Where a contractor's performance is delayed or interrupted by an act (or failure to act) of the Contracting Officer, "an adjustment (excluding profit) **shall be made** for any increase in the cost of performance." The language of the Government Delay of Work clause is mandatory and not permissive in instances of equitable adjustment. Where the Contracting officer chose not to cooperate with, and assist the company, but opted, instead, to become antagonistic and adversarial-- "trying to get a waiver of claims," he circumvented both the policy and the express language of the regulations he had sworn to uphold.

He accomplished his objective by extorting the contractor's agreement to waive its claims in exchange for payment of monies already owed. The ACO's internal memorandum of October 3, 1986, clearly shows the nature of this reprehensible course of conduct:

"Per PCO request 1600 hrs, 3 Oct 86, PP #21, in the

"This schedule provides for an increase in the progress payment ceiling by \$1,000,000, \$1,000,000 and \$800,000, respectively, for each delivery increment of 80,000 cases.

"If at the time of normal progress payment by the ACO the Contractor has completed only a portion of the 80,000 case delivery increment, the ACO is authorized to make a pro tanto progress payment based on this partial delivery and proportionate to the schedule. Upon completion of the remainder of the delivery increment, the ACO may complete the progress payment."

¹²Reference Exhibits 5A and 5B, at fn 9.

¹³See Exhibit No. 5-A, at fn 9.

amount of \$700,000, is being held in abeyance pending Freedom's execution of Mod P00029. This is expected to be accomplished during week of 6 Oct 86."¹⁴

This, then, is the framework within which the company was attempting to operate. In the light of such overwhelming evidence of the PCO's behind-the-scenes exploitation and manipulation, to assume that he suddenly became a fair and open-minded person at the time he terminated the contract for default would be ludicrous.

Mutual assent on the part of both parties is essential to the creation of any binding agreement.¹⁵ When assent is lacking on the part of one side, we have nothing more than the acceptance by one party of the views of another. Since the contractor acted under duress in executing the supplemental agreement, what resulted was no different than a unilateral decision of the contracting officer. What was incorporated into the agreement was not a compromise, but merely the contractor's unwilling adherence to a decision of the Government's authorized agent.¹⁶

Beyond doing what it did-- accepting short-changed and extortion-produced payments under protest, the company was in no position to argue.¹⁷ Contract DLA13H-85-C-0591 was in a shambles, and the company on the verge of financial ruin. Abandonment of performance was not a viable option, since there was still the hope that the company would yet get the promised award of future business. This was a hope being fed by the deceptive and fraudulent actions of the Contracting Officer.¹⁸

¹⁴See Exhibit No. 5-B, at fn 9.

¹⁵Fruhauf Southwest Garment Co. v. United States, 126 Ct.Cl. 51, 111 F.Supp 945 (1953); Monroe v. United States, 35 Ct.Cl. 199, 206; aff'd., 184 US 524; Restatement of Contracts, § 3.

¹⁶Monroe, supra, at 64.

¹⁷See Exhibit No. 7: Letter from Freedom (Patrick J. Marra, CFO) to PCO Bankoff, dated September 22, 1986, complaining about the actions of the local DCASMA office and protesting a recently-approved "partial payment" of \$311,446 against outstanding progress payment requests of \$2,315,927. "We protest this partial payment and accept it under duress, without a reasonable choice in this matter."

Mr. Marra noted that despite a 95% progress payment clause as late as the date of his letter, "the Government has released only 76% of our claimed incurred costs."

¹⁸See Exhibit No. 8: Amendment 0005 to Solicitation DLA13H-86-R-8359 (MRE-7).

Exhibit No. 9: Letter from PCO Bankoff to Freedom, dated October 10, 1986.

Exhibit No. 10: Letter from Bankers Leasing to William Stokes, Financial Analyst, at DCASMA).

The company's continued reliance on the expanded agreements of Mod P-25 was based in large part on the company's belief in the ultimate integrity of the procurement process. While the company had no faith in the local DCASMA office, there was still a groundswell of opinion inside that the PCO was well-intentioned and could be relied upon to follow through as best he could on the promises he made. Not so. He was fully involved in the pre-designed deception implemented by the Government to convince the contractor that it was in fact pursuing its promise of awarding future business. Mod P-29 was in part the result of this deception.

Two weeks prior to execution of Mod P-29, on September 25, 1986, the Government through PCO Bankoff, issued, and furnished Freedom with, a copy of Exhibit No. 8. Paragraph 3.a. of the referenced Amendment read, in pertinent part, as follows:

"Offerors will be evaluated in the following manner.

The 40% portion will be awarded * * *.
The 31% portion will be awarded * * *.
The 18% portion will be awarded * * *.
The final 11% will be awarded * * *."

Four award portions were being provided for in the Amendment. This increase from three portions to four signalled to the company that the Government was, indeed, living up to its promise of future business under Mod P-25. This promise was apparently being acted upon as early as April, 1986, when PCO Bankoff advised the company that "it is anticipated that" four maximum share quantities would be awarded at 41%, 30%, 17% and 13% share levels. Later, when the Amendment was actually issued, the company was further lulled into believing that the Government was dealing in good faith.

Then, on October 10, 1986, PCO Bankoff advised the company by letter of same date,¹⁹ that Freedom had been certified as capable of producing "the monthly allocated quantity of 700,000 cases of MRE ***. Your continued support in the Industrial Preparedness Planning Program is greatly appreciated." Following this letter, and to demonstrate its support of the program effort, Freedom's lender made clear its intent to provide required financing in the form of a \$6 million line of credit.²⁰

As late as November 26, 1986, the company was still operating under the cloud of misplaced trust and belief. When the local DCASR office conducted a resurvey of the contractor's operation in November 26, 1986, the survey team noted that the contractor was busy making modifications to its final assembly production area in anticipation of receiving the agreed-upon follow-on contract.²¹ But while the PCO was holding out the carrot stick of future awards, the ACO was refusing-- with the apparent consent of the PCO-- needed (and agreed upon) monies.

Mod P-29 required final delivery of all MRE-6 configuration

¹⁹See Exhibit No. 9, at fn 18.

²⁰See Exhibit No. 10, at fn 18.

²¹See Resurvey # S3310A6N021PN, dated 4 Dec 1986.

cases (to total 620,304) by December 5, 1986. By November 13, 1986, the company had produced and the Government had accepted 512,462 cases of MRE. Under the formula of Mod P-28, Freedom's progress payment entitlement had risen to \$15,274,620.²² The Government continued its breach of the contract by refusing to live up to the terms of Mod P-28, and paying nothing on progress payments legitimately requested.

Exception to Competition in Contracting Act-- Industrial Preparedness Planning & Mobilization 10 U.S.C. 2304(a)(16)

The contract was awarded under the auspices of Industrial Preparedness Planning and Mobilization.²³ This method of contracting effectively removed it from open competition, and restricted any award to a limited number of suppliers. The management and administration of a mobilization contract is subject to a different type of scrutiny. As the courts have made note, in considering cases of this sort:

"Mention should be made of an important difference between an Industrial Mobilization Preparedness contract and an ordinary supply contract. The sole purpose of an ordinary supply contract is to obtain currently needed supplies, and ordinarily there is a close relationship between the delivery schedule of the contract and the time when the supplies are needed. In contrast, the completed supplies to be delivered under an Industrial Mobilization Preparedness contract are not likely to be currently needed at all, and the delivery of such supplies is purely incidental to the main purpose of the contract, which is to develop a source of supply to be available in time of national emergency."²⁴

This avowed contracting purpose was intentionally and discriminatory ignored by the Government's various agents and officers in the case of this contractor, who clearly sought not to develop the contractor, but to destroy it and remove it from the exclusive group of mobilization suppliers.

²²\$15 million was the stated entitlement under Mod P-28 at 490,000 cases. At 570,000 cases the entitlement rose to \$15.8 million. The \$800,000 increase was to be spread over the additional 80,000 cases, for a progress payment increase based on \$10 per case. The additional 22,462 cases produced mandated a concomitant increase of \$224,620 in progress payment entitlement, for a total entitlement to that point in time of \$15,224,620.

²³10 U.S.C. 2304(a)(16).

²⁴Appeal of American Radio Hardware Co., Inc., ASBCA No. 3069, 57-2 BCA 1438.

WRONGFUL TERMINATION FOR DEFAULT

Contract DLA13H-85-C-0591 was terminated on June 22, 1987, for "failure to perform inventory control requirements and to make progress."²⁵ Where a contract is terminated for failure to make progress, the Government must be able to prove that **"on the basis of the entire record"** the contractor could not perform the contract within the time remaining for contract performance, and that there was no excuse for such nonperformance.²⁶

Nonperformance is excusable when repeated delays and work interruptions caused by the Government prevents the contractor from performing. Nonperformance is excusable when the Government fails to pay progress payments due and owing, or otherwise breaches the contract agreement. And when nonperformance is found to be excusable, the Termination for Default is converted to a Termination for Convenience of the Government, unless bad faith or a clear abuse of discretion is shown,²⁷ entitling the contractor to breach of contract damages.

Further, a termination for default may be overturned upon a showing of discriminatory treatment,²⁸ or when it can be shown that the Contracting Officer did not exercise his independent discretion in making the termination decision.²⁹ Termination was improper because the prime, if not sole, source of the company's failure to perform inventory requirements and to make progress was the government, itself.

I. Excusable delay

a. Nonperformance is excusable when repeated delays and work interruptions caused by the Government prevents the contractor from performing.

The Contracting Officer was advised by the contractor by letter dated October 22, 1986 that

²⁵ See Exhibit No. 11: Letter from PCO Bankoff to Freedom, dated June 22, 1987.

²⁶ Appeals of Skip Kirchdorfer, Inc., ASBCA No. 32637, 91-1 BCA ¶23,380; RFI Shield-Room, ASBCA Nos. 17374, 17991, 77-2 BCA ¶12,714, at 61,735; also, Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed.Cir.1987).

²⁷ See Kalvar Corp. v. United States, 543 F.2d 1298, 211 Ct.Cl. 192 (1976); John Reiner & Co. v. United States, 325 F.2d 438, 163 Ct.Cl. 381 (1963), cert. den., 377 U.S. 931, 84 S.Ct. 1332, 12 L.Ed.2d 295 (1964).

²⁸ Laguna Construction Co. v. United States, 88 Ct.Cl. 531 (1939).

²⁹ Schlesinger v. United States, 182 Cl.Ct. 571, 590 F.2d 702 (1968).

"as of 8:00 a.m. today, Freedom, N.Y., Inc. has received all of the necessary Contractor Furnished Materials (CFM) to begin producing cases of MRE's for the MRE-6 configuration of Contract DLA13H-85-C-0591. We have completed the production of the 505,546 MRE-5 configuration portion of said contract.

Effective October 22, 1986, Freedom's final assembly production of cases of Meals, Ready-to-Eat, Individual is shut down for lack of GFM. * * *

We are presently producing cracker packets and accessory packets but have had to layoff (sic) production workers equivalent to the number of workers in final assembly...."

Continuing interruption of the production operation by Government action and inaction caused stretch-out of deliveries, production inefficiencies, personnel layoff and turnover.

b. The Government delayed in approving award of contract under MRE7, when the award was part of a negotiated settlement of claim, and the Government knew that its award was a necessary prerequisite to the company's continued receipt of financing from its lender. By not making the promised award, the Government knowingly and intentionally stripped the company of its outside financing source.

c. The Government agreed to provide financing for the contract in the form of 95% progress payments. Progress payments required were not paid, or not paid promptly, despite the proper tender of contract goods and the submittal of proper progress payment requests. This failure to pay was intentional, and the company's failure to make progress under the MRE-6 portion was a direct result of this withdrawal of contract financing.

d. This failure to pay, and to promptly deliver MRE-6 conforming GFM to the job site, effectively suspended the contractor's performance, without its fault or negligence.

II. Government's Breach of Contract-- Mod P00025

As awarded, the Contract provided for delivery of 620,304 cases of MRE, at a price of \$17,197,928.40. On January 29, 1986, the Contracting Officer partially terminated for default, under Modification P00020, 114,758 cases of MRE, reducing the total delivery requirement to 505,546 cases. Contract price was decreased from \$16,997,928.41 to \$13,816,262.86. This was the position of the contract at the time negotiation of Mod P-25 began.

The Government made the following promises during the negotiations leading up to Mod P-25:

- 1) to provide the company with production assistance in reworking approximately 32,000 previously packaged cases then under contractor claim,³⁰
- 2) to process a request for a guaranteed loan from Freedom's lender,³¹
- 3) to live up to the mandate of 10 U.S.C. 2304(a)(16)³², by maintaining the company in the MRE program (provided the company was "otherwise qualified"), and
- 4) to assist the company in obtaining traypack and pouch contracts under the SBA 8(a) program.³³

At the specific request of the Government's representatives, the negotiated side agreement was to be kept separate from the modification to be signed.

Mod P-25, as drafted by officials of DLA, was signed by Freedom's President, Mr. Henry Thomas, in the presence of the Contracting Officer, Bankoff. The modification, as received by

³⁰This was a problem resulting from application of Government inspection specifications. The Government agreed to inspect a day's production of cases when offered. After inspecting the first day's lot of production by removing produced cases from the production line, opening the cases and inspecting the contents, the Government inspectors insisted that the cases be "palletized, capped and strapped" prior to their inspection.

The company continued producing, insisting in turn that the requirement was not contractual, and that the inspectors should continue in their then-current mode of inspection.

About this time, the strapping material submitted for use by the contractor was tested by the Government and found unsatisfactory. The contractor protested and requested re-evaluation, insisting that the strapping material met the specification requirement. The material was subsequently retested and found to be conforming, forcing the Government to resume inspection. During the six weeks it took to resolve this controversy, the company produced 31,817 cases of MRE. When inspection resumed, nonconformances were found throughout these lots of production, causing all 31,817 cases to be rejected. Since this was a first-time effort in production of MREs, the company requested production assistance in staging a "re-work" operation that would involve: 1) cutting open every rejected case and each of the 12 menu pouches inside, 2) salvaging and segregating each of the 167 items in each menu case (a total of 5,313,439 individual items), and 3) recycling each item through the production operation.

The company made claim for the delay and associated labor and material costs in the amount of \$555,478, claiming that the failure of the Government to inspect was the cause.

³¹The cumulative effect of the Government's refusal to pay progress payments had placed the company in an untenable position. We were forced to either stop work and cease to do business (there is no commercial market for the MRE) while pursuing our claim, or hedge our bets by accepting a guaranteed loan (which would have tied the government into its verbal commitment to maintain the company in the program) and future contracts.

³²The statutory authority under which the contract was removed from competition, negotiated and awarded.

³³As originally prepared, the claim sought \$5.7 million for increased costs of performance. As part of the "side agreement" discussions, the claim was reduced by company negotiators to the \$3.4 million figure. This was done "to show the company's good faith in beginning negotiations." To the extent this claim covers identical areas of cost increase, the original claim figures are used.

the company, was taken to Philadelphia and personally presented to PCO Bankoff on May 29, 1986. It was attached to a covering letter, also signed by Mr. Thomas, and directed to Raymond Chiesa, PCO Bankoff's superior and the Executive Director of Contracting at DLA.

In the covering letter, Freedom made clear its understanding of the side agreement. In addition, Mr. Thomas at that place and time made clear to PCO Bankoff that if for any reason the side agreement as understood and expressed was not in fact the actual agreement, his signature should be considered withdrawn. After receiving verbal assurance from PCO Bankoff that his wishes in this regard would be respected, he signed and handed both the cover letter and the attached modification to the PCO, who in turn then signed.

As an inducement to sign the modification, the Government deceptively and fraudulently took steps-- while negotiations were on-going-- designed to convince the company that the side agreement was in fact being acted on.³⁴ On May 20, the company received a call from Lt. Col. Doug Menarchick, an active duty officer assigned to then-Vice President Bush's staff, advising that according to DLA, agreement (on the side issues) had been reached, and were being confirmed in writing.³⁵

Within a couple of days, Lambert and Francois followed with a report that the agreement (as constituted in the covering letter) had been struck, and Mod P-25 was subsequently signed.

After tricking the contractor into signing the Mod, the Government (unknown to the contractor) did an abrupt about-face

³⁴ See Exhibit No. 12: Telex from PCO Bankoff to Freedom, dated January 29, 1986.

Exhibit No. 13: ACO Memorandum dated April 1, 1986.

Exhibit No. 14: DLA memo by Samuel Stern, Chief, Contract Mgt Div., dated 4 April 1986.

Exhibit No. 15: Telex from PCO Bankoff to Freedom, dated April, 17, 1986.

Exhibit No. 16: Solicitation DLA13H-86-R-8359, p. 98 of 135).

The chronology of relevant events is important.

January 29, 1986-- PCO issues telex advising that Solicitation to be issued indicating only 3 planned producers would participate in MRE program.

March 21, 1986-- Company's claim for \$3.4 million (reduced from \$5.7 million) formally filed with PCO. Freedom and Government commence negotiations.

March 26, 1986-- at meeting in Philadelphia, Freedom flatly refuses Government's proposed settlement offer to settle-- which offer is identical to language of Mod P-25; Freedom refuses to give up its rights under the claim. (Refusal noted in Exhibits 13 and 14.)

April 17, 1986-- negotiations in fourth week; PCO advises in writing that Government "anticipated" going from three planned producers to four. (Exhibit 15).

May 16, 1986-- PCO issues Solicitation DLA13H-86-R-8359 saying four planned producers would participate. (Exhibit 16).

³⁵ See Exhibit No. 17: Chiesa Memorandum for Record, dated May 15, 1986.

Exhibit No. 18: Letter from Raymond Chiesa to Col. Menarchick, dated May 19, 1986.

Col. Menarchick was told by the PCO's superior, Raymond Chiesa, about the existence of the side agreement. Although Chiesa stopped short of admitting to Menarchick the Government's commitment to giving Freedom future business, what is important is that Chiesa admitted the existence of the side agreement, and memorialized its existence in at least two writings.

and began a deliberate process of reneging on each and every promise contained in the side agreement. The Government's deception was not patently obvious. As late as November 1986, the contractor was still requesting prompt action on the award of contract under MRE-7.³⁶

The Government's reversal, however, left the company struggling to continue performance under the very terms and conditions that the company expressly rejected before negotiations began.³⁷

It is appropriate and critical to an understanding of Modification P-25 to consider the discussions and circumstances surrounding its execution. In the interpretation of contracts, the intention of the parties is paramount.³⁸ This intention is manifested by the words used in the contract and by the surrounding circumstances.³⁹ "[M]eaning can usually be given to writings only on consideration of all the circumstances, including the prior negotiations between the parties."⁴⁰

As the Court of Claims said in David Nassif Associates v. United States:

"[I]t is not the writing alone which attests to its own finality and completeness but the circumstances surrounding its execution, including the negotiations which produced it."⁴¹

Mod P-25 is effective **because** it includes the understanding of the side agreement as communicated to the Contracting Officer. Without the side agreement there was no meeting of the minds.

However, even without application of the parol evidence rule, the language of total release found in the Mod is not

³⁶See Exhibit No. 19: Internal Memo from Freedom's CFO to President, dated November 10, 1986.

Exhibit No. 20: Letter from Freedom to PCO Bankoff, dated November 12, 1986.

The contractor is seen here to once again have occasion to complain about the nonpayment of progress payments by ACO Liebman, who's verbalized position per Exhibit 19 was that he would not make additional payments until "either [the lender] shows additional financial support or DPSC awards a contract."

³⁷See Exhibits 13 and 14, at fn 34.

³⁸North American Philips Co. v. United States, 358 F.2d 980 (Ct.Cl. 1966); Chase & Rice, Inc., 354 F.2d 318 (Ct. Cl. 1965); 4 Williston on Contracts §601 (3rd ed. 1961).

³⁹Corbetta Construction Co. v. United States, 461 F.2d 1330 (Ct.Cl.1972); Hayes International Corp., 79-1 BCA ¶13,596 (AS); Pure Water and Ecology Products, Inc., 77-2 BCA ¶12,718 (AS).

⁴⁰Appeal of Michael Guth, ASBCA No. 22663, 80-2 BCA ¶14,572.

⁴¹557 F.2d 249, 256 (Ct.Cl. 1977).

dispositive, because the Contracting Officer was made aware of the contractor's understanding, and not only said nothing to the contrary, but signed the modification based on that understanding. In doing so, he assented to the "expanded" agreement and bound the Government thereto.

In a case involving somewhat similar circumstances, a contractor signed a release purporting to "remit, release and forever discharge the Government, * * * of and from all liabilities, obligations and claims whatsoever in law and in equity under or arising out of said contract." At the time the contractor delivered the modification he verbally notified the Contracting Officer that he had not intended to waive the company's claim by executing the release. Several days later, he followed up in writing, advising that his failure to make the exclusion clear was inadvertent, and that if the Government would not accept the release with such a condition, it should be considered as withdrawn. The Board held that the Government, having been alerted to the nature of the release, was under a duty to make its position known to the contractor at the time, and where it failed to do so, acknowledged that it viewed the release in the same light as that viewed by the contractor.⁴²

In our case, both verbal and written notification were provided to the Government both prior to and at the time of delivery and execution. If the Contracting Officer was not in agreement with the expanded terms of the agreement, he was under a duty to make his position known-- by telling the contractor he did not agree, or by not signing the Modification. With his execution of the document, however, the side agreement was effectively merged within the terms of the modification, and the Government became obligated thereunder to live up to its promises, including the award of future contracts.

As merged, this agreement formed the complete and total terms and conditions of the parties' substituted contract. Any other interpretation would fly in the face of both the facts and the law.⁴³ The Government's subsequent failure to fulfill its reciprocal commitments embodied within the expanded Mod P-25 constituted a material breach of its agreement with the

⁴²Leonard Blinderman Construction Co., (1974) ASBCA No. 18946, 74-2 BCA ¶10,811.

⁴³The ASBCA case of Mercury Machine & Manufacturing Company, 76-1 BCA ¶11,809 (AS), is also on point. There, the contractor reduced its price for a proposed contract change on the condition that its part number would be listed as an approved source in future procurements. The Government's representative agreed, but the condition was not included in the supplemental agreement. The Board held that the written modification only partially integrated the parties' agreement and that the Government became obligated to list the contractor's part.

contractor.⁴⁴

In addition to the side agreement, the Government settled the contractor's claim by increasing the contract price by the amount of the claim,⁴⁵ (with a resulting per unit price of \$34.01), and by adding back the 114,758 cases taken under Mod P-20, **at a price to be later determined and definitized by the ACO.** The specific contract language states that:

WHEREAS Freedom has asserted and certified a claim against DLA in the amount of \$3,481,768 in addition to the original contract price of \$17,197,928.40 resulting from the actions on the part of DLA and

WHEREAS DLA disputes the validity of that claim, ***

NOW, THEREFORE, in consideration of these premises and pursuant to the authorities contained within the Contract Disputes Act, 41 U.S.C. 601 et. seq., the parties consent and agree to the following.

* * *

1. The contract delivery schedule and quantity terms shall be amended as follows:

a) The 114,758 cases eliminated from the contract as a result of prior partial terminations for default shall be reinstated in their entirety. The 114,758 cases shall be manufactured and delivered in MRE VI configuration, i.e., in accordance with DLA13H-85-R-8457, as amended, with contractor furnished material as set forth on page 14 of such solicitation. **Price adjustment, if any, to be determined in accordance with the Changes Clause of the contract. Definitization shall be accomplished by the cognizant ACO.**

4. The amounts of consideration furnished to the

⁴⁴Mod P-25 was signed with side agreements left outside on a take it or leave it basis. The company's acceptance of a loan in place of legitimate cost entitlement was one reaction to this coercion. However, it is important to point out, that in exchange for the Government's long-term commitment to Freedom as one of the mobilization base planned producers, the loan was voluntarily agreed to, for in order for a guaranteed loan to be paid back, Freedom would have to be maintained consistent with the mandate of 10 U.S.C. 2304(a)(16).

It was only later that the company came to see Mod P-25 in its true and proper light-- that it was in fact the product of duress, bad faith and deceit. Should the modification for any reason be deemed not to include the side agreement, it is clear that grounds also exist to affirmatively argue that it is not the sort of bilateral agreement ordinarily contemplated within the meaning of a "substituted contract," and may not then be used by the Government to bar the company's claims for things occurring prior to its execution. See Appeals of E.L. David Construction Co., Inc., ASBCA Nos. 29225, 34787, 89-3 BCA ¶22,140, where the Board called the Government's position both "untrue and unfair," after finding "that in our judgment the Government took advantage of appellant during the negotiations which led to Modification P00002."

⁴⁵Actually, by \$3,381,666 of the \$3,481,768 claimed.

Government by Freedom . . . for modifications P00018 dated 15 November 1985 and P00011 dated 14 June 1985 are hereby rescinded and the contract price is thus increased by \$200,000.00 to \$17,197,828.41.

The existing 505,546 case requirement was fulfilled by the company on November 5, 1986. At that time the company became entitled to be paid the full \$17,197,828.41 for product delivered. The ACO never paid this amount, and the \$1,242,544 balance due on the MRE-5 portion (the difference between the full amount and the \$15,955,284 paid by the Government) is still owing and payable.

On the same date, November 5, 1986, the company began producing the 114,758 add-on cases under the MRE-6 configuration as required.⁴⁶ The ACO never definitized the price adjustment due,⁴⁷ so the contractor is entitled to be paid at the original price per case (\$27.725) under which the MRE-5 cases were to be produced.

Application of this rate would have entitled the contractor to the sum of \$3,181,666 for the 114,758 add-on cases. Profit would have totalled \$477,250, based on the 15% profit rate set under the MRE-5 portion. The company was attempting to fulfill its contractual obligations under the MRE-6 case requirement when the Government's failure to make payments caused it to stop all work. The PCO's wrongful and arbitrary termination of the MRE-6 portion of the contract entitles the contractor to payment of the lost profit of \$477,250, plus the \$191,746 owed for the 6,916 cases delivered.

III. Breach of Contract-- Mod P00028

Mod P-28 became effective on August 7, 1986, when it was signed by the Contracting Officer. By October 14, 1986, some 490,038 cases had been produced by the company and accepted by the Government. Actual physical delivery to cold storage was accomplished on October 16, 1986 under shipment number FNY0286. Progress payment entitlement, according to the express terms of Mod P-28, was automatically set at \$15 million. The ACO failed and refused to make the additional payment as required by the modification, saying instead that "the ceilings in Mod P-28 are

⁴⁶For sake of simplicity, we will refer to the cases to be produced under the MRE-6 configuration as the MRE-6 contract. The 505,546 cases, being produced under the MRE-5 configuration will be called the MRE-5 contract.

⁴⁷The price per case under the MRE-6 configuration could arguably have been lower, since the company had no start-up costs, and with the experience acquired in producing the MRE-5 cases, a lower learning curve was expected.

not mandatory."⁴⁸

If, in fact, the ceilings were not mandatory, this should have worked in favor of the contractor and not against it. For on October 14, 1986, only 15,508 cases were left to be delivered under the 505,546 MRE-5 configuration. This portion of the contract was then 97% complete.⁴⁹ Notwithstanding the 95% progress payment clause, the ACO never paid more than \$14.6 million, or 84% of the MRE-5 contract price, in progress payments.

III. Failure to establish reasonable delivery date-- Mod P00030

By November 14, 1986, some 6,916 MRE-6 cases had been completed, bring the total of all cases delivered to 512,462. The Government's unwavering refusal to make contractual payments rendered continued production impossible.⁵⁰

By December 5, 1986, the cumulative MRE-6 cases delivered still totaled 6,916. Accessory packet production continued, however, with Government inspection and acceptance being accomplished over the period from January 20 to January 27, 1987.⁵¹ The Contracting Officer said nothing and took no action of any kind until unilaterally issuing Modification P00030 in April, 1987. This subsequent attempt to unilaterally impose revised delivery dates was improper and therefore invalid. In failing to act sooner, the Contracting Officer effectively waived

⁴⁸See Exhibit No. 21: Internal Memo from Freedom's CFO to its President, dated November 5, 1986, memorializing telephone conversations with the ACO). In this series of conversations, the company was first advised on October 25/27 that the ACO would have to discuss release of the pending progress payment with PCO Bankoff, in connection with DPSC's plans for award of MRE-7.

On October 29, ACO Liebman advised that he was suspending further payment for deliveries made, but would not and was not obligated to put this decision in writing. He further advised that he had made no decision on releasing the progress payment, and cited DAR Appendix E as his authority for limiting the Government's exposure.

On November 5, ACO Liebman advised he would not make any further progress payments, notwithstanding the plain wording of Mod P-28, and further advised that PCO Bankoff was in agreement with this course of action.

⁴⁹The contract must be viewed from this perspective, since the ACO had not definitized the MRE-6 configuration portion.

⁵⁰To the extent the contractor can be said to have abandoned performance, said abandonment was excusable in that the financial problems the contractor had were created by the government. The law is clear that a contractor has the right to stop performing upon a material breach of the contract by the government (Brenner Metal Products Corp., ASBCA No. 25294, 82-1 BCA ¶15,462). This right accrues upon the breach itself and is not dependent on proof that the breach (in cases of failure to pay) actually caused the default. (DWS, Inc., ASBCA No. 33245, 87-3 BCA ¶19,960, especially where the contractor is confronted with a "prolonged failure [by the government] to pay large amounts" of money due it. Northern Helex Co v U.S., 17 CCF 81,069, 197 Ct.Cl. 118, 125, 455 F.2d 546, 550 (1972).

⁵¹The contract required a four-pronged production effort: accessory packets, cracker packets, retort pouches and final case assembly. This was not the first time "subassembly" production had gone on without simultaneous final case assembly.

the Government's right to terminate for failure to deliver.⁵²

Mods P-28 and P-29 both concluded with the following recital:

"It is agreed that no subsequent modification of this agreement shall be binding unless reduced to writing and signed by both parties."

Notwithstanding this express requirement, included in the modifications by the Government without input from the contractor, on April 23, 1987, PCO Bankoff unilaterally executed Mod P-30 to the contract establishing a purported "revised delivery schedule." This delivery schedule was not reasonable, and therefore not enforceable, as the PCO was then aware that the company had been forced, as a direct result of Government action and inaction, to lay off personnel and shut down its plant.

The contractor's failure to meet the November and December delivery increments under Mod P-29 was the fault of the Government, in failing to pay progress payments as required by Mod P-28.⁵³

Assuming, however, arguendo, that the contractor was somehow at fault in failing to deliver the MRE-6 cases, the Government waived its right to terminate by doing nothing, and allowing the contractor to continue production of subassembly items past the time specified for November and December deliveries.⁵⁴ And the case law is clear that

". . . in a waiver after breach situation, time may again become essential and the Government may regain the right to terminate a delinquent contractor for default, if (1) the Government unilaterally issues a notice under the contract's Default clause establishing a reasonable but specific time for performance on pain

⁵²See E.L. David, supra., where the September completion date was missed, and the contractor "[made] submittals of materials and the Government took action on those submittals (all five were approved) * * * on 2 November, 7 November, 10 November, 14 November and 8 December; * * * ." The Board said there that "in our view, the Government waived appellant's failure to complete * * * by the date specified."

See also, International Telephone & Telegraph Corp. III Defense Communications Division v. United States, 20 CCF 83,645, 206 Ct.Cl. 37, 509 F.2d 541 (Ct Cl 1975); Joseph DeVito v. United States, 13 CCF 82,319, 188 Ct.Cl. 979, 413 F.2d 1147 (1969); Bailey Specialized Buildings Inc. v United States, 404 F.2d at 1154; Oklahoma Aerotronics Inc., ASBCA No. 25605, 27879, 28006, 87-2 BCA ¶19,917 at 100,744-76; Vista Scientific Corp., ASBCA No. 25947, 26722, 28460, 87-1 BCA ¶19,603 at 99,190-91; Computer Products International, Inc., ASBCA Nos. 26107, 26130, 83-2 BCA ¶16,889 at 84,050-51-- reasonableness of revised delivery schedule established by unilateral Mod P-30, issued when the government was aware of Freedom's eviction from the plant.

⁵³See discussion immediately following, at IV. Failure to Pay Progress Payments.

⁵⁴DeVito, supra, at 990-91.

of default termination, or (2) the parties bilaterally agree upon a new delivery date. DeVito, supra, at 991-92, 413 F.2d at 1154."⁵⁵

In DeVito, the court specifically set out the procedure that must be followed to unilaterally establish a new delivery date:

"* * * The proper way thereafter for time to again become of the essence is for the Government to issue a notice under the Default clause setting a reasonable but specific time for performance on pain of default termination. * * * The notice must set a new time for performance that is both reasonable and specific from the standpoint of the performance capabilities of the contractor at the time the notice is given. [Emphasis supplied]⁵⁶

This is a subjective test, and where the Contracting Officer fully knew and understood that the sum total of his acts and omissions, as well as those of the ACO, were the direct and proximate causes of the contractor's inability to go forth, his action in unilaterally establishing the new delivery date was unreasonable and highly improper.

IV. Failure to Pay Progress Payments

Freedom's "failure to perform and make progress" was a direct result of the refusal of ACO Liebman to pay progress payments as required by the contract.⁵⁷ This refusal began early in contractor performance and continued throughout the term of the contract.

It has long been settled that a contractor's performance delay or failure may be excused if the contractor was rendered financially incapable of continuing performance by the Government's failure to make partial or progress payments when due.⁵⁸ This failure to pay justifies abandonment of

⁵⁵ Bailey, supra.

⁵⁶ DeVito, supra, at 991-92, 413 F.2d at 1154; Bailey, supra, at 99,190; Oklahoma Aerotronics, supra; International Telephone & Telegraph, supra, at 49-50, 509 F.2d 541 (1975).

⁵⁷ See Q.V.S., Inc. (1958) ASBCA No. 3722, 58-2 BCA 2007.

⁵⁸ Whitbeck, Receiver v United States, 77 Ct.Cl. 309, cert den 290 U.S. 671 (1933) (nonpayment for several months exhausted supply contractor's funds and caused it to close plant); Argus Industries, Inc., ASBCA No. 9960, 66-2 BCA ¶5711 (delay in making progress payments); Q.V.S., Inc., supra, ("inadequate" and "untimely" partial payments); West Coast Lumber, ASBCA No. 1131, 6 CCF 61,477 (1953) (failure to make progress payments more than 10 days after delivery of lumber impaired contractor's finances).

performance by a service contractor, whether or not the nonpayment rendered the contractor unable to continue.⁵⁹ The nonpayment need not be deliberate. It can be inadvertent or result from administrative neglect.⁶⁰ In neither case does the contractor assume the risk of nonpayment,⁶¹ and the contractor need not show that the nonpayment rendered it unable to perform:

"To require such a showing would accord the Government a license to abdicate with impunity its obligation to make payments when due to those contractors having sufficient financial resources to continue performance despite nonpayment."⁶²

If nonperformance is excusable when the government is delinquent in making progress payments, as noted above, the decision of the Contracting Officer to terminate for default must be set aside. Especially here, where the failure to pay was the actual cause of the company's inability to perform.⁶³

Freedom's obligation under the contract was to manufacture (or assemble) and deliver 620,304 MRE cases as ordered. The fundamental obligation of the government was to accept and pay in accordance with the contract.⁶⁴ The Government fulfilled its obligation to accept product, but failed in its obligation to pay.

V. Nonperformance Excusable Based on Entire Record

A. Failure to Pay Progress Payments

The payments clause of the instant contract required payment of incurred costs upon the submission of proper invoices. Since it did not specify the time within which payment was to be made, the time of payment became "a reasonable time" after submission of progress payment requests. A reasonable time to make payment

⁵⁹Contract Maintenance, ASBCA Nos. 19409, 19509, 75-1 BCA ¶11,207; Valley Contractors, ASBCA No. 9397, 1964 BCA 4071; U.S. Services Corp., ASBCA Nos 8291, 8433, 1962 BCA ¶3703.

⁶⁰US Services Corp., *supra*; Valley Contractors, *supra* (deliberate refusal to pay).

⁶¹Consumers Oil Company, ASBCA No. 24172, 86-1 BCA 18,647.

⁶²Consumers, *supra*.

⁶³Where the Government contracted to provide 95% of all incurred costs, it was clear that progress payments were actually to be the basis for financing the contract. See R.H.J. Corp., ASBCA No. 9922, 66-1 BCA 5361, in this connection.

⁶⁴UCC Sec 2-301.

under a properly prepared progress payment request was 5 to 10 days.⁶⁵ Accordingly, the ACO had a duty to make progress payment disbursements within 15 days of receipt. He failed in fulfillment of this duty.

Both Freedom and the Government⁶⁶ recognized from the outset, during pre-award procedures and evaluation of Freedom's cost/price proposal, that the Company's cash flow requirements necessitated timely receipt of progress payments to support contract performance.

These agreements were reached during contract negotiations by and between Freedom and the Government (PCO Barkewitz), where the Government insisted on a reduction of Freedom's per unit price from \$34.81 to \$27.725. Freedom strongly protested any reduction below \$29.90 per case, but relented in reliance on the Government's offer to include in the contract its agreement to pay, as progress payments, 95% of all costs incurred.⁶⁷

The exact costs to be so treated for progress payment purposes were specifically set forth in a contract document entitled "Memorandum of Understanding," and this agreement was the sole basis for arriving at the final unit price of \$27.725.⁶⁸

Total costs under the contract were definitized at \$14,970,142. The \$14,970,142 included the following costs:

Negotiated Line Items	As Proposed	As Agreed
(Under Manufact Overhead)		
Q C Equip and Supplies	54,000	54,000
Maintenance Equipment	25,380	25,380

⁶⁵"A question arises on the proper treatment of contracts awarded between July 10, 1984, and when the necessary FAR revisions are published.

"The current DoD policy is to make progress payments in an expeditious manner, normally within 5 to 10 days after receipt of a properly prepared request." DoD Policy statement dated August 14, 1984, signed by Mr. R.D. DeLauer.

⁶⁶Principal Contracting Officers Thomas A. Barkewitz, Peggy Rowles and Frank Bankoff, successively, had involvement in the instant contract. They are referred to throughout as PCO Barkewitz, PCO Rowles and PCO Bankoff.

⁶⁷See Exhibit No. 22: Clause L-4 of Solicitation DLA13H-84-R-8257, page 66 of 96, providing a maximum progress payment ceiling rate of "50% of the total item dollar value."

Exhibit No. 23: Letter from Freedom to PCO Barkewitz, dated November 2, 1984. Freedom's protest was registered in its November 2 to PCO Barkewitz, pointing out that "further price reductions below \$29.90 would appear to be imprudent and could result in extreme prejudice in the successful performance of the project. We alert DPSC to the potential dangers which might result from a less than 'fair and reasonable' price."

⁶⁸See Exhibit 24: Memorandum of Understanding, dated 6 November 1984.

Building Repairs	187,500	160,000
Build Mgt Computer Sys	75,000	177,838
Lockers	25,000	25,000
(Under G & A)		
Telephone	70,000	N/A
Office Equip (computers)	80,000	80,000
	-----	-----
Total of above	516,880	522,218

This specific cost classification can be found throughout the parties' discussions and negotiations. It is reflected in the cost proposal Freedom submitted to the Government prior to entering negotiations, the definitized schedule of costs settled on as a result of negotiations, the Government's Addendum to the Pre-Negotiation Briefing Memorandum Dated 28 June 1984, the Price Negotiation Memorandum/Price Analysis, and the Memorandum of Understanding signed by representatives of both Freedom and the United States prior to the date the actual contract was actually awarded. It is clear that there was no mistake on the part of either party in entering into this special "incurred cost arrangement."

The Government was aware that without timely receipt of progress payments, Freedom's monthly cash flow requirements would be negatively impacted and the contractor would not be able to meet initial pre-production milestones. It's failure and refusal to make full and prompt progress payments increased the cost of Freedom's performance and delayed delivery under the contract.

After contract award, Freedom began engaging contractors to make repairs to its newly leased plant facility as planned and contemplated by its projected plan of work. This work was necessary, and money for making the repairs had been, as shown above, included in total contract costs. Freedom committed itself to and incurred these and other costs in good faith reliance on the authority of the procuring contracting officer (PCO Barkewitz) to enter into a binding agreement on behalf of the Government of the United States.

While the subject costs were admittedly accorded special treatment, negotiating and definitizing them was the special province of the PCO.⁶⁹ The route he took-- entering into an

⁶⁹This dispute should never have taken place. Defense Acquisition Regulation (DAR) 1-406 requires in essential part, that "When a contract is assigned for administration, . . . if special instructions pertaining to administration . . . are to apply, they should be contained in a letter accompanying the contract when it is assigned for administration." Further, the regulation provides that "Each contract assigned by a purchasing office to a contract administration component for administration shall contain or be accompanied by all procuring agency instructions or directives which are incorporated in such contract by reference. This will not be necessary if a copy has been previously furnished" The ACO should have been thoroughly advised

advance agreement with the contractor-- was both permitted and recommended by the DAR, which specifically authorized contracting officers to enter into advance agreements which would make otherwise unallowable costs allowable.⁷⁰

ACO Liebman was charged with administering the contract, not renegotiating it. Instead of managing the contract he was assigned, he chose instead to argue that the PCO erred in agreeing to it.⁷¹ It is interesting to note that ACO Liebman was made aware of the contract, its special cost provisions, and the mutual understanding of both DLA (i.e., the PCO and DLA legal counsel) and the contractor prior to the company's commencing performance. In a meeting on December 14, 1985, after the contractor had commenced performance, the ACO was again advised of the parties' intentions, understandings and expectations under the contract. He purposely, intentionally and maliciously refused to honor the contract agreement as negotiated and awarded.⁷²

This special cost treatment had been reviewed by DCAA at the time of negotiation-- and, as M.H. Rowles, Chief of Operational Rations at DLA pointed out to him:

"DCAA did not take exception to these costs being handled as a one time cost rather than a depreciable element. In view of the above and the contracting officer's knowledge of the industry, it was decided to pay for these elements as 100% cost rather than insist upon depreciation."⁷³

regarding the treatment of special cost items, so that the type of misadministration that occurred would have been avoided.

⁷⁰DAR Sec 15-107. See also, General Dynamics Corp. v. United States, 202 Ct.Cl. 347 (1973); and Electric Boat Division, ASBCA No. 21737, 83-2 BCA Par. 16,907.

It is always desirable that advance agreement be sought with the government as to the treatment of special or unusual costs (General Dynamics Corp., supra; Rockwell Int'l Corp., ASBCA No. 20304, 76-2 BCA ¶12,131), and consonant with the holding of Philco-Ford Corp., ASBCA No. 14251, 70-2 BCA ¶8499, PCO Barkewitz properly made sure this agreement was both negotiated before the incurrence of the covered costs and incorporated into the instant contract.

⁷¹The costs that the ACO disagreed with are those costs itemized above and made part of the Memorandum of Understanding. In order that they be subject to progress payments, consonant with the Memorandum of Understanding, these costs were placed under the manufacturing overhead and G & A categories.

⁷²Exhibit No. 25: December 18, 1984 Report of Travel and Post-Award Conference, prepared by DLA Procurement Agent Keith Ford. At this conference, held at the contractor's plant on 14 December 1984, the subject of progress payments was discussed. Notwithstanding the advice of the PCO that the specially treated items were intended to be payable under the progress payment provision, and notwithstanding the advice of DLA counsel who was also present in the meeting, the ACO made it clear that he-- and not DLA-- would determine whether or not the costs would be paid under progress payment requests. He repeatedly ignored DLA advice, suggestions, and recommendations and reclassified the specially treated costs to be regularly treated costs, resulting in financial catastrophe to the company.

⁷³Exhibit No. 26: telex from M.H.Rowles, Chief, Operational Rations to Marvin Liebman, dated 5 Jun 1985.

His refusal to pay caused considerable delay in scheduling, as critical suppliers suspended work, and time projections for completion of facility preparation and production start-up were rendered meaningless. Final completion of the contract became jeopardized even before actual contract effort commenced.

In failing to pay, the ACO breached the contract,⁷⁴ but attempted to justify his actions by:

- a. de facto reclassifying equipment costs from their negotiated classification as direct, to capital items allegedly requiring a DAR deviation to be paid;⁷⁵
- b. challenging Freedom's financial capability because of its reduction in outside contract financing;⁷⁶
- c. challenging the propriety of paying the costs he objected to on the ground that the costs were improperly categorized by the PCO;⁷⁷
- d. challenging the reliability of Freedom's accounting system for billing the costs to the government under

⁷⁴A breach occurs upon the nonperformance of any duty under a contract when due. RESTATEMENT (SECOND) OF CONTRACTS Sec 235, comment b.

⁷⁵Exhibit No. 27: Memo from ACO Liebman to DLA dated 18 Jul 1985. He was fully aware of the contractor's predicament, and of the full impact of his actions in requesting the deviation. He acknowledged that without it, "there could be a failure of the contractor to obtain the required equipment and, consequently, an inability on his part to successfully perform the contract." Notwithstanding repeated directives from DPSC that the costs were properly payable, having been paid to other contractors within the context of the mobilization industry, ACO Liebman refused to comply, even though he knew he had no prior experience with contracts of this sort.

It is interesting to note that some 6 months later, the monies were subsequently paid without the requested deviation-- as part of the negotiated settlement under Mod P-25. There was no change in the contractor's position over the period of nonpayment to suddenly make a necessary deviation unnecessary. So, the deviation request should be seen for what it was-- a ruse, used to justify the ACO's continuing nonpayment of monies needed by the contractor over the period of time the request was under review.

⁷⁶When Freedom reduced its best and final offer in exchange for the increased progress payment rate, the Government was advised that its agreement to the reduction was based solely on the elimination of interest costs for loans from Dollar Dry Dock which it could now dispense with because of the increased progress payments. This was again discussed at the December 14, 1985 post-award conference. (See Exhibit No. 25, at fn. 72).

⁷⁷Where a company is in serious financial trouble because of the nonpayment of progress payments, and where the reason for nonpayment is more a matter of administrative wrangling than production-related behavior of the contractor, case law suggests that the Contracting Officer should have paid the money to keep the contractor functioning while he resolved the PCO-ACO dispute at the agency level.

In Virginia Electronics Company, Inc., ASBCA 18778, 77-1 BCA ¶12,393. See also, Brooklyn & Queens Screen Mfg. Co. v. United States, 97 Ct.Cl. 532 (1942); West Coast Lumber Corp., supra; Mifflinburg Body Works, Inc., ASBCA 723 (1951); Pilcher, Livingston and Wallace, Inc., ASBCA 13391, 70-1 BCA 8331. The Board held that the Government's refusal to make progress payments to which a contractor was entitled on the ground that the payment request was not in precise, proper form was unreasonable and arbitrary, especially where the Government knew the tight financial position of the contractor and should have known that the contractor probably needed the progress payments to pay its suppliers and get on with performance.

those categories.⁷⁸

- e. requesting a DAR deviation to permit payment of costs he had already been repeatedly advised were proper for progress payment purposes.

Notwithstanding the fact that Freedom began incurring the "Memo of Understanding costs" as early as November, 1984, and notwithstanding the fact that the ACO had not contributed any of the Government's 95% progress payment share, the ACO, in a letter dated January 4, 1985, claimed that "evidence available [to him] indicated that Freedom [was] in such unsatisfactory financial condition as to endanger performance of contract." Small wonder.

Despite this "unsatisfactory financial condition", by March of 1985, Freedom had incurred and was literally financing on its own some \$1,724,000 of debt. Under the contract, Freedom's 5% **total** cash contribution requirement was only \$748,507.⁷⁹

Progress payment requests numbered 1 through 3 were submitted by Freedom as follows:

No. 1, dated 12/7/84 - - \$252,150
No. 2, dated 1/14/84 - - \$299,683
No. 3, dated 2/25/84 - - \$231,555

The December 7, 1984 progress payment was rejected on the basis there were:

"...unbooked accruals for indirect expenses not necessarily related to progress of the contract."

and because:

⁷⁸The company's accounting system was reviewed prior to award and found satisfactory. After the contract was assigned for local area management and administration, ACO Liebman and the local area accounting staff had problems with it. The accounting system employed was not inequitable, in that it did not cause the Government to bear a disproportionate share of the costs. In fact, it only attempted, by allocating the "special costs" to the manufacturing overhead category, to make the accounting system truly reflective of the contract agreement and thereby prevent problems with progress payment disbursement later on. We were obviously not successful. Absent a finding that the Government was being inequitably charged, the company's accounting system should never have been challenged. (See Litton Systems, Inc., ASBCA No. 10395, 66-1 BCA ¶5599; Itek Corp., NASA BCA No. 27, 1963 BCA ¶3967).

⁷⁹See Exhibit 28: Letter from Noel V. Siegert of Dollar Dry Dock Commercial to Thomas Barkewitz, Contracting Officer, DPSC, dated August 10, 1984. Prior to execution of the Memorandum of Understanding (see fn 58), Freedom had arranged contract financing from its equity stockholder, Dollar Dry Dock Commercial Bank of New York, NY, in the amount of \$7.2 million. It was understood by all parties that this financing was based on Freedom's securing a contract at the \$34.81 per case price, where the proposed progress payment rate totalled only 50%.

In agreeing to pick up 95% of all incurred cost, including the cost of the capital expense items set forth in the Memorandum of Understanding, the Government effectively reduced the company's working capital requirements from 50% to 5%, and rendered the need for the full \$7.2 million line of credit unnecessary.

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

Rejection of this payment for the reasons expressed was arbitrary, capricious and unreasonable since the ACO knew that the Memorandum of Understanding made it clear that the very pre-production cost accruals in question were to receive special treatment for progress payment purposes. He was also well aware of the implications his actions would hold for the company.

The first monies Freedom received from the Government was paid in May 1985 -- some six months after the contract was awarded. Although all but \$66,000 of the \$1.766 million requested was paid -- a fact which underscores the Government's ultimate recognition that the costs were in fact proper -- the damage had already been done.

By the time these monies were received, Freedom's total costs incurred through that date amounted to \$2.44 million. So, even with receipt of the \$1.7 million progress payment, Freedom was still financing a full 60% of the contract work effort-- far in excess of what was required by the contract. The Government was still in breach.

Progress payments, the ACO constantly reminded the company, were payable at his sole discretion.⁸⁰ The confrontational nature of the relationship then existing between the company and the ACO caused serious damage to the relationships previously enjoyed by the company with its financing sources.⁸¹

Production impact can be assessed in terms of diminished ability to make progress as projected. Until the first progress payment was released by the ACO, Freedom had only been able to incur a fraction of the \$7 million it originally projected as being necessary to support a July 1985 delivery.⁸²

⁸⁰ See Exhibit 29: Letter dated 15 July, 1985 from Mr. Marvin Liebman.

⁸¹ See Exhibit No. 30: Letter to Freedom from Randolph Gross of Bankers Leasing Association, Inc., dated August 16, 1985. In this letter Mr. Gross pointed out that based upon his having been led to believe that progress payments for incurred costs could be challenged, withheld or even rejected by the government, "a very real concern exists as to the 'asset value' of the monies due . . . and hence, (his) comfort with the value of (the receivable)."

⁸² Under the contract, deliveries of end-item rations were to begin July, 1985 and end December, 1985. A total of 620,000 cases of MREs were to be delivered at the rate of 100,000 cases per month for five months, with a final delivery of 120,000. This projected monthly figure was based on the company's acquiring and using certain state-of-the-art equipment identified in the original proposal and made part of the contract award.


This \$7 million expenditure was necessary, and was to be used to:

- a) repair the building;
- b) purchase/lease necessary equipment and machinery;
- c) await delivery of the machinery and equipment and install same when received;
- d) hire and train personnel;
- e) purchase and install a computerized system for accounting, quality control, security and building maintenance purposes.

It is obvious from even a cursory glance that each of the above items a) through e) had to be in place before production could begin. Freedom was unable, because of the government's failure and refusal to pay progress payments, to reach the \$7.2 million figure at the time projected. Put differently, it was unable, because of lack of necessary and agreed-upon Government financing, to complete the above items by the time originally projected.⁸³

By July 1985, Freedom had been able to incur costs of only \$4,054,366. This \$3.1 million disparity between projected and actual costs incurred represents work Freedom was unable to perform because of the government's refusal to pay according to the contract, and reflects the amount of disruption in work sequence that added additional time to the delay the company was then experiencing.⁸⁴

The ACO's repeated refusal to make full and prompt progress payments caused Freedom to make major alterations in its administration and performance of the contract in a manner totally inconsistent with the original understanding of the parties. It also added \$2,426,826 in costs to Freedom's performance.

AS OF THAT DATE & TIME PERIOD  9 JULY 1985

⁸³The company was forced to use inefficient labor intensive manufacturing and assembly equipment. Purchase orders for thirteen Doboy Model CBS-B Continuous Band and Sealers, one Koch Multivac Rollstock Package Machine Model R5100 MC, and one Koch Model R5100 TF Rollstock Vacuum Packaging Machine had to be canceled because the sellers and lessors refused to honor purchase orders or provide financing when they were made aware that progress payments #1, #2, and #3 had been suspended.

⁸⁴This \$3.1 million difference between projected progress payments and progress payments actually received represents the awesome power of the government to influence contractor success or failure. Because the \$4,054,366 in incurred costs was itself far below the amount projected as necessary to support July deliveries, the government's payment of only \$2,739,846 over that period was incontestably the most critical element of Freedom's inability to deliver on schedule.

B. Failure to Cooperate

The Government failed in its duty to cooperate with the contractor during performance of the contract.⁸⁵

The Government was well aware that Freedom was a new, start-up operation, and that the company's cash flow projections were based upon renovation of the production facility and receipt of progress payments prior to commencement of actual production. Notwithstanding these facts, the Government, by and through the ACO, failed and refused to cooperate with the company in its efforts to perform the contract by refusing to pay any monies for 6 full months.⁸⁶

Instead of moving to assist the company in the resolving of problems, and instead of working with the company to ensure that the United States Government would get in timely fashion the product it had bargained for, ACO Liebman began prescribing new terms and conditions not within the contract that the company was required to meet in order to have progress payments released.

Specifically, in a letter dated 15 Feb 85, the ACO made payment of any progress payment monies contingent upon Freedom's acquiring additional outside financing in the sum of \$3.8 million and a novation of its contract.⁸⁷ This unreasonable and non-contractual requirement made necessary the obtaining of a \$5 million line of credit at a cost of \$150,000 for every increment of \$1 million loaned to Freedom, plus 2% over prime rate. This borrowing was far in excess of the amount that would otherwise have been necessary had the ACO made timely progress payments at 95% of incurred costs.

In addition, the Government improperly offset monies through the wrongful withholding of progress payments. Under the Assignment of Claims Act of 1940, payments actually made to the assignee may not be recovered by the Government on the basis of any liability of the assignor to the Government.⁸⁸ See EX 38

⁸⁵ Implied warranty not to hinder performance and implied warranty of cooperation exist in every government contract. Florida East Coast Railway Co. v United States, 29 Cont. Cas. Fed. (CCH) 81,927 (1981). See also, Space Dynamics Corp., 71-1 BCA 8853 (1971).

⁸⁶ The ACO could have provided interim progress payments for that portion of the incurred costs that were "allowable", costs, notwithstanding his disagreement with the contract as finalized, but he failed and refused to do so. By March 1985, four months after contract award, Freedom had incurred costs of some \$1.7 million. Not only had the government not paid any of the disputed costs, it had further refused to pay any of the other costs incurred by the company, as well.

⁸⁷ See Exhibit 31: Letter from ACO Liebman to Freedom, dated 15 February 1985.

⁸⁸ Great American Ins. Co. v. United States, 19 CCF 82864, 203 Ct.Cl. 592, 492 F.2d 821 (1974); Central National Bank of Richmond, VA v. United States, 4 CCF 61048, 117 Ct.Cl. 389, 91 F.Supp. 738 (1949).

Additionally, in or around July 1985, after paying three progress payments out of a total of seven submitted, ACO Liebman again stopped paying. The stated reason for his action was deficiencies in the contractor's accounting system, but this was merely a ruse to permit the government to investigate a report that the contractor was defrauding the Government of money.⁸⁹ The ensuing 3-month "suspension" of payments caused the company considerable increase in cost of performance. The case law is clear that any suspension of progress payments for alleged improprieties of this magnitude should have occurred only **after** a proper investigation **and proof** of irregularity.⁹⁰

Further, unfulfilled promises of guaranteed loan financing made by the Government were relied upon by the company to its detriment. The Government promised the company a guaranteed loan, but refused to follow through because it never intended to honor its commitment. The company was unable to continue its performance, and the contract was subsequently defaulted. This was not a pre-bid commitment, but was part of an agreement made in settlement of a pending contractor claim. The Government's failure to deliver the guaranteed loan is both a breach of contract and another cause of excusable delay.⁹¹

Failure to cooperate can be clearly seen throughout the ACO's administration of the contract, evidenced in one graphic example by his decision to suspend progress payments because of an alleged impropriety in the contractor's accounting system-- rather than attempt to work with the company to cure what was clearly a surmountable problem.

C. Interference with Contractor Performance

The Government has an implied obligation not to hinder,

⁸⁹ See Exhibit No. 32: Memorandum from Vito Soranno, Branch Manager of the New York Office of Defense Contract Audit Agency, to the Regional Director, dated August 2, 1985. The allegations advanced were subsequently determined to be baseless.

⁹⁰ This type action nearly rises to the level of an unconstitutional deprivation of property without due process of law. In the 1954 case of Edgerton ta Edgerton Flying Service v. United States, 127 Ct.Cl. 515, 117 F.Supp. 193 (1954), a contractor was held entitled to recover where the evidence showed that the suspension on the ground that the contractor's airplanes were not airworthy was a ruse to permit the Government to investigate a report that he had defrauded the Government of a sum of money. Under the contract, the Veteran's Administration had no right to close down the contractor's school on a mere accusation of irregularities without proof of proper investigation.

⁹¹ While the case law suggests that a contractor will not be excused for failure of an expected loan to come through where there is no evidence of a pre-bid commitment (Security Signals, Inc., ASBCA 4634, 58-2 BCA 2045), the case presented here is different in that the commitment was made in settlement of claims charging the Government with responsibility for creating the financial difficulty.

interfere with, or delay the contractor's performance.⁹² As the factual recitation above clearly points out, ACO Liebman repeatedly and consistently breached this obligation.⁹³

Not only did the ACO refuse to pay, he also advised critical suppliers that he intended not to pay, and on at least one occasion, he actually "instructed [the company's financial backers] not to advance any monies (to Freedom)."⁹⁴ This was an arbitrary and capricious action which resulted in loss of needed equipment, supplies and trade creditworthiness.⁹⁵ The result was that less efficient and more labor intensive assembly equipment had to be manufactured and/or obtained and modified from other sources. This added 95 additional employees to the payroll for an estimated increase of \$15,238 per week or a total estimated \$548,057 increase in direct labor costs.

In a separate incident, in January 1986, the Government directed Freedom's CFM suppliers to divert subcontract items produced for the 114,758 case delivery period of December 1985 and January 1986 to other Government prime contractors. This action was taken without any provision being made for current production needed by Freedom for the uncanceled portion of its contract. Production lead time required by the subcontractors caused an additional six week delay and costs of \$899,285.

D. Late Deliveries of GFM

Late deliveries of GFM were repeated under the Contract, and continued through the period of October-November, 1986. They caused changes in production scheduling and sequences, with resulting loss of efficiency by rescheduling of work production down-time. Late deliveries of GFM ultimately led to a situation where GFM item in inventory had to be substituted for those that

⁹²Argus Industries, Inc. (1966) ASBCA No. 9960, 66-2 BCA ¶5711.

⁹³In a case surprisingly similar to ours, the Armed Services Board of Contract Appeals held that a contractor's default was excused and a default termination was ordered converted to one for convenience of the government because throughout performance the Contract Management District unreasonably interfered with performance of the contract by requiring of the contractor things that had already been waived by the procuring agency. The contractor's financial position grew worse because the government failed to make some progress payments and delayed in making others. Knowledge by subcontractors and suppliers that the contractor was failing to receive approvals and progress payments caused them to refuse deliveries and the contractor became insolvent and had to cease operations. Argus Industries, supra.

⁹⁴See Exhibit 33: Letter from Performance Financial Services, Inc. to Freedom, dated June 17, 1985.

⁹⁵By way of illustration, the company's production plan called for acquisition and use of certain state-of-the-art machinery, to wit: a Doboy Model CBS-B Continuous Band Sealers with accessories, a Koch Multivac Rollstock Package Machine Model R5100MC (Accessory Room), and a Koch Multivac Rollstock Vacuum Packaging Machine with accessories Model R5100TF. These were all high cost and long lead-time items. After the ACO refused to confirm his payment of 95% of the costs to be incurred, the supplier refused to honor Freedom's purchase orders.

were not on hand, causing unplanned engineering of production changes, slowed production and increase in overhead costs.

E. Failure to Act in Reasonable Time

The progress payment issue was forwarded by the ACO to the Defense Logistics Agency on 18 Jul 1985 for resolution. In his conveying communication, he requested that "a one-time deviation to [sic] DAR 7-104-35(b) be approved * * * [to] permit certain office equipment, quality control equipment and supplies and automated building management and control systems in the approximate amount of \$311,838 to be treated as direct costs for progress payment purposes."⁹⁶

In the same letter, he accurately pointed out that "[i]f a deviation is not granted, the result could be a failure of the contractor to obtain the required equipment and, consequently, an inability on his part to successfully perform the contract."

Two points must be made. First, the ACO delayed unreasonably in requesting a deviation if he thought one was necessary for payment of the costs the company was then, and had for the past 7 months been, incurring.

Second, the Government had a duty to resolve the problem in a reasonable time. Submitted in July, 1985, payment was not made for one full year-- in June, 1986, after the signing of Mod P-25. This was not a reasonable time for problem resolution.

F. Defective Specifications

Finally, specifications susceptible to more than one interpretation caused delay in production and required the company to accelerate internal efforts in attempting to comply with delivery schedules.

By way of example, Army Veterinary Inspection (AVI) personnel assigned to Freedom's facility refused to inspect product when offered, claiming that they could not inspect unless and until a palletized load of MRE cases had been capped and strapped. Because the unit load strapping had been (improperly, as it later turned out) determined unacceptable by Government laboratory personnel, Freedom could not use the strapping it had in-house. Interpreting the specification to identify a single case of MRE rations as an end-item for acceptance inspection, Freedom continued to produce and offer the said lots to AVI. Interpreting the specification refer to a capped and strapped

⁹⁶Reference Exhibit 27, at fn 75.

palletized load as the contract end-item, the government inspectors refused to inspect.

Ultimately, the strapping was determined to have been improperly declared defective, and the contract end-item was defined to be the single case of MRE rations. The cost to Freedom was six weeks lost production and learning curve inefficiencies, and \$555,478.

In addition, the Medical Hold problem growing out of the Star Foods production operation caused considerable disruption of work. The contractor was required to visually inspect for micro-holes, which by their very definition were not susceptible to identification by the naked eye. Also imposed was a requirement to perform zyglo-dye testing, which caused considerable loss of efficiency, rescheduling of work and performing testing out-of-sequence. It was impossible to segregate the costs associated with the impact of this change, but the company's loss was a direct and necessary result of the ordered change.⁹⁷

On the basis of the entire record (i.e., the history of Government performance under the contract), a finding of no excuse for contractor nonperformance would be incredible. When production reports are juxtaposed to prompt distribution progress payments, it is easy to see that high-level production output consistently resulted when the contractor was paid in accordance with contract terms.

VI. Abuse of Discretion, Bad Faith and Discriminatory Treatment *W.A.*

Even if a contractor is in technical default, the decision to terminate must fall within the discretion of the contracting agency, and that discretion must not be abused.⁹⁸

The entire record of performance under MRE-5 (see §V, above), evidences a designedly oppressive course of conduct on the part of Government representatives. We do not repeat the factual allegations here. Conduct of this sort has previously been held by the Courts to constitute the requisite abuse of discretion.

Additionally, when a default termination is taken solely to rid the Government of having to deal with the terminated

⁹⁷ The Government contractually assumed risk of having to pay these costs when it ordered change. (See Electronic & Missile Facilities, Inc. v. United States, 14 CCF 83,109, 189 Ct.Cl. 237, 416 F.2d 1345 (1969).

⁹⁸ Darwin Construction Co., Inc. v. United States, 811 F.2d 593 (Fed.Cir. 1987) rev'g & remanding ASBCA No. 29340 on mtn for reconsid., 86-2 BCA 18,959.

contractor, it is a clear abuse of discretion.⁹⁹

The Government's decision to terminate was made solely to rid the Government of having to deal with the contractor. It was made despite written guarantee from the company's lender that Freedom would be provided with a \$6 million line of credit in future procurements-- and that its existing debt would not impact MRE-7 once awarded. Given the rationale for award of all planned producer contracts, the history of contractor performance, and the Government's role in the contractor's shortcomings, this decision constituted a gross abuse of discretion.¹⁰⁰ And where abuse of discretion is shown, the decision of the Contracting Officer must be reversed.¹⁰¹

The Contracting Officer's decision, whether made by him alone or in concert with higher authorities, continued a conscious course of (discriminatory conduct) aimed at keeping the company out of the program, and it began with the contractor's initial attempt to enter the MRE program.

Freedom submitted its first price proposal as part of the MRE-1 reprocurement, in 1980. There were only two companies in the program at the time-- Southern Packaging and Storage Company, Inc. (Sopaco) of Mullins, South Carolina; and Right Away Foods Corporation (Rafco) of McAllen, Texas. Freedom was told by PCO Michael Cunningham that if it withdraw its proposal from the reprocurement effort, it would be allowed to participate in MRE-2.

Freedom was not allowed to participate in MRE-2. Contracts were awarded by letter contract to the two existing suppliers. Freedom was simply advised that the MRE program had been placed under Industrial Preparedness Planning, and that only those companies with IPP plans on file were eligible for contract award.¹⁰² Freedom was told it would have to meet the requirements of the program in order to participate in MRE-3. As evidence of the Government's discriminatory conduct, Rafco and Sopaco, however, had no such plans on file.

Freedom undertook to comply and prepared prime contractor

⁹⁹Darwin Construction, supra, at 596.

¹⁰⁰See Darwin Construction, supra.

¹⁰¹Quality Environment Systems, Inc., ASBCA No. 22187, 87-3 BCA ¶20,060, at 101,569.

¹⁰²To ensure that the industrial preparedness mobilization base remains intact and available in the event of troop mobilization or national emergency, DPSC is required to give to the existing IPP producers an opportunity to offer on a solicitation to produce the MRE ration during peacetime. *ts*

IPP plan under IPP 1519,¹⁰³ and submitted said plans to the Government.

Freedom was then told by Government officials that it would have to do subcontractor planning to show sources and supplier commitments for raw material items. While Freedom was complying with this latest requirement, the Government arbitrarily and discriminatorily awarded the MRE-3 contracts to Rafco and Sopaco. Again, neither Rafco nor Sopaco had been required to do similar subcontractor planning.

Freedom then protested the award of MRE-3, and sought Congressional assistance in halting this discriminatory treatment. As a result, the Government subsequently offered Freedom an opportunity to manufacture a quantity of retort pouches under MRE-3 in order that it might first be "test-qualified" as a manufacturer under the Walsh-Healey Act.¹⁰⁴

MRE-4 was announced, and with all imposed qualifications having been met, Freedom submitted its pricing proposal. Once again, the Government arbitrarily and discriminatorily failed and refused to negotiate with Freedom, and contracts were awarded to Rafco and Sopaco.

Freedom then sued the Government in the Federal District Court. As part of the resulting case (settlement), the Office of the Secretary of Defense issued a Determination & Findings ordering that all three existing planned producers be negotiated with and awarded contracts with price differentials included.¹⁰⁵

MRE-5 was awarded in accordance with the new D&F, but even while the contract was being performed, steps were already being taken internally to remove Freedom from the program.

Specifically, the Government, in furtherance of its bad faith design to keep Freedom out of the program, advised in the

¹⁰³To be an IPP program producer, Freedom was required to estimate within the context of a full-scale production plan the total quantities of MREs it could produce within 90 days if a national emergency arose. The plan had to demonstrate equipment acquisition, man-power loads and build-up, learning curve and overall production efficiency. Based on its per case per month war-time estimate, Freedom was declared eligible to offer on a specific quantity of MRE peacetime production.

¹⁰⁴Title 41, United States Code, §§35-45, and Title 5, United States Code, §616. This was an express requirement of the Solicitation and every resulting contract award.

¹⁰⁵All prior Determination & Findings required only that "at least two" suppliers be awarded peacetime contracts.

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Supplies Not 4

D&F to MRE-6¹⁰⁶ that a fourth supplier, Cinpac, Inc. of Cincinnati, Ohio, would be allowed to participate in the upcoming procurement.¹⁰⁷ Cinpac was not a manufacturer under the terms and meaning of the Walsh-Healey Act, and therefore not eligible for award under the express terms of the Solicitation itself.¹⁰⁸

¹⁰⁶See Exhibit No. 34: Solicitation DLA13H-85-R-8457, at pages 137-38 of 158. The Solicitation to MRE-6 was identical to that of MRE-5 in laying out the duties of the PCO in evaluating offers. The solicitations both provided in clear terms:

Section M - Evaluation of Offers

B. Award Evaluation Will Be Performed As Follows:

1. The Procuring Contracting Officer (PCO) will determine if an offeror has qualified as a planned offeror has qualified as a planned producer with respect to this solicitation . . . This determination will be based on the Government's verification and approval of the signed DD Form 1519 and the recommendation of the Armed Services Production Planning Officer's (ASPPPO) Industrial Preparedness Planning (IPP) Survey. An offeror's participation in the IPP program must meet or exceed the minimum level of allocated MRE assembly capacity at M+90 as set forth in Table "A" below.

* * *

D. M+90 Assembly Capacity is defined as verified production capacity from a cold base within a 61 to 90 day time frame following notification of an award under mobilization procedures.

* * *

Table A

Maximum award quantities correspond to allocated M+90 monthly capacity levels as follows:

<u>Monthly Allocated IPP Quantity at M+90</u>	<u>Maximum Share Quantity</u>	<u>% of Requirement</u>
1,800,000 - Unlimited	1,879,401	45%
1,200,000 - 1,799,000	1,461,756	35%
600,000 - 1,199,000	835,000	20%

¹⁰⁷The D&F provided in part that "[a]ccommodations will be made to allow any new firm who has an approved, negotiated IPP agreement to offer on this solicitation. In addition to those who have written plans on file, CINPAC Inc, of Cincinnati, Ohio has expressed interest in MRE assemble and their IPP capability is currently being evaluated." DLA/DPSC Justification for Other Than Full and Open Competition, dated 20 Jun 1985.

¹⁰⁸The process was well-defined (see fn 106). First, the PCO was required to determine Cinpac qualified as an IPP program producer. Second, Cinpac had to qualify as a planned producer with respect to the particular solicitation.

Third, the solicitation required that Cinpac meet or exceed the minimum level capacity at M+90 days, meaning that between days 61 and 90, Cinpac must be capable of producing 600,000 cases. Cinpac certified it could do this.

Fourth, the PCO was required to make a determination that Cinpac qualified as an IPP producer, meaning he was required to verify the information in Cinpac's DD Form 1519.

Finally, the PCO was allowed to use the recommendation of the ASPPPO survey in making his decision.

The PCO used a pre-award survey in making this critical decision. (See pp. 15 and 16 of Report and Recommendation of the Contracting Officer.) No ASPPPO survey was used; no verification of Cinpac's DD Form 1519 ever took place. Pre-award surveys are designed only to ascertain standards of responsibility, and therefore focus on such concerns as adequacy of financial resources, performance records, business ethics, and accounting systems. (FAR 9.104-1, 9-106) A contractor could have all those items in place, and be responsible, and still not qualify as an IPP producer. This is not the IPP survey that was required by the solicitation.

Perhaps more importantly, the threshold requirement for being an IPP planned producer was that the company be a manufacturer under the terms of Walsh-Healey. Cinpac was not a manufacturer-- it had no manufacturing facilities of its own. As Rafco complained in its Protest filed with the General Accounting

MRE-6 was subsequently awarded to Rafco, Sopaco and Cinpac-- while Freedom was still struggling under the strain of unpaid progress payments. At DLA's request, the United States Department of Labor reviewed the actions of the PCO in connection with the qualifications of Cinpac and found "that Cinpac, Inc. did not qualify for award under Public Contracts Act and 41 CFR 50-201.101(a)(1)." ¹⁰⁹

"[A] decision may constitute an abuse of discretion if found to be arbitrary and capricious, and one of four factors that should be used in determining if a Government decision is arbitrary and capricious is a 'proven violation of an applicable statute or regulation'." ¹¹⁰ In its desperate bid to keep Freedom out of future procurements, the Contracting Officer made the award to Cinpac in violation of Walsh-Healey, the interests of the Government under mobilization planning, and the very requirements Freedom had been rigorously compelled to comply with over the period of the first three procurements.

CONCLUSION AND SUMMARY

Mod P-25 as expanded by the merged side agreement is valid and enforceable as a substituted contract. It was breached by failure of the Government to award a contract to the company under MRE-7. Its breach entitled the contractor to cease production and the subsequent termination for default was therefore wrongful, as it was the Government that was at fault-- not the contractor.

The Government's continuing refusal to pay progress payments as required by the terms of Mod P-28 likewise constituted breach of the parties' agreement, rendering the subsequent termination for default wrongful for the same reasons stated above.

Both Mods P-28 and P-29 are limited in scope and application insofar as language of release is concerned, and in any event, the breach of Mod P-25 occurs subsequent to the signing of Mod P-29, so that the company's entitlement is not affected by the

Office, "Cinpac had no suitable production capacity to allow it to participate. . . . In addition, Cinpac will be unable to acquire the necessary production capacity in the event of a national emergency. This is due in part to the finite number of companies with capacity to produce the required retort pouches, most of whom are already committed to the other participants in the IPP program. * * * [So that], in making this award to CINPAC, the DLA has ignored the evaluation criteria"

¹⁰⁹ Exhibit 35: Letter from Herbert Cohen, Deputy Administrator, U.S. Department of Labor, to Vera E. Zappile, Assoc. Dir. of Small Business, DLA.

¹¹⁰ _____, ASBCA No. 36764, citing United States Fidelity & Guaranty Co. v. United States, 230 Ct.Cl. 355, 368, 676 F.2d 622, 630 (1982).

language of either later Mod.

The Government's course of conduct during the period of the contract term evidenced a clear design to remove the contractor from the MRE program. This renders the Contracting Officer's decision to terminate arbitrary and capricious, and suggestive of bad faith, allowing the Breach of Mod P-25 to be redressed by breach of contract damages, outside the terms of the Termination for Convenience Clause. ✓ 7.

The Government's course of conduct during the period of the contract term constituted a designedly oppressive performance environment for the contractor, giving rise to bad faith, and allowing the Government's various breaches to be redressed outside the terms of the Termination for Convenience Clause.

Finally, the PCO, in overseeing the ACO's mismanagement of the contract (and in subsequently terminating the contract) was guided by his superiors, who forced the PCO to renege on the agreements of Mod P-25 after he knowingly and willingly signed off in acceptance of the "side agreement" provisions.

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RELIEF SOUGHT
(See Exhibits 36 & 37)

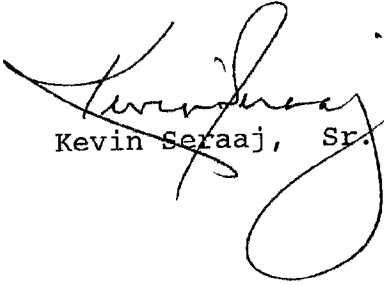
		Note
Adjusted increase in cost of contract:	\$ 3,275,798	a of EX 36 + 37
Original profit under contract:	2,227,544	→ EX 24
Profit under 114,758 case add-on:	477,250	b of EX 36 + 37
Company income improperly offset and taken by ACO:	375,436	EX 38,39 40
Equipment, machinery, special tooling and leasehold improvements to facility lost through insolvency:	1,167,563	c of EX 36 + 37
Lost profits on promised future MRE procurements (MRE7-MRE11):	14,435,720	d of EX 36 + 37
	<hr/>	
Total entitlement:	\$ 21,959,311	

Re-entry to the MRE program and development as a prime contractor/planned producer

Freedom is prepared to meet with you or any duly designated representative of your office to discuss this request for payment.

Sincerely,


Henry Thomas, President


Kevin Seraaj, Sr. V.P.

kss:s\wp\claimltr

Enclosures:

- (1) Appendix
- (2) Table of Authorities
- (3) Exhibits 1-37
- (4) Certification of Claimed Costs

APPENDIX

APPLICABLE STATUTES and REGULATIONS

1-905.4. (d) Walsh-Healey Public Contracts Act Eligibility Determination. The contracting officer shall accept the representation by the offeror that the firm is either a manufacturer or regular dealer pursuant to the requirements of the Walsh-Healey Public Contracts Act (Section XII, Part 6) unless--

- (ii) a protest has been lodged pursuant to 12-604;
- (iii) the offeror in line for contract award has not previously been awarded a contract subject to the Act by the individual acquisition office; or
- (iv) a preaward investigation or survey of such offeror's operations is otherwise made to determine the technical and production capability, plant facilities and equipment, and subcontracting and labor resources of such offeror.

Where these conditions exist, the PCO shall determine the Walsh-Healey Act eligibility status of the offeror, based on available evidence, including preaward surveys, experience of other acquisition offices, information available from the cognizant contract administration office or information provided directly by the offeror.

1-2202 Industrial Preparedness Production Planning--
General. The Industrial Preparedness Production Planning is conducted jointly among DoD components and industry to provide a means for * * * rapid application of industrial capability to military production during an emergency.

1-2203 Policy.

(a) The Department of Defense will conduct Industrial Preparedness Production Planning to assure capability for the sustained production of essential military items to meet the needs of the U.S. and Allied Forces during an emergency.

* * *

1-2205 Existing Authority Affecting the Industrial Base
Specific authority under current contracting procedures to accomplish industrial planning actions includes the following:
(ii) purchases in the interest of national defense or industrial preparedness (see 3-216)

Section 3. Procurement by Negotiation

DAR 3-101 General.

(a) Pursuant to the authority of 10 U.S.C. 2304(a), procurement may be effected by negotiation under any one of the exceptions (1) through (17) set forth in Part 2 of this Section.

(b) When supplies or services are to be procured by negotiation, offers shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured.

(c) No contract shall be entered into as a result of negotiation unless a business clearance or approval as is prescribed by applicable Departmental procedures has been obtained.

(d) * * * When a proposed procurement appears to be necessarily noncompetitive, the contracting officer is responsible not only for assuring that competitive procurement is not feasible, but also for acting whenever possible to avoid the need for subsequent noncompetitive procurements. This action should include both examination of the reasons for the procurement being noncompetitive and steps to foster competitive conditions for subsequent procurements[.] * * * [C]ontracts in excess of \$10,000 shall not be negotiated on a noncompetitive basis without prior review at a level higher than the contracting officer to assure compliance with this subparagraph.

3-216 Purchases in the Interest of National Defense or Industrial Mobilization.

3-216.1 Authority. Pursuant to 10 U.S.C. 2304(a)(16), purchases and contracts may be negotiated if--

"he [the Secretary] determines that (A) it is in the interest of national defense to have a * * * producer, manufacturer or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency * * * would be subserved."

3-216.2 Application. The authority of this paragraph 3-216 may be used to * * * provide an industrial mobilization base which can meet production requirements for essential military supplies and services. The following are examples of situations when use of this authority should be considered:

(i) when procurement by negotiation is necessary to keep vital facilities or suppliers in business; or to make them available in the event of a national emergency;

(ii) when procurement by negotiation with selected suppliers is necessary to train them in the furnishing of critical supplies or services . . . ;

(iv) when procurement by negotiation is necessary to limit competition to * * * planned producers with whom industrial

preparedness agreements for those items exist; or to limit award to offerors who agree to enter into industrial preparedness agreements;

(vii) when procurement by negotiation is necessary to divide current production requirements among two or more contractors to provide for an adequate industrial mobilization base.

3-216.3 Limitation. The authority of this paragraph 3-216 shall not be used unless and until the Secretary has determined, in accordance with the requirements of Part 3 of this Section III, that:

(i) it is in the interest of national defense to have a particular * * * producer, manufacturer or other supplier available for furnishing supplies in case of a national emergency, and negotiation is necessary to that end;

(ii) the interest of industrial mobilization, in case of a national emergency, would be subserved by negotiation with a particular supplier;

* * *

DAR 3-402(5) Adequacy of the Contractor's Accounting System.

Before reaching agreement on price and contract type, determination should be made that the contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated.

DAR 3-809(b)(3) Responsibilities for Pre-Award Surveys and Reviews.

Pre-Award surveys of potential contractor's competence to perform proposed contracts shall be managed and conducted by the contract administration office. When information is required on the adequacy of the contractor's accounting system or its suitability for administration of the proposed type of contract, such information shall always be obtained by the ACO from the auditor. The contract administration office shall be responsible for advising the PCO on matters concerning the contractor's financial competence or credit needs.

DAR 3-809(b)(4) Reviews of Contractor's Estimating Systems:

(ii) * * * A copy of the survey report, together with a copy of the official notice of corrective action required, shall be furnished to each purchasing and contract administration office having substantial business with that contractor. Any significant deficiencies in the system not corrected by the contractor shall be referenced in Part V of subsequent Pre-Award Surveys and will be considered in subsequent proposal reviews and by the ACO and PCO in negotiating with, and in determining the

reasonableness of prices proposed by, that contractor. Where deficiencies continue to exist and where they have an adverse effect on prices, the problem should be brought to the attention of procurement officials at a level necessary to bring about corrective action.

DAR 3-809(b)(5) Cost Accounting Standards Board Rules and Regulations

In accordance with Section III, Part 12-- Cost Accounting Standards, and Section XV-- Contract Cost Principles and Procedures, the cognizant contract auditor shall be responsible for making recommendations to the ACO as to whether:

(iii) a contractor's or subcontractor's failure to comply with applicable Cost Accounting Standards or to follow consistently his disclosed cost accounting practices has resulted, or may result in, any increased cost paid by the Government; * * *

DAR 7-103.17 Walsh-Healey Public Contracts Act (1958 Jan)

If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed \$10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act, as amended (41 U.S.C. 35-45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

DAR 7-104.35(b) Progress Payment Clause for Small Business Concerns (1981 Oct)

Progress payments shall be made to the Contractor when requested as work progresses, but not more frequently than monthly, in amounts approved by the Contracting Officer under the following terms and conditions.

(a) Computation of Amounts.

(1) Unless a smaller amount is requested, each progress payment shall be (i) ninety-five percent (95%)** (See footnote at end of clause) of the amount of the Contractor's total costs incurred under this contract, except as provided herein with respect to costs of pension contributions, plus (ii) the amount of progress payments to

subcontractors as provided in (j) below; all less the sum of previous progress payments.

(2) The Contractor's total costs ((a)(1)(i)) shall be reasonable, allocable to this contract, and consistent with sound and generally accepted accounting principles and practices. However, such costs shall not include (i) any costs incurred by subcontractors or suppliers, or (ii) any payments or amounts payable to subcontractors or suppliers, except for completed work (including partial deliveries) to which the Contractor has acquired title and except for amounts paid or payable under cost-reimbursement or time and material subcontracts for work to which the Contractor has acquired title, or (III) costs ordinarily capitalized and subject to depreciation or amortization except for the properly depreciated or amortized portion of such costs.

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

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

(c) Reduction or Suspension. The Contracting Officer may reduce or suspend progress payments, or liquidate them at a rate higher than the percentage stated in (b) above, or both, whenever he finds upon substantial evidence that the Contractor (i) has failed to comply with any material requirement of this contract, (ii) has so failed to make progress or is in such unsatisfactory financial condition, as to endanger performance of this contract, * * * (v) has so failed to make progress that the unliquidated progress payments exceed the fair value of the work accomplished on the undelivered portion of this contract, or (vi) is realizing less profit than the estimated profit used for establishing a liquidation percentage in paragraph (b), if that liquidation percentage is less than the percentage stated in paragraph (a)(1).

DAR 7-103.11 Default (1969 Aug)

* * *

(e) If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the default was excusable under the provisions of this clause, the rights and obligations of the

parties shall, if the contract contains a clause providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such clause. * * *

DAR 8-602.3 Procedure for Default.

(c) If, after compliance with the foregoing procedures, the PCO determines that termination for default is proper, he shall, . . . [i]f the termination is predicated upon . . . failure of the contractor [other than failure to make timely deliveries] . . . give the contractor written notice specifying such failure and providing a period of 10 days (or such longer period as the PCO may authorize) in which to cure such failure. . . . Upon expiration of the 10 days (or longer period), the PCO . . . may issue a notice of termination for default unless he determines that the failure to perform has been cured.

DAR 8-602.4 Procedure in Lieu of Termination for Default.

The following courses of action, among others, are available to the PCO . . . in lieu of termination for default, when in the best interests of the Government:

- (i) permit the contractor, his surety, or his guarantor, to continue performance of the contract under a revised delivery schedule (see 10-112(b) for requirement of notification of surety);
- (ii) permit the contractor to continue performance of the contract by means of a subcontract, or other business arrangement with an acceptable third party; provided the rights of the Government are adequately preserved; * * *

DAR 15.205.20(ii)

Extraordinary maintenance and repair costs are allowable, provided such are allocated to the periods to which applicable for purposes of determining contract costs.

DAR Appendix K-201 Procedure for Requesting Pre-Award Survey.

(a) The contracting officer shall request a pre-award survey . . . indicating . . . the scope of the survey desired. * * * If information is needed on the offeror's eligibility under the Walsh-Healey Act, it must be specifically requested in block "14" of Section III.

K-203.3 Designation and Responsibilities of Team Coordinator and Members.

(a) When an on-site survey by a team is necessary, members should include specialists qualified to evaluate all appropriate phases of the firm's capabilities.

K-303.1(d) Specific Factors to be Considered. [T]hose factors described in K-303.2 through K-303.4 below and all others needed to provide the report and recommendations in the detail and to the extent required by the purchasing office shall be considered.

K-303.2 Production.

(a) General. The production portion of the on-site survey consists of an evaluation of the prospective contractor's ability to manufacture the product(s) in accordance with the specifications and delivery schedule of the proposed contract.

K-303.3 Quality Assurance.

(a) The standing of the quality assurance organization in the prospective contractor's overall organization must be evaluated. . . . and be reviewed:

K-303.4 Financial.

(a) General. The normal procedure for determining a prospective contractor's financial capability shall be initial pre-survey planning, followed by verification of financial data as required. . . .

(b) Procedure. Aspects to be considered in determining the prospective contractor's financial capability (DD Form 1524-3) include the following:

(1) The latest balance sheet and profit and loss statement shall be reviewed. The following are indicative of the soundness of the prospective contractor's financial structure:

- (i) rates and ratios;
- (ii) working capital as represented by current assets over current liabilities;
- (iii) financial trends such as net worth, sales and profit.

(2) The method of financing the contract shall be evaluated. Where sources of outside financing, other than the Government, are indicated, their availability should be verified.

(3) When financial aid from the Government is to be obtained, the necessity should be verified. Review shall be made concerning the applicability of such financing as progress payments or guaranteed loans.

TABLE OF AUTHORITIES

STATUTES

Contract Disputes Act of 1978 (P.L. No. 95-563, 41 U.S.C. §601 et. seq., effective March 1, 1979).	2
Exception to Competition in Contracting Act-- Industrial Preparedness Planning & Mobilization 10 U.S.C. 2304(a)(16)	p9
Walsh-Healey (Title 41, U.S.C. §35 et. seq., and Title 5, U.S.C. §616	p35, 36, 37

REGULATIONS

1-905.4.(d) Walsh-Healey Public Contracts Act Eligibility Determination.	p40
1-2202 Industrial Preparedness Production Planning	p40
3-101 Procurement by Negotiation	p41
3-216 Purchases in Interest of National Defense or Mobilization.	p41
3-402(5) Adequacy of the Contractor's Accounting System.	p42
3-809(b)(3) Responsibilities for Pre-Award Surveys and Reviews.	p42
3-809(b)(4) Reviews of Contractor's Estimating Systems.	p42
3-809(b)(5) Cost Accounting Standards Board Rules and Regulations	p43
7-103.11 Default (1969 Aug)	p45
7-103.17 Walsh-Healey Public Contracts Act (1958 Jan)	p43
7-104.35(b) Progress Payment Clause for Small Business Concerns (1981 Oct).	p43
8-602.3 Procedure for Default.	p45
8-602.4 Procedure in Lieu of Termination for Default	p45
15.205.20(ii) Extraordinary maintenance and repair costs	p45
K-201 Procedure for Requesting Pre-Award Survey.	p46
K-203.3 Designation and Responsibilities of Team Members.	p46

CASES

Appeal of Michael Guth, ASBCA No. 22663, 80-2 BCA ¶14,572	14
Appeals of E.L. David Construction Co., Inc., ASBCA Nos. 29225, 34787, 89-3 BCA ¶22,140.	p16, 19
Argus Industries, Inc. (1966) ASBCA No. 9960, 66-2 BCA ¶5711.	p31
Bailey Specialized Buildings Inc. v. United States, 404 F.2d 1154	p19, 20
Brenner Metal Products Corp., ASBCA No. 25294, 82-1 BCA ¶15,462.	p18
Chase & Rice, Inc., 354 F.2d 318 (Ct. Cl. 1965)	14
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Consumers Oil Company, ASBCA No. 24172, 86-1 BCA ¶18,647.	p21
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Darwin Construction Co., Inc. v. United States, 811 F.2d 593 (Fed.Cir. 1987) rev'g & remanding ASBCA No. 29340 on mtn for reconsid., 86-2 BCA ¶18,959.	p33
David Nassif Assoc. v. United States, 557 F.2d 249 (Ct.Cl. 1977)	14
DWS, Inc., ASBCA No. 33245, 87-3 BCA ¶19,960.	p18
Edgerton ta Edgerton Flying Service v. United States, 127 Ct.Cl. 515, 117 F.Supp. 193 (1954).	p30
Electric Boat Division, ASBCA No. 21737, 83-2 BCA ¶16,907.	p24
Electronic & Missile Facilities, Inc. v. United States, 14 CCF 83,109, 189 Ct.Cl. 237, 416 F.2d 1345 (1969).	p33
Florida East Coast Railway Co. v United States, 29 Cont. Cas. Fed. (CCH) 81,927 (1981).	p29
Fruhauf Southwest Garment Co. v. United States, 126 Ct.Cl. 51, 111 F.Supp 945 (1953)	p7
General Dynamics Corp. v. United States, 202 Ct.Cl. 347 (1973).	p24
Great American Ins. Co. v. United States, 19 CCF 82864, 203 Ct.Cl. 592, 492 F.2d 821 (1974).	p29
	p48

Hayes International Corp., 79-1 BCA ¶13,596 (AS) p14

International Telephone & Telegraph Corp. ITT Defense Communications
Division v. United States, 20 CCF 83,645, 206 Ct.Cl. 37, 49-50,
509 F.2d 541 (1975). p19, 20

Itek Corp., NASA BCA No. 27, 1963 BCA ¶3967). p26

Joseph DeVito v. United States, 13 CCF 82,319, 188 Ct.Cl. 979,
413 F.2d 1147 (1969) p19, 20

King Point Mfg. Co., ASBCA No. 27201, 85-2 BCA ¶18,043 p2

Laguna Construction Co. v. United States, 88 Ct.Cl. 531
(1939) p10

Leonard Blinderman Construction Co., (1974) ASBCA No. 18946,
74-2 BCA ¶10,811. 15

Litton Systems, Inc., ASBCA No. 10395, 66-1 BCA ¶5599. p26

Mercury Machine & Manufacturing Company, 76-1 BCA ¶11,809 (AS). . . p15

Mfg. Co. v. United States, 97 Ct.Cl. 532 (1942). p25

Mifflinburg Body Works, Inc., ASBCA 723 (1951) p25

Monroe v. United States, 35 Ct.Cl. 199, 206 (19) p7

National Bank of Richmond, VA v. United States, 4 CCF 61048,
117 Ct.Cl. 389, 91 F.Supp. 738 (1949). p29

North American Philips Co. v. United States, 358 F.2d 980
(Ct.Cl. 1966) 14

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455 F.2d 546, 550 (1972). p18

Oklahoma Aerotronics, ASBCA No. 25605, 87-2 BCA ¶19,917 . . . p19, 20

Orion Electronic Corp., ASBCA No. 18918, 80-1 BCA ¶14,219 2

Philco-Ford Corp., ASBCA No. 14251, 70-2 BCA ¶8499. p24

Pilcher, Livingston and Wallace, ASBCA 13391, 70-1 BCA ¶8331 . . . p25

Pure Water and Ecology Products, Inc., 77-2 BCA ¶12,718 (AS) . . . p14

Q.V.S., Inc. (1958) ASBCA No. 3722, 58-2 BCA ¶2007. p20

Quality Environment Systems, Inc., ASBCA No. 22187, 87-3
BCA ¶20,060, at 101,569. p34

p49

R.H.J. Corp., ASBCA No. 9922, 66-1 BCA ¶5361.	p21
Rockwell Int'l Corp., ASBCA No. 20304, 76-2 BCA ¶12,131.	p24
Security Signals, Inc., ASBCA 4634, 58-2 BCA ¶2045.	p30
Space Dynamics Corp., 71-1 BCA ¶8853 (1971).	p29
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Vista Scientific Corp., ASBCA Nos. 25947, 26722, 28460, 87-1 BCA ¶19,603	p19
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Whitbeck, Receiver v United States, 77 Ct.Cl. 309, cert. den. 290 U.S. 671 (1933).	p20

TEXTS

6 Corbin on Contracts, §1293.	p4
Restatement of 2d Contracts, §3	p7
Restatement 2d of Contracts, §235, comment b.	p24
Uniform Commercial Code §2-301.	p21
4 Williston on Contracts §601 (3rd ed. 1961).	p14

Listing of Exhibits

May 1, 1991 Claim Under Contract DLA13H-85-C-0591

- Exhibit No. 1: Letter from Freedom to Raymond Chiesa, dated 13 May 1986.
- Exhibit No. 2: Letter from David Lambert to Chiesa, dated 6 May 1986.
- Exhibit No. 3: Letter from PCO Bankoff to Freedom, dated July 11, 1986.
- Exhibit No. 4: Letter from Freedom to Bankoff, dated July 23, 1986.
- Exhibit No. 5-A, Internal Memorandum by ACO Liebman dated 26 Sep 86.
- Exhibit No. 5-B, Internal Memorandum by Liebman dated 3 Oct 86.
- Exhibit No. 6: Letter from Bankoff to Freedom, dated October 7, 1986.
- Exhibit No. 7: Letter from Freedom (Patrick J. Marra, CFO) to Bankoff, dated 22 Sep 1986.
- Exhibit No. 8: Amendment 0005 to Solicitation DLA13H-86-R-8359 (MRE-7).
- Exhibit No. 9: Letter from Bankoff to Freedom, dated 10 Oct 1986.
- Exhibit No. 10: Letter from Bankers Leasing to William Stokes (Financial Analyst, DCASMA).
- Exhibit No. 11: Letter from Bankoff to Freedom, dated 22 Jun 1987
- Exhibit No. 12: Telex from Bankoff to Freedom, dated 20 Jan 1986.
- Exhibit No. 13: Liebman memorandum dated April 1, 1986.
- Exhibit No. 14: DLA memo by Samuel Stern, Chief, Contract Mgt Div., dated 4 Apr 1986.
- Exhibit No. 15: Telex from Bankoff to Freedom, dated 17 Apr 1986.
- Exhibit No. 16: Solicitation DLA13H-86-R-8359, p. 98 of 135).
- Exhibit No. 17: Chiesa Memorandum for Record, dated 15 May 1986.
- Exhibit No. 18: Letter from Chiesa to Col. Menarchick, dated 19 May 1986.
- Exhibit No. 19: Internal Memo from Freedom's CFO to President, dated 10 Nov 1986.
- Exhibit No. 20: Letter from Freedom to Bankoff, dated 12 Nov 1986.
- Exhibit No. 21: Internal Memo from Freedom's CFO to its President, dated 5 Nov. 1986
- Exhibit No. 22: Clause L-4 of Solicitation DLA13H-84-R-8257, page 66 of 96

- Exhibit No. 23: Letter from Freedom to PCO Barkewitz, dated 2 Nov 1984.
- Exhibit No. 24: Memorandum of Understanding, dated 6 Nov 1984.
- Exhibit No. 25: 18 Dec 1984 Report of Travel and Post-Award Conference, prepared by DLA Procurement Agent Keith Ford.
- Exhibit No. 26: Telex from M.H.Rowles, Chief, Operational Rations to Marvin Liebman, dated 5 Jun 1985.
- Exhibit No. 27: Memo from Liebman to DLA dated 18 Jul 1985.
- Exhibit No. 28: Letter from Noel V. Siegert of Dollar Dry Dock Commercial to Thomas Barkewitz, Contracting Officer, DPSC, dated August 10, 1984.
- Exhibit No. 29: Letter dated 15 July, 1985 from Mr. Marvin Liebman.
- Exhibit No. 30: Letter to Freedom from Randolph Gross of Bankers Leasing Association, Inc., dated August 16, 1985.
- Exhibit No. 31: Letter from ACO Liebman to Freedom, dated 15 February 1985.
- Exhibit No. 32: Memorandum from Vito Soranno (Branch Manager, NY DCAA Office), to Regional Director, dated August 2, 1985.
- Exhibit No. 33: Letter from Performance Financial Services, Inc. to Freedom, dated June 17, 1985.
- Exhibit No. 34: Solicitation DLA13H-85-R-8457, at pages 137-38 of 158.
- Exhibit No. 35: Letter from Herbert Cohen, Deputy Administrator, U.S. Department of Labor, to Vera E. Zappile, Assoc. Dir. of Small Business, DLA.
- Exhibit No. 36: Explanation of dollar amounts of claim submitted.
- Exhibit No. 37: Company financials (balance sheet, income statement, g&a, overhead, etc.) showing cost detail.
- Exhibit No. 38: Excerpt from lease agreement, p.42
- Exhibit No. 39: Letter from Freedom to ACO Liebman, dated 5 Nov 1985.
- Exhibit No. 40: Letter from Freedom, Patrick G. Marra, to ACO Liebman, dated 11 Nov. 1985.



FREEDOM, NY, INC.

1600 BRONXDALE AVENUE
BRONX, NY 10462

(212) 822-7500



IWX 510 100 1911
FREEDOM UD

File MRES

May 13, 1986

- Claim -
Ex 1

Mr. Raymond F. Chiesa
Executive Director of Contracts
Defense Logistics Agency, Room 4D231
Cameron Station
Alexandria, Virginia 22304-6100

COPY

Dear Mr. Chiesa:

Over the past several months Freedom, through its counsel David M. F. Lambert, Esq., Barnett & Alagia, Washington, D.C. and its consultant, Frank Francols, President, Potomac Marketing and Sales, Inc., Alexandria, Virginia, have been engaged in discussions with Defense Logistics Agency ("DLA") and its field activities, Defense Personnel Support Center (DPSC) and Defense Contract Administrative Services, New York, representatives to resolve a series of specific issues relating to Freedom's participation as a producer in the Individual Combat Rations, Meals-Ready-to-Eat ("MRE") Program and the Industrial Preparedness Producer Program.

Those issues, in part, involved a dispute concerning Freedom's performance of DLA Contract DLA13U-85-C-0591 ("the Contract") for the production of 620,304 cases of MRES. By Modification to be designated (the Mod) P00025, Freedom and DLA under the authority of the Contract Disputes Act, 41 U.S.C. 5601 et seq. have agreed to settle Freedom's claim against DLA for \$3,481,768. "That settlement is reflected in part in the Contract Modification which is attached." The terms and conditions of which have been agreed to by Freedom and DPSC.

FREEDOM, NY, INC.

During those settlement negotiations between Freedom's representatives and DLA, significant matters were discussed relating to Freedom's participation in the MRE Assembly Program. It was agreed that the understandings reached on those matters were not appropriate for inclusion in the Mod but were more appropriately to be addressed in a separate letter. Freedom and DLA agreed to take certain administrative and other actions relating to the MRE Program. Freedom wishes to confirm those commitments based on both parties in good faith and in a timely manner taking their respective actions to do the following:

1. If Freedom is otherwise qualified, DPSC will negotiate a fair and reasonable contract with Freedom based on Freedom's existing mobilization capability and a specific cost/price qualifier for one of the four maximum share quantities of MRE VII production consistent with Freedom's approved monthly IPP quantity at M Plus 90. It is anticipated that the following table will be included in the MRE VII Assembly Solicitation:

MONTHLY ALLOCATED IPP QTY. AT M PLUS 90	MAXIMUM SHARE QUANTITY	PERCENT OF REQUIREMENTS
2,000,000-Unlimited	2,182,132	41-0/0
1,200,000-1,999,000	1,596,786	30-0/0
850,000-1,199,999	904,786	17-0/0
600,000-849,999	638,674	12-0/0

2. As appropriate DPSC and DLA will process a request for a guaranteed loan to be submitted by Bankers Leasing Association, Northbrook, Illinois (hereinafter "The Lender") under the authority of 50 U.S.C. Appendix Section 2091, and the Related Federal Acquisition Regulations (41 C.F.R. 532.3), DOD Far Supplement (532.302 et seq.) and other applicable regulations

FREEDOM, NY, INC.

including financing defense contracts (32 C.F.R. 5163.1 et seq.) and Federal Reserve Board Policies and Procedures (12 C.F.R. 5245.1). The government loan guarantee to the Lender in an amount not greater than \$2.7 million of costs for "the purpose of ensuring Freedom the necessary cash flow for the performance of the Contract through completion on October 31, 1986." Costs shall mean direct labor, manufacturing overhead, G&A, depreciation, and other allocable and allowable costs which are in excess of the contract price of \$17,197,828.

3. Provide all reasonable assistance to Freedom in obtaining traypack and pouch contracts through the Small Business Administration's 8(A) Program.

4. Provide technical and production assistance to Freedom to rework and reprocess as necessary approximately 46,000 MRE V cases presently being held by Freedom under AVL inspection and a medical hold. (Letter to be sent by Freedom requesting technical Rep. from Nadick)..

Although there were other matters discussed, the above represents resolution of the salient issues essential to Freedom's continued participation as a viable Mobilization Based government contractor.

It is important that the above understanding be confirmed as soon as practical.

Sincerely,

Henry Thomas
President

cc: Mr. Frank Bankoff, Contracting Officer
Ms. Norma Leftwich, The Pentagon, Washington, DC

LETTER

Separate
Letter

was required to replace certain damaged signal conduits. Before a ruling had been made on the claim, the government made final payment, enumerating the items of cost. No mention was made of the pending claim. The question presented was whether the final payment constituted an accord and satisfaction, barring recovery on the pending claim. Because the VA procedure regards as final only items listed in the final settlement memorandum, the pending claim was not affected.

Comp. Gen. B-131347 (June 12, 1961) 8 CCF ¶ 71,548.

.60 Letter preserving claim.—A construction contractor was entitled to reimbursement for certain salary and living expense costs paid to his job superintendent during a government-ordered work suspension, despite the existence of a modification agreement covering time extensions for the suspension period that stated "there is no change in the contract price," because that statement could not be deemed to foreclose the right to such compensation reserved by the contractor in a separate letter "almost immediately" before execution of the modification. Work was suspended from December 16 to January 24. The modification was made effective as of February 1 and was executed at later dates. Because the contractor had affirmatively reserved the right to claim increased compensation for the suspension, the government could not use the modification agreement as an accord and satisfaction.

J.E. Robertson Co. (1968) ASBCA Nos. 11340, 12109, 68-2 BCA ¶ 7153.

.61 Lump sum.—The contractor under a Capehart Housing contract was denied relief on his claim for the cost of a retaining wall which the government contended it had paid for by a lump sum payment under a field adjustment. The contractor submitted a lump sum change estimate which the government accepted and paid after correction of an obvious arithmetic error. In view of the lack of evidence to support the contractor's allegation that the retaining wall was omitted from the change estimate, it was not necessary to decide whether the lump sum transaction could be reopened and additional money allowed.

Murray-Sanders & Associates and George A. Fuller Co. (1961) ASBCA Nos. 6509, 6510, 61-2 BCA ¶ 3138.

.63 Mistake of fact.—A compromise settlement of a nonexistent tax liability, mistakenly assumed by both the government and the taxpayer to be due and owing, did not bar a right to a refund of the taxes paid. Although the general rule is that a com-

Payments

promise settlement is binding and conclusive and does further inquiry into the subject matter, is an exception to the general rule when a contract or compromise is entered into under a mistake of fact. In such cases the agreement is binding and may be modified or set aside.

San v. U.S. (1934) 80 CtCl 81, 8 FSupp 746.

Modification in prior cost adjustment.—A contractor was not entitled to an equitable adjustment for the costs of preparing as-built drawings of aircraft made necessary by specification changes because he could not establish that the drawings costs were not included in a prior equitable adjustment for extra work. In consideration of the contractor's failure to deliver the first of three aircraft on time, and also of the substantial changes in the eight systems, the parties agreed on an adjustment of the contract price and a new delivery schedule. The contractor denied that the modification of the contract carried with it an adjustment for the increased costs of the drawings. The modification appeared to include them, and he had signed it without reservation, despite the fact that he had two opportunities to make exceptions.

Welch Electronics Corp., Div. of Halliburton Co. and Inter-Continental Engine Services, Inc. (1968) ASBCA No. 11738, 68-1 BCA ¶ 6850.

.641 A dredging contractor's changed conditions claim was barred because a formal contract modification granting the government a credit for work deleted by the modification constituted an accord and satisfaction. The board concluded that even though the specific claim may not have been negotiated, the express language of the modification discharged the government from any potential claim.

Lloyd W. Richardson Construction Corp. (1970) ENG BCA No. 3042, 70-2 BCA ¶ 8467.

.643 Modification not affecting price.—The ASBCA (1964 BCA ¶ 4483) erred as a matter of law in finding that an agreement to a contract modification constituted an accord and satisfaction barring the contractor's claim under the Changes clause for reworking costs, because the modification made no mention of a different price, and, thus, was not an agreement as to price. The ASBCA viewed the modification as an accord and satisfaction barring the contractor's claim for an equitable adjustment, arguing that the government waived the weathertight requirement in return for a new firm delivery date, thereby precluding further price adjustment. However, the modification was only a deletion of the weathertight requirement and, thus, a change necessary to achieve performance of the contract, rather than a mutual agreement with respect to price.

Emerson-Sack-Warner Corp. v. U.S. (1969) 14 CCF ¶ 83,108, 189 CtCl 264, 416 F2d 1335.

.645 Although a contractor executed a contract modification agreement granting him a time extension, he was not thereby precluded from an equitable adjustment for the costs he had incurred as a result of the delay for which he received the time

¶ 26,680

September 20, 1974, and it concluded that appellant had failed to demonstrate that its overhead had been underabsorbed during the period of delay. Advice from the DCAS production engineer identified contractor causes of delay as well, and concluded that appellant would not have been ready for the chassis prior to May 1, 1974. On November 12, 1974 appellant revised its unabsorbed overhead claim from \$99,000 to \$289,000, which it called a "more precise computation." After meeting with appellant's representatives, DCAA, in its report of April 21, 1975, concluded that appellant had failed to demonstrate that it had incurred unabsorbed overhead, and detailed its reasons; the PCO received the report on May 2, 1975. Our record also reflects that appellant was advised on June 11, 1975 of the denial of its overhead claim based upon the audit report, and that the contracting officer offered to issue a final decision so that an appeal could be taken to the Board; that on July 25, 1975 appellant supplemented and sought reconsideration of the denial of its unabsorbed overhead claim, but did not request the issuance of a contracting officer's decision; that, on October 2, 1975, DCAA completed its reconsideration of the unabsorbed overhead claim and found, once again, that appellant had failed to sufficiently support its claim; and, that, following another meeting between the parties, appellant included its claim for unabsorbed overhead in its consolidated claim of December 12, 1975. There is nothing in the record to indicate that the Government responded in other than a reasonable and timely manner to appellant's claim for unabsorbed overhead, or that the nature of the additional information requested was inappropriate.

Appellant's consolidated claim sought in excess of \$1 million, including a claim of compensable delay totalling 26 months—11 months allegedly resulting from the late delivery of the GFP chassis and 15 months allegedly due to drawing errors.

As our findings reflect, the parties, in April 1975, signed Modification P00005 to the contract, which extended the delivery schedule "as a result of the seven month delay in delivery of the Government furnished chassis," that appellant accompanied its execution of the modification with a cover letter affirming that the modification in the delivery schedule "covers the delay resulting from late GFP" and certain ECPs, and that the Government did not respond to the cover letter. Appellant contends that the bilateral modification was an admission by

the Government of responsibility for delay which it should not be permitted to subsequently retract, and that the Government should therefore be held responsible for the costs of delay for the period covered by the modification.

Appellant relies heavily upon the case of *Robert McMullan & Son, Inc.*, ASBCA No. 19023, 76-1 BCA ¶11,728, in which the Board concluded that a bilateral contract modification which included (a) an extension of the contract completion date, which resulted from a Government ordered suspension, and (b) payment for additional overhead resulting from changed work, constituted an accord and satisfaction with respect to overhead costs incurred during the suspension period. In doing so, however, the Board pointed out that the contractor did not receive a right, either in the modification or by an external expression of intent, to assert further claims for such costs in the future. Our case, which includes a clear reservation of rights in the cover letter to the executed modification, falls more squarely within the purview of *Pathman Construction Company v. United States* [28 OCF ¶81,299], 227 Ct.Cl. 670 (1981), where it was held that bilateral contract modifications for changes which included time extensions did not constitute accords and satisfactions fixing the delay period for purposes of recovery of delay costs. The Court's decision quoted with approval the earlier Postal Board's decision which focused upon the contractor's specific reservations of rights:

Such reservations effectively preserved appellant's rights and precluded any perception of those modifications as being accords and satisfactions of these claims. *Supra* at 674.

The modifications were therefore found insufficient to obviate the need for the contractor to independently establish the length of time to which it was entitled to compensation for delay costs. Since appellant, in our case, reserved its right to submit claims with respect to costs resulting from late GFP, we conclude that Modification P00005 does not constitute an accord and satisfaction nor a Government admission that it was responsible for delay costs for the extended performance period covered in the modification. We also take note of the PCO's credible testimony that, in signing the modification, she did not intend to admit that the Government had delayed appellant by the late GFP or drawing errors, and that the intent was to establish a new delivery

date, since earlier.

We attention P00013 the Gov to ECP sable de modif P00008 with a ties we that M eral, sp ment delay a

Our chassis tract, January month ment of sonably plan ca the W mount errs. A reasor presen vided, WPU Gover knowl obviot from t could the de the G deder, ductio chassi sis de series pellan betwe incur

At the o late c abilit requi van. ductio Ten Nove RFD stitut grant order 22, 19

Contr

Int Financing—Payments

led the contractor to sign for extra work because of latent defects in used pipe, the fact that the contractor subsequently signed a full release of all claims under the contract, without filing an exception for the extra pipe work, precluded the contractor from continuing to prosecute its appeal.

L.F. Nichols vs L.F. Nichols Construction Co. (1943) WDBCA No. 350, 1 CCF 780.

.2903 A general release of all but two claims under a contract, which also provided that the contractor would withdraw specified claims, was effective as to all but the two excepted claims under the contract including any issues relating to liquidated damages or adjustment of unit prices for overruns. It is a well settled rule that a general release bars all claims not expressly excepted or reserved therefrom.

M.S.I. Corp. (1965) ASBCA No. 9779, 65-2 BCA ¶ 5094.

.2904 Although a contractor received an equitable price adjustment arising from issuance of a change order, the contractor was not precluded from making a further claim for costs incurred during the period of the government's unreasonable delay in issuing that written change order because a claim for delay was specifically reserved in the contractor's Release of Claims upon final payment.

Gill Construction Co. and Lindo Engineering Co. (1968) IBCA Nos. 588-9-65, 626-2-67, 68-2 BCA ¶ 7205.

.2905 A claim for additional compensation, appealed after execution of a final release and settlement, was not dismissed because the contractor released the government from all claims except those which were the subject of appeal and pending disposition. The claim within this appeal was included in an appeal pending at the time the release was signed.

Wm. E. Schweitzer & Co. (1971) VACAB No. 957, 71-1 BCA ¶ 8754.

.2906 Even though a contractor had appealed the decision of a contracting officer denying a claim for extra work because of latent defects in used pipe, the fact that the contractor subsequently signed a full release of all claims under the contract, without filing an exception for the extra pipe work, precluded the contractor from continuing to prosecute its appeal.

L.F. Nichols vs L.F. Nichols Construction Co. (1943) WDBCA No. 350, 1 CCF 780.

.292 See also:

Hellander vs Tom Hellander Co. v. U.S. (1959) 147 CICI 550, 178 FSupp 932.

Halvorson Lents, (1977) IBCA No. 1039-2-75, 77-1 BCA ¶ 12382.

John A. Bingham, Inc. (1965) GSBGA No. 1478, 65-2 BCA ¶ 4927.

Fort Sill Associates (1963) ASBCA No. 7925, 1963 BCA ¶ 3806, (1962) 1962 BCA ¶ 3418.

American Pipe & Steel Corp. (1960) ASBCA No. 4611, 60-1 BCA ¶ 2501, 60-2 BCA ¶ 2769.

Consolidated Contractors (1957) ASBCA No. 3387, 57-1 BCA ¶ 1280.

pp 648, 4 CCF

Ford J. Twiss Co. et al. (1955) ASBCA No. 1845, Comp. Gen. B-160706 (Aug. 4, 1967) 12 CCF ¶ 81,243, Comp. Gen. B-153472 (Dec. 2, 1965) 11 CCF ¶ 80,152.

.298 **Excess items.**—A purchaser of surplus property who had allegedly received items in excess of those included in his bid was denied a request for a government-executed release to future claims on those items. The GSBGA's authority was limited strictly by the terms of the contract on appeal. Since the excess items were not covered by the contract, the matter had to be resolved by the parties.

Mansur (1964) GSBGA No. 1369, 65-1 BCA ¶ 4548.

.299 **Executed modification.**—When a contract modification is negotiated for the sole purpose of adjusting the contract price upward to compensate the contractor for extra work due to faulty specifications, and both parties agree to such modification, the executed modification acts as a release of any further claims for additional compensation due to the faulty specifications. Under such circumstances the contractor has a duty to clearly indicate that such modification is only a conditional release if he anticipates making further claim thereafter. Unless the conditional nature of the modification is clearly indicated by the contractor prior to execution, it acts as an absolute bar to subsequent claims.

Columbus Jack Corp. (1962) ASBCA No. 7249, 1962 BCA ¶ 3288.

.30 A contractor did not release his right under the Disputes clause to have the board determine his claim on the merits when he executed a contract modification for additional compensation reserving his right to petition for relief under Public Law 85-804 only. The contractor was mistaken in thinking that such law was proper for the purpose of further appealing the disputed items and the contracting officer should have known that the contractor was mistaken. At any rate, the contracting officer was put upon sufficient notice that the contractor intended the executed modification to be only a conditional release, concerning only the items upon which reimbursement was based in the modification; and since the contracting officer was on notice as to the intent of the contractor, the government could not rely upon the executed modification as a general release of all claims under the contract.

La Scola Industries, Inc. (1962) ASBCA No. 7134, 1962 BCA ¶ 3385, 3514.

.301 **Extent of reservation.**—Where the contractor executed a full and final release to the government for all claims arising out of the contract except a disputed liquidated damages assessment, the release barred the contractor's subsequent claim for additional compensation arising out of alleged extra work required during the course of the contract. A full and final release encompasses all claims arising out of prior transactions except for such claims as are specially reserved in the release, and reservation of a claim for remission of liquidated damages cannot be construed as a reservation of a claim for extra work and changes.

Pelton Water Wheel Co. v. U.S. (1919) 55 CICI 31.

LAW OFFICES

BARNETT & ALAGIA

1000 THOMAS JEFFERSON STREET, N.W.

WASHINGTON, D.C. 20007

(202) 342-0342

TELECOPIER (202) 775-9089

CABLE ALBAR

TELEX 89-2445

*CLAIM
EX 2*

OFFICES IN:

LOUISVILLE, KENTUCKY
PALM BEACH, FLORIDA
MIAMI, FLORIDA
FRANKFORT, KENTUCKY
NASHVILLE, TENNESSEE
ATLANTA, GEORGIA
NEW ALBANY, INDIANA

DAVID M. F. LAMBERT
PARTNER

May 6, 1986

Mr. Raymond F. Chlesa
Executive Director of Contracts
Defense Logistics Agency
Room 4D231
Cameron Station
Alexandria, Virginia 22304-6100

Dear Ray:

Enclosed is a draft of the Freedom letter which will be sent to the Contracting Officer tomorrow along with a draft of the Mod with some minor changes in schedules. I understand they have been discussed with Frank Bankoff. Copies were sent to Bob Apellan last evening. The signing of the Mod is scheduled for Wednesday or Thursday based on availability of DPSC personnel.

Col. Francios and I appreciated the manner in which you and Karl worked with us.

Please call if you have any comments or suggestions.

Sincerely,


David M.F. Lambert

DMFL/tmsb
Enclosure

cc: Col. Francios
Henry Thomas

Barnett

May 2, 1986

Mr. Frank Bankoff
Contracting Officer
Defense Personnel Support Center
Defense Logistics Agency
Philadelphia, Pennsylvania

*Revised F. Chrise
Ex. Director, Contract
DLA
Contract*

Dear Mr. Bankoff: *Chrise*

Over the past several months Freedom, through its counsel David M. F. Lambert, Esq., Barnett & Alagia, Washington, D.C. and its consultant, Frank Francois, President, Potomac Marketing and Sales Inc., Alexandria, Virginia, have been engaged in discussions with Defense Logistics Agency ("DLA") and its field activities, Defense Personnel Support Center ^(DPSC) and Defense Contract Administrative Services, New York, representatives to resolve a series of specific issues relating to Freedom's participation as a producer in the Individual Combat Rations, Meals-Ready-to-Eat ("MRE") Program.

Those issues, in part, involved a dispute concerning Freedom's performance of DLA Contract DLA 13 H-85-C-0591 ("the Contract") for the production of 620,304 cases of MREs. By Modification ^{to be designated (The MOD)} P00021, dated _____ (Attachment) Freedom and DLA under the authority of the Contract Disputes Act, 41 U.S.C. §601

Mr. Frank Bankoff
May 2, 1986
Page 2

et seq. have agreed to settle Freedom's claim against DLA for \$3,481,768. That settlement is reflected in part in the Contract Modification P0021 which is attached. *the terms & conditions of which have been agreed to by F. & DPSC.*

During these settlement negotiations *between Freedom & DPSC* certain additional significant matters were discussed relating to Freedom's participation in the MRE Assembly Program. It was agreed that the understandings reached on those matters were not appropriate for inclusion in ^{the} Modification P00021 but were more appropriately to be addressed in a separate letter. Freedom and DLA agreed to take certain administrative and other actions relating to the MRE Program. Freedom wishes to confirm those commitments based on both parties in good faith and in a timely manner taking their respective actions to do the following:

1. If Freedom is otherwise qualified, DPSC will negotiate a fair and reasonable contract with Freedom based on Freedom's mobilization capability and a specific cost/price qualifier for one of the four maximum share quantities of MRE VII production consistent with Freedom's approved monthly IPP quantity at M Plus 90. It is anticipated that the following table will be included in the MRE VII Assembly Solicitation:

Mr. Frank Bankoff
May 2, 1986
Page 3

MONTHLY ALLOCATED IPP QTY. AT M PLUS 90	MAXIMUM SHARE QUANTITY	PERCENT OF REQUIREMENTS
2,000,000-Unlimited	2,182,132	41-0/0
1,200,000-1,999,000	1,596,786	30-0/0
850,000-1,999,999	904,786	13-0/0
600,000-849,999	638,674	12-0/0

2. As appropriate DPSC and DLA will process a request for a guaranteed loan to be submitted by Bankers Leasing Association, Northbrook, Illinois (hereinafter "The Lender") under the authority of 50 U.S.C. Appendix Section 2091, and the Related Federal Acquisition Regulations (41 C.F.R. §32.3), DOD Far Supplement (§32.302 et seq.) and other applicable regulations including financing defense contracts (32 C.F.R §163.1 et seq.) and Federal Reserve Board Policies and Procedures (12 C.F.R. §245.1). The government loan guarantee to the Lender in an amount not greater than \$2.7 million of costs for the purpose of ensuring Freedom the necessary cash flow for the performance of the Contract through completion on October 31, 1986. Costs shall mean direct labor, manufacturing overhead, G&A, depreciation, and other allocable and allowable costs which are in excess of the contract price of \$17,197,828.

Mr. Frank Bankoff
May 2, 1986
Page 4

3. Provide all reasonable assistance to Freedom in obtaining traypack and pouch contracts through the Small Business Administration's 8(A) program.

4. Provide technical and production assistance to Freedom to rework and reprocess as necessary approximately 46,000 MRE V Cases presently being held by Freedom under AVI inspection and a medical hold. (Letter to be sent by Freedom requesting technical Rep. from Nadick).

Although there were other matters discussed, the above represents resolution of the salient issues essential to Freedom's continued participation as a viable Mobilization Based government contractor.

It is important that the above understandings be confirmed as soon as practical.

Sincerely,

H. T.

Attachment

cc: Frank Bankoff, contracting officer



File
MRE'S

DEFENSE LOGISTICS AGENCY

DEFENSE PERSONNEL SUPPORT CENTER

2800 SOUTH 20TH STREET

PO BOX 8419

PHILADELPHIA, PENNSYLVANIA 19101-8419

Claim
Ex 3

IN REPLY
REFER TO

CERTIFIED MAIL-- RETURN RECEIPT REQUESTED

JUL 11 1986

DPSC-SPPR (Bankoff/215-952-3660/ed)

SUBJECT: Contract DLA13H-85-C-0591, Meal, Ready-to-Eat (MRE) Assembly

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

Dear Mr. Thomas:

Please refer to subject contract awarded to your company on 15 November 1984 and subsequent contract modification P00025 dated 29 May 1986. Modification P00025 extended your contract delivery schedule for the undelivered balance of the contract as follows:

1-30 May 86	65,000 Cases
1-30 Jun 86	85,000 Cases
1-31 Jul 86	80,000 Cases
1-31 Aug 86	80,000 Cases
1-30 Sep 86	80,000 Cases
1-31 Oct 86	50,062 Cases

Under the terms of this contract modification, Freedom was to have delivered a total of 330,242 cases by 30 June 1986. Freedom has failed to meet this delivery schedule and has delivered 308,664 cases by 30 June 1986. Freedom is expected to complete the 1-30 June 1986 increment by 10 July 1986. This leaves 15 to 16 production days for the completion of the 1-31 July delivery increment. At Freedom's current production rate, timely completion of this 1-31 July 1986 delivery increment is doubtful.

In addition, despite constant requests, Freedom is not supplying DPSC with timely submissions of Production Progress Reports, DD Form 375, and Subsistence Government Furnished Property Correspondence, DPSC Form 2651, as contractually required.

As a consequence of the above, the Government must construe that Freedom is unable or unwilling to comply with the requirements of the subject contract. You are hereby notified that the Government considers your actions concerning contract DLA13H-85-C-0591 as endangering performance in accordance with its terms. Unless such condition is cured within ten (10) days after receipt of this notice, the Government may terminate your contract for default pursuant to DAR Clause 7-103.11, entitled "Default".

DPSC-SPPR

PAGE 2

SUBJECT: Contract DLA13H-85-C-0591, Meal, Ready-to-Eat (MRE) Assembly

A complete response to this notice must be provided or corrective action achieved within the required time frame. The Government will rely on Freedom's actions or on the information provided in your response in reaching a decision regarding exercise of our rights under the "Default" clause. You are cautioned that my evaluation of your reply does not imply an election on the part of the Government to extend your present delivery schedule. Your attention is directed to the rights of the contractor and the Government under the "Default" clause and to your contractual liabilities in the event a decision is made to terminate for default. Your liabilities specifically include assessment for all excess costs relative to any reprourement against your account of the required supplies.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank Bankoff", written in a cursive style.

FRANK BANKOFF
Contracting Officer



FREEDOM, NY, INC.



(212) 822-7500

1600 BRONXDALE AVENUE
BRONX, NY 10462

TWX 510 100 1911
FREEDOM UD

*File
MRES*

*Claim
EX 4*

July 23, 1986

Mr. Frank Bankoff, DPSC-SPPR
Contracting Officer
Defense Personnel Support Center
2800 South 20th Street
Philadelphia, PA 19101

COPY

Dear Mr. Bankoff:

Reference is made to your cure notice dated 11 July 86 that was received by Freedom, N.Y., on 18 July 86.

In said notice you stated that "At Freedom's current production rate, timely completion of this 1-31 July 86 delivery increment is doubtful. In addition despite constant request, Freedom is not supplying DPSC with timely submissions of Production Progress Reports, DD Form 375, and Subsistent Government Furnished Property Correspondence, DPSC Form 2651, as contractually required."

Be advised that Freedom is ready, willing, and able to comply with the requirements of the subject contract. Be further advised that:

- I.
 - A. In accordance with our meeting of 24 June, Freedom has developed and implemented a detailed rework and recycle program to make conforming the forty thousand plus cases in our warehouse.
 - B. Per our rework/recycle plan thirty thousand plus cases will have been reworked and reoffered to the AVI by 31 July and approximately one hundred thousand menu bags will have been cut opened and recycled to production.
 - C. Thru 22 July, the following lots have been reworked and accepted by the AVI:

<u>Date Reworked</u>	<u>F Lot</u>	<u># of Cases</u>	<u>Date Accepted</u>
15 Jul	5B	1,782	21 July
10 Jul	18A	646	15 July
9 Jul	19A	288	15 July
10 Jul	38A	709	15 July
3 Jul	48A	2,784	8 July
26 Jun	75A	2,064	2 July
26 Jun	77A	2,834	2 July
9 Jul	97A	1,104	11 July
3 Jul	103A	1,996	9 July
11 Jul	104A	288	14 July

10 lots 14,495 cases

- D. Thru 22 July, the following lots have been reworked and are pending QCR or QAR inspection:

<u>Date Reworked</u>	<u>F Lot</u>	<u># of Cases</u>	<u>Inspection Date</u>
21 Jul	7A	2,281	23 July
18 Jul	9A	2,370	23 July
21 Jul	11A	2,877	24 July
23 Jul	13A	2,592	25 July

4 lots 10,120 cases

- E. Thru 22 July, the following lots have been reworked and pending DPSC waiver:

<u>Date Reworked</u>	<u>F Lot</u>	<u># of Cases</u>	<u>Waiver Request Date</u>
24 Jul	109B	554	8 July
	147	2,016	7 July

2 lots 2,570 cases

- F. Thru 22 July, we have produced 30,038 cases during 12 actual production days

- G. Progress towards the July requirements....
(COB 22 July 86)

July requirement	80,000
Cases produced in July	30,038
Reworked and Accepted	14,495
	<hr/>
Sub total	44,533
Towards June requirement	20,847

Sub total	23,686
Anticipated waiver acceptance	2,570
Anticipated additional rework	17,000
Anticipated additional production	27,000

Towards July requirement	70,256
--------------------------	--------

Apparent July shortfall	9,744
Days short at 4500 per day	Less than 3 days

H. Progress against shortfall....

June shortfall	20,847
July shortfall	9,744
Improvement	11,103

Shortfall is planned to be eliminated in August 1986

II.

Timely submissions of Subsistence Government Furnished Property Correspondence (see attachment 1) and Production Progress Reports (see attachment 2) are now being and will continue to be made.

Notwithstanding the aforementioned progress towards the July requirements, our July shortfall is attributable primarily to the following reasons:

1. Box Form, Seal and Sleeve....

Freedom's box erector began malfunctioning on or about 2 July and broke down fully on or about 8 July. This resulted in having to double seal the cases on the top sealer, effectively cutting our production in half. Double sealing on the top case sealer also resulted in the cases not being properly erected or squared, thereby creating a sleeving problem. On 8 July 86 we notified MARQ Packaging (our box erector manufacturer) who sent their service person on 15 July. The box erector and sealer have now been functioning properly since 16 July 86. The following day we could not produce final cases because of no GFM Jelly.

2. GFM Jelly....

Freedom has been shut down since 17 July for lack of GFM jelly, resulting in 6 to 7 days loss of production, based on anticipated jelly arrival of 24-25 July. You have been advised (see attachment 3) of this situation. We believe that our GFM report to you of 30 June clearly showed that we were short of jelly, and other GFM items, and constituted sufficient notice to you to obtain the needed items to

maintain our production. Further, on 15 July we called you to remind you of said critical shortage. We believe that this lack of GFM components is grounds for excusable delay. Had we had GFM jelly from 17 July on, we would have produced an additional 49,500 cases, thereby exceeding our July requirement, thus putting us ahead of schedule on production.

Additionally Freedom has taken the following actions to insure being able to continue to meet the delivery requirements:

1. **GFM Shortages....**
Informed DPSC of all shortages for timely replacement of GFM supplies. (see attachment 3)
2. **Box Form, Seal, and Sleeve....**
Repaired existing equipment on 16 July.
Ordered additional case erector and sealer.
Ordered automatic sleeving machine. (see attachment 4)
3. **Second Shift....**
Implemented a second shift to complete rework/recycle plan (see attachment 5) and to support the first shift.
4. **Saturday Production....**
Requested AVI support for Saturday production thru the month of September. (see attachment 6)
5. **CFM Shortages....**
Ordered, have received, and have scheduled to receive the necessary CFM to minimize CFM outages. (see attachments 7-11)

Freedom, N.Y., Inc. has and will continue to take all necessary measures within our control, to provide the Gov't with MRE's in a timely manner. Lack of GFM jelly is beyond our control and is clearly not due our negligence.

If further information is necessary please do not hesitate to contact me by telephone or arrange for a meeting with me at your earliest convenience.

Sincerely,

Henry Thomas
President

f:cure4.let

Claim
EX 5

26 Sep 86

NAME : Freedom N.Y., Inc.

ACO : MARVIN LIERMAN

ADDRESS : 1600 Bronxdale Avenue

TELEPHONE : (212) 822-7500

CONTRACT : DLA13H-85-C-0591

QUANTITY : 620,304 Cases

DISCUSSION :

1. To date, Freedom has shipped 37,113 cases toward the 80,000 case delivery requirement due 10 Sep 86. As noted in point paper dated 19 Sep 86, the slippage will impact on deliveries for the balance of the contract as follows:

Schedule per Mod. P00028 <u>7 Aug 86</u>		Forecast per Industrial Specialist <u>26 Sep 86</u>	
<u>Delivery Date</u>	<u>Quantity (Cases)</u>	<u>Delivery Date</u>	<u>Quantity (Cases)</u>
10 Sep 86	80,000	10 Oct 86	80,000
10 Oct 86	79,606	18 Nov 86	79,606
12 Nov 86	50,062	10 Dec 86	50,062

2. The remaining rework cases were cut open and the components were recycled into production.

3. As of COB 23 Sep 86, a total of 450,189 cases have been accepted and 447,113 cases have been shipped.

4. Freedom commenced retorting of the production quantity of Apple Sauce during the week of 15 Sep 86.

5. On 11 Sep 86, the PCO authorized substitution of GFM item, Beans in place of Potato Patties. On 19 Sep 86, he authorized substitution of Beef Stew and/or Beef Diced in place of Beef Slices.

6. GFM Item, Crackers :

a. There is a low inventory of Crackers at Freedom. Crackers on-hand are enough to support approx. 67,000 cases.

b. Freedom has claimed that a portion of Crackers arrived at its facility in damaged condition. DPSC has disagreed and has advised Freedom, per TWX dated 22 Sep 86, that Freedom, per terms of the contract, was liable for the cost of the Crackers.

c. Vacuum loss has been discovered in Cracker pouch folders by Army Veterinary Inspectors (AVI).

Waiver
of
Claims

7. The PCO and Freedom are currently negotiating an extension in the delivery schedule as a result of stock outage of GFM item, Fruit Mix and shortage of GFM item, Potato Patties. The PCO is trying to get a waiver of claims against the Government as well as monetary consideration for GFM item, Crackers damaged at Freedom.

8. Progress Payment #20, in the reduced amount of \$311,447, became payable on 23 Sep 86. A check for the above amount was mailed to Freedom's financial institution, Banker's Leasing Associates on that day. The calculations were as follows:

33,061 Cases Shipped Out of 80,000 Case Increment	=	.4132625% Factor	
\$1,000,000 (PP Increment per Mod P00028)	x	.4132625% Factor	= \$413,262.50
Less: Unallowable Costs per DCAA Report on PP #19 and 20			- \$31,166
Maximum Amount Payable			= \$382,096.50
	Loss Ratio Factor	x .8580	
			\$327,838.79
	PP Rate	x 95%	
	Amount Payable		\$311,477

It is noted that Freedom has requested that DPSC change the tie-in of Progress Payments to deliveries per Modification P00028.

9. PROGRESS PAYMENTS

- a. Progress Payments Paid to Date - \$14,172,838
(PP#1-20)
- b. Unliquidated Progress Payments - \$3,245,753
(As of 19 Sep 86)
- c. Dollar Value of Cases Shipped - \$12,396,207
(As of COB 23 Sep 86)

03 Oct 86

NAME : Freedom N.Y., Inc.

ACO : MARVIN LIEPMAN

ADDRESS : 1600 Bronxdale Avenue

TELEPHONE : (212) 822-7500

CONTRACT : DLA13H-85-C-0591

QUANTITY : 620,304 Cases

DISCUSSION :

1. To date, Freedom has shipped 55,440 cases toward the 80,000 case delivery requirement due 10 Sep 86. As noted in point paper dated 26 Sep 86, the slippage will impact on deliveries for the balance of the contract as follows:

Schedule per Mod. P00028 7 Aug 86		Forecast per Industrial Specialist 26 Sep 86	
<u>Delivery Date</u>	<u>Quantity (Cases)</u>	<u>Delivery Date</u>	<u>Quantity (Cases)</u>
10 Sep 86	80,000	10 Oct 86	80,000
10 Oct 86	79,606	18 Nov 86	79,606
12 Nov 86	50,062	10 Dec 86	50,062

2. Modification P00029 was faxed to Freedom for signature 2 Oct 86. The modification revises the delivery schedule as a result of delays encountered in receipt of GFM. The revised schedule is as follows:

<u>DATE</u>	<u>QUANTITY</u>
15 Oct 86	*95,304 Cases
15 Nov 86	64,696 "
5 Dec 86	50,062 "

*62,223 accepted as of 2 Oct 86.

It is expected that the modification will be signed by both parties, in DPSC, 6 Oct 86.

3. As of COB 2 Oct 86, a total of 472,465 cases have been accepted and 465,440 cases have been shipped.

4. Accessory production has been shutdown at Freedom for approx. one (1) week due to a stock outage of GFM item, Cream. It is anticipated that a shipment of Cream will be received in-house by COB 3 Oct 86.

5. *The ACO, 2 Oct 86, made a decision to pay Progress Payment Request No. 21 in the reduced amount of \$700,000. Considered in his decision was the best interest of the Gov't., the contract loss (approx. \$2.8 million), progress payments and cases accepted to date (including 13,600 cases that the PCO, DPSC anticipated Freedom might have shipped if there had been no GFM outage), \$31,166 in DCAA disallowances and Modification P00029. Payment is expected to be forwarded to Freedom's assignee, Banker's Leasing Associates, Glencoe, IL by 8 Oct 86.

6. ~~It is noted that it is within the ACO's prerogative to apply the Loss Ratio Formula in toto or in part.~~ Had the Loss Ratio Formula been applied in toto, a progress payment in the amount of \$640,761 could have been approved. Had no Loss Ratio Formula been applied, \$746,808 could have been approved.

7. PROGRESS PAYMENTS

- a. Progress Payments Paid to Date - \$14,872,838
(PP#1-21)
- b. Unliquidated Progress Payments - \$3,557,200
(As of 30 Sep 86)
- c. Dollar Value of Cases Shipped - \$12,904,324
(As of COB 2 Oct 86)

* Note, per PCO request 1600 hrs, 3 Oct 86, PP #21, in the amount of \$700,000, is being held in abeyance pending Freedom's execution of Mod P00029. This is expected to be accomplished during week of 6 Oct 86.

*
7.



DEFENSE LOGISTICS AGENCY
DEFENSE PERSONNEL SUPPORT CENTER
2800 SOUTH 20TH STREET
PO BOX 8418
PHILADELPHIA, PENNSYLVANIA 19101-8418

Claim
EX 6

OCT 7 1986

IN REPLY
REFER TO

DPSC-HPPR (Lecollier/215-952-4269/ed)

File MRE S

SUBJECT: Progress Payments, Contract DLA13H-85-C-0591
Freedom N.Y., Inc., MRE Assembly

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

Dear Mr. Thomas:

As we discussed on 26 September 1986, upon execution of modification P00029, the current progress payment ceiling for the subject contract, per modification P00028, will be \$14,900,725.00 based on delivery of 482,058 cases. To date you have been paid \$14,178,838.00. This leaves a balance of \$721,887.00 available to you. This amount will be paid to you by DCASMA N.Y. against progress payment requests submitted by Freedom N.Y., Inc.

Sincerely,

Frank Bankoff
FRANK BANKOFF
Contracting Officer



FREEDOM, NY, INC.



Claim
EX 7

(212) 822-7500

1600 BRONXDALE AVENUE

BRONX, NY 10462

TWX 510 100 1911
FREEDOM UD

File MRE 5

September 22, 1986

Mr. Frank Bankoff, DPSC-SPPR
Contracting Officer
Defense Personnel Support Center
2800 South 20th Street
Philadelphia, Pa 19101

PROTEST
+
NOTICE of DURESS

Re: Contract DLA13H-85-C-0591

Dear Mr. Bankoff:

On September 21 we were informed by Mr. Clyde Martin, Contract Administrator, DCASMA that a partial payment of \$311,446 had been approved for release to Bankers Leasing Association, on our behalf as a Progress Payment under the above contract.

We ~~protest~~ this partial payment and accept it under duress, without a reasonable choice in this matter.

The current magnitude of Freedom's losses incurred on this contract are well known to the Government. Freedom's consequential financial hardship, caused by thorough disregard by the Government of basic business principles has strained our finances to the point of collapse.

Freedom requires funds to meet its ongoing obligations to complete its contractual commitment to deliver 620,304 cases of MRE. It has incurred costs properly, in accordance with the requirements of DAR and has submitted its claims for reimbursement on Form 1443, Contractor's Request for Progress Payment as follows:

PP #20	\$1,222,585
PP #21	1,093,342
	<u>\$2,315,927</u>

The Government's imposed ceiling of \$15,800,000 would permit immediate payment of \$1,949,685 in the normal course of events. However, it opts to continue its idiotic mismanagement of the finances of this contract and again spoon feeds us only \$311,446. In spite of our warnings of the dangers of this action, the Government has chosen to take the risk of the ultimate financial collapse of Freedom, which if materialized, would impose irrecoverable losses of millions to the Government, Bankers Leasing, and Freedom.

FREEDOM, NY, INC.

Upon receipt of the \$311,446, Freedom's status of Progress Payments will be as follows:

	Millions
Contract Value	<u>\$17.1</u>
Progress Payment Limitation	<u>\$15.8</u>
Costs Incurred	<u>\$18.6</u>
Payments Made	<u>\$14.2</u>

Although costs incurred represent 109% of the contract value, The Government has released only 76% of our claimed incurred costs. In order to finance this funding shortfall, Freedom has been obliged to incur enormous debt. It presently owes about \$2.6 million to Bankers Leasing and about \$2.6 million to other creditors. Freedom's exclusive activity has been the MRE program; therefore, all costs incurred and all debt assumed by it are a direct consequence of the MRE contract.

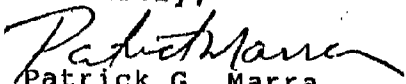
In order for Freedom to complete the contract it must obtain the necessary materials to do so. As we have constantly advised you, virtually all subcontractors require cash payments up front prior to delivery. About \$1.7 million of materials are required to complete the contract.

Over our strenuous objections, the Government, however, has tied the release of Progress Payments to the completion of delivered cases, thereby cutting off the needed funds to acquire materials. If this situation is not immediately remedied by substantial release of the Progress Payments due Freedom, financial collapse and contract default can be expected to occur imminently.

Attached is a Proposed Payment Calculation - Progress Payments which we believe would produce a fair and reasonable solution to the current dilemma, and, in our opinion, meets the spirit of the Mod. P00028.

We request your immediate consideration of the proposal and trust in your good common sense to instruct DCASMA to release the Progress Payments due Freedom based on the proposed calculation.

Sincerely,



Patrick G. Marra
Executive Vice President
Chief Financial Officer

cc: Mr. Henry Thomas, President
Mr. Marvin Liebman, DCASR-NY-NAA-7

F:BANKOF21.LET

FREEDOM, N.Y., INC.
PROPOSED PAYMENT CALCULATION - PROGRESS PAYMENTS

CEILING LIMITATION	\$15,800,000
PAID TO DATE	13,850,315

MAXIMUM REMAINING BALANCE	<u>1,949,685</u>
PROGRESS PAYMENT SUBMITTED	
AT 95% RATE	
PP #20	\$ 1,222,585
PP #21	1,093,342

	\$ 2,315,927
LOSS RATIO FACTOR	<u>85.8%</u>
LOSS RATIO MAXIMUM	<u>\$ 1,987,065</u>
DELIVERIES:	
TOTAL SHIPPED TO DATE	442,869 CXS
PREVIOUS MONTH REQUIREMENT	<u>410,000 CXS</u>
CURRENT INCREMENT	<u>32,869 CXS</u>
ADJUSTMENT FOR GFM SHORTAGES:	
FRUIT 5 DAYS	
POTATO PATTY 4 DAYS	
SUBST. BEANS FOR	
POTATO PATTY 1 DAY	
TOTAL DAYS <u>10 DAYS</u>	
ACTUAL SHIPMENTS AUG. 18 - SEPT. 16	<u>48,617 CXS</u>
SHIPPING DAYS	<u>21 DAYS</u>
AVERAGE SHIPPED PER DAY	<u>2,315 CXS</u>
GOVERNMENT CAUSED DELAY	
2,315 CXS X 10 DAYS	23,150 CXS
CURRENT INCREMENT	32,869 CXS

	<u>56,019 CXS</u>
PERCENT TOWARD CURRENT REQUIREMENT	
56,019 CXS ÷ 80,000 CXS	<u>70%</u>
LOSS RATIO MAXIMUM	<u>\$ 1,987,065</u>
MAXIMUM PROGRESS PAYMENT DUE	
\$1,987,065 x 70%	<u>\$ 1,390,945</u>

PAYMENT TO BE MADE:	
PP #20	\$ 1,000,000
PP #21	390,945

	<u>\$ 1,390,945</u>

OR

PAYMENT TO BE MADE

PP #20 (70% x \$1,000,000)

PP #21

\$ 700,000

690,945

\$ 1,390,945

MAXIMUM REMAINING BALANCE

PAYMENT TO BE MADE

\$ 1,949,685

1,390,945

BALANCE

\$ 558,740

REMAINING PAYMENTS TO BE MADE

9/25

\$ 100,000

10/2

100,000

10/9

100,000

10/16

100,000

10/23

100,000

10/30

58,740

\$ 558,740

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT			1. CONTRACT ID CODE	PAGE OF PAGE
AMENDMENT/MODIFICATION NO. 0005	3. EFFECTIVE DATE 25 SEP 86	4. REQUISITION/PURCHASE REQ. NO. ARS-85-294-000101	5. PROJECT NO. (if applicable)	1 5
ISSUED BY Logistics Agency Personnel Support Center 800 South 20th Street P.O. Box 8059 Philadelphia, Pa. 19101-8059	CODE SP0102	7. ADMINISTERED BY (if other than Item 6) CODE		
NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)		(X) 9A. AMENDMENT OF SOLICITATION NO. DLA13H-86-R-8359 9B. DATED (SEE ITEM 11) 16 MAY 86 10A. MODIFICATION OF CONTRACT/ORDER NO. 10B. DATED (SEE ITEM 13)		

Bidder's Mailing List HPPR-1

E	FACILITY CODE
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11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

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

Contractor must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods:

(a) By completing Items 8 and 15, and returning 1 copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

ACCOUNTING AND APPROPRIATION DATA (if required)

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

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

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

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

D. OTHER (Specify type of modification and authority)

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

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

A. Confirming telecons 24 September 86, discussions under subject solicitation are hereby concluded. Best and Final Offers are requested for the quantities under which you offered as cited in Amendment 0002 and an alternate quantity proposal. This amendment incorporates the changes for that alternate quantity proposal, a change in delivery schedule and a revised schedule for delivery of certain GFM.

B. All terms and conditions of subject solicitation and amendments 0001, 0002, 0003 and 0004 remain the same and in effect except as changed herein. All qualifications not accepted in negotiations and stated in Amendment 0004 continue to be unacceptable. Any additional qualifications submitted may eliminate an Offeror's proposal from consideration.

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

CONTINUATION SHEET

REFERENCE NO. OF DOCUMENT BEING CONTINUED

PAGE OF

DLA13H-86-R-8359

0005

2

5

PAGE

NAME OF OFFEROR OR CONTRACTOR

O.	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
	C. The following additions, deletions and substitutions, which supersede all previous changes, apply:				
	1. Amendment 0002:				
	a. Pages 3 and 4, for the following line items, delete the cited quantity and substitute the following:				
	<u>LINE ITEM</u>	<u>QUANTITY</u>			
	0001AG	250,896			
	0001AE	373,896			
	0001AG	373,896			
	0001AL	204,650			
	0001AR	193,974			
	0001AU	251,496			
	0001AX	251,496			
	0001BA	262,598			
	0001BC	373,896			
	0001BE	373,896			
	b. Page 4, delete:				
	"0001BF COLD STORAGE 2	394,460	BX"		
	c. Page 5, after "20%", add "				
	<u>"ALTERNATE PROPOSAL:</u>				
	Unit Price for Assembly, all sub-assemblies and Contractor Furnished Material for each quantity level for which your firm is qualified.				
				40%	
				31%	
				10%	
				11%	
	d. Page 79, Section "F" is superseded. Delete aforesaid page and substitute the page attached as the last page of this Amendment 0005.				
	e. Pages 84-85, Clause H-5 J., the delivery periods for certain components are changed. Delete those cited as applicable and substitute the following:				

CONTINUATION SHEET	REFERENCE NO. OF DOCUMENT BEING CONTINUED	PAGE	OF
	DLA13H-86-R-8359 0005	3	5
NAME OF OFFEROR OR CONTRACTOR			

SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
<u>"THERMOSTABILIZED MEATS AND POULTRY</u>				
15% 15-30	JAN 87			
15% 16-27	FEB 87			
10% 16-31	MAR 87			
10% 15-30	APR 87			
10% 15-29	MAY 87			
10% 15-30	JUN 87			
10% 15-31	JUL 87			
10% 17-31	AUG 87			
10% 15-30	SEP 87"			
<u>"CRACKERS</u>				
10% 19-30	JAN 87			
9% 16-27	FEB 87			
9% 16-31	MAR 87			
9% 20-30	APR 87			
9% 19-29	MAY 87			
9% 19-30	JUN 87			
9% 20-31	JUL 87			
9% 17-31	AUG 87			
9% 21-30	SEP 87			
9% 19-30	OCT 87			
9% 2-13	NOV 87"			
<u>"BEVERAGE BASE</u>				
10% 15-30	JAN 87			
10% 16-27	FEB 87			
10% 16-31	MAR 87			
10% 15-30	APR 87			
10% 15-29	MAY 87			
10% 15-30	JUN 87			
10% 15-31	JUL 87			
15% 17-31	AUG 87			
15% 15-30	SEP 87"			
f. PAGE 95, Clause M-1;				
1. For the alternate proposal, add the following paragraphs:				

SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
<p>3.a. OFFERS WILL BE EVALUATED IN THE FOLLOWING MANNER. THE 40% PORTION WILL BE AWARDED TO THE LOW RESPONSIVE, RESPONSIBLE OFFEROR ON THAT PORTION. THE 31% PORTION WILL BE AWARDED TO THE LOW, RESPONSIVE, RESPONSIBLE OFFEROR ELIGIBLE FOR THAT PORTION, UNLESS THAT OFFEROR RECEIVED AWARD OF THE 40% PORTION. THE 18% PORTION WILL BE AWARDED TO THE LOW RESPONSIVE RESPONSIBLE OFFEROR ON THAT PORTION, UNLESS THAT OFFEROR RECEIVED AWARD OF EITHER THE 40% OR 31% PORTIONS. THE FINAL 11% WILL BE AWARDED TO THE LOW RESPONSIVE, RESPONSIBLE OFFEROR ON THAT PORTION WHO DID NOT RECEIVE AN AWARD OF ANY OF THE ABOVE PORTIONS.</p>				
<p>3.b. EITHER ONE OF THE ABOVE OFFER EVALUATION APPROACHES MAY BE APPLIED TO DETERMINE THE PATTERN OF AWARDS, BUT NOT BOTH. THE SELECTED EVALUATION APPROACH SHALL BE USED EXCLUSIVELY AND IN ITS ENTIRETY AND IN NO EVENT COMBINED WITH ANOTHER APPROACH.</p>				
<p>2. Add the following to table "A":</p>				
<p style="padding-left: 40px;">"For Alternate Proposal</p>				
2,000,000 - unlimited	1,735,504		40%	
1,200,000 - 1,999,999	1,345,077		31%	
850,000 - 1,199,999	781,013		18%	
600,000 - 849,999	477,286		11%	
<p>d. Clause L-5, for the Best and Final offer, <u>ALL</u> revised prices must be supported with submission of revised cost data by time of closing.</p>				
<p>e. The following two clauses apply to this Best and Final Amendment 0004 as if set forth herein in full text:</p>				
<p>L40 LATE SUBMISSIONS, MODIFICATIONS, AND WITHDRAWALS OF PROPOSALS (APR 1984). 1</p>				
<p>L59A TIMELINESS AND PLACE OF RECEIPT OF OFFERS/MODIFICATIONS/WITHDRAWALS (APR 1985) DPSC</p>				
<p>f. Date and Time for receipt of Best and Final offers is hereby established at 3:00 PM E.D.T. local time, 14 October 86.</p>				
<p>g. Best and Final offers must contain explicit agreement to all terms and conditions of Solicitation DLA13H-86-R-8359, Amendment 0001, Amendment 0002, Amendment 0003, Amendment 0004 and this Best and Final Amendment 0005.</p>				

CONTINUATION SHEET

REFERENCE NO. OF DOCUMENT BEING CONTINUED

DLA1311-86-R-8359

0005

PAGE OF

5

5

PA

NAME OF OFFEROR OR CONTRACTOR

NO.	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
SECTION "F" DELIVERIES					
F-1	Delivery is required to be made in accordance with the following schedule:				
	<u>DESTINATION</u>	<u>DELIVERY BY</u>	<u>TPK</u>		
0001AA	Pirmasens, Ger	2-31 Mar 87	2	60,000 BX	
0001AB	DVD Marines	2-31 Mar 87	2	123,000 BX	
0001AC	Cold Storage	2-31 Mar 87	2	250,896 BX	
0001AD	Pirmasens, Ger	1-30 Apr 87	2	60,000 BX	
0001AE	Cold Storage	1-30 Apr 87	2	373,896 BX	
0001AF	Pirmasens, Ger	1-29 May 87	2	60,000 BX	
0001AG	Cold Storage	1-29 May 87	2	373,896 BX	
0001AH	Pirmasens, Ger	1-30 Jun 87	2	60,000 BX	
0001AJ	DVD Air Force	1-30 Jun 87	2	10,710 BX	
0001AK	DVD GSA	1-30 Jun 87	2	25,000 BX	
0001AL	Cold Storage	1-30 Jun 87	2	204,650 BX	
0001AM	Pirmasens, Ger	1-31 Jul 87	2	60,000 BX	
0001AN	DVD Marines	1-31 Jul 87	2	122,400 BX	
0001AO	DVD Navy	1-31 Jul 87	2	18,358 BX	
0001AP	DVD Army	1-31 Jul 87	2	39,164 BX	
0001AR	Cold Storage	1-31 Jul 87	2	193,974 BX	
0001AS	Pirmasens, Ger	3-31 Aug 87	2	60,000 BX	
0001AT	DVD Marines	3-31 Aug 87	2	122,400 BX	
0001AU	Cold Storage	3-31 Aug 87	2	251,496 BX	
0001AV	Pirmasens, Ger	1-30 Sep 87	2	60,000 BX	
0001AW	DVD Marines	1-30 Sep 87	2	122,400 BX	
0001AX	Cold Storage	1-30 Sep 87	2	251,496 BX	
0001AY	Pirmasens, Ger	1-30 Oct 87	2	60,000 BX	
0001AZ	DVD Marines	1-30 Oct 87	2	111,298 BX	
0001BA	Cold Storage	1-30 Oct 87	2	262,598 BX	
0001BB	Pirmasens, Ger	2-30 Nov 87	2	60,000 BX	
0001BC	Cold Storage	2-30 Nov 87	2	373,896 BX	
0001BD	Pirmasens, Ger	1-31 Dec 87	2	60,000 BX	
0001BE	Cold Storage	1-31 Dec 87	2	373,896 BX	
0002AA	DVD Air Force	1-29 May 87	2	133,536 BX	
003	When required by Clause II5, FIRST ARTICLES shall be delivered within 60 calendar days after the date of award.				



DEFENSE LOGISTICS AGENCY

DEFENSE PERSONNEL SUPPORT CENTER
2800 SOUTH 20TH STREET
PO BOX 8418
PHILADELPHIA, PENNSYLVANIA 19101-8418

CLAIM
EX 9

OCT 10 1986

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

IN REPLY
REFER TO

DPSC-HPPR(Dyduck/Adellzz1/(215)952-3663/dds)

SUBJECT: Industrial Preparedness Plan (IPP) 84-S-67-86,
Meal, Ready-to-Eat, Assembly (MRE)

Mr. Henry Thomas
President
Freedom N.Y., Inc.
1600 Bronxdale Ave
Bronx, NY 10462

File IPP-MRE?
A

Dear Mr. Thomas:

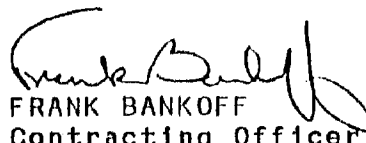
Reference subject plan dated 13 January 1986 which was submitted by you in connection with solicitation DLA13H-86-R-0359, Meal, Ready-to-Eat, Assembly.

This office has completed their evaluation of subject IPP Package and supporting subcontracting documents which were furnished to DCASMA New York.

This office concurs with the certification of DCASMA New York which states that Freedom N.Y., Inc. has the capability to assemble the monthly allocated quantity of 700,000 cases of MRE at M+90 cited in the subject IPP Package.

Additionally, all subcontracting documentation provided with the planning package supports Freedom N.Y., Inc.'s ability to meet this allocated quantity.

Your continued support in the Industrial Preparedness Planning Program is greatly appreciated.


FRANK BANKOFF
Contracting Officer

**Bankers
Leasing
Association
Incorporated**

155 Revere Drive • Northbrook, Illinois 60062 • (312) 654-8353

October 7, 1986

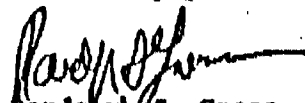
Mr. William Stokes
Defense Logistics Agency
Defense Contract Administration Services Region, New York
201 Varick St.
New York, New York 10014-4811

Subject: Freedom, N.Y., Inc.
Solicitation DLA13H-85-R-8359

Dear Mr. Stokes:

In the event the above Solicitation, which is eligible for progress payments under the FAR is awarded, we will extend a \$6 million dollar line of credit for the subject company. This line of credit can be used for financing accounts receivable, material inventory, and other allowable incurred costs under the Contract. In addition, we will be the assignee under the Assignment of Claims provision of the Contract. Furthermore, monies still due us because of MRE V will not reduce this line of credit. Also, monies still due us after completion of MRE V will be amortized from anticipated profits derived from this and other contracts between the Government and Freedom, N.Y., Inc.

Very truly yours,


Randolph S. Gross
Executive Vice President

RBG/jh

cc: Henry Thomas, Freedom, N.Y., Inc.

OFFICES IN PRINCIPAL CITIES

(800) 323-4380 Except in Illinois

**** PRNRPX UF-408 *****

15:24

02/18/1987

02505891 P.03

XEROX TELECOPIER 296 : 2-18-87: 4:22 PM:

02505891 +



71E MRES

DEFENSE LOGISTICS AGENCY

DEFENSE PERSONNEL SUPPORT CENTER

2800 SOUTH 20TH STREET

PO BOX 8419

PHILADELPHIA, PENNSYLVANIA 19101-8419

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Claim
EX II

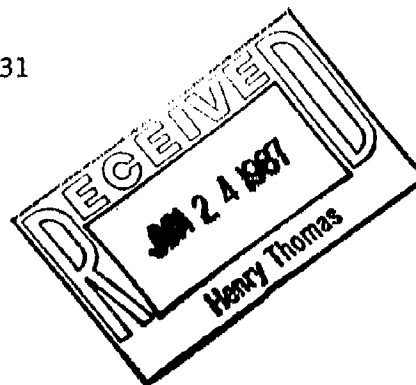
JUN 22 1987

IN REPLY
REFER TO

DPSC-HPPR (Bankoff/215-952-3660/ed)

SUBJECT: Contract DLA13H-85-C-0591 Modification P00031
Termination for Default

Mr. Henry Thomas
President
243 California Road
Mt. Vernon, NY 10552



Dear Mr. Thomas:

Reference Contract DLA13H-85-C-0591 awarded 15 November 1984 for 620,304 cases of Meal, Ready-to-Eat, Individual (MRE) and DAR Clause 7-103.11 titled "Default" which forms a part of the contract.

Notice of Termination for Default

Effective immediately, the undelivered quantity of 107,842 cases under the subject contract is hereby terminated for default pursuant to the Default clause.

Findings of Fact

The undersigned Contracting Officer makes the following findings of fact:

1. Contract DLA13H-85-C-0591 was awarded 15 November 1984 for 620,304 cases of MRE assembly with required delivery of 100,000 (or more) cases each month during the period July thru December 1985.
2. In accordance with modification P00030 dated 23 April 1987, the seventh contract delivery schedule extension granted to your firm, of the 107,842 cases remaining on the subject contract, 57,780 cases were to be delivered 1-30 August 1987 and the final 50,062 cases delivered in 1-30 September 1987.
3. On 7 November 1986, Freedom ceased final production of assembled MRE cases. Since that time, Freedom has not resumed production. As of 3 April 1987, Freedom was evicted from its place of production at 1600 Bronxdale Avenue, Bronx, NY and has never obtained another facility at which to complete the contract. Additionally, on 28 April 1987, an auction was conducted at the Bronx facility and Freedom's production equipment necessary for contract performance was sold off.

SUBJECT: Contract DLA13H-85-C-0591 Modification P00031
Termination for Default

4. Under the terms of Freedom's contract, as specified in Section H, and clause 7-104.24, "Government Property", and Appendix B of the Defense Acquisition Regulations (DAR), Freedom is responsible for the adequate inventory control of all Government property to include establishing and maintaining correct inventory control records, storing and safeguarding all property, segregating useful product from non-useful product, and to use, prepare for shipment or dispose of as instructed, all Government property, for up to 90 days after completion of the contract. Freedom has failed to comply with these contractual requirements.

5. By your failure to perform your inventory control requirements and to make progress towards completing your contract in accordance with the delivery schedule, you indicated your inability to fulfill your contractual obligations. When you are awarded a contract you have the responsibility to comply with all terms and conditions of the contract and to deliver the product by the required delivery date. Therefore, your default is found by the Contracting Officer not to have resulted from causes beyond your control and without your fault or negligence. Such default affords the Government the right to terminate under the "Default" clause, and the Government reserves all rights and remedies provided by law or regulation under the contract.

6. Under the terms of the Default clause, referenced above, the Government is empowered to reprocore the supplies required by this contract in the open market and hold Freedom liable for any excess reprocorement costs incurred as a result thereof.

Decision

In the independent exercise of my best judgement, it is my decision as Contracting Officer that this Termination for Default taken against you as described above is valid. This is the final decision of the Contracting Officer. This decision may be appealed to the Armed Services Board of Contract Appeals, 200 Stovall St., Hoffman Bldg. II, Alexandria, VA 22332, within ninety (90) days from the date you receive this decision. A copy thereof shall be furnished to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, should reference this decision and identify the contract number. In lieu of appealing to the Armed Services Board of Contract Appeals, you may bring action directly to the U.S. Claims Court within 12 months from the date you receive this decision.

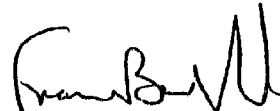
DPSC-HPPR

PAGE 3

SUBJECT: Contract DLA13H-85-C-0591 Modification P00031
Termination for Default

An optional Acceleration procedure is available if the disputed amount is \$50,000.00 or less and if you elect that procedure. If the amount in dispute is \$10,000.00 or less, you may elect to have the appeal processed under a Small Claims Expedited Procedure also made available by the Contract Disputes Act. Both the revised Accelerated Procedure and Small Claims Expedited Procedure are described in the supplement to Board Rule 12. This supplement provides for a 180 day limit on processing Small Claims Expedited Procedure cases.

Sincerely,



FRANK BANKOFF
Contracting Officer

File Date: ~~29 JAN 86~~

85141 TXI

Claim
EX 12
Page 1

DX

EASYLINK MBX 9570442A001 29JAN86 19:49/09:58 EST
VIA: 5101001911
WU INFOMASTER 4-019114A029 01/29/86
TO: 62075143

FREEDOM UD

WU INFOMASTER 4-019114A029 01/29/86
ICS DODCRSA ABN
00154 DOD CRC ALBANY GA 300040Z JAN 86/030
TWX 5101001911 FREEDOM UD

1 P RUEOBKA2353 0300025 DS-GB4C
P-291500Z JAN 86 HAND DELIVER DO NOT MAIL
FM DEFENSE PERSONNEL SUPPORT CENTER//2000 SOUTH
20TH STREET//PHILADELPHIA PA 19101
TO RUCLRFA/FREEDOM NY INC//1600 BRONXDALE AVE//BRONX NY
14462//ATTN HENRY THOMAS
DS-GB4C
UNCLAS

DPSC-SFPR-86-0056(0)

SUBJECT: MRE VII ASSEMBLY IPP PRODUCTION AND CORRESPONDING PEACE-
PAGE 02 RUEOBKA2353 UNCLAS
MRE AWARD ELIGIBILITY

1. IT IS ANTICIPATED THAT THE FOLLOWING TABLE WILL BE INCLUDED IN
THE SOLICITATION FOR THE MRE ASSEMBLY:

MONTHLY ALLOCATED IPP QTY AT M+90	MAXIMUM SHARE QTY	% OF REQUIREMENT
2,000,000 - UNLIMITED	2,125,468	47%
1,200,000 - 1,999,999	1,492,350	33%
600,000 - 1,999,999	904,454	20%

2. IF YOU HAVE ANY QUESTIONS REGARDING THE ABOVE TABLE CONTACT MARY
ADELIZZI OR LOIS DYDUCK ON (215)952-3663.

3. SIGNED FRANK BANKOFF, CONTRACTING OFFICER.

1951 EST

^
FREEDOM UD

NNNN

YOUR MAILBOX IS NOW EMPTY
EASYLINK

12960A 30JAN86 09:58 EST
S
7001T

only
3 AWARDS
for MRE ?

Claim
EX 13

01 April 1986

NAME: Freedom P.Y., Inc.

ACC: FARVIN LIFENAP

ADDRESS: 1600 Bronxdale Avenue
Bronx, N.Y. 10462

PHONE #: (212) 822-7500

CONTRACT #: FLA1311-85-C-0501

QUANTITY: 505,546 Cases

DISCUSSION

1. At the IPSC meeting on 26 March 1986 with Freedom representatives, the Government attempted to settle all outstanding actions including Freedom's claim for equitable adjustment, dated 20 March 1986, in the amount of \$3.4 million. Specifically, the Government was willing to:

a. Reinstate to the contract the previously terminated for default quantity of 114,758 cases.

b. Extend the delivery schedule on a "no cost" basis to October 1986.

c. Return the \$200,000 in monetary consideration taken for past delivery schedule extensions.

d. Pay Freedom approximately \$500,000 in capital type costs that had been allowed by the FCC in the negotiation of the basic contract.

However, no settlement was reached because Freedom: a) wanted a guaranteed portion of the next ration procurement (MRF VII) and b) refused to waive the \$3.4 million claim against the Government. The meeting concluded with IPSC, Phila advising Freedom that it was going to refer the entire matter to FLA Headquarters, Cameron Station, Va.

2. The ACC received Freedom's "estimates to complete" for both the original (620,304 cases) and current (505,546 cases) contract quantities. The estimates showed losses of \$2.2 million and \$3.1 million respectively. The estimates have been forwarded to the Financial Services Branch ICASFA PY for Audit and Technical evaluation.

3. As of 1 April 1986, a total of 123,176 cases have been accepted and 120,447 cases have been shipped. The end of April 1986 cumulative delivery requirement is 180,000 cases. Farring any unforeseen developments, this requirement should be achieved.

4. Progress Payment No. 10 (\$1,412,276) which was received on 21 March 1986 is being held for audit and technical review. In view of Freedom's projected losses, the ACC has decided to apply the loss ratio formula, per IAR Appendix F, on all current and future Progress Payments.



IN REPLY
REFER TO

DEFENSE LOGISTICS AGENCY
DEFENSE CONTRACT ADMINISTRATION SERVICES MANAGEMENT AREA
NEW YORK
201 VARICK STREET
NEW YORK, NEW YORK 10014-4811

Claim
Ex 14

DCASP NY-GMAA-7 (M. Liebman (AV) 994-3304/wp)

4 April 1986

SUBJECT: Freedom M.Y., Inc.
Contract DLA 13H-85-C-0591

THRU: DCASR NY-A
ATTN: James Triscoll

TO: DLA-ACA
ATTN: Mr. John Galbraith

1. Introduction

As per 1 March 1985 DLA Headquarters request, this is the twenty-fourth (24th) status report on subject contract.

2. Contract Status

a. Freedom, M.Y., Inc. is currently meeting its scheduled delivery requirements. As of 1 April 1986, a total of 133,176 cases have been accepted and 130,447 cases have been shipped. The end of April cumulative delivery requirement is 180,000 cases. Barring any unforeseen developments, this requirement should be achieved.

b. Pursuant to an Industry meeting with the Health Services Command, the contractor was advised by DPSC, Philadelphia, PA in a TWX dated 21 March 1986 that specially trained teams would be sent to each assembly location to pre-screen all retort lots prior to assembly. This pre-screening will include both CFM and GFM retort items. The TWX also stated that samples would be individually inspected in accordance with prescribed inspection criteria for evidence of leakers, swellers and/or visual holes. The contractor was informed that a medical hold could be placed on products by inspection personnel due to their concern for wholesomeness of the product and its potential health risk to the user.

c. A meeting was held at DPSC, Philadelphia, PA on 26 March 1986 with DCASMA, NY representation to review and settle the Contractor's claim dated 21 March 1986 in the amount of \$3.4 million. Specifically, the Government was willing to settle all outstanding actions by:

(1) Reinstating to the contract the previously terminated for default quantity of 114,758 cases.

11 April 1986

(2) Extending the delivery schedule on a "No Cost" basis to October 1986.

(3) Returning the \$200,000 in monetary consideration taken for past delivery extension(s).

(4) Paying Freedom approximately \$500,000 in Capital type costs that had been allowed by the PCO in the negotiation of the basic contract. However, no settlement could be reached because Freedom wanted a guaranteed portion of the next ration procurement (MRE VII) and refused to waive the \$3.4 million claim against the Government. The meeting concluded with FPSC advising Freedom that it was going to refer the entire matter to FLA Hdqrs, Cameron Station, VA.

3. The contractor furnished his "estimate(s) to complete" for both the original (620,304) cases and current contract quantity of (505,546) cases. The estimates showed losses of \$2.2 million and \$3.1 million respectively. The "estimate(s) to complete" were forwarded to the DCASMA, New York Financial Services Branch for Audit and Technical review.

4. Progress Payment No. 14 (\$1,412,276) which was received on 21 March 1986 is being held for audit and technical review. In view of Freedom's projected losses, the ACO has decided to apply the Loss Ration formula per DAR Appendix F on all current and future progress payments.

5. Progress Payments

Requested to Date - Approx. \$12.1 million
(PP's 1-14)

Paid to Date - Approx. \$8.7 million
(PP's 1-13)

Disallowed/Questioned - Approx. \$1.7 million

Deducted under FP# 13 - \$300,000
because of contract
being in loss position

Held for Review/Audit - \$1.4 million
(PP #14)

DCASB NY-GHAA-7 Page 3
SUBJECT: Freedom, N.Y., Inc.
Contract FLA13H-P5-C-0501

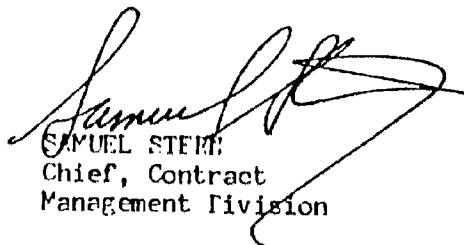
11 April 1986

6. FAR Deviation Request

There has been no decision regarding the FAR Deviation Request which had been forwarded by the PCC, FPSC TO FLA Hdqrs, Cameron Station on 4 November 1

7. DCASMA NEW YORK: IN THE FOREFRONT OF QUALITY AND SERVICE.

FOR THE COMMANDER:


SAMUEL STERN
Chief, Contract
Management Division

*Copies (1-2) hand carried to Mr J. G. Galt
"C" - Region 4/1/86*

MBX

File MRE 7 File 2.

Claim
Ex 15

L1 ☐
KS ☐
PM ☐
JC ☐

EASYLINK MBX 3575943A001 17APR86 18:27/12:45 EST
C : 5101001911
NO INFOMASTER 4-016065A107 04/17/86
TO: 62875143

FREEDOM UD

NO INFOMASTER 4-016065A107 04/17/86
ICS DODCRSE ABN
04159 DOD CRC ALBANY GA 172319Z APR 86/107
TUX 5101001911 FREEDOM UD

4 Awards
for MRE 7
-A7

1 P RUEDBKA2017 1072209 DS-GB4C
P 172000Z APR 86 ZEX HAND DELIVER DO NOT MAIL RETURN RECEIPT REQUEST
FM DEFENSE PERSONNEL SUPPORT CENTER 2800 SOUTH
20TH STREET PHILADELPHIA PA 19101
TO RUCLRFA/FREEDOM NY INC 1600 BRONXDALE AVE BRONX NY 10462
//ATTN HENRY THOMAS//
DS-GB4C
UNCLAS
DPSC-5PPR-86-0408(O)
SUBJECT: MRE VII IPP PRODUCTION AND CORRESPONDING PEACEFIRE AWARD
PAGE 02 RUEDBKA2017 UNCLAS
ELIGIBILITY

1. REFERENCE DPSC WIRE 291500Z JAN 86, SUBJECT AS ABOVE.
2. IT IS ANTICIPATED THAT THE FOLLOWING TABLE WILL BE INCLUDED IN THE SOLICITATION FOR MRE ASSEMBLY:

1. ONLY ALLOCATED

QTY AT M PLUS 90	MAXIMUM SHARE QTY	PCT OF REQUIREMENT
2,000,000 - UNLIMITED	2,182,132	41%
1,200,000 - 1,999,999	1,596,681	30%
850,000 - 1,199,999	904,786	17%
500,000 - 849,999	638,674	12%

3. THIS TABLE SUPERCEDES THE TABLE CITED IN REFERENCE ABOVE.
4. IF YOU HAVE ANY QUESTIONS REGARDING THE ABOVE TABLE CONTACT LOIS DYDUCK OR MARY ADELIZZI ON (215)952-3663;
5. SIGNED FRANK BANKOFF, CONTRACTING OFFICER.

1021 EST

FREEDOM UD

NNNN

NAME OF OFFEROR OR CONTRACTOR

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT															
	<p><u>SECTION "M" EVALUATION FACTORS FOR AWARD</u></p> <p>3. OFFERS WILL BE EVALUATED IN THE FOLLOWING MANNER. THE 41% PORTION WILL BE AWARDED TO THE LOW RESPONSIVE, RESPONSIBLE OFFEROR ON THAT PORTION. THE 30% PORTION WILL BE AWARDED TO THE LOW, RESPONSIVE, RESPONSIBLE OFFEROR ELIGIBLE FOR THAT PORTION, UNLESS THAT OFFEROR RECEIVED AWARD OF THE 41% PORTION. THE 17% PORTION WILL BE AWARDED TO THE LOW RESPONSIVE RESPONSIBLE OFFEROR ON THAT PORTION, UNLESS THAT OFFEROR RECEIVED AWARD OF EITHER THE 41% OR 30% PORTIONS. THE FINAL 12% WILL BE AWARDED TO THE LOW RESPONSIVE, RESPONSIBLE OFFEROR ON THAT PORTION WHO DID NOT RECEIVE AN AWARD OF ANY OF THE ABOVE PORTIONS.</p> <p>4. IN THE EVENT A FAIR AND REASONABLE PRICE ON ANY PORTION IS NOT ACHIEVED AFTER NEGOTIATIONS WITH ALL QUALIFIED OFFERORS THE GOVERNMENT RESERVES THE RIGHT TO AWARD A LETTER CONTRACT ON THAT PORTION OR TO NEGOTIATE THAT PORTION WITH ALL OFFERORS AND TO AWARD THAT PORTION TO A FIRM WHO HAS RECEIVED AN AWARD UNDER ANOTHER PERCENTAGE GROUP.</p> <p>TABLE "A"</p> <p>MAXIMUM AWARD QUANTITIES CORRESPOND TO ALLOCATED M+90 MONTHLY CAPACITY LEVELS AS FOLLOWS:</p> <table><tr><th>MONTHLY ALLOCATED IPP QUANTITY AT M+90</th><th>MAXIMUM SHARE QUANTITY</th><th>% OF REQUIREMENT</th></tr><tr><td>2,000,000 - UNLIMITED</td><td>2,182,131</td><td>41%</td></tr><tr><td>1,200,000 - 1,999,999</td><td>1,596,681</td><td>30%</td></tr><tr><td>850,000 - 1,199,999</td><td>904,786</td><td>17%</td></tr><tr><td>600,000 - 849,999</td><td>638,674</td><td>12%</td></tr></table> <p><u>4 AWARDS</u></p> <p>16 MAY 86</p>	MONTHLY ALLOCATED IPP QUANTITY AT M+90	MAXIMUM SHARE QUANTITY	% OF REQUIREMENT	2,000,000 - UNLIMITED	2,182,131	41%	1,200,000 - 1,999,999	1,596,681	30%	850,000 - 1,199,999	904,786	17%	600,000 - 849,999	638,674	12%				<p>Claim Ex 16</p>
MONTHLY ALLOCATED IPP QUANTITY AT M+90	MAXIMUM SHARE QUANTITY	% OF REQUIREMENT																		
2,000,000 - UNLIMITED	2,182,131	41%																		
1,200,000 - 1,999,999	1,596,681	30%																		
850,000 - 1,199,999	904,786	17%																		
600,000 - 849,999	638,674	12%																		



DEFENSE LOGISTICS AGENCY
HEADQUARTERS
CAMERON STATION
ALEXANDRIA, VIRGINIA 22304-6100

File MRE₅

REF TO DLA-P

May 15, 1986

MEMORANDUM FOR RECORD

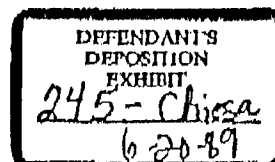
Claim
Ex 17

SUBJECT: Freedom Industries

1. I received a call today from Ms. Andrea Fischer, OASD, advising me that Mr. Henry Thomas had called Vice President Bush's office. Ms. Fischer asked if I would return the call to Lt Colonel Doug Menarchick, an active duty officer assigned to Vice President Bush's staff.
2. Lt Colonel Menarchick advised me that Mr. Thomas claims that he has an acceptable agreement with the Defense Logistics Agency but that he can not get it in writing.
3. I advised Colonel Menarchick that the agreement that we reached with Mr. Thomas had, in fact, been reduced in writing and that we were prepared to sign a modification to the contract implementing that agreement. I informed the Colonel that Mr. Thomas was seeking some additional commitments from the Agency, some of which we were prepared to give and some which we considered inappropriate. Mr. Thomas has asked for expedited processing of a request for loan guarantee and is requesting production assistance. Colonel Menarchick was advised that we have agreed on those issues and would confirm those agreements in writing.
4. However, other requests made by Mr. Thomas deal with follow-on competitive contracts and other financing issues which neither the contracting officer nor the Defense Logistics Agency management can agree to without extending preferential treatment to one of the competitors in our industrial base.
5. Colonel Menarchick advised me that he would inform Mr. Thomas that some of the issues could be agreed to and that some probably could not and that the issue should be addressed with Mr. Karl Kabeiseman, DLA General Counsel or with me.

cc:
General Litke
Mr. Kabeiseman,

R. F. Chies
R. F. CHIESA
Executive Director
Contracting



800484

FOR OFFICIAL USE ONLY

NOV-17-89 FRI 16:30 BINGHAM SUMMERS WELSH

P. 03

*Claim
Ex 18*

DLA-PPP

Lieutenant Colonel Doug Menarchick, USAF
Military Assistant to the Vice President
Room 292, Old Executive Office Building
Washington, D.C. 20501

Dear Colonel Menarchick:

I have attached copies of the documents that you requested during our telephone conversation of 16 May 1986.

The first enclosure is the proposed modification to the contract which we are prepared to sign. The second enclosure is a draft letter from Mr. Thomas by which he would like to elicit additional commitments from this Agency. As I informed you, we are prepared to commit ourselves to timely processing of the loan guarantee request and the request for production assistance. We believe that any other commitments would be inappropriate.

Additional information can be obtained from me or from the Agency Counsel, Mr. Kabeisman.

Sincerely,

2 Encl

1. Proposed Modification
2. Ltr from Mr. Thomas

cc: *d/t*
P ESO PP PPP/H.Hermann/47936/di/19 May 86
WP: LTR/MANARCHI

File No. _____

DLA-G _____

REF: As of 16 May, modification had not been signed by Friedman or UPSC per Peggy Rowles (UPSC-SPP). Address for Lt Col Menarchick obtained by phoning his office 395-4223.

PD

PP

*Peggy Rowles
19 May*

800058

File MRES

FREEDOM, N.Y., INC.

M E M O R A N D U M

Claim
Ex 19

TO: Henry Thomas, President ✓
FROM: Patrick G. Marra, Executive Vice President/
Chief Financial Officer
DATE: November 10, 1986
RE: Progress Payments

On November 10 I had a further telephone conversation with Marvin Liebman regarding release of progress payments.

His position has not changed, he won't release any more payments under current conditions. He won't "increase the Governments" exposure until either Bankers shows additional financial support or DPSC awards a contract.

(A)



FREEDOM, NY, INC.

1600 BRONXDALE AVENUE

BRONX, NY 10462

(212) 822-7500

MRES



1WX 510 100 1911
FREEDOM UD

Claim
Ex 20

November 12, 1986

Mr. Frank Bankoff, DPSC-IIPPR
Contracting Officer
Defense Personnel Support Center
2800 South 20th Street
Philadelphia, Pa 19101

COPY

Dear Mr. Bankoff:

In connection with negotiations which led to the signing of Contract Modification P00029, we alerted the Government to an impending cash shortfall which would preclude Freedom from completing its current MRE contract, (see letter of September 29, 1986).

We further advised the Government that the cash shortfall could be covered by award of an MRE VII contract. We proposed two alternatives to avert the cash shortfall:

- I - Contract award by October 17
- II - Contract award deferred until November 7; however this alternative required acceleration of Progress Payments.

The cash shortfall has, in fact, occurred and not only has there been no award of MRE VII but Mr. Liebman, the ACO, has effectively suspended all payments to us.

Contract Modification P00028 permits the ACO to release progress payments of \$285,275 based on 508,000 cases of product which has been accepted by the Government. The ACO has decided to subvert the spirit of Mods. P00028 and P00029 by suspending progress payments. The informal reasons given are:

- . Lack of contract award of MRE VII.
- . Inadequate financial support.

By taking such action, the ACO has sent a message to our financial supporter, Bankers Leasing Association, Inc., that the Government is not willing to cooperate with Freedom during this period of financial crisis. This message has caused Bankers Leasing to retract financial support until such time that it is assured a contract will be awarded to Freedom.

FREEDOM, NY, INC.

Again, we are locked into a "Catch 22" situation. The ACO won't release funds until a contract is awarded and our banker has taken the same attitude.

We request your support of Freedom. We request you review the actions of the ACO to determine whether such actions are: a) consistent with the spirit of Mods. P00028 and P00029 and b) in the interest of the Government.

Sincerely,



Henry Thomas
President

cc: Col. Robert D. Chittenden, USAF, DPSC
Col. Lowell A. Grimaud, USAF, DPSC
Ms. Vera Zappile, DPSC

F:BANKOF25.LET

CAL 01
FAX TO RANDY GROSS
+ Cal Francois
FILE MRE 5
CLAIM Ex 21

FREEDOM, N.Y., INC.

MEMORANDUM

TO: Henry Thomas, President (A)
FROM: Patrick G. Marra, Executive Vice President/
Chief Financial Officer *Blawie*
DATE: November 5, 1986
RE: Status of Progress Payment ✓

Contract Mod. P00028 raised the progress payment ceiling from \$13.0M to \$15.8M and tied payments to completion of MRE cases.

Upon completion of 490K cases the ceiling is \$15.0M. The amount due FNY at 490K cases is \$105,275. Marv Liebman had indicated to me that release of payment would occur probably on October 24, and payment to Bankers' on Oct 28. Additionally, because FNY had completed 500,364 cases, the progress payment could be increased by \$103,640.

In anticipation of completion of the 505K cases, I advised Randy Gross that the progress payment would be between \$100K and \$250K, depending on actual cases completed.

Based upon 503,288 cases accepted through Nov. 4, the Progress Payment due FNY would be:

Amount for 490,000 cases	\$105,275
Amount for 13,288 cases	132,288

	\$237,563

On October 25/27 Marvin called to obtain information regarding the layoff of personnel. I explained the basic reasons for the layoff:

- Completion of rework
- Completion of 505K cases
- Start up of MRE 5A
- Shortage of GFM (eventually covered by substitutions)
- Need for MRE 7 contract (as discussed in our cash flow projections for Mod. P00029)

I also advised Marv that we were expecting to test and produce MRE 5A, and continue accessory/cracker production.

Marv advised me that to protect the Government exposure he had to discuss release of the progress payment with Frank Bankoff, specifically DPSC's plans for award of MRE 7.

On October 29 Marv advised me that:

- . He had instructed DCASMA Finance to suspend the 5% payment of invoices until further notice. (I questioned him as to whether he had to put this in writing to us and he said "no").
- . He had made no decision on the release of the Progress Payment. (I questioned his authority to do nothing and he stated that he could do so under DAR APPENDIX E in connection with his authority to limit exposure).

From October 29 through today I have followed up the status of this situation. Marv has stated that he will look at the situation on a day to day basis and as of October 31, would look toward this week to see progress on MRE 5A.

On Nov. 3, 4, 5, I called Marv and he was either out of the office or did not return my calls for other reasons. Clyde Martin advised me on Nov. 4 that there was no change and I told him that was not acceptable. He agreed to try to get a decision from Marv.

On Nov. 5, Marv returned my call and advised that he would not make a progress payment under present conditions and that F. Bankoff agreed. Also, DCASR Legal had agreed his action. This will be put in writing to us soon. Basic reasons given were:

- . His actions are justified by Mod. P00028. The ceilings in P00028 are not mandatory.
- . FNY can't complete the contract because its outside financing has stopped.
- . The major layoff of personnel.
- . FNY is in unsatisfactory financial condition.
- . The Government has no guaranty that we can complete contract.
- . We do not have sufficient inventory to produce more than 15K cases.
- . There is no guaranty that the Government's exposure can be eliminated through deliveries.
- . The Government can't increase exposure until outside financing flows or MRE 7 is awarded.

He suggested we speak to Bankoff.

I asked whether this was an intentional move to put us out of business -- He said definitely not.

I stated that if he is refusing to make payment until MRE 7 is awarded then he was in effect telling us to stop producing until we get MRE 7.

As a sidelight he stated that we do not have an open line of credit with Bankers. When I stated that he knew this from the beginning he said "yes".

CLAIM Ex 24

STANDARD FORM 36, JULY 1966 GENERAL SERVICES ADMINISTRATION FED. PROC. REG. (41 CFR) 1-16.101	CONTINUATION SHEET	REF. NO. OF DOC. BEING CONT'D. DLA13H-84-R-8257	PAGE 66 OF 96
NAME OF OFFEROR OR CONTRACTOR			

ITEM NO.	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
	SECTION "L" <u>INSTRUCTIONS, CONDITIONS AND NOTICE TO OFFERORS</u>				
L-1	<p><u>TYPE OF CONTRACT:</u> It is contemplated that firm fixed price contracts will be negotiated as a result of this solicitation. Notwithstanding the above the selection of an appropriate contract type and the negotiations of the final price shall be considered together. A contract type and price shall be negotiated that includes reasonable contractor risk and provides the resultant awardee with the greatest incentive for efficient economical performance. No contract type other than a firm fixed price shall be negotiated until a determination can be reached by the Procuring office that there is compatibility between the type of contract selected and the contractors accounting system.</p>				
L-2	<p><u>AVAILABILITY OF SPECIFICATIONS:</u></p> <p>Refer to Clause L-56 and L-57 of the DPSC 3595 Master Solicitation.</p>				
L-3	<p><u>ALL OR NONE OFFERS</u></p> <p>Under no circumstances will "All or None" offers be allowed under this procurement. Any contractors who submits a proposal based on an "All or None" offer will be promptly requested to remove this qualification. Failure to delete an "All or None" qualification will result in a determination by the PCO of unacceptability of the proposal</p>				
L-4	<p><u>APPROVAL OF FIRST ARTICLES AND PROGRESS PAYMENTS:</u> First Articles are required under this contract (see Item 0002, page 7), and must be approved prior to commencing production under this contract for that respective item. Prior to receipt of written approval of the respective CFM First Article, a ceiling of 25% of the dollar value of that item or subcontract of CFM, as delineated in line items 000201 thru 000220 of the schedule, is established for the purposes of progress payments. After acceptance of the First Article, the progress payment ceiling is increased to a maximum of 50% of the total item or subcontract dollar value whichever applies. Requests for increases beyond this 50% ceiling rate must be accompanied by a cash flow analysis detailing the necessity of the increase by showing the impact of progress payments on operations over and above the impact on profit. No other costs or increases in the progress payment rate will be allowed unless written approval is received from the PCO. In addition, a total progress payment ceiling for the entire contract is established at \$9,000,000 or 50% of the contract value whichever is lesser. Increases to this ceiling must be accompanied by a cash flow analysis, detailing impact over and above that on profit, as noted previously. Requests for increases for long lead time materials must also be accompanied by a similar cash flow statement. The progress payments shall be for only those costs that are determined by the Defense Contract Administration Office as reasonable, allowable to the contract, and consultant with sound and generally accepted accounting principles and practices.</p> <p>NEXT CLAUSE IS L07</p>				

Claim
Ex 23



Freedom Industries, Inc.

243 CALIFORNIA ROAD
MOUNT VERNON, NEW YORK 10552

(914)667-3542

TWX 710 562 0149
FREEDOM MTV

November 2, 1984

Mr. Thomas Barkewitz, Contracting Officer
Defense Personnel Support Center
2800 South 20th Street
Philadelphia, Penn. 19101

Re: DCASR-NY Report on Review of Proposal DLA13H-84-R-8257

Dear Mr. Barkewitz:

The purpose of this memorandum is to respond to the above referred report.

GENERAL

The report is essentially superceded and definately limited in use as guidance for establishing a "fair and reasonable" price for MRE to be assembled by Freedom Industries. The initial price of \$34.81 was reduced by Freedom to \$30.12 and further reduced to \$29.90. Such price reductions of \$3,045,910 more than adequately adjusts for the findings of DCASR and DCAA. Additionally the revised price of \$29.90 includes the additional occupancy costs of our new facility located at 1601 Bronxdale Avenue. Details of the line item cost changes were previously presented to DCASR and DCAA. We believe that both agencies will be satisfied that the price proposal of \$29.90 is "fair and reasonable" given the first-time nature of this project. In fact, it is our firm belief that a price of \$32.00 would be more appropriate under presently estimated conditions. Freedom is willing to accept the reduced price of \$29.90 or \$18,547,090 and is confident of its ability to perform successfully at that price. However, further price reductions below \$29.90 would appear to be imprudent and could result in extreme prejudice in the successful performace of the project. We alert DPSC to the potential dangers which might result from a less than "fair and reasonable" price.

MATERIALS

Material costs was reduced by 365,652 as a result of lower price quotations received from sub-contractors. Certain prices have or will become obsolete because time has expired. Further price negotiations with suppliers are possible, however, Freedom is not in a market advantageous position. Competitors have firmed their supply arrangements whereas Freedom remains the only remaining prime supplier of MRE without a contract. This prolonged deferral can be conservatively expected to result in moderate inflationary price increases.

DCASR's objection to our estimate of 2% for material rejects is inappropriate. This provision for loss is not intended to absorb rejected materials supplied by subcontractors. Rather, it is our best estimate of losses which will be experienced through material handling, production errors, damages, pilferage and other normal losses. Considering the nature of the materials, volume (including GFM) and Freedom's limited experience in MRE, we believe the 2% factor is not excessive.

OTHER MATERIALS - SKIDS

Costs of skids, estimated at \$91,896 was included in the price of \$29.90. We believe Schedule 4 of DD ~~633~~ adequately demonstrates the cost calculation of this category. We do not agree with DCASR's comment regarding the insufficiency of information on skid strapping of \$4790 and pallet caps of \$40,205.

DIRECT LABOR

Our estimate of direct labor costs was reduced by \$347,981 to \$1,086,491 representing a 24% saving. Further reduction is unwarranted.

Labor rate - The average hourly rate was reduced from \$4.25 to \$4.00. The DCAA suggested rate of \$3.50, in our opinion, is not attainable for many economic and social reasons. Although the minimum wage rate is \$3.35 adequate personnel can be obtained only at a premium. Additionally, because of the inefficiencies inherent in our start-up situation, overtime can be expected to occur if a production level of 85,000 cases per month is to be attained and sustained.

MANPOWER

We believe Freedom's proposal manning levels are consistent with the demands of the solicitation and are in line with competition levels. The DCASR report suggests substantially reducing personnel for the production of accessories, meal bag and final assembly. DCASR based meal bag production upon the presumption that 73% efficiency can be attained. This presumption is invalid because materials will not be available to operate at efficiency levels over those proposed. In addition, DCASR based its efficiency levels on our proposed equipment for meal bags, 12

Doboy machines. We will need 12 machine operators in order to seal meal bags. It seems quite ridiculous that the analyst would state in his report that a total of 18 employees would be sufficient for meal bag production. This would leave 6 employees to supply and fill 12 different menus with up to 13 different items per menu.

FRINGE BENEFITS

Benefits of \$133,799 are included in the cost of \$1,086,491. Such benefits exclusively represent taxes and insurance for federal unemployment, social security, N.Y. unemployment, N.Y. disability and workers compensation. Costs were not provided for other usual benefits such as medical insurance, life insurance, vacations, sick leave, etc.

Overall, we believe the direct labor costs is barely adequate to perform the MRE contract. Direct labor costs amount to merely 5.9% of the final price, and even substantially lower if the GFM components are considered in the pricing structure.

MANUFACTURING OVERHEAD

Manufacturing overhead excluding occupancy costs, was reduced from \$3,638,596 to \$2,595,427, a reduction of 29% or \$1,043,169. DCASR suggests a cost excluding occupancy costs, of \$2,199,339. We believe on a line-by-line comparison of costs our revised estimates are more realistic than DCASR's. Details of our revised estimates were provided to DCAA for review.

Occupancy costs were adjusted to account for the costs of the new building located at 1601 Bronxdale Avenue.

Full allocation of manufacturing overhead to the MRE program was made because there are no current plans for additional work by Freedom. The MRE project will receive absolute and exclusive priority until such time that undertaking additional work can be guaranteed without prejudice to the MRE program. To allocate less than 100% of the costs to MRE would be imprudent at this time.

We remind DPSC of the high degree of uncertainty impacting on cost estimating procedures. This uncertainty results from the lack of historical data, limited hands-on experience with the MRE program, undertaking a new facility and the present limited documentation available. However, we assure DPSC of the good faith effort we have attempted to make in estimating costs under these circumstances.

GENERAL AND ADMINISTRATIVE

Costs were reduced from \$3,598,325 to \$1,840,824. The reduction of \$1,757,501 amounts to 49%. The DCASR report suggests a total cost of \$1,829,002. Essentially the only difference is that "Business Meeting Expense" was improperly named "Entertainment."

Although there are line-by-line differences between Freedom and DCASR, we believe that current review by DCAA will more than support our estimates. Again, estimating procedures suffer because of the circumstances discussed previously.

DEPRECIATION

Support for equipment estimates were provided to DCAA and DCASR. Although our present estimate reduces investment from \$2,000,000 to \$1,500,000 it will be difficult to contain final investment at the lower level. Depreciation was proportionately reduced from \$555,550 to \$333,333 to reflect the lower investment and reduction in equipment utilization from ten to eight months. Depreciation would be \$125,000 higher if it were calculated from the date equipment is installed rather than from the date it becomes fully operational.

PROFIT

The projected profit margin of 11.87% calculated on estimated costs is low even by the weighted guidelines method. As an entrant into the MRE program, the associated risks and uncertainty would clearly support the reasonableness of a higher margin, probably close to 16%. As stated on various occasions, Freedom's profit margin is more properly defined as a contingency rather than profit. If Freedom is fortunate enough to manage its business in such a manner that this contingency becomes in reality profit, it will have earned the profit for its successful efforts. Under the present circumstances, we do not agree with DCASR that Freedom's cost risk is average. Realistically, such risk must be considered high. Additionally the profit margin as proposed, does not include any factor associated with GFM.

FACILITY COST OF CAPITAL

Freedom did not request this item as a cost factor. Costs would have been increased between 240,000 and \$300,000 had this item been included as allowable cost.

CONCLUSION

We believe our proposal price of \$29.90 per case of MRE is fair and reasonable. We further believe that this price is documented by the data submitted to DPSC, DCAA and DCASR. Our price adequately considers results of DCAA and DCASR reviews, to the extent that their opinions have been provided to us. If any doubts exist by DPSC, DCAA and DCASR, we remain willing to satisfy any questions which might remain. If any substantial doubt exists we must clearly informed so that we can respond to such doubt. Of minor doubt exists we should be give the benefit of such minor doubt, because, in the final analysis it will be our exclusive obligation to perform the MRE contract. We solicit a speedy conclusion to the prolonged process experienced to date. We look forward to contract award and assure you of our

willingness, ability and success to perform in the MRE program at a fair and reasonable price.

We appreciate the individual and collective efforts made by personnel of DPSC, DCAA and DCASR in attempting to conclude our entrance into the MRE program.

THANK YOU

PRESIDENT

CONFIDENTIAL

6 NOVEMBER 1984

Claim
Ex 24

MEMORANDUM OF UNDERSTANDING

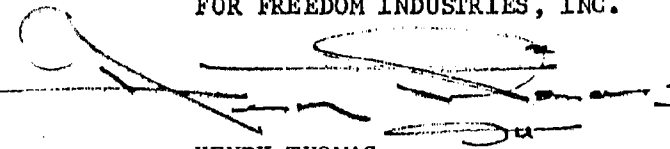
As a result of contract negotiations ending this date, Freedom Industries and the Government have reached a settlement under solicitation DLA13H-84-R-8257 for 620,304 cases at \$27.725 per case, or \$17,197,928. Contract award at this price is pending approval from all appropriate review levels up to and including DLA. The break-out of cost elements as determined by the Government negotiating team is as follows:

Materials	\$ 8,193,637
Direct Labor	811,002
Manuf. O/H	3,627,530
Depreciation	333,333
Other Costs	163,816
G & A	1,840,824
Total Costs	14,970,142
Profit 14.997%	2,227,786
TOTAL PRICE	<u>\$17,197,928</u>

CONFIDENTIAL

FOR FREEDOM INDUSTRIES, INC.

FOR THE UNITED STATES


HENRY THOMAS
PRESIDENT


THOMAS A. BARKEWITZ
CONTRACTING OFFICER

CONFIDENTIAL

Claim
Ex 25

DEC 18 1984

DPSC-SPP (FOIA/0004/92)

SUBJECT: Report of travel to New York, NY on 13 and 14 December 1984 to conduct a Post Award Conference with Freedom Industries on Contract DAA138-83-C-0591

THRU: DPSC-SPP
DPSC-SF

TO: DPSC-SF

I. Itinerary:

Depart: Philadelphia, Penna - 12 December 1984
Arrive: New York, NY - 13 December 1984
Depart: New York, NY - 14 December 1984
Arrive: Philadelphia, Penna - 14 December 1984

II. Purpose of Travel:

The trip had a two fold purpose: 1. To meet with the Government personnel who will be administering Freedom's HRE assembly contract to coordinate responsibility; and 2. To meet with Freedom Industries to discuss what their responsibilities are under their contract.

III. Personnel Present:

See Attachments I and II.

IV. Observations:

A. 13 December 1984 Meeting: This meeting was conducted with only Government personnel attending. Attachment I contains a list of the attendees. Marvin Lieberman, the AGC from DCASMA New York, chaired the meeting. Mr. Lieberman opened the meeting with a few remarks and stated that in tomorrow's meeting the Government would present one voice to the contractor. He reiterated that there should be no arguments between Government personnel when the contractor was present. Any disagreements would be resolved in private meetings without Freedom.

Gwendolyn Clarke of the DCASMA NY Small Business Office stated that the Small Business Administration was very happy that Freedom received a \$17.1 million contract and that they would do whatever they could to assist Freedom in their efforts. Additionally, Ms. Clark stated that it appeared that Freedom would be getting a \$500,000 loan guaranteed loan. Ms. Clarke said that she would confirm this information and notify all interested parties.

SUBJECT: Report of Travel to New York, NY on 15 and 16 December 1954 to
conduct a Post Award Conference with Freedom Industries on Contract
DASH-44-C-0091

The next topic discussed caused the most heated debate of the day. Freedom has submitted their First Progress Payment request and no decision has been made yet on whether to make payment. The auditors and the legal representatives present are sharply divided on how to resolve this issue. Guy Sansone stated that he felt that Freedom was insolvent and not financially stable. Therefore, he felt that Freedom was not eligible for Progress Payments. In addition, Mr. Sansone stated that while he realized that this was not a normal contract in terms of direct and indirect costs, in that Freedom has no other business, he still felt that what Freedom has submitted for a Progress Payment request was not acceptable for payment.

Costs
Captain Parsons interjected that Freedom received a Positive Pre-Award Survey and their letter of credit was reviewed by DLA and approved. He stated that based on these findings, Freedom has to be considered solvent. Carl Heringer, Deputy Counsel, DCASR NY stated that the Progress Payment issue could not be looked at from a strict accounting standpoint. He further stated that he agreed with Captain Parsons, that Freedom must be considered solvent. He also said that based on the information available, and the fact that all of Freedom's costs are direct costs, he felt that Freedom should be paid. Mr. Heringer concluded by stating that his office would review this matter further.

Colonel Hein stated that he was concerned whether Freedom's bank credit was good and whether the costs were actually incurred and applicable to this contract. After Colonel Hein's questions, discussion continued with both point of views being stated and restated.

Mr. Lieberman cut short the discussion and stated that as ACO, he had the final responsibility for determining if a Progress Payment was payable. He emphasized that his decision would be based upon recommendations of DCAA, Counsel and DLA. He concluded the discussion of this matter by stating that Freedom had indicated they would be submitting a revised request for Progress Payment and the issue did not have to be resolved immediately. He added that, with DPSC's concurrence, the issue of Progress Payments would be handled at the Post Award conference by stating that a request had been made, it's payment was under consideration, and a decision would be made shortly.

Mr. Lieberman then stated that the contract was awarded under the DAR and that DAR clauses were applicable. Colonel Hein questioned why this was being done. He stated that Congress had intended the FAR to supercede the DAR in all situations. Thomas Markewitz stated that DPSC Counsel had determined that the DAR was the governing regulation. Mr. Lieberman then commented that his discussions with DCASR Counsel had brought about a similar response. Colonel Hein responded that this information satisfied him on this matter.

DPSC-DPPK

PAGE 1

SUBJECT: Report of travel to New York, NY on 13 and 14 December 1984 to conduct a Post Award Conference with Freedom Industries on contract DLA12H-85-C-051.

Harv Liebman stated that this contract would receive special emphasis. DCASHA NY was requesting assistance in production surveillance on all of Freedom's subcontractors. He stated that this contract was being placed under the SMART program with reports being forwarded to DLA monthly. Mr. Gutfleisch commented that DCAS would support this contract totally and that if anyone was not satisfied with the support being given, they should elevate the problem.

Harv Liebman stated that production surveillance function was critical to the success of this contract. DCAS, with DPSC's concurrence, had intended to develop key milestones and incorporate them into the contract. Thomas Barkevitz stated that solicitation required management milestones and that as PCO he had no problems with modifying the contract to include milestones. (?)

LTC Lafontaine discussed what Health Service Command's role in this contract would be. He stated that he would have ten men on full time duty at Freedom. Mr. Barkevitz indicated that that was more support than SOPAKCO and RASCO were currently receiving and that he was glad HSC was giving this contract so much attention. LTC Lafontaine stated that while Freedom had passed a sanitary inspection, they would have to do repairs to the building to keep a passing score. He has discussed these problems with Freedom and has made arrangements to monitor these improvements. Additionally, Freedom must have their facilities fumigated prior to receipt of GFH or CFK. Harv Liebman stated that he felt it was important to have monthly progress meetings at Freedom's facilities with DCAS, DPSC and Freedom representatives present. This had been done on the Freedom contract for retort pouches, but not until after problems had occurred. Captain Parsons agreed that the monthly progress meetings were important and that DPSC would be represented.

Harv Liebman then discussed the routing of correspondence. All correspondence from Freedom, with the exception of requests for waiver, should go to DCASHA NY directly with copies to DPSC. In addition, Harv Liebman stated that it was important that all DPSC correspondence to Freedom should have a courtesy copy going to DCASHA NY and that all DCASHA NY correspondence to Freedom would have a copy going to DPSC.

Property Management by Freedom Industries of GFH was discussed at the meeting. The DCAS property management personnel indicated that they would make arrangements to meet separately with their Freedom counterparts to discuss this matter.

Harv Liebman requested that the DPSC Entomologist visit the Freedom facilities as soon as possible. He also requested that tentative delivery destinations for Freedom's contract be given to DCASHA.

Report of travel to New York, NY on 13 and 14 December 1964 to conduct a Post Award Conference with Freedom Industries on contract DAASH-65-C-3071.

It was then agreed that key contacts at DPSC, DCASHA, NSC and Freedom be established. The meeting then concluded with directions given to get to Freedom's facility. The Post Award Conference was scheduled to start at 9:00 AM on 15 December 1964.

D. 14 December 1964: The Post Award Conference commenced at 9:00 AM with Government and Freedom personnel attending. Attachment II contains a list of the attendees. An agenda (attachment III) was distributed to everyone, in order to structure the meeting. The information disseminated to Freedom in this meeting was basically the same as discussed in yesterday's meeting. The Program Payment issue was mentioned and Freedom submitted a revised request for payment. It was determined that a separate meeting be held at the conclusion of the conference to discuss finances. Freedom was then given the opportunity to ask questions.

Henry Thomas stated that he was very happy that everyone was in attendance and that Freedom appreciated all the support they had been given. Henry Thomas requested that Freedom be given an inbound material schedule for Government furnished material. He then stated he had made arrangements for everyone not involved in the financial meeting to tour the plant.

The auditors, Henry Thomas and Pat Marx of Freedom, Harv Lieberman and Len Guttleisch of DCASHA and Thomas Barkowitz and the undersigned attended the finance meeting. At this meeting, Freedom indicated that they were in line for a \$500,000 SBA guaranteed loan. In addition, Henry Thomas stated that Freedom was considering not using Dollar Dry Dock as their financial resource. Freedom was negotiating with Broadway Bank and considering assigning this contract to Broadway. This option has been left open, pending the conclusion of discussions with Dollar Dry Dock.

Freedom requested that all financial data remain confidential. Freedom concluded by stating that the \$7.2 million letter of credit from Dollar was significantly higher than what they needed. They have revised their calculations to show a need for \$5.3 in bank loans.

The meeting concluded with a tour of Freedom facilities.

V. Required Actions:

a. Provided DCASHA NY with tentative delivery destinations for Freedom's contract.

b. Arrange for Major Kasa, DPSC-ST, to visit Freedom to review the implementation of Freedom's Pest Management Plan.

DISC-OPPA (1955)
SUBJECT: Report of Travel to New York, NY on 10 and 11 December 1954 to
conduct a Post Award Conference with Freedom Industries on Contract
DRAIN-53-C-0001

c. Provide Freedom with a proposed OFN schedule.

VI. Recommendations:

That the required action be completed in an expedited manner.

SIR

KEITH R. FORD
Procurement Agent

FREEDOM INFORMATION
POET AWARD CONFERENCE
DLAISH-85-C-0321

GOVERNMENT MEETING

<u>NAME</u>	<u>ACTIVITY</u>
Harvin Lieberman	DCASHA NY
Salvatore Castiglioni	DCASHA NY
Julius Maubel	DCASHA NY
Samuel Stern	DCASHA NY
Larry Leyko	DPSC
Eugene Guzik	DCASHA NY
Elsie Davis	DCASHA NY
John Williamson	DCASHA NY
Pete Plaudini	DCASHA NY
Nel Little	DCASHA NY
Guy Santono	DCAA NY
Abe Bilfer	DCAA NY
Peter Simonis	VET EVCS
LTC. Danile E. LaFontaine	FT. DIX
Leonard Gutfleish	DCASHA NY
D. Hehn	DCASHA NY
Capt. Donald S. Parsons	DPSC
Ray Trolano	DCASHA NY
Albert A. Sacchet	DCASHA NY
Gwendolyn Clarke	DCASHA NY
Thomas A. Baskwitz	DPSC
Keith R. Ford	DPSC
Joseph P. Marcotellio	DCASH NY
Carl S. Heringer	DCASH NY

ENCLOSURE I

PRELIMINARY INVESTIGATION
POST WARMS COMPLAINTS
DIAISON-0000-0001

GOVERNMENT MEETING

NAME

ACTIVITY

Harvin Lieberman	DCASNA NY
Samuel Stern	DCASNA NY
Larry Loyko	DPSC Phila
John Williamson	DCASNA NY
Pete Pizzini	DCASNA NY
Del Little	DCASNA NY
Clay Linsone	DCAA NY
Alb Miller	DCAA NY
Peter Simonis	VET SVCE
Lt. Danile E. LaFontaine	Pt. Dix
Leonard Gutfeldsch	DCASNA NY
Ray Troiano	DCASNA NY
Thomas A. Barlowitz	DPSC
Keith E. Ford	DPSC

FREEBORN MEETING

Henry Thomas
Patrick Mara
Leon James
Howard Marks
Kenneth Drummond
Walter Boetta
Vandiel Hecter
Alb Vandy
Linda Iglehart

ENCLOSURE II

* UNCLAS * 158 1650 *PRIORITY*

JUN 9 12 10 PM '85

NEW YORK

claim
EX 26
JUN 10 8 45 AM '85

UNCLAS
NEW YORK

PAUZYUW RUEOBKA3871 1581649 MTMS-UUUU--RUEDATA.

ZNR UUUUU

P 051500Z JUN 85

FM DPSC PHILADELPHIA PA//DPSC-SPPR

TO DCASMA NEW YORK//ATTN DCASR-NY-NCA-7/7//

MR MARVIN LIEBMAN

BT

UNCLAS

DPSC-SPPR-85-1436(0)

SUBJECT: H.F. FOOD PRODUCTS, INC., DLA13H-85-C-0591

1. PLEASE REFER TO CONTRACT DLA13H-85-C-0591 FOR MRE V ASSEMBLY AND OUR NEGOTIATIONS WHICH RESULTED IN THAT AWARD. CONFIRMING OUR TELECON OF 4 JUNE 1985, THE FOLLOWING INFORMATION IS PROVIDED: FREEDOM INDUSTRIES INC. REVISED SUPPORTING DATA FOR FORM 633. SCHEDULE 3 DATED 16 OCT 1984 SHOWS THE FOLLOWING: MANUFACTURING OVERHEAD

QUALITY CONTROL EQUIPMENT & SUPPLIES \$ 85,000

AUTOMATED BLDG MGT & CONTROL SYSTEMS \$177,838

GENERAL ADMINISTRATIVE

OFFICE EQUIPMENT \$ 80,000

THE QUALITY CONTROL EQUIPMENT ELEMENT WAS REDUCED BY \$31,000 FROM \$85,000 TO \$54,000.00 IN THE COURSE OF NEGOTIATIONS. NO OTHER

PAGE 02 RUEOBKA3871 UNCLAS

ELEMENTS WERE REDUCED. DCAA DID NOT TAKE EXCEPTION TO THESE COSTS BEING HANDLED AS A ONE TIME COST RATHER THAN A DEPRECIABLE ELEMENT.

2. IN VIEW OF THE ABOVE AND THE CONTRACTING OFFICER'S KNOWLEDGE OF THE INDUSTRY, IT WAS DECIDED TO PAY FOR THESE ELEMENTS AS 100% COST

* UNCLAS * 158 1650 *PRIORITY*

* UNCLAS * 158 1650 *PRIORITY*

→ RATHER THAN INSIST UPON DEPRECIATION.

3. SIGNED M.H. ROWLES, CHIEF, OPERATIONAL RATIONS.

BT

#3871

WIRE
62



DEFENSE LOGISTICS AGENCY
DEFENSE CONTRACT ADMINISTRATION SERVICES MANAGEMENT AREA
NEW YORK
201 VARICK STREET
NEW YORK, NEW YORK 10014

Claim
EX 27

DCASR NY-NAA-7 (Mr. Mel Zitter/3307/im)

18 Jul 85

SUBJECT: H. T. Food Products, Inc. - Contract DLA13H-85-C-0591

THRU: DCASR NY-NAA
ATTN: Mr. T. Leadon *Red 18 Jul 85*

THRU: DCASR NY-ND
ATTN: Col. D. Hein, USAF, Commander

THRU: DCASR NY-HA
ATTN: Mr. J. Driscoll *JM 7/18/85*

THRU: DCASR NY-HD
ATTN: Col. O. Guenther, USA, Commander *OG 7/18/85*

TO: Director
Defense Logistics Agency
ATTN: DLA-A/W. Gordon
Cameron Station
Alexandria, VA 22314

1. References:

- a. DPSC message, 051500Z Jun 85, subject as above, copy enclosed.
- b. DCASR NY-HG letter, 15 Jul 85, subject: H.T. Food Products, Inc. Progress Payments, Contract No. DLA 13H-85-C-0591. (Copy enclosed.)

2. Based on the referenced correspondence, it is requested that a one-time deviation to DAR 7-104-35(b) be approved. This would permit certain office equipment, quality control equipment and supplies and automated building management and control systems in the approximate amount of \$311,838 to be treated as direct costs for progress payment purposes.

3. If a deviation is not granted, the result could be a failure of the contractor to obtain the required equipment and, consequently, an inability on his part to successfully perform the contract.

4. Please direct any questions to the undersigned at AY 994-3304.

Marvin Lieberman
MARVIN LIEBMAN
Contracting Officer

Claim
EX 28

◀ Dollar Dry Dock Commercial

Noel V. Siegert
Vice President and
Senior Loan Officer

August 10, 1984

Defense Personnel Support Center
Post Office Box 8059
Philadelphia, Pennsylvania 19101

Attention: Mr. Thomas Barkewitz, Contracting Officer

Gentlemen:

In the event Freedom Industries, Inc. is awarded a contract pursuant to Solicitation DLA 13H-84-R-8257 in the amount of \$21,593,000.00, we shall upon assignment by Freedom Industries, Inc. to Dollar Dry Dock Savings Bank of New York of all claims or monies due or become due, from the U. S. Government under the proposed contract, extend to Freedom Industries, Inc. such credit as in our judgment may be required but not to exceed \$7,244,000.00 for the performance of said contract.

It is contemplated that any credit facilities extended will be done in conjunction with the various governmental guaranty programs available to disadvantaged small business companies.

We understand that the Government, in its discretion, may rely on this letter of intent in making an award of the above contract to Freedom Industries Inc.

Yours very truly,


Noel V. Siegert

NVS:gs

Dollar Dry Dock Commercial, 742 Lexington Avenue, New York, NY 10022
A Division of Dollar Dry Dock Savings Bank

(212) 644-6013



DEFENSE LOGISTICS AGENCY

DEFENSE CONTRACT ADMINISTRATION SERVICES MANAGEMENT AREA

NEW YORK

201 VARICK STREET

NEW YORK, NEW YORK 10014

H.7

EX 2141m
29

REPLY
REFER TO

DCASR NY -NAA-7/M. Liebman/X3304

15 Jul 1985

SUBJECT: Contract DLA13H-85-C-0591

TO: Mr. Vincent Ferrandino, Executive Vice President
H.T. Food Products, Inc.
1600 Bronxdale Ave.
Bronx, New York 10462

COPY

Dear Mr. Ferrandino:

Reference is made to your letter of 26 June 1985 regarding progress payments under subject contract.

In response, I invite your attention to DAR E-509.4 and E-509.5 for the definition of costs and incurred costs for progress payment purposes. It is noted that all progress payment requests are, at the discretion of the Contracting Officer, subject to pre-payment/post-payment reviews.

Please call me if you have any questions.

*Abuse of Discretion -
DAR → is not mandatory.*

Sincerely,

Marvin Liebman

MARVIN LIEBMAN
Contracting Officer

*Abuse
of
Discretion*

**Bankers
Leasing
Association
Incorporated**

155 Revere Drive • Northbrook, Illinois 60062 • (312) 564-5353

Claim
Ex 30

August 16, 1985

Mr. Henry Thomas, President
H. T. FOOD PRODUCTS, INC.
1600 Bronxdale Avenue
Bronx, New York 10462

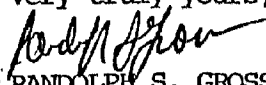
Dear Mr. Thomas:

I am in receipt of your letter of 14 August, 1985 in which you have asked me to summarize the chain of events surrounding our financing arrangement. Simply put the A/R line is based upon "Receivables" due H. T. Foods. The term receivables originally included monies due for material delivered and then evolved to include monies due for "progress payments".

Since our line of credit is asset based, we are in need of evidence that your receivables are both valid and eligible for payment by the government. With respect to material delivered this verification procedure is rather clear but with respect to progress payments, it is not so clear. You have all along claimed that once a cost is incurred on your books, it is automatically eligible for progress payment reimbursement and therefore constitutes a valid receivable (asset) of H. T. Foods. We have been led to believe that progress payments for incurred costs are subject to audit and may be challenged, modified, withheld or rejected by the government even if you certify them as being eligible. If this is the case, then a very real concern exists as to the "asset value" of the monies due for progress payment, and hence, our comfort with the value of this receivable.

Mr. Liebman has left us with the impression that we must make a business risk judgement in loaning you money against your incurred costs before his office has had an opportunity to audit them because even though you certify the incurred costs as being in accordance with the Contract's provisions, his office may find otherwise and withhold some or all of the progress payment request. With this in mind, a meeting was held in New York in hopes that we could identify certain routine costs (rent, salaries, utilities, etc.) that would be automatically approved (eligible) for reimbursement and use that as a basis for our loan, but to date, that has not occurred. Obviously, confusion exists but if we could obtain documentation supporting your statement that by regulation once you certify that a cost has been incurred in connection with the contract it will be approved as eligible for progress payment reimbursement, and that any dispute will be handled separately between H. T. and the government, we would be able to consider incurred costs as a valid receivable or asset of H. T. Foods and as such proceed with our A/R financing.

Very truly yours,


RANDOLPH S. GROSS
Executive Vice President

RSG/ehs

OFFICES IN PRINCIPAL CITIES
(800) 323-4380 Except in Illinois



DEFENSE LOGISTICS AGENCY

DEFENSE CONTRACT ADMINISTRATION SERVICES MANAGEMENT AREA
NEW YORK

201 VARICK STREET
NEW YORK, NEW YORK 10014

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Claim
Ex 31

IN REPLY
REFER TO

DCASR-NY-NAA-7/M. Liebman/(212)807-3304/cm

15 February 1985

SUBJECT: Contract DLA13H-85-C-0591
Progress Payments

Mr. Henry Thomas, President
Freedom Industries, Inc.
243 California Road
Mount Vernon, New York 10552



Dear Mr. Thomas:

The purpose of this letter is to confirm the conditions the Government requires to be met before progress payments can be considered for release. These conditions were conveyed to you by the undersigned during the meeting held in Headquarters, Defense Logistics Agency on 14 February 1985 and during our telephone conversation on 15 February 1985. Specifically, at the 14 February 1985 meeting, I advised you that:

- a. \$3.8 million in credit would have to be committed to Freedom Industries, Inc. from reliable, reputable and verifiable sources of credit. I noted that the commitment letters would have to include timetables depicting the actual and anticipated transfer of funds to Freedom Industries.
- b. Sufficient information (documentation/records) in support of the progress payment requests would have to be submitted by Freedom Industries to the Defense Contract Audit Agency for review before any determination by DCAA concerning the adequacy and reliability of Freedom Industries' accounting system could be made.
- c. The foregoing actions were to be accomplished at no additional cost to the Government.

During our telephone conversation on 15 February 1985, I advised you that all of the foregoing conditions, including the \$3.8 million in credit, would also have to apply to H.T. Food Products, Inc. should a novation agreement be entered into between the United States of America, Freedom Industries, Inc. and H.T. Food Products Inc.

J.C. Gm²

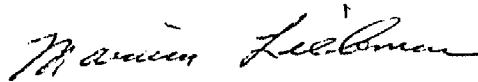
Mr. Henry Thomas, President
Contract DLA13H-85-C-0591

PAGE 2

15 February 1985

Should you have any questions, please contact me at (212)807-3304.

Sincerely,



MARVIN LIEBMAN
Contracting Officer



DEFENSE CONTRACT AUDIT AGENCY

PHILADELPHIA REGION

NEW YORK BRANCH OFFICE

252 SEVENTH AVENUE

NEW YORK, NEW YORK 10001

Claim
Ex 32

IN REPLY REFER TO

6171

2 August 1985

MEMORANDUM FOR REGIONAL DIRECTOR, PHILADELPHIA REGION, DCAA

ATTENTION: RAMC-6

SUBJECT: Suspected Irregular Conduct Resulting from Misuse of
Progress Payment Monies
Freedom N.Y. Inc. (formerly H. T. Food Products, Inc.)
Successor to Freedom Industries, Inc.
Contract No. DLA-13H-85-C-0591

In accordance with DCAM 4-702, we are reporting several disclosures of irregular conduct on the part of Freedom N.Y. Inc. which resulted in the misuse of progress payment monies under Contract No. DLA-13H-85-C-0591. We found that Freedom's unsatisfactory record keeping and questionable business practices resulted in diverting progress payment funds for purposes other than intended.

Freedom N.Y. Inc. (formerly H. T. Food Products, Inc.) successor to Freedom Industries, Inc. assumed novated Contract No. DLA-13-85-C-0591 on 17 April 1985. This contract was transferred in an attempt to remedy the problems created by Freedom Industries' financial condition. The novation agreement provided for the acquisition of the entire portion of the assets involved in the performance of the subject contract, and the assumption of all obligations and liabilities of Freedom Industries, Inc. under Contract No. DLA-13H-85-C-0591. This novation to Freedom N.Y. Inc. (formerly H. T. Food Products, Inc.) was executed even though Freedom N.Y. Inc. was insolvent.

Prior to the execution of the novation agreement (10 April 1985), Freedom N.Y. Inc. submitted progress payment request No. 1 for \$1.766 million. DCAA recommended no payment based on the nature of the expenses, (not related to the production of goods provided for in the contract) and the uncertain financial condition of the company. However, the Administrative Contracting Officer paid this and subsequent progress payments for a total of \$2.5 million.

The contractor now has submitted progress payment No. 4 in the amount of \$807,000. The ACO requested an audit since he was advised that subcontractors and certain creditors, for which progress payment money was intended, had not received payment. In response to this request, we reviewed the progress payment costs claimed. Based on this review, the conditions as described below were noted.

1. In the absence of adequate working capital and or private financing, Freedom N.Y. Inc. diverted progress payment monies earmarked for such items as rent, utilities, insurance, salaries and subcontractor costs, etc. to the following items listed below:

FOR OFFICIAL USE ONLY

6171

2 August 1985

SUBJECT: Suspected Irregular Conduct Resulting from Misuse
of Progress Payment Monies
Freedom N.Y. Inc. (formerly H. T. Food Products, Inc.)
Successor to Freedom Industries, Inc.
Contract No. DLA-13H-85-C-0591

Capital Acquisitions
Deposits for Utilities
Deposits for Purchase of Capital Equipment
Interest
Political Contributions
Personal Loan Repayment
Personal Automobile
Large Amount of Questionable Legal Expense
Accounting Services Devoted to Obtaining Capital
Plants/To beautify office facility

2. In addition, we found unsatisfactory record keeping and questionable business practices listed below:

a. We found inadequate documentation supporting disbursement, namely, in some instances no invoices to support payment. In other instances, especially on major expenditures, no purchase orders were issued.

b. Lack of internal control of the disbursements. All transactions were solely disbursed by Henry Thomas. After the disbursements were made, the accounting department was advised of the transaction and nature thereof, without adequate justification and documentation. This resulted in questionable expenditures and business practices, some of which are listed below.

(1) Gemini Remodeling Corporation. This company was contracted to perform clean up, building repair and renovations. Only one purchase order totaling \$50 thousand was awarded to Gemini. Total payments to date amount to \$132 thousand. The majority of payments were made personally to an official of Gemini. These checks were all cashed at Citibank - (bank used by Freedom). In certain cases the checks that were cashed were not endorsed. Invoices in support of work performed were handwritten on Gemini letterhead with no indication of work performed or where it was performed.

(2) Payroll - Freedom had originally accrued payroll together with related payroll taxes for employees who worked on this contract from inception November 1984 through 29 March 1985. This accrued payroll was reversed on the books and the individuals paid as though they were consultants. The payroll taxes were avoided and taken off the books.

(3) Freedom had entered into a lease for the building in which they occupy with Penco, Inc. Included in the lease agreement was an option by Freedom to purchase the building. Penco subsequently sold the

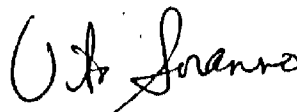
6171

2 August 1985

SUBJECT: Suspected Irregular Conduct Resulting from Misuse
of Progress Payment Monies
Freedom N.Y. Inc. (formerly H. T. Food Products, Inc.)
Successor to Freedom Industries, Inc.
Contract No. DLA-13H-85-C-0591

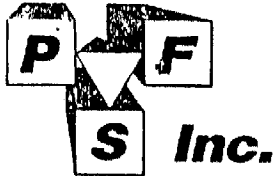
building to a third party and Freedom contends that they received \$400 thousand as a buy-out of their option. Freedom had submitted and was reimbursed for full occupancy costs. Freedom did not nor do they intend on reducing the costs to give affect to the lease buy-out. Freedom is treating this item as other income.

In light of the disclosures discussed above, we believe that this matter should be submitted for further investigative actions in accordance with CAM 4-702.



VITO SORANNO
Branch Manager

FOR OFFICIAL USE ONLY



Performance Financial Services, Inc.

June 17, 1985

Mr. Henry Thomas, President
H. T. Food Products, Inc.
1600 Bronxdale Avenue
Bronx, New York 10462

Dear Henry:

Per our recent conversations regarding problems that exist on your current contract with the Defense Logistics Agency, that are inhibiting our ability to financially support your company during this contract, the following should outline our particular areas of concern.

To begin, you are aware that in order for us to advance funds on invoices or vouchers, we must have some acknowledgement of approval from the appropriate contracting office. Despite your contract allowing for progress payments, which stipulates H. T. Food's ability to bill the government for specific incurred costs as opposed to shipped product, without an approval from the government on these vouchers or invoices, they reserve the right to deny payment to your assignee under the Assignment of Claims Act of 1940. I'm certain you can appreciate our sensitivity to this issue, especially in light of the large volume of dollars involved.

As I have indicated to you previously, on all our other progress payment contracts we have gotten the contracting office to issue us a list of accepted and allowable expenses across the board. With this acknowledgement, we can circumvent the time delay caused by your monthly audit and advance monies immediately upon invoicing. Frank Francois has indicated that this list is forthcoming and we will proceed as agreed upon its receipt.

* The next topic has created a deal of anxiety internally with regard to our commitment for \$780,000 in leased equipment for your company. In our earlier conversations regarding this equipment, I indicated that I was able to convince our lender, Bankers Leasing Association, Inc., that the risk factor on this particular loan agreement to H. T. Foods was virtually non-existent, due to the Federal Government's stringent guidelines for payment of approved invoices to an assignee. That fact, coupled with a

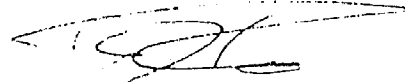
* \$333,333.33 sum due H. T. Foods under this contract for the equipment purchase, that Bankers Leasing Association, Inc., would receive monthly from April through December of 1985, enabled us to generate an approval for this transaction. Your first invoice voucher for \$1,700,000 was submitted and advanced upon April 19, 1985 and payment subsequently received by Bankers Leasing Association on May 9, 1985. At that point, this transaction appeared to be as straight forward as all our others. Unfortunately upon submission of your progress payment voucher on May 16, 1985 we encountered a problem. As is standard operating procedure on all our invoices, a phone verification was attempted with Mr. Marv Liebman of the contracting office for DCASMA. Upon contacting Mr. Liebman, our administrative person in Chicago, a Ms. Linda Polhemus, was told by Mr. Liebman that although this invoice had been signed off on and approved, he advised Bankers Leasing not to advance any monies as there were problems with this invoice and payment was not forthcoming. Since we had received an approved voucher, Linda was quite surprised when Mr. Liebman instructed her not to advance any monies due to this change of posture regarding the approval. Subsequent to that conversation, you were contacted directly by myself and advised of the situation. Our concern very candidly, is that had no phone verification been attempted, which from time to time we will bypass, monies would have been advanced to H. T. Food Products and a potential legal battle could have ensued between the Federal Government and Bankers Leasing Association, Inc. Needless to say, this situation created a tremendous amount of paranoia on the part of our lender. Despite the provisions of the Assignment of Claims Act of 1940, any agency, if they feel it is warranted, after the fact, can deny payment on an already approved invoice. Whether or not these matters would be resolved quickly or protracted indefinitely is unknown. Consequently, Bankers Leasing Association, Inc., after much discussion with my office withdrew its commitment to lease your equipment for this contract. For the record, another factor in this decision was that no check was remitted by the Government for their \$37,037.04 installment for this equipment purchase. As you can see this situation has created a very real problem for both my organization and Bankers Leasing Association, Inc.

* In conversation with Randy Gross, concerning your account, he has indicated that in order for him to consider proceeding with your equipment lease, some irrevocable guarantees will need to be issued by the Federal Government regarding payments due to Bankers Leasing Association, Inc. One alternative would be for the Federal Government to issue an irrevocable letter of credit to Bankers Leasing Association, Inc., for \$600,000, as partial payment of the equipment purchased in event of a default. To date, that is the only option Randy has given me.

Page three

I sincerely hope that this matter can be resolved expediently and that we can continue to work with H. T. Food Products, Inc. Please advise me of any input I may lend to help resolve this issue.

Sincerely,

A handwritten signature in dark ink, appearing to read 'W. J. Rosen', with a long horizontal flourish extending to the right.

Warren J. Rosen
President

52.2
Protes
shall
know

Claim
EX 34

STANDARD FORM 36, JULY 1964 GENERAL SERVICES ADMINISTRATION D. PROC. REG. (41 CFR) 1-16.101		CONTINUATION SHEET		REF. NO. OF DOC. BEING CONT'D. DLA13H-85-R-8457		PAGE 137 OF 158	
NAME OF OFFEROR OR CONTRACTOR							
ITEM NO.	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT		
M-1	<p><u>SECTION M - EVALUATION OF OFFERS</u></p> <p><u>EVALUATION PROCEDURES AND DEFINITIONS.</u></p> <p>A. THIS ACQUISITION IS LIMITED TO PLANNED PRODUCERS UNDER THE AUTHORITY OF 10 USC (2304)(C)(3) AND WILL DIVIDE REQUIREMENTS AMONG TWO OR MORE CONTRACTORS TO PROVIDE FOR AN ADEQUATE INDUSTRIAL MOBILIZATION BASE. CONSEQUENTLY, EACH OFFEROR MUST FIRST QUALIFY AS A PLANNED PRODUCER.</p> <p>B. AWARD EVALUATION WILL BE PERFORMED AS FOLLOWS:</p> <p>1. THE PROCURING CONTRACTING OFFICER (PCO) WILL DETERMINE IF AN OFFEROR HAS QUALIFIED AS A PLANNED PRODUCER WITH RESPECT TO THIS SOLICITATION, AND DETERMINE THE EXTENT OF EACH PLANNED PRODUCER'S PARTICIPATION. THIS DETERMINATION WILL BE BASED ON THE GOVERNMENT'S VERIFICATION AND APPROVAL OF THE SIGNED DD FORM 1519 AND THE RECOMMENDATION OF THE ARMED SERVICES PRODUCTION PLANNING OFFICER'S (ASPPO) INDUSTRIAL PREPAREDNESS PLANNING (IPP) SURVEY. AN OFFEROR'S PARTICIPATION IN THE IPP PROGRAM MUST MEET OR EXCEED THE MINIMUM LEVEL OF ALLOCATED MRE ASSEMBLY CAPACITY AT M+90 AS SET FORTH IN TABLE "A" BELOW.</p> <p>2. BASED ON THE PCO'S DETERMINATION, OFFERORS WILL QUALIFY FOR A MAXIMUM SHARE OF THE TOTAL REQUIREMENTS UNDER THIS SOLICITATION ACCORDING TO THE CORRESPONDING LEVEL OF IPP PROGRAM PARTICIPATION AT M+90 AS SHOWN IN TABLE "A" BELOW.</p> <p>3. AFTER A DETERMINATION OF EACH OFFEROR'S POTENTIAL MAXIMUM SHARE, BASED UPON THE LOWEST, EVALUATED, FAIR AND REASONABLE PRICE, ACTUAL AWARD QUANTITIES WILL BE DETERMINED. SUCH AWARD QUANTITIES WILL BE ALLOCATED AS A PREDETERMINED PERCENTAGE OF THE SOLICITED REQUIREMENTS AS SHOWN IN TABLE "A" BELOW. AWARD QUANTITY WILL NOT EXCEED THE MAXIMUM SHARE OF THE TOTAL REQUIREMENT FOR WHICH THE OFFEROR HAS QUALIFIED UNDER IPP. HOWEVER, IN THE EVENT THAT ALL THREE PERCENTAGE GROUPS CANNOT BE AWARDED DUE TO THE LACK OF OFFEROR ELIGIBILITY OR OFFERED PRICES ARE NOT DETERMINED TO BE FAIR AND REASONABLE, THE GOVERNMENT RESERVES THE RIGHT TO INCREASE AWARD QUANTITY PERCENTAGES.</p> <p>C. TO QUALIFY AS A PLANNED PRODUCER FOR THE PURPOSE OF THIS SOLICITATION, THE OFFEROR MUST HAVE FIRST COMPLETED AN IPP SCHEDULE (DD FORM 1519) FOR THE PERIOD OF 1 OCT 85 THRU 30 SEP 87, AND MUST HAVE SUBMITTED ADEQUATE SUPPORTING DOCUMENTATION TO THE COGNIZANT ASPPO BY 10 JUNE 1985 IN ACCORDANCE WITH DPSC TELEX MESSAGE OF 24 MAY 1985. FAILURE TO HAVE TIMELY SUBMITTED DOCUMENTATION MAY DISQUALIFY AN OFFEROR UNDER THE TERMS OF THIS SOLICITATION.</p>						

CONTINUATION SHEET

REF. NO. OF DOC. BEING CONT'D.
DLA13H-85-R-8457

PAGE 138 OF 158

OFFEROR OR CONTRACTOR

EM NO.	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
	D. M+90 ASSEMBLY CAPACITY IS DEFINED AS VERIFIED PRODUCTION CAPABILITY FROM A COLD BASE WITHIN A 61 TO 90 DAY TIME FRAME FOLLOWING NOTIFICATION OF AN AWARD UNDER MOBILIZATION PROCEDURES. THE EFFECTIVE PERIOD OR FISCAL YEAR INDICATED ON THE DD FORM 1519 NOTWITHSTANDING.				
	E. IN THE EVENT OF A DISCREPANCY BETWEEN THE CAPACITY ADDUCED BY THE OFFEROR AND THAT RECOMMENDED BY THE ASPPO, THE CONTRACTING OFFICER'S DETERMINATION RESPECTING SUCH DISCREPANCY WILL BE FINAL.				
	TABLE "A"				
	MAXIMUM AWARD QUANTITIES CORRESPOND TO ALLOCATED M+90 MONTHLY CAPACITY LEVELS AS FOLLOWS:				
	<u>MONTHLY ALLOCATED IPP QUANTITY AT M+90</u>	<u>MAXIMUM SHARE QUANTITY</u>		<u>% OF REQUIREMENT</u>	
	1,800,000 - UNLIMITED	1,879,401		45%	
	1,200,000 - 1,799,999	1,461,756		35%	
	600,000 - 1,199,999	835,290		20%	

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

Claim
Ex 35



MAY 23 1986

Ms. Vera E. Zappile
Associate Director of Small Business
Defense Logistics Agency
Defense Personnel Support Center
2800 South 20th Street
P.O. Box 8419
Philadelphia, Pennsylvania 19101-8419

Dear Ms. Zappile:

Re: Walsh-Healey Public Contracts Act Protest by
Freedom, N.Y., Inc. and Right-Away Foods Corporation
Contract No.: DLA13H-86-C-0544

This is in reply to your April 15 letter and enclosed report requesting our final determination as to whether CINPAC, Inc., Cincinnati, Ohio, was eligible for award of the referenced contract as a manufacturer within the meaning of the Walsh-Healey Public Contracts Act and the regulations issued thereunder.

After carefully examining the evidence submitted, including information submitted by the protesters and CINPAC, it is our determination that CINPAC, Inc. did not qualify for award under the Public Contracts Act and 41 CFR 50-201.101(a)(1). In this regard, the firm did not show that it had made all necessary prior arrangements for manufacturing space, equipment, and personnel to perform on its own premises the manufacturing operations required for fulfillment of the contract (41 CFR 50-206.51(b)). Specifically, the lease agreement with Star Food Processing, Inc. does not allow CINPAC the complete and unrestricted use and control of the manufacturing space and equipment as required under 41 CFR 50-206.51(c)(2)(i) and (ii), but rather sets a schedule for their use which is convenient for both parties. As set forth in 41 CFR 50-206.51(e), a contractor's "arrangements to use, rent, or share the equipment, personnel, or space of another legal entity on a time and material or 'as needed' basis do not constitute the making of all necessary prior arrangements or definite commitments."

Sincerely,

~~Herbert J. Cohen~~

Herbert J. Cohen
Deputy Administrator

Claim
Ex 36

EXHIBIT 36

Note a

Total contract costs	\$ 21,727,850
(less) contract costs projected	14,970,284

Total increase in cost of contract performance	\$ 6,757,566
(less) sum released by Modification P-25	- 3,481,768

Adjusted increase in cost of contract performance	\$ 3,275,798

Note b

114,758 cases priced at \$27.725 total	\$ 3,181,666
Profit rate of 15% equals profit of	x .15

	\$ 477,250

Note c

Leasehold improvements	\$ 838,510
Furniture and fixtures	50,349
Machinery and equipment	689,656

(less) accumulated depreciation & amort	\$ 1,578,515
	257,652

Net	\$ 1,320,863
(less) equipment credit	98,300
	55,000
	153,300

Total value of equipment lost through insolvency	\$ 1,167,563

Note d

Award of MRE7 to Cinpac at \$19,247,625; application of Freedom's profit rate of 15% = 2,887,144; contract level and profit held constant over MRE8, MRE9, MRE10 and MRE11 to arrive at projected lost profit of 2,887,144 x 5 contracts	\$ 14,435,720
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FREEDOM NY, INC.
BALANCE SHEET
MARCH 31, 1987 AND OCTOBER 31, 1986

ASSETS

<u>CURRENT ASSETS</u>	<u>MARCH 31, 1987</u>	<u>OCTOBER 31, 1986</u>
CASH	\$0	\$44,586
CERTIFICATES OF DEPOSIT	\$0	\$100,000
GOV'T RECEIVABLE-SHIPED PRODUCT	\$1,590,666	\$1,549,051
LOAN TO STOCKHOLDER	\$107,699	\$95,000
GOV'T CONTRACT IN PROGRESS(SCH. A)		\$818,389
DEPOSITS AND ADVANCES		\$270,381
OTHER CURRENT ASSETS	\$300	\$15,657
TOTAL CURRENT ASSETS	\$1,698,665	\$2,891,064
 <u>FIXED ASSETS</u>		
FURNITURE AND FIXTURES		\$50,349
MACHINERY AND EQUIPMENT		\$689,656
LEASEHOLD IMPROVEMENTS		\$838,510
	\$0	\$1,578,515
LESS: ACCUMULATED DEPRECIATION AND AMORTIZATION		\$257,652
NET FIXED ASSETS	\$0	\$1,320,863
 TOTAL ASSETS	\$1,698,665	\$4,211,927

LIABILITIES AND STOCKHOLDER'S DEFICIENCY

<u>CURRENT LIABILITIES</u>		
ACCOUNTS PAYABLE	\$3,326,651	\$2,897,773
PRE-CONTRACT COSTS PAYABLE	\$271,217	\$271,217
ACCRUED EXPENSES	\$400,000	\$0
ACCRUED PAYROLL PAYABLE	\$149,950	\$72,606
PAYROLL TAXES & BENEFITS PAYABLE	\$538,789	\$461,915
LOANS PAYABLE-BANKERS	\$2,483,306	\$2,383,322
FREEDOM NAT'L BANK	\$0	\$95,000
UNLIQUIDATED PROGRESS PAYMENTS	\$3,182,780	\$3,612,248
TOTAL CURRENT LIABILITIES	\$10,352,693	\$9,794,081
 <u>STOCKHOLDER'S DEFICIENCY</u>		
CAPITAL STOCK	\$300	\$300
CONTRIBUTED CAPITAL	\$98,300	\$98,300
ACCUMULATED DEFICIT	(\$8,752,628)	(\$5,680,754)
TOTAL STOCKHOLDER'S DEFICIENCY	(\$8,654,028)	(\$5,582,154)
 TOTAL LIABILITIES AND STOCKHOLDER'S DEFICIENCY	\$1,698,665	\$4,211,927

FREEDOM NY, INC.

STATEMENT OF INCOME AND ACCUMULATED DEFICIT

FOR THE PERIOD 3-31-1987 AND THE YEAR ENDED 10-31-1986

REVENUE	3-31-1987	10-31-1986	TOTAL
SALES TO U.S. GOV'T	\$300,792	\$13,907,220	\$14,208,012
SALE OF REAL ESTATE OPTION	\$0	\$375,436	\$375,436
GRANT - JOB TRAINING	\$250	\$102,145	\$102,395
OTHER REVENUE	\$5,678	\$39,112	\$44,790
TOTAL REVENUE	\$306,720	\$14,423,913	\$14,730,633
 COSTS AND EXPENSES			
MATERIALS	\$216,657	\$7,001,124	\$7,217,781
DIRECT LABOR	\$67,669	\$2,299,330	\$2,366,999
MANUFACTURING OVERHEAD	\$902,869	\$6,042,893	\$6,945,762
DEPRECIATION & AMORTIZATION	\$0	\$257,652	\$257,652
GENERAL & ADMINISTRATIVE EXPENSE	\$461,740	\$4,223,140	\$4,684,880
PRE-CONTRACT EXPENSES	\$0	\$280,528	\$280,528
TOTAL COSTS & EXPENSES	\$1,648,935	\$20,104,667	\$21,753,602
 NET PROFIT\ (LOSS) FROM OPERATIONS	(\$1,342,215)	(\$5,680,754)	(\$7,022,969)
 INTEREST INCOME	\$3,419	\$0	\$3,419
 LOSS ON SALE OF INVENTORY BY DEPT OF DEFENSE	(\$387,455)	\$0	(\$387,455)
 LOSS ON AUCTION OF EQUIPMENT	(\$1,345,623)	\$0	(\$1,345,623)
 TOTAL LOSS	(\$3,071,874)	(\$5,680,754)	(\$8,752,628)

FREEDOM NY, INC.
GENERAL & ADMINISTRATIVE EXPENSES
MARCH 31, 1987 AND OCTOBER 31, 1986

<u>COSTS</u>	<u>3-31-1987</u>	<u>10-31-1986</u>	<u>TOTAL</u>
ACCOUNTING	\$4,000	\$25,415	\$29,415
BANK CHARGES	\$2,146	\$4,256	\$6,402
BUSINESS MEETING	\$0	\$8,653	\$8,653
COMPUTER SOFTWARE	\$15,963	\$27,349	\$43,312
CONSULTING - SPECIAL	\$0	\$68,373	\$68,373
CONSULTING - TECHNICAL	\$0	\$28,024	\$28,024
DUES AND SUBSCRIPTIONS	\$896	\$2,012	\$2,908
INSURANCE	\$37,290	\$444,622	\$481,912
LEGAL	\$22,414	\$620,555	\$642,969
OFFICE EQUIPMENT	\$7,275	\$22,362	\$29,637
OFFICE EXPENSE	\$4,149	\$105,267	\$109,416
DOCUMENT HANDLING	\$3,407	\$35,814	\$39,221
RECRUITMENT	\$992	\$16,432	\$17,424
RELOCATION	\$0	\$41,645	\$41,645
SALARIES	\$320,573	\$1,890,574	\$2,211,147
EMPLOYEE MORALE	\$696	\$50,940	\$51,636
EMPLOYEE TRAINING	\$2,216	\$13,044	\$15,260
TELEPHONE	\$11,179	\$141,298	\$152,477
TRANSPORTATION	\$1,332	\$42,897	\$44,229
TRAVEL	\$9,778	\$61,872	\$71,650
LATE CHARGES	\$5,721	\$69,107	\$74,828
USDA FEES	\$0	\$5,908	\$5,908
NYS FRANCHISE TAX	\$293	\$365	\$658
INTEREST EXPENSE AND FEES	\$1,070	\$489,558	\$490,628
CONTRIBUTIONS	\$950	\$6,250	\$7,200
OTHER	\$9,400	\$548	\$9,948
TOTAL	\$461,740	\$4,223,140	\$4,684,880

FREEDOM NY, INC.
 MANUFACTURING OVERHEAD
 MARCH 31, 1987 AND OCTOBER 31, 1986

<u>COSTS</u>	<u>3-31-1987</u>	<u>10-31-1986</u>	<u>TOTAL</u>
AUTOMATED BUILDING MGT	\$0	\$8,728	\$8,728
GARABAGE AND SNOW REMOVAL	\$0	\$76,612	\$76,612
EQUIPMENT MAINTENANCE	\$1,512	\$57,344	\$58,856
PLANT AND GROUND MAINTENANC	\$7,297	\$231,774	\$239,071
OCCUPANCY COSTS	\$575,432	\$2,710,249	\$3,285,681
EQUIPMENT LEASES	\$160,719	\$719,382	\$880,101
PEST CONTROL	\$12,624	\$78,294	\$90,918
QUALITY CONTROL	\$934	\$3,735	\$4,669
WAREHOUSE AND RECEIVING EQUI	\$3,724	\$27,644	\$31,368
BUILDING REPAIRS	\$0	\$56,792	\$56,792
SALARIES	\$83,537	\$1,645,662	\$1,729,199
START-UP COSTS	\$0	\$30,263	\$30,263
FACTORY SUPPLIES	\$172	\$42,868	\$43,040
UNIFORMS	\$139	\$30,099	\$30,238
UTILITIES	\$56,779	\$402,803	\$459,582
TOTAL	\$902,869	\$6,122,249	\$7,025,118

FREEDOM NY, INC.
GOV'T CONTRACT
MARCH 31, 1987 AND OCTOBER 31, 1986

<u>COSTS AND EXPENSES</u>	<u>3-31-1987</u>	<u>10-31-1986</u>	<u>TOTAL</u>
MATERIALS	\$216,657	\$7,653,918	\$7,870,575
DIRECT LABOR	\$67,669	\$2,383,569	\$2,451,238
MANUFACTURING OVERHEAD	\$902,869	\$6,122,249	\$7,025,118
GENENERAL & ADMIN EXPENSES	\$461,740	\$4,223,140	\$4,684,880
DEPRECIATION & AMORTIZATION	\$0	\$257,652	\$257,652
PRE-CONTRACT EXPENSES	\$0	\$280,528	\$280,528
TOTAL	\$1,648,935	\$20,921,056	\$22,569,991

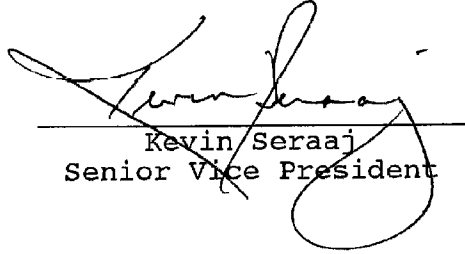
C E R T I F I C A T I O N

Pursuant to the Contracts Disputes Act of 1978 (Public Law 95-563, 41 U.S.C. 601-613) and the Defense Acquisition Regulation 1-314 (L), the undersigned certifies that this request for equitable adjustment submitted by Freedom NY, Inc., is submitted in good faith; that the supporting data are accurate and complete in all material respects, to the best of my knowledge and belief; and that the amount requested accurately reflects the contract adjustment for which the contractor believes it is entitled.



Henry Thomas
President

May 1, 1991




Kevin Seraaj
Senior Vice President

CERTIFICATE OF OVERHEAD COSTS

This is to certify that:

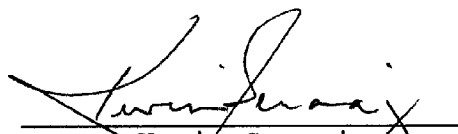
1. I have reviewed the request for equitable adjustment submitted herewith;
2. All costs included in this request are allowable in accordance with the requirements of contracts to which they apply and with the cost principles of the Department of Defense applicable to those contracts;
3. This request does not include any costs which are unallowable under applicable cost principles of the Department of Defense, such as (without limitation); advertising and public relations costs (FAR 31.205-1), contributions and donations (FAR 31.205-8), entertainment costs (FAR 31.205-14), fines and penalties (FAR 31.205-15), lobbying costs (FAR 31.205- 22), defense of fraud proceedings (FAR 31.205-47), and goodwill (FAR 31.205-49); and
4. All costs included in this request benefit the Department of Defense and are demonstrably related to or necessary for the performance of the Department of Defense contract(s) covered by the request.

I declare under penalty of perjury that the foregoing is true and correct in all material respects.



Henry Thomas
President

May 1, 1991



Kevin Seraaj
Senior Vice President

FREEDOM NY, INC.
SUMMARY OF LABOR COSTS
MARCH 31, 1987

	EXECUTIVE	FINANCE	CONTRACT	MIS	PERSONNEL	ACCRUED	TOTAL G & A	QC	OPER G & A	OPER MFG	SECURITY	ACCRUED	TOTAL OH	ACCRUED	DIRECT LABOR	TOTAL DIRECT	TOTAL LABOR
SALARY	\$47,476.21	\$13,460.73	\$8,446.19	\$8,407.76	\$4,706.53	\$196,971.01	\$279,468.43	\$14,731.31	\$3,516.87	\$36,666.70	\$17,166.24	\$1,427.62	\$73,528.74	\$8,000.00	\$7,491.35	\$15,491.35	\$368,488.52
VACATIO	\$961.52	\$1,615.36					\$2,576.88	\$3,108.80	\$400.00	\$4,499.59	\$640.00		\$8,646.39		\$13,952.00	\$13,952.00	\$25,175.27
HOLIDAY	\$3,813.06	\$1,367.69	\$1,080.78	\$821.54	\$270.76		\$7,453.83	\$1,236.11	\$300.00	\$3,546.25	\$1,133.21		\$6,215.57		\$264.00	\$264.00	\$13,933.40
SICK	\$60.00	\$210.00	\$0.00	\$120.00	\$305.36		\$715.36	\$109.05		\$269.73	\$160.00		\$554.78		\$70.40	\$70.40	\$1,340.54
CORP FI	\$1,364.59	\$819.52	\$309.96	\$327.47	\$377.70		\$3,199.24	\$1,377.86	\$301.50	\$3,191.42	\$1,332.34		\$6,203.12		\$1,591.93	\$1,591.93	\$10,994.29
SUI	\$706.46	\$190.51	\$84.86	\$62.16	\$106.35		\$1,150.14	\$103.16	\$96.32	\$583.22	\$390.82		\$1,143.52		\$767.54	\$767.54	\$3,061.20
FUI	\$162.75	\$41.19	\$16.30	\$13.44	\$23.00		\$246.68	\$22.33	\$14.34	\$126.13	\$84.47		\$247.27		\$124.99	\$124.99	\$620.94
HEALTH	\$547.60						\$547.60			\$766.33			\$766.33				\$1,333.93
OUTSIDE	\$25,212.70						\$25,212.70			(\$13,788.45)			(\$13,788.45)		\$35,406.89	\$35,406.89	\$46,831.14
TOTAL	\$80,414.89	\$17,705.00	\$9,939.89	\$9,752.37	\$5,789.70	\$196,971.01	\$320,572.86	\$20,665.62	\$4,599.03	\$35,917.92	\$20,907.08	\$1,427.62	\$83,537.27	\$8,000.00	\$59,669.10	\$67,669.10	\$471,779.23

FREEDOM NY, INC.

Leaders in Food Processing

243 California Road

Mt. Vernon, NY 10552

(914) 665-0098 FAX (914) 667-5185

EX 38

June 22, 1991

FOR

Frank Bankoff
Defense Logistics Agency
Defense Personnel Support Center
2800 South 20th Street
Philadelphia, PA 19101

RE: Claim under Contract DLA13H-85-C-0591

Per our previous discussion, I am enclosing a copy of the claim previously filed with your office. As you requested, an Exhibit Listing has also been prepared and is attached.

Additionally, with respect to your request that we provide clarification of line item number 4 of "Relief Sought" (at page 39 of the abovereferenced claim), to wit: \$375,436, we charged at page 29 of said claim that the ACO improperly offset monies due the company. As further explanation and detail, the following is offered:

H.T. Food Products, Inc. (Freedom's corporate name before undergoing its official name change), was lessee of the Bronx plant facility which housed the MRE production operation. Under the terms of its lease agreement, the company had the right to purchase the facility at any time prior to November 15, 1986. (Exhibit No. 38: Excerpt from lease agreement, p.42). This lease agreement was submitted to Government personnel during preaward. Under the lease, if the company declined to buy the building, it had to then determine whether or not it wanted to lease or buy the racks and forklifts located inside.

When the landlord found a buyer and decided to sell prior to the time for exercise of the option, he offered to buy the option back. Freedom agreed to sell, and then exercised its option to buy the racks and forklifts, at a cost of \$335,100 plus 8.5% sales tax of \$28,484, for a total cost of \$363,584. Deducting the cost of the racks and forklifts from the income received from sale of the option, Freedom's net gain on the transaction was less than \$50,000. (See Exhibit No. 39: Letter from Freedom to ACO Liebman, dated 5 Nov 1985).

Notwithstanding the above, and notwithstanding the fact that the income derived was legitimate, outside revenue to the company, the monies actually received (\$375,436) were offset by ACO Liebman against Freedom's continuing occupancy costs.

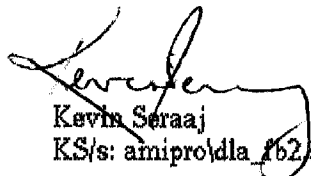
On November 11, 1985, Freedom demanded in writing that ACO Liebman return the money improperly deducted from Progress Payment No. 8, advising that his actions were in clear violation of the wording, intention and spirit of DAR 15-205.32(f), which stated that "gains and losses of any nature arising from the sale or exchange of capital assets other than depreciable property shall be excluded in computing contract costs." (Exhibit No. 40: Letter from Freedom, Patrick G. Marra, to ACO Liebman, dated 11 Nov. 1985).

In addition, since the ACO was "recouping" monies he had already paid to the company's lender, he was barred by the Assignment of Claims Act from his re-taking. Said money was never returned to the company, and the "offset" was, at best, improperly-- if not illegally-- accomplished.

The additional Exhibits have been incorporated into the Exhibit Listing, and the above recitation should be considered an Addendum to our previously submitted Claim.

If we can be of further assistance, please do not hesitate to let us know.

Sincerely,


Kevin Seraaj
KS/s: amipro/dla fb2/sam

tion of Tenant's remedies.

Broker

39. Tenant warrants and represents to Landlord ~~& Dantre & Zuckerbrot~~ that Sholom & Zuckerbrot Realty Co., (the "Broker") are the only broker who brought about this Lease. Accordingly, Tenant covenants and agrees to indemnify and hold harmless Landlord from and against any and all loss, cost, damage, liability and expense (including, without limitation, legal fees and disbursements) by reason of any claim, demand or legal process seeking to recover any fee, compensation or remuneration by reason of this Lease made or brought by any broker or finder other than the Broker.

Option to
Purchase

40. (a) Tenant shall have the right to purchase the demised premises at any time prior to November 15, 1986 on the terms and conditions set forth herein and in the Purchase Agreement annexed hereto as Schedule C and made a part hereof, by giving Landlord written notice of its intention to purchase the demised premises not less than ninety (90) days prior to the proposed closing date of the purchase, provided that such notice shall be given prior to August 15, 1986, and provided further that on the date when such notice is given and on the proposed closing date of the purchase there shall be no default under this Lease.

(b) If Tenant duly exercises such option on or before August 15, 1985, then the purchase price shall be \$6,500,000 and the closing shall take place not later than November 15, 1985; if Tenant duly exercises such option after August 15, 1985 and on or before August 15, 1986, then the purchase price shall be \$7,000,000 and the closing shall take place not later than November 15, 1986. Time shall be of the essence with respect to the giving of notice of exercise of such option and Tenant's performance of its obligations with respect thereto.

(c) Any such notice shall be accompanied by

H. T. Food Products, Inc.

1600 BRONXDALE AVENUE
BRONX, NEW YORK 10462

(212) 931-4480

TWX 510 100 1911
FREEDOM UD

November 5, 1985

Federal Express
Airbill # 443189644

Mr. Marvin Liebman
Contracting Officer
Defense Contracts Administration
Services Management Area
201 Varick Street, Room 1006
New York, New York 10014

MRES

Dear Mr. Liebman:

You have advised us of your intention to reduce payment on our Progress Payment Request No. 8 by \$400,000 representing the sale by H.T. Food Products, Inc., of the option to buy our present facilities. This intention appears to be based upon the DCAA - New York Audit Reports on prior Progress Payments.

DCAA's Advisory Report on Review of Progress Payment Request No. 7, states that "Freedom contends that they surrendered their right to buy this facility and were informally offered \$400,000 for their rights. We saw no evidence of such an agreement."

Attached is a copy of "AGREEMENT OF COMPROMISE AND SETTLEMENT" which was submitted to you as part of our response to the DCAA report on Progress Payment Request No. 4. Certainly this agreement is not an informal offer as DCAA is so misinformed. This agreement was accepted by H. T. Food Products, Inc. to put an end to legal actions by and against the prior landlord Mr. Richard Penzer. If DCAA's suggestion to offset the sale of option against occupancy expense is based upon the fact that it believed the sale of the option was "informal," we are confident DCAA's review of the attached agreement will result in DCAA eliminating its objection to recording the \$400,000 as revenue. DCAA has not yet reviewed the attached AGREEMENT, although a copy is in its possession.

Furthermore, reduction of this revenue of \$400,000 against our requested Progress Payment No. 8 would result in a clear disallowance of fair and reasonable incurred occupancy costs, properly allocable to the MRE Contract and eligible for Progress Payments. Such contemplated action violates our contractual

arrangement on the MRE Contract and creates an undue strain on our finances.

As you are well aware, Freedom Industries, Inc. subleased the facilities from H.T. Food Products, Inc. The lease and sublease were given to you many months ago. Freedom's sublease did not contain the provision for the option to buy the facilities. This option remained the exclusive right of H. T. Food Products, Inc. and was brought to your attention by us on various occasions. Pure and simple, the sale of the option by H. T. Food Products, Inc. has absolutely no relationship to the MRE Contract (which was originally issued to Freedom Industries, Inc.). The \$400,000 received for the sale of the option is solely a real estate investment transaction having nothing to do with the MRE Contract. By agreeing to sell the right to buy the premises, we have surrendered a very significant right. Based upon current escalating real estate values in the North Bronx, it should be evident that our receipt of \$400,000 in no way compensates us adequately for the forgiveness of the right to buy our facility.

The sale of the option will be treated in accordance with Generally Accepted Accounting Principles and Internal Revenue Service Regulations, as Revenue, not as an offset to expense. To offset such revenue would be totally inappropriate for accounting purposes and would result in a total mis-statement of taxable income. Regardless of the DCAA's opinion, it is our intention to record this transaction in the proper manner.

Please review Page 4 of the attached "AGREEMENT OF COMPROMISE AND SETTLEMENT." As can be seen, in connection with the sale of the option, we have assumed an obligation to lease certain food storage racks ("racks") and machinery ("forklifts") in the amount of \$335,000, payable on March 1, 1986. Such costs were to have been paid as monthly rental as follows:

November, 1984	. . . . .	\$ 37,222.24
December, 1984	. . . . .	74,444.44
January, 1985	. . . . .	74,444.44
February, 1985	. . . . .	74,444.44
March, 1985	. . . . .	74,444.44
T O T A L . . .		\$335,000.00

This additional cost has not yet been passed on in our Progress Payments Requests. Upon payment of the \$335,000 under the attached "Agreement," we intend to exercise our purchase option to acquire the racks and forklifts by payment of an additional \$100 plus applicable sales taxes. Considering our clear

responsibility to pay \$335,000 on March 1, 1986, we calculate our total cost for the racks and forklifts as follows:

Base Lease Cost	\$335,000.00
Option Cost	100.00
<hr/>	
T O T A L	\$335,100.00
Sales Tax - 8.5%	28,484.00
<hr/>	
T O T A L C O S T	\$353,584.00
<hr/>	

The net economic gain to H. T. Food Products, Inc. obtained from the sale of the option on the premises is:

Sale of Option	\$400,000.00
Cost of Racks and Forklifts	353,584.00
<hr/>	
N E T G A I N	\$ 46,416.00
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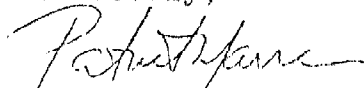
We believe it would be absolutely improper and immoral to reduce progress payments by \$400,000 based upon the above facts. We contend that full payment of appropriate occupancy costs should be made to us without offset, as such offset is inappropriate.

We respectfully request immediate reconsideration of your stated intention to withhold \$400,000.

I suggest a meeting with you, DCAA, our advisor Mr. Jerry Rosenberg, C.P.A., and me to fully discuss this matter prior to taking any negative action on your part with regard to the contemplated offset of \$400,000.

I look forward to your favorable decision in this matter, and await to hear from you.

Sincerely,



Patrick G. Marra
Executive Vice President and
Chief Financial Officer

PGM/ejBENZA02:marra2

Attachment

cc: Mr. Henry Thomas, President

- Bcc. Frank Bankoff

H. T. Food Products, Inc.

Claim
Ex 40

1600 BRONXDALE AVENUE
BRONX, NEW YORK 10462

(212) 931-4480

TWX 510 100 1911
FREEDOM UD

November 11, 1985

Mr. Marvin Liebman, DCASR NY-NAA-7
Contracting Officer
Defense Contracts Administration
Services Management Area
201 Varick Street, Room 1006
New York, New York 10014

Dear Mr. Liebman:

SUBJECT: CONTRACT DLA13H-85-C-0591

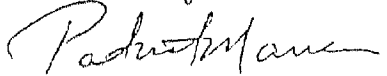
As further consideration to the matter of the sale of option for \$400,000 discussed in detail in my letter to you dated November 5, 1985, I call your attention to DAR 15-205.32(f).

This provision clearly states "Gains and losses of any nature arising from the sale or exchange of capital assets other than depreciable property shall be excluded in computing contract costs."

We believe the sale of the option unequivocally falls within the dictates of provision DAR 15-205.32(f) and, consequently, the realized gain of \$400,000 must be excluded in computing the costs of Contract DLA13H-85-C-0591.

Again, we request your timely reimbursement of the \$400,000 withheld from our Requests for Progress payments.

Sincerely,



Patrick G. Marra
Executive Vice President/
Chief Financial Officer

PGM/ejBENO2:liebman1

Attachment

cc: Mr. Henry Thomas, President

CONTRACT COST PRINCIPLES AND PROCEDURES

shall be included in the year in which they occur as credits or charges to the cost grouping(s) in which the depreciation or amortization applicable to such assets was included (but see (d)) below).

(b) Gains and losses on disposition of tangible capital assets, including those acquired under capital leases (see 15-205.9(j)), shall be considered as adjustments of depreciation costs previously recognized. The gain or loss for each asset disposed of is the difference between the net amount realized, including insurance proceeds from involuntary conversions, and its undepriciated balance. The gain to be recognized for contract costing purposes shall be limited to the difference between the acquisition cost (value at which capitalized for assets acquired under capital lease) of the asset and its undepriciated balance, except see (c)(ii)(A) or (B) below.

(c) Special considerations apply to involuntary conversions. An involuntary conversion of property occurs when a contractor's property is destroyed in whole or in part by events, over which the owner has no control, such as fire, wind-storm, flood, accident, theft, etc., and an insurance award is recovered. The following shall govern regarding involuntary conversions:

(i) where there is a cash award and the converted asset is not replaced, gain or loss will be recognized in the period of disposition but the gain recognized for contract costing purposes will be limited to the difference between the original acquisition cost of the asset and its undepriciated balance;

(ii) where the converted asset is replaced, contractor will either—

(A) adjust the depreciable basis of the new asset by the amount of the total realized gain or loss; or

(B) recognize the gain or loss in the period of disposition, in which case the Government will participate to the same extent as outlined in (c)(i) above.

(d) Gains and losses on the disposition of depreciable property shall not be recognized as a separate charge or credit where:

(i) such gains and losses are processed through the depreciation reserve account and reflected in the depreciation allowable under 15-205.9, or

(ii) the property is given in exchange as part of the purchase price of a similar item and the gain or loss is taken into consideration in the depreciation cost basis of the new item.

(e) Gains and losses arising from mass or extraordinary sales, retirements, or other dispositions shall be considered on a case-by-case basis.

(f) Gains and losses of any nature arising from the sale or exchange of capital assets other than depreciable property shall be excluded in computing contract costs.

15-205.33 Recruitment Costs.

(a) (CWAS) Subject to (b), (c), and (d) below, and provided that the size of the staff recruited and maintained is in keeping with workload requirements, costs of help-wanted advertising, operating costs of an employment office necessary to secure and maintain an adequate labor force, costs of operating an aptitude and educational testing program, travel costs of employees while engaged in recruiting personnel, travel costs of applicants for interviews for prospective employment, and relocation costs incurred incident to recruitment of new employees are al-

15-205.33

ARMED SERVICES PROCUREMENT REGULATION

CONTRACT COST PRINCIPLES AND PROCEDURES

(b) In determining the allowability of costs in a particular case, no single factor or any special combination of factors is necessarily determinative. However, the following factors among others may be relevant:

- (i) the nature and scope of the service rendered in relation to the service required;
- (ii) the necessity of contracting for the service considering the contractor's capability in the particular area;
- (iii) the past pattern of such costs, particularly in the years prior to the award of Government contracts;
- (iv) the impact of Government contracts on the contractor's business (i.e., what new problems have arisen);
- (v) whether the proportion of Government work to the contractor's total business is such as to influence the contractor in favor of incurring the cost, particularly where the services rendered are not of a continuing nature and have little relationship to work under Government contracts;
- (vi) whether the service can be performed more economically by employment rather than by contracting;
- (vii) the qualifications of the individual or concern rendering the service and the customary fees charged, especially on non-government contracts;
- (viii) adequacy of the contractual agreement for the service (e.g., description of the service; estimate of time required, rate of compensation; termination provisions).

(c) In addition to (b) above, retainer fees to be allowable must be supported by evidence that:

- (i) the services covered by the retainer agreement are necessary and customary;
- (ii) the level of past services justifies the amount of the retainer fees (if no services were rendered, fees are not automatically unallowable); and
- (iii) the retainer fee is reasonable in comparison with maintaining an in-house capability to perform the covered services, considering factors such as cost, and level of expertise.

(d) Costs of legal, accounting and consulting services, and directly associated costs, incurred in connection with organization and reorganization, defense of antitrust suits, and the prosecution of claims against the Government, are unallowable. Costs of legal, accounting, and consulting services, and directly associated costs, incurred in connection with patent infringement litigation, are unallowable unless otherwise provided for in the contract. (Also see 15-205.23.)

(e) Except for retainers (see (c) above), fees for services rendered shall be allowable only when supported by evidence of the nature and scope of the services furnished. (Also see 15-205.37(c).)

15-205.32 Gains and Losses on Disposition of Depreciable Property or Other Capital Assets. (CWAS-NA)

(a) Gains and losses from the sale, retirement or other disposition (but see 15-205.16) of depreciable property, for purposes of computing contract costs,